

NOTES

DOG WHISTLES AND DISCRIMINATORY INTENT: PROVING INTENT THROUGH CAMPAIGN SPEECH IN VOTING RIGHTS LITIGATION

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ABSTRACT

Politicians are increasingly employing dog whistles in campaign speech to appeal to a divided electorate. Simultaneously, states continue to pass legislation restricting minority access to the ballot box. Litigants attempting to challenge new vote denial laws are left with only one tool—Section 3 of the Voting Rights Act—which requires the difficult task of demonstrating that the jurisdiction violated the Fourteenth Amendment. Despite the frequency of dog whistles, courts have declined to use campaign rhetoric as evidence of discriminatory intent in Fourteenth Amendment challenges.

This Note argues that, to ease the nearly insurmountable burden of proving discriminatory intent in voting rights challenges, courts should consider dog whistles in campaign speech as evidence of discriminatory intent. It is particularly important for voters to prove discriminatory intent in voting rights cases because they face the unique difficulty of distinguishing between closely aligned racial-discrimination motivations and political-party motivations; Section 3 of the VRA allows for preclearance systems once discriminatory intent is proven; and broader, less tailored remedies become available when litigants can successfully prove intent.

The right to vote is a right “preservative of [all] other basic civil and political rights.” Considering dog whistles as evidence of discriminatory intent gives litigants a necessary tool to protect this fundamental right.

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Dog Whistle (noun)

[A] remark, speech, advertisement, etc. by a politician that is intended to be understood by a particular group, especially one with feelings of racism or hatred, without actually expressing these feelings.¹

INTRODUCTION

The day before Georgia’s 2018 gubernatorial election, Georgia’s Secretary of State, Brian Kemp, tweeted: “The Black Panther Party is backing my opponent. RT if you think Abrams is TOO EXTREME for Georgia!”² In one of his campaign ads, titled “So Conservative,” he proclaimed, “I got a big truck, just in case I need to round up criminal illegals and take ‘em home myself. Yep, I just said that.”³ In the bitter race between Kemp and former State Representative Stacey Abrams,⁴ Kemp’s skillful use of dog whistles—remarks of racism and hatred intended to be understood by a particular group—in his tweets and campaign ads resonated with Georgia voters.⁵

The divisiveness of Georgia’s gubernatorial election was intensified by the state’s controversial voter-registration law. Enacted in 2017, Georgia’s “exact match” law⁶ required that information entered into a voter-registration form exactly match the applicant’s Drivers Services or Social Security records.⁷ Despite being a candidate in the race, Kemp was in charge of the implementation of the voter-

1. *Dog Whistle*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/dog-whistle> [<https://perma.cc/U8JE-DXWT>].

2. Brian Kemp (@BrianKempGA), TWITTER (Nov. 5, 2018, 3:00 PM), <https://twitter.com/BrianKempGA/status/1059581337554898944> [<https://perma.cc/8JZ4-ALZT>].

3. Kemp for Governor, *So Conservative*, YOUTUBE (May 9, 2018), <https://www.youtube.com/watch?v=5Q1cfjh6VfE> [<https://perma.cc/PD6R-7HNL>].

4. *Georgia Governor Election Results*, N.Y. TIMES (Jan. 28, 2019, 10:33 AM), <https://www.nytimes.com/elections/results/georgia-governor> [<https://perma.cc/XX7A-VKGM>] (discussing the Georgia gubernatorial election results and noting that the Kemp–Abrams race was “among the country’s most expensive and vitriolic”).

5. April Glaser, *It Was Too Easy for Brian Kemp’s Last-Minute Dog Whistle About Stacey Abrams To Go Viral*, SLATE (Nov. 6, 2018, 11:46 PM), <https://slate.com/technology/2018/11/brian-kemp-stacey-abrams-dog-whistle-black-panthers-facebook.html> [<https://perma.cc/QFY3-SEFG>]; see also *Georgia Governor Election Results*, *supra* note 4 (detailing the 2018 Georgia gubernatorial election results, in which Kemp won by a narrow margin).

6. H.B. 268, 154th Gen. Assemb., Reg. Sess. (Ga. 2017) (codified in scattered sections of Title 21 of the Georgia Code).

7. Complaint for Injunctive and Declaratory Relief at 2, Ga. Coal. for the Peoples’ Agenda, Inc. v. Kemp, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (No. 1:18-CV-04727-ELR) [hereinafter Complaint].

registration requirements during the state’s 2018 elections,⁸ vehemently defending the law.⁹ When applied, the law produced “a high rate of erroneous ‘no-matches’ that disproportionately impact[ed] African-American, Latino and Asian-American applicants.”¹⁰ For instance, the removal or addition of letters, hyphens, spaces, or apostrophes could lead to a no-match, and “minority voters are more likely statistically to have names with hyphens or suffixes or other punctuation that can make it more difficult to match their name in databases.”¹¹ The law’s effects were glaring during the election, as the law purged more than 53,000 voters—who were predominantly black—and moved them to pending status.¹² Abrams and voting rights advocacy groups alleged that Kemp used his authority as Secretary of State to suppress votes and swing the election in his favor.¹³ The suit alleged violations of both the Voting Rights Act (“VRA”) and the Fourteenth Amendment.¹⁴ However, the United States District Court for the Northern District of Georgia hardly discussed the VRA’s discriminatory-intent requirement, dismissed Fourteenth Amendment claims, and did not mention Kemp’s tweets or campaign ads.¹⁵

In an age of divisive politics, dog whistles in campaign rhetoric are pervasive. As voters increasingly affiliate themselves politically

8. Ben Nadler, *Voting Rights Become a Flashpoint in Georgia Governor’s Race*, ASSOCIATED PRESS (Oct. 9, 2018), <https://apnews.com/fb011f39af3b40518b572c8cce6e906c> [https://perma.cc/2DAP-JQYG].

9. Kemp’s office defended the law by claiming that it “applies equally across all demographics,” but these numbers became skewed by “the higher usage of one method of registration among one particular demographic group.”

....

Kemp dismissed and derided the legal threat targeting the “exact match” policy, issuing a statement saying that with Election Day coming up, “it’s high time for another frivolous lawsuit from liberal activist groups.”

Id.

10. Complaint, *supra* note 7, at 5.

11. Miriam Valverde, *Georgia’s ‘Exact Match’ Law and the Abrams-Kemp Governor’s Election, Explained*, POLITIFACT (Oct. 19, 2018, 1:37 PM), <https://www.politifact.com/georgia/article/2018/oct/19/georgias-exact-match-law-and-its-impact-voters-gov> [https://perma.cc/9APE-J2B5].

12. Nadler, *supra* note 8. “Voters whose applications are frozen in ‘pending’ status have 26 months to fix any issues before their application is canceled, and can still cast a provisional ballot.” *Id.* Applicants frozen in pending status can still vote if they provide proper photo identification at their polling place. Valverde, *supra* note 11.

13. Nadler, *supra* note 8.

14. See, e.g., *Ga. Coal. for the People’s Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1255 (N.D. Ga. 2018) (referencing alleged violations of the VRA and the Fourteenth Amendment).

15. See generally *id.*

through their identities, politicians are more frequently appealing to these identity-based divisions.¹⁶ For instance, Ron DeSantis, candidate for Florida's 2018 gubernatorial election, warned that "voters should not 'monkey this up' by electing his opponent, Andrew Gillum," who would have been the state's first black governor.¹⁷ DeSantis defeated Gillum by a narrow margin to become governor.¹⁸ Soon after taking office, DeSantis signed a bill requiring felons to pay "outstanding fines, fees or restitution" to restore their voting rights,¹⁹ a bill that has been equated to a modern-day poll tax.²⁰ From terms and phrases like "urban" and "inner city" to "radical Islam" and "illegal immigrant,"²¹ dog whistles have been used to win elections²² and appeal to a large body of voters with racial resentments and animosities.²³

This Note examines how dog whistles can serve as evidence of discriminatory intent in voting rights challenges. In 1965, Congress passed the VRA to enforce the Fourteenth and Fifteenth Amendments

16. Eugene Scott, *2018: The Year of Dog Whistle Politics*, WASH. POST (Nov. 14, 2018), <https://www.washingtonpost.com/politics/2018/11/14/year-dog-whistle-politics> [https://perma.cc/NQ73-Y3JQ].

17. Julia Jacobs, *DeSantis Warns Florida Not To 'Monkey This Up,' and Many Hear a Racist Dog Whistle*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/us/politics/desantis-monkey-up-gillum.html> [https://perma.cc/9FLG-B5FS].

18. Marc Caputo, *DeSantis Wins Florida Gubernatorial Race as Gillum Concedes*, POLITICO (Nov. 17, 2018, 5:36 PM), <https://www.politico.com/story/2018/11/17/desantis-wins-florida-gubernatorial-race-as-gillum-concedes-1000530> [https://perma.cc/4PMA-L5H5].

19. Arian Campo-Flores, *Florida Gov. DeSantis Signs a Bill That Adds Restrictions to Felon Voting*, WALL ST. J. (June 28, 2019, 8:51 PM), <https://www.wsj.com/articles/florida-gov-desantis-signs-felon-voting-bill-11561762090> [https://perma.cc/ZVE2-696U]. In the 2018 election, Florida voters passed a constitutional amendment to restore felons' voting rights. *Id.* DeSantis's bill "exclude[s] tens of thousands of people who should qualify to regain [their right to] vote." *Id.* A group of civil rights organizations, on behalf of ten Floridians, filed a lawsuit to challenge the bill. Doha Madani, *Civil Rights Groups Sue Florida over 'Poll Tax' Law To Restore Felon Voter Rights*, NBC NEWS (June 28, 2019, 9:52 PM), <https://www.nbcnews.com/politics/politics-news/civil-rights-group-sue-florida-over-poll-tax-law-restore-n1024866> [https://perma.cc/FFP9-X9YS].

20. Campo-Flores, *supra* note 19.

21. German Lopez, *The Sneaky Language Today's Politicians Use To Get Away with Racism and Sexism*, VOX (Feb. 1, 2016, 4:30 PM), <https://www.vox.com/2016/2/1/10889138/coded-language-thug-bossy> [https://perma.cc/Z7HJ-2ETU].

22. Sara Grossman, *Blog: Revisiting 'Dog Whistle Politics.'* HAAS INST. (Sept. 22, 2017), <https://haasinstitute.berkeley.edu/blog-revisiting-dog-whistle-politics> [https://perma.cc/G6FP-85HA].

23. See, e.g., Sean McElwee & Jason McDaniel, *Economic Anxiety Didn't Make People Vote Trump, Racism Did*, NATION (May 8, 2017), <https://www.thenation.com/article/economic-anxiety-didnt-make-people-vote-trump-racism-did> [https://perma.cc/2GN6-KFN9] ("[R]acial attitudes towards blacks and immigration [were] the key factors associated with support for Trump.").

and achieve equality at the ballot box.²⁴ In particular, Congress sought to address vote denial schemes, or “direct, formal discriminatory practices intended to exclude black participation in the central political and economic institutions of American life.”²⁵ After its enactment, Section 2 became the focus of voting rights litigation,²⁶ particularly to address states engaged in vote dilution, or “practices that diminish minorities’ political influence in places where they are allowed to vote.”²⁷ However, recent disputes over voting rights have again shifted to issues of vote denial and barriers to registration.²⁸ In response to this changed landscape, litigants have increasingly added Fourteenth Amendment claims to their voting rights challenges.²⁹ To block or mitigate the effects of vote denial laws, plaintiffs utilized the VRA’s preclearance protections in Section 5,³⁰ which required “covered” states and localities with histories of intentional discrimination to obtain federal approval before making any changes to their voting laws.³¹ However, in *Shelby County v. Holder*,³² the Court struck down Section 4(b),³³ rendering Section 5 inoperative.³⁴

To continue obtaining federal protections under the VRA, litigants turned to Section 3(c),³⁵ a “seldom-used path to federal preclearance.”³⁶ Section 3(c) allows courts to mandate preclearance

24. Edward K. Olds, Note, *More Than “Rarely Used”: A Post-Shelby Judicial Standard for Section 3 Preclearance*, 117 COLUM. L. REV. 2185, 2190 (2017).

25. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838 (1992) [hereinafter Issacharoff, *Polarized Voting*].

26. *Id.*; see also Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 675, 678–79 (2014) [hereinafter Ho, *Voting Rights Litigation After Shelby County*].

27. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006) [hereinafter Tokaji, *The New Vote Denial*].

28. Ho, *Voting Rights Litigation After Shelby County*, *supra* note 26, at 679.

29. Danielle Lang & J. Gerald Hebert, *A Post-Shelby Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J. F. 779, 783–84 (2018).

30. *Id.*

31. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10304 (2018)); Ho, *Voting Rights Litigation After Shelby County*, *supra* note 26, at 675–76.

32. *Shelby Cty. v. Holder*, 570 U.S. 529 (2013).

33. *Id.* at 557 (declaring Section 4(b) unconstitutional). Section 4(b) established a coverage formula to determine which covered states and localities were required to obtain preclearance. Voting Rights Act § 4(b) (codified as amended at 52 U.S.C. § 10303(b)).

34. Ho, *Voting Rights Litigation After Shelby County*, *supra* note 26, at 676.

35. Voting Rights Act § 3(c) (codified as amended at 52 U.S.C. § 10302(c)).

36. Olds, *supra* note 24, at 2186.

regimes after finding that a jurisdiction violated the Fourteenth Amendment, allowing for a more targeted and flexible preclearance requirement than the one in Section 5.³⁷ This inquiry requires proving that the procedure has both discriminatory effects and was enacted with discriminatory intent.³⁸ Yet, despite the increasing prevalence of dog whistles in campaign speech³⁹ and the recent wave of restrictive voting laws,⁴⁰ plaintiffs have faced challenges proving discriminatory intent in Fourteenth Amendment challenges.⁴¹ Although courts generally decline to use campaign rhetoric as evidence of discriminatory intent in Fourteenth Amendment challenges,⁴² the Supreme Court has attempted to ease the difficulty of “[d]etermining whether invidious discriminatory purpose was a motivating factor.”⁴³ Given the prevalence of dog whistles in campaign rhetoric, the time is ripe to discuss their use by the courts.

This Note argues that, to ease the nearly insurmountable burden of proving discriminatory intent in voting rights challenges, courts should consider dog whistles in campaign speech as evidence of invidious intent. The importance of easing the burdens of proving discriminatory intent in voting rights cases in particular is threefold. First, litigants face the unique difficulty of distinguishing between

37. *Id.*

38. Paul M. Wiley, Note, *Shelby and Section 3: Pulling the Voting Rights Act's Pocket Trigger To Protect Voting Rights After Shelby County v. Holder*, 71 WASH. & LEE L. REV. 2115, 2129–30 (2014).

39. Eugene Scott, *2018: The Year of Dog Whistle Politics*, WASH. POST (Nov. 14, 2018), <https://www.washingtonpost.com/politics/2018/11/14/year-dog-whistle-politics> [<https://perma.cc/CFC3-H39D>].

40. *Election 2016: Restrictive Voting Laws by the Numbers*, BRENNAN CTR. FOR JUSTICE (Sept. 28, 2016), <https://www.brennancenter.org/analysis/election-2016-restrictive-voting-laws-numbers> [<https://perma.cc/X2NN-Q675>] [hereinafter BRENNAN CTR., *Election 2016*].

41. See Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 270 n.106 (2003) (“[T]he discriminatory intent requirement of the Court’s Equal Protection doctrine is likely to defeat most Equal Protection challenges where plaintiffs cannot produce a smoking gun of intentional discrimination.”).

42. See, e.g., Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 510–13 (2018) (discussing concerns raised by courts in using “explicit bias,” including unofficial statements, as evidence of discrimination); Shawn E. Fields, *Is It Bad Law To Believe a Politician? Campaign Speech and Discriminatory Intent*, 52 U. RICH. L. REV. 273, 294 (2018) (“[C]ourts remain reluctant to . . . consider evidence of discriminatory intent beyond the four corners of an official governmental record, even though no doctrinal restriction prevents them from doing so.”).

43. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (establishing a six-factor test to prove discriminatory intent “even when the governing legislation appears neutral on its face” by conducting “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available”).

racial-discrimination motivations and political-party motivations, which are closely aligned. Thus, legislators can easily reframe a racially discriminatory law as one motivated by partisan reasons, avoiding Equal Protection problems and receiving deference. Second, Section 3 of the VRA allows for preclearance systems once discriminatory intent is proven. And third, broader, less tailored remedies become available when litigants can successfully prove intent.

Part I of this Note provides background on the VRA and traces the evolution of voting rights litigation under the VRA. Part II discusses the history of discriminatory-intent analysis under the Fourteenth Amendment. Part III examines three reasons why proving discriminatory intent is particularly important for plaintiffs engaged in voting rights litigation. Part IV presents the arguments made for overlooking evidence of discrimination in campaign speech and ultimately concludes that courts should consider dog whistles as evidence of discriminatory intent in voting rights challenges. Doing so would allow litigants to overcome some of the challenges of proving discriminatory intent and ultimately protect the right to vote, a right “preservative of [all] other basic civil and political rights.”⁴⁴

I. THE VOTING RIGHTS ACT

This Part reviews Sections 2, 5, 4, and 3 of the VRA, which are the major substantive provisions that litigators utilize to protect against discriminatory voting mechanisms. It ultimately concludes that Section 3 of the VRA is the only remaining—and most powerful—tool for plaintiffs to challenge new vote denial laws; Section 2 is effective but was largely developed for vote dilution schemes; and Sections 5 and 4(b) have been rendered inoperative by *Shelby*.

This Part is split into four sections: Section (A) surveys the enactment of the VRA; Section (B) discusses Section 2 and its ineffectiveness for new vote denial laws; Section (C) details *Shelby* and the inoperability of Sections 5 and 4(b); and Section (D) considers how Section 3 can be a helpful tool for litigants seeking to challenge new vote denial legislation.

44. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

A. *The VRA's Enactment*

At the height of the Civil Rights Movement, activists marched for voting rights in Selma, Alabama.⁴⁵ They hoped to gain protections from the increasing vote denial laws enacted by southern states that circumvented the Fourteenth and Fifteenth Amendments.⁴⁶ Many of these states had implemented literacy tests, poll taxes, and property qualifications,⁴⁷ and by the beginning of the twentieth century, “virtually all African Americans in the South were denied the right to vote.”⁴⁸ The activists’ fifty-mile march ended a few blocks later, however, as Alabama state troopers beat them “with billy clubs in a cloud of tear gas.”⁴⁹

The violence spurred action on comprehensive voting rights legislation, and five months later, on August 6, 1965, President Johnson signed the VRA into law.⁵⁰ Congress originally fashioned the VRA as a tool to address the vote denial schemes that were prevalent in the South⁵¹ and to “achiev[e] equality at the ballot box.”⁵² It was immediately successful in dismantling direct impediments to participation.⁵³ In the first two years of the VRA’s passage, African American voter registration increased from 29.3 percent to 52.1 percent in the seven covered states.⁵⁴ By the end of 1967, over half a million new African American voters were registered.⁵⁵ The rise in African American enfranchisement made it more difficult for ill-intentioned politicians to prevent African Americans from voting altogether. Eventually, these politicians searched for new ways to

45. *Today in History - March 7: First March from Selma*, LIBR. CONG., <http://memory.loc.gov/ammem/today/mar07.html> [<https://perma.cc/QP6N-Q8JQ>].

46. Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 790–91 (2006) [hereinafter Tokaji, *If It's Broke, Fix It*].

47. Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1711 (2004) [hereinafter Issacharoff, *Victim of Its Own Success*].

48. Tokaji, *If It's Broke, Fix It*, *supra* note 46, at 790.

49. *The Selma to Montgomery Voting Rights March: Shaking the Conscience of the Nation*, U.S. DEP'T INTERIOR: NAT'L PARK SERV., <http://www.nps.gov/nr/twhp/wwwlps/lessons/133semo/133selma.htm> [<https://perma.cc/AJX4-UUAQ>].

50. *Id.*

51. Issacharoff, *Polarized Voting*, *supra* note 25, at 1838.

52. Olds, *supra* note 24, at 2190.

53. Tokaji, *The New Vote Denial*, *supra* note 27, at 701–03.

54. BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 23 (1992).

55. *Id.* at 21.

weaken African American influence at the ballot box.⁵⁶ Thus, the techniques of discrimination swiftly shifted from vote denial to vote dilution schemes, which “canceled out or minimized . . . voting strength.”⁵⁷ Congress subsequently amended the VRA with vote dilution in mind, leading VRA litigation to largely focus on dilutive techniques.⁵⁸

In recent years, barriers to voting rights have again shifted to laws restricting voter registration and access to the ballot.⁵⁹ Though the current trend of vote denial is not as blatantly discriminatory as before, felon disenfranchisement, voting machines, and voter ID laws continue to restrict minority access to the ballot box.⁶⁰ Before the 2012 election, nineteen states passed laws obstructing individuals’ rights to vote or register to vote, such as voter-ID laws and early voting cutbacks.⁶¹ Leading up to the 2016 election, seventeen states passed new restrictive voting laws.⁶² The “new vote denial” schemes are “a throwback to the early days of voting rights enforcement” and “involve practices that disproportionately exclude minority voters from” access to the ballot box altogether.⁶³ However, discriminatory intent in new vote denial schemes, unlike in early vote denial practices, is less overt.⁶⁴ Because “government actors nowadays are less likely to admit that intentional discrimination underlies their actions,” it has become increasingly difficult to prove discriminatory intent.⁶⁵

The VRA was designed as “a broad, remedial tool to prevent all forms of racial discrimination in voting”,⁶⁶ it therefore has several mechanisms to combat voting discrimination. As techniques of discrimination shift, different sections of the VRA are more effective for challengers.

56. Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1054–55 (2013) [hereinafter Ho, *Minority Vote Dilution*].

57. Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J. FORUM 799, 800 (2018) [hereinafter Ho, *Building an Umbrella in a Rainstorm*].

58. *Id.* at 801.

59. Ho, *Voting Rights Litigation After Shelby County*, *supra* note 26, at 679.

60. Tokaji, *The New Vote Denial*, *supra* note 27, at 691–92.

61. Ho, *Building an Umbrella in a Rainstorm*, *supra* note 57, at 799–800.

62. BRENNAN CTR., *Election 2016*, *supra* note 40.

63. Tokaji, *The New Vote Denial*, *supra* note 27, at 718–19.

64. *Id.* at 719.

65. *Id.*

66. Ho, *Minority Vote Dilution*, *supra* note 56, at 1056.

B. Section 2

To address the shift in voting discrimination methods from vote denial to vote dilution, Congress amended the VRA in 1982 to prohibit “any State or political subdivision” from restricting voting “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.”⁶⁷ Congress’s focus on vote dilution claims and creation of a results test was in direct response⁶⁸ to the decision in *City of Mobile v. Bolden*.⁶⁹ In *Bolden*, a plurality of the Court concluded that intentional discrimination was necessary for a vote dilution scheme to violate the Constitution.⁷⁰ Requiring discriminatory intent made it difficult for voters to challenge widespread vote dilution schemes.⁷¹ Accordingly, the amendments revised Section 2 to instead incorporate a results test, allowing litigants to demonstrate that a policy has a disproportionate racial impact through a “totality of [the] circumstances.”⁷²

Shortly after the 1982 amendments, the Court established a specific framework for claims under Section 2 in *Thornburg v. Gingles*.⁷³ The Court articulated three “necessary preconditions” that a litigant must satisfy in a Section 2 vote dilution claim.⁷⁴ First, the minority group must demonstrate that it is “sufficiently large and geographically compact to constitute a majority in a single-member district.”⁷⁵ Second, the group must “show that it is politically cohesive.”⁷⁶ Third, the group must demonstrate that “the white

67. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2, 96 Stat. 131, 134 (codified at 52 U.S.C. § 10301(a) (2018)) (emphasis added).

68. Tokaji, *The New Vote Denial*, *supra* note 27, at 704.

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

70. *See id.* at 65 (holding that the Fifteenth Amendment prohibits only purposeful discrimination).

71. *See* Tokaji, *The New Vote Denial*, *supra* note 27, at 704 (noting that requiring direct evidence of discriminatory intent “made it significantly more difficult for minority voters to challenge election systems that effectively prevent them from electing candidates of their choice”).

72. Voting Rights Act Amendments sec. 3 (codified as amended at 52 U.S.C. § 10301(b)). The accompanying Senate report to the 1982 amendments listed seven factors that could be used to demonstrate that a voting restriction denied minority voters “an equal opportunity to participate in the political processes and to elect candidates of their choice.” S. REP. NO. 97-417, at 27–29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07.

73. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

74. *Id.* at 50.

75. *Id.*

76. *Id.* at 51.

majority votes sufficiently as a bloc to . . . defeat the minority's preferred candidate."⁷⁷

The Section 2 amendments lowered the burden of proof for plaintiffs and subsequently became the "ideal tool" to tackle vote dilution schemes and "increas[e] minority representation."⁷⁸ In the two decades following the amendments, "the vast majority of Section 2 litigation occurred in the vote dilution context."⁷⁹ Litigants' increased use of Section 2 can be explained by the difficulty of proving discriminatory intent.⁸⁰ But given Section 2's substantial focus on vote dilution, challengers can no longer effectively turn to this provision for new vote restricting legislation.

C. Section 4, Section 5, and Shelby

Voting discrimination at the time of the VRA's passage involved vote denial and disenfranchisement schemes. But as courts enjoined one discriminatory practice, jurisdictions simply employed a different exclusionary tactic.⁸¹ Section 5's preclearance requirement eliminated the frequent burden of bringing another lawsuit every time jurisdictions implemented a new scheme. Instead, it mandated that certain jurisdictions demonstrate nondiscrimination before passing a new voting law.⁸² More specifically, Section 5 required states and localities that met the criteria listed in Section 4(b) to obtain approval from the Attorney General or a three-judge panel of the United States District Court for the District of Columbia prior to "enact[ing] . . . any . . . standard, practice, or procedure with respect to voting."⁸³ Section 4(a) allowed a jurisdiction covered by Section 4(b) to be released from coverage if it could prove both that the change in voting policy was not made with discriminatory intent and that it would not have a racially discriminatory effect.⁸⁴ Section 5 "essentially froze the voting status quo in place" until covered jurisdictions could

77. *Id.*

78. Lang & Hebert, *supra* note 29, at 783.

79. Ho, *Building an Umbrella in a Rainstorm*, *supra* note 57, at 801.

80. See *Thornburg*, 478 U.S. at 44 ("The intent test . . . places an 'inordinately difficult' burden of proof on plaintiffs" (quoting S. REP. NO. 97-417, at 36)).

81. Tokaji, *If It's Broke, Fix It*, *supra* note 46, at 791.

82. *Id.*

83. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 437-38 (codified as amended at 52 U.S.C. § 10304 (2018)).

84. *Id.* § 4(a) (codified as amended at 52 U.S.C. § 10303(a)).

demonstrate nondiscrimination.⁸⁵ Though Section 5 prevented the implementation of discriminatory voting laws in several jurisdictions with persistent discrimination,⁸⁶ many others were not yet covered by Section 4(b)'s criteria. In those uncovered jurisdictions, restrictive voting laws have “exploded in recent years.”⁸⁷

Despite the rising number of restrictive voting laws and voting-related controversies,⁸⁸ in 2013, the Court in *Shelby County v. Holder* struck down Section 4(b) of the VRA, thereby eliminating the Section 5 preclearance regime.⁸⁹ The Court stated that the VRA “punish[ed] for the past” and failed to appropriately develop a framework to identify jurisdictions based on their current conditions.⁹⁰ Further, the Court held that Section 4(b) applied too broadly and did not sufficiently target the problem it sought to address.⁹¹

Justice Ginsburg forewarned that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”⁹² Section 5 helped curtail discriminatory voting laws in “parts of the country where voting discrimination had proved stubbornly persistent,”⁹³ but its dismantling in *Shelby* opened the floodgates of discrimination. In the weeks following the Court's decision in *Shelby*, states formerly subject to Section 5 preclearance “capitalize[d] on their new found freedom.”⁹⁴ In 2013, nine previously covered states enacted new vote denial schemes to restrict voter access.⁹⁵ Leading up to the 2014 midterms, fifteen states passed new voting restrictions.⁹⁶ John Lewis, who led the march from Selma, called

85. Ho, *Voting Rights Litigation After Shelby County*, *supra* note 26, at 676.

86. *Id.*

87. *Id.*

88. *Id.*; see also BRENNAN CTR., *Election 2016*, *supra* note 40 (“Starting after the 2010 election, legislators in nearly half the states passed a wave of laws making it harder to vote. These new restrictions ranged from cuts to early voting to burdens on voter registration to strict voter ID requirements.”).

89. *Shelby Cty. v. Holder*, 570 U.S. 529, 557 (2013).

90. *Id.* at 553.

91. *Id.* at 554.

92. *Id.* at 590 (Ginsburg, J., dissenting).

93. Ho, *Voting Rights Litigation After Shelby County*, *supra* note 26, at 676.

94. Brian F. Jordan, *Finding Life in Hurricane Shelby: Reviving the Voting Rights Act by Reforming Section 3 Preclearance*, 75 OHIO ST. L.J. 969, 989 (2014).

95. Ho, *Voting Rights Litigation After Shelby County*, *supra* note 26, at 676–77.

96. Ho, *Building an Umbrella in a Rainstorm*, *supra* note 57, at 800.

the *Shelby* decision “a dagger in the heart of the Voting Rights Act of 1965.”⁹⁷

D. Section 3

To continue protecting voting rights after *Shelby*, litigants turned to Section 3 of the VRA. Section 3 allows a judge to require a jurisdiction to obtain preapproval for any “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” prior to enactment upon a finding that the jurisdiction violated the Fourteenth Amendment.⁹⁸ Accordingly, voting rights litigators have increasingly added Fourteenth Amendment intentional discrimination claims to their challenges.⁹⁹

Though Section 3’s preclearance resembles the Section 5 preclearance requirement eliminated in *Shelby*, the Court left Section 3 intact.¹⁰⁰ This is likely because Section 3 is more targeted than Section 5.¹⁰¹ Specifically, Section 3 directly addresses the *Shelby* Court’s concern that Section 4 was “based on decades-old data and eradicated practices”¹⁰² by allowing preclearance only for current constitutional violations.¹⁰³ Section 3 also allows for a court to impose the preclearance requirement for a predetermined amount of time and to tailor that requirement to the violation, allowing for a more flexible application of the VRA.¹⁰⁴

In sum, given the recent shift in voting discrimination from vote dilution to vote denial,¹⁰⁵ Section 2 may no longer be effective in combatting the new techniques of vote restriction. Section 2 jurisprudence was largely developed and amended as a direct response to vote dilution laws. Further, because Section 5 preclearance no longer protects litigants, those plaintiffs are turning to Section 3’s

97. Jeff Zeleny, *John Lewis: Court’s Decision Puts ‘Dagger in Heart of Voting Rights Act,’* ABC NEWS (June 26, 2013), <https://abcnews.go.com/blogs/politics/2013/06/courts-decision-puts-dagger-in-heart-of-voting-rights-act> [<https://perma.cc/2G4D-TTS6>].

98. Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437, 437–38 (codified as amended at 52 U.S.C. § 10302(c) (2018)).

99. Lang & Hebert, *supra* note 29, at 783.

100. *See generally* *Shelby Cty. v. Holder*, 570 U.S. 529 (2013) (making no mention of Section 3).

101. Wiley, *supra* note 38, at 2132.

102. *Shelby*, 570 U.S. at 551.

103. Olds, *supra* note 24, at 2194–95.

104. *Id.*

105. Ho, *Voting Rights Litigation After Shelby County*, *supra* note 26, at 679.

comparable preclearance regime.¹⁰⁶ Though Section 3 serves as a useful tool under the VRA to combat vote denial schemes, it requires a showing of discriminatory intent under the Fourteenth Amendment, a difficult burden for litigants. Without the ability to prove discriminatory intent, Section 3 is largely ineffective, and plaintiffs will be unsuccessful in eliminating discriminatory voting laws.

II. DISCRIMINATORY INTENT

The Fourteenth Amendment of the Constitution, ratified in 1868, guarantees “the equal protection of the laws” to all citizens.¹⁰⁷ Presented in the wake of the denial of rights to newly freed slaves, the Fourteenth Amendment aimed to protect the legal rights granted by the Thirteenth Amendment.¹⁰⁸ It has now become the “single most important concept in the Constitution for the protection of individual rights.”¹⁰⁹

The Equal Protection Clause “generated a jurisprudence of intent” after its ratification.¹¹⁰ In order for a court to apply strict scrutiny,¹¹¹ current Equal Protection doctrine requires that “the law classifies on its face on the basis of race” or “it can be shown that a facially neutral law has an impact and a purpose that discriminate on such basis.”¹¹² Though discriminatory intent is central to the judicial

106. Lang & Hebert, *supra* note 29, at 789.

107. U.S. CONST. amend. XIV, § 1 (referred to as the “Equal Protection Clause”).

108. See Mark A. Graber, *Subtraction by Addition?: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501, 1510–11 (2012) (“Justice Miller’s opinion in the *Slaughter-House Cases* is the canonical statement of the conventional understanding that the Fourteenth Amendment augmented the constitutional ban on slavery.”).

109. JOHN E. NOWAK & RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* § 14.1, at 383 (8th ed. 2010).

110. Aziz Z. Huq, *What is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1225 (2018).

111. If plaintiffs cannot prove that a government action or statute was motivated by discriminatory intent, the Court applies a deferential standard of review and “will uphold the action if it is rationally related to a legitimate government interest.” Julia Kobick, *Discriminatory Intent Reconsidered: Folk Concepts of Intentionality and Equal Protection Jurisprudence*, 45 HARV. C.R.-C.L. L. REV. 517, 521–22 (2010). On the other hand, if plaintiffs “can prove that the government intended to discriminate on the basis of race . . . , the Court will apply a strict scrutiny analysis, upholding the government action only if it is necessary to achieve a compelling government objective and is narrowly tailored to achieve that objective.” *Id.* at 522; see also *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (applying that standard); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (same); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (same).

112. Sofia D. Martos, *Coded Codes: Discriminatory Intent, Modern Political Mobilization, and Local Immigration Ordinances*, 85 N.Y.U. L. REV. 2099, 2114 (2010); see also ERWIN

interpretation of the Equal Protection Clause today, the requirement of proving intent was not obvious from the text of the Fourteenth Amendment.¹¹³ This Part will discuss three instrumental cases in the creation of the discriminatory-intent framework: *Washington v. Davis*,¹¹⁴ *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,¹¹⁵ and *Personnel Administrator v. Feeney*.¹¹⁶

In *Davis*, the Court held that a showing of discriminatory impact alone was insufficient to establish a violation of the Equal Protection Clause.¹¹⁷ Specifically, the Court explained that a law is not automatically invalid under the Equal Protection Clause “simply because it may affect a greater proportion of one race than of another” if it is neutral on its face and serves a valid government purpose.¹¹⁸ To trigger strict scrutiny under the Equal Protection Clause, the plaintiff was required to demonstrate that the intent of the law was to discriminate on the basis of race.¹¹⁹

However, the Court clarified that disproportionate impact is not irrelevant, and that a finding “that the law bears more heavily on one race than another” can support an inference that the law had an invidious discriminatory purpose.¹²⁰ Further, the Court made clear that discrimination need not appear on the face of the statute.¹²¹ To infer discriminatory intent, courts can consider a “totality of the relevant facts,” including the existence of a discriminatory impact.¹²² Despite establishing this test, the Court did not elucidate clear factors for litigants to use in proving discriminatory intent.¹²³

CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 687–89 (4th ed. 2011) (observing the differing levels of scrutiny applicable to different types of discrimination).

113. Huq, *supra* note 110, at 1212–13.

114. *Washington v. Davis*, 426 U.S. 229 (1976).

115. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

116. *Pers. Adm’r v. Feeney*, 442 U.S. 256 (1979).

117. *Davis*, 426 U.S. at 242.

118. *Id.*

119. *Id.* at 241–42.

120. *Id.* at 242.

121. *Id.* at 241.

122. *Id.* at 242.

123. *See id.* (concluding that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts,” including discriminatory impact, but not providing further facts to assist in the inquiry).

One year later, in *Arlington Heights*, the Court provided six nonexclusive¹²⁴ factors to evaluate evidence of discriminatory intent: (1) the discriminatory effect of the official action; (2) the “historical background of the decision”; (3) the “specific sequence of events leading up to the challenged decision”; (4) “[d]epartures from the normal procedural sequence”; (5) departures from normal substantive standards; and (6) the “legislative or administrative history” of the decision.¹²⁵ The Court’s articulation of these six factors created a more precise and objective test than the one created in *Davis*.¹²⁶ Although the Court noted that the factors could support a finding of discriminatory intent, it also left room for further development by emphasizing that the factors were not exhaustive.¹²⁷

In *Feeney*, the Court further defined discriminatory purpose. The Court held that even if a disparate impact was foreseeable, the constitutional standard for discriminatory intent requires proof that decision-makers acted because of this impact, not merely in spite of it.¹²⁸ In other words, the Court found that generalized intent was insufficient to prove discriminatory purpose and that the Fourteenth Amendment required a stronger showing of specific intent.¹²⁹ Though the Court reaffirmed the practicality of using the objective factors from *Arlington Heights* in proving discriminatory intent,¹³⁰ it ultimately developed a more subjective inquiry into the specific intent of the legislature.¹³¹ *Feeney*’s subjective inquiry imposes a significantly more demanding burden of proof on litigants bringing challenges under the Fourteenth Amendment.¹³²

124. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (“The foregoing summary identifies, without purporting to be exhaustive, subjects of proper inquiry in determining whether racially discriminatory intent existed.”).

125. *Id.* at 266–68.

126. Kobick, *supra* note 111, at 525. *Compare Davis*, 426 U.S. at 242 (establishing the “totality of the relevant facts” test and suggesting consideration of discriminatory impact), with *Vill. of Arlington Heights*, 429 U.S. at 266–68 (providing at least six specific factors to guide discriminatory-intent analysis).

127. *See Vill. of Arlington Heights*, 429 U.S. at 268 (noting that the factors are not “purporting to be exhaustive”).

128. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (“[Discriminatory purpose] implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”).

129. *Id.*

130. *Id.* at 279 n.24.

131. Sheila Foster, *Intent and Incoherence*, 72 TUL. L. REV. 1065, 1082–85 (1998).

132. *Id.* at 1082.

III. DISCRIMINATORY INTENT IN VOTING RIGHTS LITIGATION

Expressions of discrimination have become more subtle in recent years,¹³³ and dog whistles have largely taken the place of explicit discriminatory statements in campaign communications.¹³⁴ As voters respond favorably to these dog whistles, politicians continue to use these tactics to appeal to their racial resentments and animosities.¹³⁵ As a result, even though “smoking gun” evidence of discriminatory intent has largely been eliminated, the high burden of proving such intent in a Fourteenth Amendment challenge frustrates claims when plaintiffs cannot produce conclusive evidence of intentional discrimination.¹³⁶ Despite acknowledging the obstacles litigants face in proving intent, courts have generally declined to use campaign rhetoric as evidence of discriminatory intent in Fourteenth Amendment challenges.¹³⁷

This Part argues that courts should consider dog whistles in campaign speech as evidence of discriminatory intent in voting rights challenges. As a threshold consideration, it discusses discerning the intent of a legislative body—a daunting but achievable task in most voting rights challenges. After discussing legislative intent, this Part examines three reasons why proving discriminatory intent is particularly important for plaintiffs engaged in voting rights litigation. First, distinguishing between racial-discrimination motivations and political-party motivations is uniquely difficult and therefore poses an additional challenge in proving discriminatory intent in a voting rights challenge; second, if litigants are able to prove discriminatory intent, they are afforded additional protection in the form of a preclearance regime under Section 3 of the VRA; and third, when challengers can successfully prove intent, broader, less tailored remedies become available. Allowing the use of dog whistles in campaign statements as evidence of discriminatory intent gives litigators a necessary tool to ease the insurmountable burden of proving discriminatory intent in voting rights challenges.

133. Godsil, *supra* note 41, at 247–48.

134. See, e.g., Emily Cadei, *How Donald Trump Made Race the Wedge Issue of 2016*, NEWSWEEK (Aug. 31, 2016, 11:21 AM), <https://www.newsweek.com/trump-race-wedge-issue-494601> [<https://perma.cc/4MWW-8Q8S>] (“Socially, it’s become unacceptable to be openly racist. . . . Most politicians these days, however, prefer to address the issue through coded language and references that can trigger subconscious racial biases, popularly referred to as ‘dog whistle’ politics.”).

135. McElwee & McDaniel, *supra* note 23.

136. Godsil, *supra* note 41, at 270.

137. See *supra* note 42 and accompanying text.

A. *Legislative Intent*

First, as a preliminary matter, it is necessary to discuss the importance of proving a legislative body's intent. To succeed on an Equal Protection challenge, litigants must prove that the body acted with invidious intent.¹³⁸ Though proving the intent of a legislature can be a complex task, scholars have posited several compelling theories to attribute and discern collective intent. Many arguments rely on the central premise that a legislative body is a "They, not an It,"¹³⁹ meaning the intent of individual legislators or coalitions of legislators can play a critical role in legislative-intent analysis.¹⁴⁰ It is important to remember that different members of a legislature may support laws for different reasons, and it would therefore be imprudent to believe that the group "shares[s] some collective meta-intent."¹⁴¹ Consequently, when examining the intent of a legislative body, it is more sensible to focus on the specific intents of key players, the meaningful compromises made during the voting process, and consensus through agreement with a committee chairman.

First, the intent of a legislator who was in "a critical position to forge a final legislative compromise" and whose vote is critical to the act's success is significant in discerning the legislature's collective intent.¹⁴² In fact, both common sense and the law regularly attribute intent to collective bodies based on the intentions of key players within

138. See Lang & Hebert, *supra* note 29, at 784–85 ("In order to prevail on an intentional discrimination claim, plaintiffs must show that a discriminatory purpose was at least part of the motivation for the passage of a law. But adjudicating the intent of an entire legislative body can be a complex task.").

139. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239–42 (1992). This basic premise is also at the core of the argument that collections of individuals cannot have intent. *Id.* Those arguments conclude that legislative intent is incoherent or undiscoverable to the extent that a collective body cannot be charged with having an intent. *Id.*; see Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1, 11 (1992) ("If legislative purpose is the mere aggregation of the motivations of individual legislators, then there seems no escaping the conclusion that the very idea of legislative purpose is incoherent.").

140. See Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1432 (2003) ("The process of legislation, then, is shaped by the decisions made by legislators to form and maintain coalitions within the institutional structure of the legislature and within the structure of those nonlegislative institutions . . .").

141. *Id.* at 1433.

142. *Id.* at 1450.

a group.¹⁴³ A similar attribution can be made to the leaders—“pivotal legislators on whose support the legislation’s future depends.”¹⁴⁴ Typically, these leaders are moderates, who, if united as a bloc, could either defeat or pass legislation.¹⁴⁵ Though some argue that each vote is equally critical to the final legislative outcome, that claim does not hold up in practice.¹⁴⁶ Without the leaders’ assent, the legislation could not be passed, and therefore, their intentions are central to an act’s meaning.¹⁴⁷

Second, in a similar vein, legislative intent should focus not only on the intentions of the side that won—or even the strongest initial supporters of the bill—but also on “the accommodations that were necessary to gain the support of the moderates.”¹⁴⁸ Legislation results from bargaining and compromises between numerous parties with a wide range of motivations.¹⁴⁹ In the legislative process, two parties with opposing objectives debate over an issue, and the majority chooses between the two sides.¹⁵⁰ “[C]ourts seeking to interpret the legislation should look to . . . the side that won, especially its leaders, in order to guide their interpretation.”¹⁵¹ This is because the legislative process is a compromise among three groups: “ardent supporters,” “ardent opponents,” and “moderates.”¹⁵² Legislation is ultimately generated from a compromise between the ardent supporters and the moderates, meaning these compromises are central to the legislation’s meaning.¹⁵³

Third, an interpretation in the committee report and by the committee chairman can be thought of as congressional consensus

143. See generally Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2005) (defending the use of legislative intent through examples from linguistics, social and developmental psychology, and philosophy).

144. Rodriguez & Weingast, *supra* note 140, at 1450–51.

145. *Id.*

146. *Id.* at 1450.

147. *Id.*

148. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 711–12 (1992) (emphasis omitted).

149. *Id.* at 711.

150. *Id.* This description of the legislative process is “idealized” and fails to address situations where multiple views—as opposed to just two—are expressed for more controversial legislation. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 711–12.

unless expressly denied by a legislator.¹⁵⁴ In other words, to insist that each individual legislator must express his specific reasons for supporting legislation in addition to voting “aye” disregards the realities of legislative procedure.¹⁵⁵ Instead, a “mere expression of assent” acts as agreement with the view presented in a report or meeting.¹⁵⁶ Further, a legislator voting down a piece of legislation or accepting it based on a statement made by its proponent is strong evidence of intent.¹⁵⁷ Therefore, legislative history focused on the reasons for agreement or disagreement provides an accurate and compelling guide to legislative intent.¹⁵⁸

B. Distinguishing Between Racial-Discrimination Motivations and Political-Party Motivations

Intentional discrimination claims in voting rights challenges pose the unique difficulty of distinguishing one’s race from her party affiliation.¹⁵⁹ The increasing polarization along political lines is matched by a parallel increase in racial polarization,¹⁶⁰ resulting in a “more consistent alignment of race, party, and ideology.”¹⁶¹ Now, the idea that “it is possible to separate considerations of race from those of party is ludicrous.”¹⁶² For example, in 2008, President Obama “lost the white vote by 20 percent, but won with a nonwhite margin of 62 percent.”¹⁶³ Before the 2016 presidential election, a poll indicated that in North Carolina, 100 percent of African American voters supported Hillary Clinton, while 67 percent of white voters supported Donald Trump.¹⁶⁴

154. James M. Landis, *A Note on “Statutory Interpretation,”* 43 HARV. L. REV. 886, 888–90 (1930).

155. *Id.* at 888.

156. *Id.* at 888–89.

157. *Id.* at 889.

158. *Id.*

159. Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 888 (2016).

160. *Id.* at 873.

161. *Id.* at 869.

162. Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1839 (2018).

163. Cain & Zhang, *supra* note 159, at 873.

164. ELON POLL, NORTH CAROLINA RACES TIGHTEN AS ELECTION DAY APPROACHES 1 (2016), <https://www.elon.edu/e/CmsFile/GetFile?FileID=694> [<https://perma.cc/7K87-E244>].

With the close alignment of race and political party, a common defense to voting rights challenges is that the legislators acted for partisan reasons rather than race-motivated reasons.¹⁶⁵ If a court finds that partisan factors motivate a challenged law rather than race, the law may be given deference.¹⁶⁶ If, on the other hand, a court finds that racial animus prompted the law, it will not be given deference and the litigants would likely win.¹⁶⁷ The Supreme Court has held that, in a racial gerrymandering case in which race and party closely correlate, the plaintiffs must be able to show that the legislature drew the boundaries “because of race *rather than* because of political behavior.”¹⁶⁸ This dramatic difference in outcomes based on a reframing of the law can lead to manipulation by legislators, especially in light of the interconnectedness between race and politics. For example, a legislator could use partisan data to achieve racial discrimination and distort election results,¹⁶⁹ but she might avoid an Equal Protection violation by citing partisan motivations.

This tactic is utilized in both vote dilution and vote denial schemes. In vote dilution schemes—including gerrymandering—legislators can create racially discriminatory redistricting schemes so long as the record only suggests political motivations.¹⁷⁰ A racially motivated gerrymander is permissible if, instead of diluting the strength of racial minorities, the legislator claims that it dilutes the strength of minority political parties.¹⁷¹ With no evidence on the record of racial motivation, the litigant will not have sufficient evidence to prove an Equal Protection violation. Similarly, in vote denial schemes—such as voter ID or citizenship requirements—legislators can easily claim that the requirements are measures to prevent voter fraud, thus avoiding a racial-discrimination challenge.¹⁷² Therefore, in a case in which a

165. See, e.g., Lang & Hebert, *supra* note 29, at 788.

166. Atiba R. Ellis, *When Political Domination Becomes Racial Discrimination: NAACP v. McCrory and the Inextricable Problem of Race in Politics*, 68 S.C. L. REV. 517, 531 (2017).

167. *Id.*

168. *Easley v. Cromartie*, 532 U.S. 234, 257 (2001).

169. See Cain & Zhang, *supra* note 159, at 887–88 (“Conjoined polarization allowed Republicans in Alabama and Virginia to redistrict based on race and achieve a partisan outcome.”).

170. Megan Creek Frient, Note, *Similar Harm Means Similar Claims: Doing Away with Davis v. Bandemer’s Discriminatory Effect Requirement in Political Gerrymandering Cases*, 48 CASE W. RES. L. REV. 617, 657 (1998).

171. Richard E. Levy, *The Nonpartisanship Principle*, 25 KAN. J.L. & PUB. POL’Y 377, 388–89 (2016).

172. *Id.* at 395–97.

litigant has evidence of discriminatory intent through dog whistles made during a campaign, courts should consider the statements in a discriminatory-intent analysis to protect litigants from discriminatory voting laws.

C. Section 3 Preclearance

To continue protecting voting rights after *Shelby*, which eliminated Section 5's preclearance regime, litigators have turned to Section 3 of the VRA. Once a court decides to submit a jurisdiction to preclearance under Section 3, it can determine the requirement's duration and scope.¹⁷³ If the court later deems that preclearance is no longer appropriate, it can lift the requirement before the ordered date.¹⁷⁴ Section 3 can also be tailored to address the specific part of the law that violates the Constitution and leave other procedures unaffected.¹⁷⁵ Section 3's targeted, tailored, and flexible nature distinguishes it from Section 5 and, therefore, likely will not get similarly eliminated.

Because Section 3 preclearance depends on a finding of a Fourteenth Amendment violation, proving intentional discrimination has significant benefits for litigants in voting rights challenges. Once a jurisdiction is submitted to preclearance, plaintiffs can avoid the burden of relitigating future restrictions. As the Court noted in *South Carolina v. Katzenbach*,¹⁷⁶ "case-by-case litigation [is] inadequate to combat widespread and persistent discrimination in voting."¹⁷⁷ Efforts are especially futile when, even after a litigant wins a suit against a jurisdiction, the state simply enacts new restrictions designed to entrench the disparities in voter registration.¹⁷⁸ Challenging each new restriction is "onerous" and "exceedingly slow," forcing injured minorities to live under discriminatory laws while awaiting the results

173. Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437, 437-38 (codified as amended at 52 U.S.C. § 10302(c) (2018)).

174. Olds, *supra* note 24, at 2195.

175. *Id.*

176. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), *abrogated by* *Shelby Cty. v. Holder*, 570 U.S. 529, 551 (2013). *Katzenbach* discusses the need for Section 5 preclearance, which was eliminated in *Shelby*. However, the reasons offered by the *Katzenbach* Court apply to the idea of preclearance generally, which was not wholly eradicated by *Shelby*. Therefore, the arguments made for Section 5's preclearance regime can be applied to Section 3 preclearance. *See id.* (discussing preclearance generally); Olds, *supra* note 24, at 2208-13 (arguing that "the Supreme Court's logic for upholding preclearance" in *Katzenbach* should apply to Section 3 preclearance).

177. *Katzenbach*, 383 U.S. at 328.

178. *Id.* at 314.

of the litigation.¹⁷⁹ The “inordinate amount of time and energy required”¹⁸⁰ to challenge restrictive voting laws highlights the need for a robust, more enduring remedy under Section 3. To ease the heavy burdens associated with proving discriminatory intent, courts should allow litigants the use of dog whistles made during campaigns as evidence. This will provide litigants the availability of Section 3 preclearance and “shift the advantage of time and inertia from the perpetrators of the evil to its victims.”¹⁸¹

D. Broader, Less Tailored Remedies

Even if a court determines preclearance to be inappropriate, the remedies available to challengers who can prove discriminatory intent differ significantly from remedies available in impact-only violations.¹⁸² When a violation is found based on proof of discriminatory impact but not discriminatory intent, the court must tailor the remedy to “maintain legitimate legislative priorities where possible.”¹⁸³ Though the court should fashion the remedy to cure the impact-only violation and provide minorities equality at the ballot box, the “remedy must be narrowly tailored to include only those measures necessary to cure the defect.”¹⁸⁴

On the other hand, when a court finds discriminatory intent, it is no longer required to tailor the remedy narrowly.¹⁸⁵ In cases involving discriminatory intent, courts instead have a duty to eliminate the discrimination “root and branch”¹⁸⁶ and ensure that the remedy “restore[s] the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.”¹⁸⁷ Courts can invalidate laws enacted with discriminatory purpose in their entirety rather than having to establish narrow—and potentially harmful—

179. *Id.*

180. *Id.* at 328.

181. *Id.*

182. Lang & Hebert, *supra* note 29, at 790.

183. *Id.*; *see also* Veasey v. Abbott, 830 F.3d 216, 280 (5th Cir. 2016) (“Such scrutiny should be seen not as heavy-handed judicial rejection of legislative priorities, but as part of a process of harmonizing those priorities with the fundamental right to vote . . .”).

184. *Dillard v. Baldwin Cty. Bd. of Educ.*, 686 F. Supp. 1459, 1469 (M.D. Ala. 1988).

185. Lang & Hebert, *supra* note 29, at 790.

186. *Id.*

187. *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)).

alternatives.¹⁸⁸ After invalidating a law in its entirety, a court can require that the jurisdiction return to its prior, nondiscriminatory voting procedures.¹⁸⁹

The significant distinctions in the remedies available to litigants who can prove discriminatory intent further demonstrate the importance of easing the burden of proving discriminatory intent in voting rights challenges. Allowing litigants to prove discriminatory intent through dog whistles made during campaigns would open the possibility of more robust and overarching remedies. These remedies are necessary to eradicate discriminatory vote denial schemes and ensure that minorities have equal access to the ballot box.

IV. DENYING DISCRIMINATORY CAMPAIGN STATEMENTS

Subtle forms of racial bias continue to exist in the campaign context, and dog whistles have become increasingly prevalent in recent years.¹⁹⁰ However, *Feeney*'s subjective inquiry into the specific intent of the legislature imposes a significantly more demanding burden of proof on litigants bringing challenges under the Fourteenth Amendment.¹⁹¹ After *Feeney*, courts have limited evidence of discriminatory intent to official governmental records and have largely "refused to consider 'unofficial' or 'extra-official' evidence of animus."¹⁹² This refusal "betrays both the letter and the spirit of the *Arlington Heights* six-factor test," which allows for a "broad inquiry" into "extra-governmental context."¹⁹³ In fact, factors two and three specifically permitted evaluation of the "historical background of the decision" and the "specific sequence of events leading up to the challenged decision."¹⁹⁴

Even though no doctrinal restriction prevents courts from considering such evidence, both judges and scholars have argued that "campaign statements should be inadmissible per se in the

188. See Lang & Hebert, *supra* note 29, at 790–91 (discussing the differences between a results-only remedy and a remedy when intentional discrimination was found in Texas and North Carolina cases).

189. *Id.* at 791.

190. See *supra* notes 5, 16–23, 133–35 and accompanying text (discussing the prevalence of dog whistles in campaign rhetoric and their appeal to voters).

191. Foster, *supra* note 131, at 1082–85.

192. Fields, *supra* note 42, at 283–84.

193. *Id.* at 285.

194. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

discriminatory-intent analysis.”¹⁹⁵ This Part will address several arguments against consideration of campaign statements, including dog whistles, in proving discriminatory intent such as the unreliability of campaign statements, their chilling effects on campaign speech, and the fact that they are not official communications. It ultimately concludes, however, that these arguments are often overstated and do not support a bright-line rule excluding dog whistles as evidence of discriminatory intent.

A. *Unreliability*

This Section argues that critics of using campaign statements as evidence of discriminatory intent often exaggerate the unreliability of campaign statements in demonstrating motive. It suggests that instead of a categorical exclusion on campaign statements, courts should allow the use of campaign statements—and dog whistles during campaigns—as evidence of discriminatory intent and assess their evidentiary weight as they do for all other pieces of evidence.¹⁹⁶

First, critics misrepresent that campaign statements are unreliable to prove discriminatory intent because these statements “lack a sufficient temporal connection to the legal actions” challenged.¹⁹⁷ They argue that, because candidates begin campaigning long before actually assuming office, there may be a significant lapse of time between policy statements and implementation of policy.¹⁹⁸ During this time, “intervening events might alter a candidate’s mental state,” and thereby, her intentions.¹⁹⁹ Therefore, when politicians make discriminatory statements in campaigns long before they vote on legislation, it may not be certain that they still hold the same beliefs and motivations expressed earlier.²⁰⁰

This argument ignores the fact that though some campaign statements are made years before policy implementation, others are made simultaneously with government action.²⁰¹ Further, even some statements outside the campaign context can be made long before the

195. Fields, *supra* note 42, at 294.

196. *Id.*; see Michael Coenen, *Campaign Communications and the Problem of Government Motive*, 21 U. PA. J. CONST. L. 333, 360 (2018).

197. Coenen, *supra* note 196, at 360 (emphasis omitted).

198. *Id.*

199. *Id.*

200. *Id.*

201. *See id.* (giving an example of a candidate running for reelection while still conducting government business and implementing policy).

relevant policy comes into effect.²⁰² Thus, the connection between a campaign statement and the implementation of a specific policy is not necessarily eliminated because of the time elapsed between the two events. Accordingly, courts should consider the time between the campaign statement and the implementation of the challenged policy when evaluating the statement's evidentiary weight rather than its admissibility.²⁰³

Second, critics argue that campaign speech is unreliable due to the inherently self-interested and competitive nature of elections, ignoring the fact that elected officials continue making self-interested statements even after elections end.²⁰⁴ These critics argue that to get elected, politicians lie and "make explicitly biased remarks to pander to the base emotions of voters."²⁰⁵ As a result, campaign statements do not reveal the politician's true discriminatory intentions.²⁰⁶ Judge Alex Kozinski argued that campaign promises can only demonstrate the politician's intent to win the election and nothing more when he stated, "No shortage of dark purpose can be found by sifting through the daily promises of a drowning candidate, when in truth the poor shlub's only intention is to get elected."²⁰⁷ The detractors argue that these biased campaign statements are "often insincere, designed to appeal to voters."²⁰⁸ This argument envisions the "stereotypical political candidate . . . who will say anything to get elected, even if that means saying one thing at 10:00 a.m., another thing at noon, and a third thing at 6:00 p.m."²⁰⁹

These arguments about lies and pandering in campaign statements ignore the fact that officials who are already in office also routinely pander "to get re-elected, acquire influence within the party, and curry favor with their constituents."²¹⁰ Despite this fact, courts are willing to

202. *Id.* at 360–61 (giving an example of an "inauguration speech about legislation that takes several years to pass").

203. *Id.*

204. *Id.* at 361; Fields, *supra* note 42, at 299–300.

205. Clarke, *supra* note 42, at 553.

206. *Id.*

207. *Washington v. Trump*, 858 F.3d 1168, 1173 (9th Cir. 2017) (Kozinski, J., dissenting).

208. Fields, *supra* note 42, at 300 (quoting Eugene Kontorovich, Opinion, *The 9th Circuit's Dangerous and Unprecedented Use of Campaign Statements to Block Presidential Policy*, WASH. POST (Feb. 9, 2017), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2017/02/09/the-9th-circuits-dangerous-and-unprecedented-use-of-campaign-statements-to-block-presidential-policy> [<https://perma.cc/R24T-4HCG>]).

209. *Id.*

210. Coenen, *supra* note 196, at 361.

separate sincerity from exaggerated pandering when analyzing statements made by elected officials.²¹¹ Courts are equipped to give different pieces of evidence the appropriate weight and routinely assess their value in the record.²¹² Therefore, courts should do the same for dog whistles in campaign statements rather than drawing a bright-line rule excluding the statements altogether.

Further, campaign statements likely shape politicians' motives after they get elected.²¹³ When candidates make promises during a campaign, they feel obligated to deliver on those promises when they are elected.²¹⁴ Even if the candidate lacked a personal intention to discriminate in campaign speeches, once the statements were made, they "created a reality in which the candidate needed to follow through on [them]."²¹⁵ Similarly, even if the politician's motives did not change and he enacted discriminatory policies solely to please his constituents, the policies themselves would be no less discriminatory.²¹⁶ In essence, the discriminatory views of the constituents can be attributed to the politician "as a conduit."²¹⁷ Therefore, despite concerns about the reliability of campaign statements, the statements may in fact represent genuine indications of discriminatory intent and should be given weight as evidence of discriminatory intent.

B. Chilling Effect

This Section argues that critics overstress the chilling effects of using campaign speech as evidence of intent. Ultimately, these arguments for a per se ban of campaign statements are unconvincing in their application because their future use in litigation does not have a general chilling effect and may actually create beneficial self-censorship.

Critics argue that if candidates' campaign statements will be used against politicians in constitutional challenges, it will have a chilling effect on campaign communications generally. Rather than openly express their motives, politicians will pretend to support policies for reasons that they do not believe or "not say[]" anything about those

211. *Id.*

212. Fields, *supra* note 42, at 301.

213. Coenen, *supra* note 196, at 362.

214. *Id.*

215. *Id.* (emphasis omitted).

216. Clarke, *supra* note 42, at 554.

217. *Id.*

policies at all.”²¹⁸ As stated by Judge Paul Niemeyer, “[i]t is hard to imagine a greater or more direct chill on campaign speech than the knowledge that any statement made may be used later” to prove discriminatory intent in a legal challenge.²¹⁹ This chilling effect, critics lament, results in the lack of political dialogue, which in turn deprives voters of information when voting.²²⁰ Critics continue this argument by citing to First Amendment free speech principles;²²¹ they make the consequentialist argument that any chilling effect on political campaigns is a cost on free speech values and thus a reason for a categorical ban on campaign speech as evidence.²²²

Though these arguments seem persuasive at first blush, they are ultimately overstated. A candidate hoping to win an election is not focused on the possibility of future litigation.²²³ In fact, if a politician sees present value in making a statement, she will “opt for the immediate electoral gain” and worry about future consequences only when they arise.²²⁴ This is especially true concerning candidates for the legislature, who often do not believe their statements will be attributable to the institution’s reasons for acting.²²⁵ Additionally, most officials are “already circumspect, avoiding gaffes for reasons related to the desire to be reelected rather than in anticipation of lawsuits.”²²⁶ For these politicians, the purported chilling effects would not disappear the moment the campaign ends, but instead would seem to last throughout their political careers.²²⁷ This demonstrates the inconsistency of ignoring campaign statements but allowing statements from outside of the campaign context. Therefore, utilizing dog

218. Coenen, *supra* note 196, at 366.

219. *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 651 (4th Cir. 2017) (Niemeyer, J., dissenting).

220. Coenen, *supra* note 196, at 366.

221. Professor Coenen clarifies that First Amendment concerns do not “suggest that campaign-cognizant motives review might violate the First Amendment itself.” *Id.* at 367 n.97 (emphasis omitted). Violation is unlikely, “given the absence of any sort of ‘official sanction’ or ‘punishment’” when considering campaign statements. *Id.* However, the First Amendment concerns are applicable to the extent that free speech values “might militate against judicial reliance” on the use of campaign statements in proving intent. *Id.*

222. *Id.* at 367–68.

223. *Id.* at 366–67.

224. *Id.* at 367.

225. *Id.*

226. Clarke, *supra* note 42, at 576.

227. *Id.* at 553.

whistleds in campaign statements as evidence of discriminatory intent will not alter politicians' behaviors in any realistic way.

Although employing campaign speech as evidence of discriminatory intent will not have a generalized chilling effect on all campaign communications, it may lead to positive self-censorship by politicians. When individual politicians refrain from engaging in discriminatory speech, it is "a welcome[d] restraint."²²⁸ Ultimately, by refusing to use campaign statements in discriminatory-intent analysis, courts are giving politicians license to make discriminatory statements without consequence.²²⁹ Politicians will likely feel more empowered to use dog whistles during their campaigns, as they are subtle enough to be understood by a particular group without attracting public scrutiny.

C. *Official Communications*

Finally, this Section argues that critics of utilizing campaign statements as evidence of discriminatory intent assert that the Constitution does not govern what private persons do in their unofficial capacities. It concludes that a bright-line rule excluding unofficial campaign statements, including dog whistles, misinterprets the purpose of the discriminatory-intent analysis and should be discredited.

Critics misguidedly argue that because campaign statements are made in politicians' unofficial capacities before they have an obligation to uphold the Constitution, the statements cannot reveal "the government's ostensible object."²³⁰ In advancing this argument, critics argue that campaign statements are irrelevant because only an official objective can violate the Constitution²³¹ and that private statements cannot be attributed to the official conduct of government actors.²³² Further, they contend that the Constitution is concerned with state action and does not regulate the unofficial conduct of private persons.²³³ This argument needlessly distinguishes between official and

228. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 600 (4th Cir. 2017).

229. *Fields*, *supra* note 42, at 314.

230. *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005).

231. *See, e.g.*, Reply Brief for the Petitioners at 9, *Trump v. Int'l Refugee Assistance Project*, 138 S. Ct. 353 (2017) (No. 16-1436), 2017 WL 2610075, at *9; *Clarke*, *supra* note 42, at 551.

232. *Fields*, *supra* note 42, at 310.

233. *Coenen*, *supra* note 196, at 364.

unofficial conduct, drawing a bright-line exclusion against analyzing unofficial conduct in determining an action's constitutionality.²³⁴

Though the Fourteenth Amendment only governs state action—and a private citizen's actions cannot violate the Fourteenth Amendment—courts have the authority to consider unofficial statements when evaluating whether postelection actions were motivated by discriminatory intent. The central focus of discriminatory-intent analysis is to consider whether a government official had an improper and unconstitutional motive in taking official action.²³⁵ To this end, “an official's statements are all the more important” in determining whether an official action was motivated by discriminatory purpose.²³⁶ In fact, a politician acting in his unofficial capacity can “propose, describe, explain, and/or justify” actions he plans to take in his official capacity.²³⁷ Once the politician is elected, those earlier statements are relevant in determining the constitutionality of subsequent official actions.²³⁸ A categorical bar on dog whistles made during a campaign in a discriminatory-intent analysis conflates “what the Constitution prohibits with . . . how prohibited conduct may be shown”²³⁹ and ignores the purpose of discriminatory-intent analysis.

CONCLUSION

Both dog whistles in campaign speech and discriminatory voting laws have increased in recent years. Nevertheless, voters have faced challenges proving discriminatory intent, a barrier they must surpass in an Equal Protection challenge under Section 3 of the VRA. Courts have supported a per se ban on campaign statements as evidence of discriminatory intent, blocking litigants' ability to demonstrate a legislator's intent through dog whistles made during a campaign.

The right to vote is considered as central and fundamental as the right to bodily integrity and is critical to a legitimate democracy. When

234. *See id.* (“The argument would thus posit a key distinction between official and unofficial conduct, and it would derive from that distinction the rule that only ‘officially’ proclaimed motives should bear on a law’s constitutionality.”).

235. Fields, *supra* note 42, at 311.

236. Clarke, *supra* note 42, at 553.

237. Coenen, *supra* note 196, at 365.

238. *Id.*

239. *Id.* at 364.

it is violated, “[o]ther rights, even the most basic, are illusory.”²⁴⁰ Allowing the use of dog whistles to prove discriminatory intent in voting rights challenges ensures that litigants have the necessary tools to surpass the heavy burden of demonstrating discriminatory intent and ultimately protects the fundamental right to vote.

240. *Reynolds v. Sims*, 377 U.S. 533, 560 (1964) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).