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***After Shelby County. Getting Section 2 of the VRA
To Do the Work of Section 5***

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After *Shelby County*: Getting Section 2 of the VRA to Do the Work of Section 5

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Abstract. Until the Supreme Court put an end to it in *Shelby County v. Holder*, Section 5 of the Voting Rights Act was widely regarded as an effective, low-cost tool for blocking potentially discriminatory changes to election laws and administrative practices. The provision the Supreme Court left standing, Section 2, is generally seen as expensive, cumbersome and almost wholly ineffective at blocking changes before they take effect. This paper argues that the courts, in partnership with the Department of Justice, could reform Section 2 so that it fills much of the gap left by the Supreme Court's evisceration of Section 5. The proposed reformation of Section 2 rests on two insights: first, that national survey data often contains as much or more information than precinct-level vote margins about the core factual matters in Section 2 cases; second, that the courts have authority to create rebuttable presumptions to regularize Section 2 adjudication. Section 2 cases currently turn on costly, case-specific estimates of voter preferences generated from precinct-level vote totals and demographic information. Judicial decisions provide little guidance about how future cases—each relying on data from a different set of elections—are likely to be resolved. By creating evidentiary presumptions whose application in any given case would be determined using national survey data and a common statistical model, the courts could greatly reduce the cost and uncertainty of Section 2 litigation. This approach would also end the dependence of vote-dilution claims on often-unreliable techniques of ecological inference, and would make coalitional claims brought jointly by two or more minority groups much easier to litigate.

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INTRODUCTION

Widely lauded as one of the most effective statutes ever enacted, the Voting Rights Act (VRA) of 1965 finally made good on the promise of the 15th Amendment. The VRA outlaws the use of “tests or devices” as a prerequisite to voting, and Section 2 of the statute further prohibits state and local governments from structuring elections in a manner “which results” in members of a group defined by race or color “hav[ing] less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.”¹ Sections 4 and 5 target states and localities with a history of black disenfranchisement, requiring them to obtain prior approval from the federal government before implementing any changes to their election laws. The principal question in these “preclearance” proceedings is a simple one: Would the change make minority voters worse off?² The jurisdiction seeking preclearance bears the burden of proving it would not.

In June 2013, the Supreme Court in *Shelby County v. Holder* put the preclearance mechanism on ice.³ The Court faulted Congress for not updating the coverage formula (which determines the states and localities subject to preclearance) when Congress reauthorized Section 5 in 2006. Justice Kennedy mused that Section 5 was probably not needed in any event because discriminatory voting changes can also be blocked, pre-implementation, by preliminary injunctions in lawsuits brought under Section 2.⁴ Leading election lawyers think this risible.⁵ Section 2 litigation is costly and rarely results in preliminary relief⁶; moreover, *Shelby County* further undermined the already shaky constitutional moorings of Section 2.⁷

¹ 42 U.S.C.A. § 1973.

² Preclearance could also be denied if the change was adopted for discriminatory reasons.

³ *Shelby County v. Holder*, 570 U.S. ____ (2013).

⁴ *Id.*, transcript of oral argument, at 37-39.

⁵ See, e.g., Eileen O'Connor, *Shelby County v. Holder* and the Fate of Section 5 of the Voting Rights Act, http://www.lawyerscommittee.org/projects/voting_rights/page?id=0139; Rick Hasen, post to Election Law Blog, Feb. 28, 2013, 8:30 am (“Justice Kennedy seems to mistakenly believe that section 2 liability plus preliminary injunctions would be just as good as section 5 liability”); J. Gerald Hebert and Armand Derfner, More Observations on Shelby County, Alabama and the Supreme Court, Campaign Legal Center Blog (March 1, 2013; 18:01).

⁶ J. Gerald Herbert and Armand Derfner, *More Observations on Shelby County, Alabama, and the Supreme Court*, Campaign Legal Center Blog, Mar. 1, 2013, http://www.clcblog.org/index.php?option=com_content&view=article&id=506:more-observations-on-shelby-county-alabama-and-the-supreme-court- (“The actual number of preliminary injunctions that have been granted in the hundreds of Section 2 cases that have been filed over the years is quite small, likely putting the percentage at less than 5%, and possibly quite lower.”).

⁷ See *infra* note 51 and accompanying text. Cf. Richard L. Hasen, The Curious Disappearance of *Boerne* and the Future Jurisprudence of Voting Rights and Race, post to SCOTUSblog, June 25, 2013, 7:10 pm (noting that “the Court for now seems to have foreclosed greater deference for voting decisions under Congress’s Fifteenth amendment powers[, which] could spell trouble for

Shelby County's impact was felt immediately. A number of state and local governments that had been subject to the preclearance process quickly adopted or implemented new, restrictive voting laws. For example:

- The day *Shelby County* was decided, Texas announced that it was implementing its strict voter ID requirement, which had been blocked under Section 5.⁸ Voter ID laws recently adopted in Alabama and Virginia were also freed to take effect.⁹
- Texas's Attorney General announced that the Legislature's 2011 redistricting maps would immediately take effect. (Preclearance had been denied preclearance because a three-judge panel of the District Court of DC was "persuaded by the totality of the evidence that the plan was enacted with discriminatory intent."¹⁰)
- Two months after *Shelby County*, North Carolina enacted a sweeping election reform bill which the president of the state's NAACP chapter called, "the worst voter suppression law since the days of Jim Crow."¹¹ During the same month, Mississippi passed new ID requirements for voting.¹²
- The city of Pasadena, Texas replaced two district council seats in predominately Latino neighborhoods with two at-large seats elected from the majority-white city.¹³
- Galveston County, Texas cut in half the number of constable and justice-of-the-peace districts, eliminating virtually all of the seats currently held by Latino and black incumbents.¹⁴
- The city of Macon, Georgia moved the date of city elections from November to July, when black turnout has traditionally been low.¹⁵

Section 2 of the Voting Rights Act . . . and other laws aimed at preventing race discrimination in voting").

⁸ See Ryan J. Reilly, Harsh Texas Voter ID Law 'Immediately' Takes Effect After Voting Rights Ruling, *The Huffington Post*, June 25, 2013, http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html.

⁹ Ala. Code § 17-9-30 (2011); Va. Code Ann. § 24.2-643. Alabama had passed the photo ID law in 2011 but had not requested preclearance because the Secretary of State's office had yet to develop rules for implementing the law. See Kim Chandler, State Has Yet to Seek Preclearance of Photo Voter ID Law Approved in 2011, *AL.com*, June 12, 2013, http://blog.al.com/wire/2013/06/photo_voter_id.html;

¹⁰ *Texas v. U.S.*, 887 F.Supp.2d 133, 161 n. 32 (2012) ("The parties have provided more evidence of discriminatory intent than we have space, or need, to address here.").

¹¹ N.C. Session Bill 2013-381 (Aug. 12, 2013). Zachary Roth, North Carolina Wants Voting Law E-mails Kept Secret, *MSNBC.com*, Jan. 9, 2014, <http://www.msnbc.com/msnbc/nc-wants-voting-law-emails-kept-secret>.

¹² Miss. Code Ann. § 23-15-563 (2014).

¹³ See <http://www.scotusblog.com/media/after-shelby-county/>.

¹⁴ See <http://www.houstonchronicle.com/news/houston-texas/houston/article/Galveston-County-may-run-afoul-of-Voting-Rights-4747681.php>.

¹⁵ See <http://www.npr.org/2014/02/06/272359791/voting-rights-act-update>.

With Congress divided and slow to respond to *Shelby County*,¹⁶ Attorney General Holder has pledged to do all he can to protect voting rights using the remnants of the VRA.¹⁷ The Department of Justice has challenged the new voter ID requirements in Texas and North Carolina under Section 2,¹⁸ and other private and public lawsuits are in the offing.¹⁹

This Article takes up the question of whether Section 2 can be made to function like erstwhile Section 5 in the post-*Shelby County* world. We argue that it can—provided that courts, litigators, and the Department of Justice come to understand two fundamental points. First, national survey data often contain as much or more information about the fundamental evidentiary matters in Section 2 cases than the precinct-level vote tallies and demographics that have been the grist of voting rights litigation for the last generation. Demographic and legal changes are undermining the conventional sources of evidence for Section 2 cases. But at the same time, advances in survey administration, reweighting, and model-based estimation of local political preferences from national surveys are generating new kinds of evidentiary materials that speak to the central factual questions in Section 2 cases. Second, because Section 2 is a common law statute (or statutory provision), the courts have authority to create rebuttable presumptions to guide and regularize the adjudication of Section 2 claims.

We show how the courts could create rebuttable presumptions under Section 2 that would give the statute special bite in many jurisdictions formerly covered by Section 5. Implemented with national survey data rather than local election tallies, the new presumptions would greatly reduce the cost of challenging under Section 2 the kinds of election law changes that the Department of Justice used to block under Section 5. The presumptions would

¹⁶ It was not until January 2014 that the civil rights community and its allies in Congress came forth with draft legislation responding to *Shelby County*. The bill would bring only four of the formerly covered states back under Section 5, see Summary of the Voting Rights Amendment Act of 2014, <http://www.advancementproject.org/pages/summary-of-the-voting-rights-amendment-act-of-2014-introduced-january-16-20#sthash.fPoBAqJb.dpuf>, notwithstanding that much broader coverage (using a different formula) is readily justified, see Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CAL. L. REV. (forthcoming 2014) (hereinafter, “Elmendorf & Spencer, *Preclearance*”).

¹⁷ Sari Horwitz, Justice Department to Challenge States’ Voting Laws, WASH. POST, July 25, 2013.

¹⁸ Rick Hasen, post to Election Law Blog, Aug. 22, 2013, 9:32 am, <http://electionlawblog.org/?p=54695> (linking to DOJ press release about suit against Texas voter ID requirement); <http://www.politico.com/story/2013/09/justice-department-north-carolina-voter-id-law-97542.html> (explaining challenge to several North Carolina restrictions).

¹⁹ Horwitz, *supra* note 17. For a summary of election law changes in formerly covered jurisdictions since *Shelby County*, see <http://www.naacpldf.org/document/states-responses-shelby-decision..>

also go a long distance toward establishing the “likelihood of success on the merits” needed for preliminary relief.

Even if the courts decline our call to create formal evidentiary presumptions under Section 2, mere judicial recognition of the fact that national survey data shed light on the central factual questions in Section 2 cases would breathe new life into the statute. Presently Section 2 cases are like snowflakes. Each one depends on highly idiosyncratic judgments about which local elections are most probative of minority political cohesion, white bloc voting against minority-preferred candidates, and (possibly) white discrimination. The relevant data is costly to obtain and process, and has very little value except for litigation in the particular locale at issue. Judicial rulings on the evidentiary materials in one case provide little guidance regarding the next case down the pike. By contrast, if the same (national) data sets start getting deployed in case after case, the ordinary processes of common law adjudication will create substantial guidance about whether a given would-be defendant is likely to be held liable under Section 2. This is so whether or not the courts create *de jure* evidentiary presumptions.

* * *

The presumptions we propose address the central, difficult-to-establish factual issues that arise in most Section 2 cases: whether white and minority voters have opposing political preferences (“racial polarization”); whether the minority’s electoral disadvantage is due to intentional or subjective race discrimination (“causation”); and whether the minority community’s opportunity to secure representation is nonetheless adequate (generally defined as “rough proportionality” in the number of minority “opportunity districts”).

We argue that courts may rebuttably presume polarized voting if (plaintiff group) minority citizens in the defendant jurisdiction substantially diverge from other citizens in terms of their policy preferences, general political ideology, or socio-economic status. Defendants could try to rebut the polarization inference with data from local elections, but it would not be necessary for plaintiffs to introduce local voting data after establishing presumptive polarization.

Next, we offer two presumptions with respect to the so-called causation requirement of Section 2. This requirement, as we interpret it, obligates plaintiffs to show to a “significant likelihood” that their injury resulted from subjective racial discrimination by conventional state actors or majority-group voters. In vote dilution cases, the causation requirement should be deemed rebuttably satisfied if the jurisdiction’s majority-group citizens generally subscribe to negative stereotypes of the minority.²⁰ And in all cases, an extreme correlation between race and reliably partisan voting should give rise to a presumption of discriminatory intent, if actors affiliated with the white-

²⁰ We are agnostic about whether this presumption should apply outside of the vote dilution context.

preferred party were responsible for the election law or practice at issue, and if it has a racially disparate impact. By shifting the burden of persuasion to defendants, the courts acknowledge that partisan motives do not merit the same presumption of legitimacy in jurisdictions where the partisan payoff to racial discrimination is exceptional.²¹

Third, we sketch a couple of ways of addressing, with presumptions, the question of whether an electoral district should be categorized as a minority opportunity district. The simplest approach treats the district as a presumptive opportunity district if the minority community makes up a majority of the district's citizen voting age population.

In contrast to the coverage formula for Section 5 preclearance, there would be no *de jure* list of jurisdictions “covered” by our Section 2 presumptions. Rather, plaintiffs would have to make evidentiary showings at the start of their case to establish which presumptions apply. We demonstrate in Part IV that these showings can be made using multilevel statistical modeling and data from existing national surveys, such as the National Annenberg Election Survey, the Cooperative Congressional Election Study, and the Cooperative Campaign Analysis Project. Our empirical results suggest that blacks (but not necessarily other racial groups) are likely to be protected by the presumptions throughout the Deep South, i.e., in most of the formerly covered jurisdictions. The two fastest growing racial groups in the United States, Asian Americans and Latinos, are jointly politically cohesive almost everywhere. This implies that Asians and Latinos ought to have considerable success bringing “coalitional” claims under Section 2—which has not been the case to date.²² However, our results also indicate that Asian American and Latino plaintiffs may find it harder than blacks to satisfy the Section 2 “causation” requirement.

Although our approach would not yield an official list of jurisdictions covered by the presumptions, a pattern of *de facto* coverage should emerge as courts and litigants come to a shared understanding of what the presumptions are and how they may be established in a given case. As models and data sources become standardized (more on this below), it should be pretty clear to litigants which jurisdictions face presumptive liability.

State and local officials in the *de facto* covered jurisdictions would have to disprove central elements of a Section 2 case, much as covered jurisdictions bore the burden of proof in preclearance proceedings under Section 5. This shifting of evidentiary burdens should make it fairly easy for plaintiffs to obtain pre-implementation preliminary relief, much as DOJ under Section 5 was able

²¹ Where there is an extreme correlation between race and partisanship, opposing-party actors have incentives to target and burden voters on the basis of their race, race being easier to observe than reliable partisanship. See generally Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553 (2011).

²² See generally Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. IRVINE L. REV. 359 (2013).

to block suspicious changes before they took effect. In a redistricting case, for example, plaintiffs could establish the requisite “likelihood of success” by showing that the defendant failed to create a roughly proportional number of presumptive opportunity districts when it was feasible to do so. Or, in a challenge to voter identification requirements or barriers to youth voting, plaintiffs might obtain preliminary relief by showing that the law was adopted on a substantially party line vote (thereby establishing partisan intent) and that the burden of the law would fall disproportionately on racial minorities. Because defendants would have to rebut the inference of discrimination where the relevant presumptions apply, Section 2 litigation would be more costly for defendants than for plaintiffs, incentivizing defendants to settle quickly and on terms favorable to the plaintiffs. Lawmakers and election administrators in these jurisdictions would have correspondingly strong *ex ante* incentives to safeguard minority voting rights.²³

The balance of this Article unfolds as follows. Part I provides a brief overview of Sections 2 and 5. It also explains the conventional wisdom that (weak, cumbersome) Section 2 is no substitute for (potent, efficient) Section 5, as well as the less widely appreciated fact that Section 2 may not be able to play in the future even the limited role it as played in the past, due to recent developments in law and in statistics.

Parts II, III, and IV develop our proposal for a presumption-driven Section 2. Part II identifies what we take to be the central factual questions in Section 2 cases and explains how they could be answered using evidentiary presumptions and survey data. Part III steps back and considers the courts’ authority to create the presumptions suggested in Part II. We argue that judicial authority to establish the presumptions is pretty straightforward as a matter of law. However, Department of Justice guidelines—developed with the assistance of a technical advisory panel and issued through notice-and-comment rulemaking—would be very helpful for inducing judicial coordination on what the presumptions are and how they may be proven in a given case. Part IV turns to empirical methods and results. We introduce the art and science of multilevel regression with poststratification (MRP), a recently developed tool for estimating local opinion from national survey data, and we present some initial results and maps, highlighting regions of the country likely to be covered *de facto* by the presumptions. The Appendix provides further information about MRP.

²³ The recently introduced Voting Rights Act Amendments of 2014 also aim to facilitate preliminary relief under Section 2, but in a different manner. As we read the Amendments, they would replace the traditional four-prong test for a preliminary injunction with a simple weighing of relative hardship (to defendants and to plaintiffs), without any consideration of the plaintiffs’ likelihood of success on the merits. See Voting Rights Act Amendments of 2014, S. ___, 113th Cong. § 6(b)(4), <http://www.leahy.senate.gov/download/1-16-14-senate-bill>. Whether this is constitutional is an open question. At best, it permits plaintiffs to maintain the status quo while a suit proceeds, without the information-forcing and settlement-inducing benefits of our proposal.

I. SECTION 2 AS A WEAK SUBSTITUTE FOR SECTION 5

To frame our proposal, we begin by outlining the standard understandings of Sections 2 and 5; the conventional wisdom that Section 2 is weak and ineffective in comparison to Section 5; and the looming threats to Section 2 as it has been implemented to date.

A. Conventional Wisdom About Sections 2 and 5

The potency of Section 5 is commonly attributed to its substitution of administrative for judicial procedures; its establishment of a fairly bright-line results test; and, critically, its placement of the burden of proof on the party seeking preclearance.²⁴ Congress's delegation of authority to the Department of Justice to make preclearance decisions meant that determinations could be made with a minimum of legal expenses, for covered jurisdictions and would-be plaintiffs alike.²⁵

The principal substantive standard under Section 5 was reasonably clear-cut. Preclearance was to be denied if the measure was adopted with a discriminatory purpose, or “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”²⁶ Discriminatory intent can be hard to prove (or disprove),²⁷ but the “retrogressive effects” prong of Section 5 did a lot of the work. Congress boiled the retrogression inquiry down to the question of whether the electoral change would hinder minorities' ability to elect their “preferred candidates of choice.”²⁸ DOJ and the courts denied preclearance when a change would reduce the number or reliability of electoral districts that provide minorities with an opportunity to elect minority candidates,²⁹ or would create a material

²⁴ For an excellent summary of the differences between Sections 2 and 5 with more detail than we provide here, see Nicholas Stephanopoulos, *The South After Shelby County*, __ Sup. Ct. Rev. (forthcoming 2014) (manuscript at 6-48).

²⁵ Though covered jurisdictions were permitted to opt out of DOJ review in favor of a preclearance proceeding District Court for the District of Columbia, this option was rarely invoked, as it was much more costly for the jurisdiction seeking preclearance.

²⁶ *Georgia v. Ashcroft*, 539 U.S. 461, 466 (2003) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

²⁷ As a leading treatise notes, “the criteria used to evaluate a plan under Section 5's purpose prong [were] vast and comprehensive.” J. GERALD HEBERT, PAUL M. SMITH, MARTINA E. VANDENBERG & MICHAEL B. DESANCTIS, *THE REALIST'S GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS* 29 (2d. ed. 2010).

²⁸ Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 2006 U.S.C.C.A.N. (120 Stat.) 577 (codified at 42 U.S.C. §§ 1971 to 1973aa-1a).

²⁹ See, e.g., *Texas v. United States*, 887 F.Supp.2d 133, 149-151 (D.D.C. 2012) (interpreting Section 5 to protect only those districts that give a political cohesive minority community the opportunity to elect their preferred candidates, as opposed to simply the opportunity to elect a Democrat).

barrier to voting borne disproportionately by minority citizens.³⁰ According to law professor and former DOJ staff attorney Michael Pitts, “local officials and their demographers” in the covered jurisdictions were “acutely cognizant of the standards for approval and typically tr[ie]d to steer very clear of anything that would raise concerns with the Attorney General.”³¹

Finally, because Section 5 put the burden of proof on the party seeking preclearance, the provision was information-forcing.³² Jurisdictions contemplating an election law change that might disadvantage racial minorities had incentives to gather information about potentially retrogressive impacts and to mitigate those impacts *ex ante*.³³ If DOJ remained worried about the impacts, it could respond with a “More Information Request,” essentially putting the new law on hold until the state or local government had gathered enough information to allay DOJ’s concerns.³⁴

The world of Section 5, then, was a world in which civil rights advocates could block voting changes that might disadvantage the minority community without needing to spend huge sums of money on courtroom legal fees, expert witnesses, and the like. For advocacy groups worried about a change in local election procedures, it was often enough to fire off a letter outlining their concerns to the Department of Justice. DOJ lacked the resources to give in-depth scrutiny to each of thousands of preclearance proceedings, so it relied on

³⁰ See, e.g., *Florida v. United States*, 885 F.Supp.2d 299 (D.D.C. 2012) (denying preclearance to Florida’s reduction in early voting period, on ground that early voting had been disproportionately used by African Americans and reduction in early voting days represented a “material burden” on the franchise); Letter from Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice, to Keith Ingram, Director of Elections, Office of the Texas Secretary of State, Mar. 12, 2012, http://www.brennancenter.org/sites/default/files/analysis/DOJ_Final_Letter_To_Texas_On_Voter_ID_Law.pdf (denying preclearance because state’s own data showed that Hispanics disproportionately lacked qualifying ID, and because the statute did not adequately mitigate burdens on voters who lacked qualifying ID); *Texas v. Holder*, 888 F.Supp.2d 113 (D.D.C. 2013) (denying preclearance to Texas voter ID requirement, on the ground that the law would create a significant barrier to voting for poor people, and that racial minorities were disproportionately represented among the poor);

³¹ Michael J. Pitts, Let’s Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff’s Suggestion to Scuttle Section 5 of the Voting Rights Act, 84 NEB. L. REV. 605, 613-14 (2005).

³² This point is emphasized in Guy-Uriel E. Charles & Luis Fuentes-Rohwer, Mapping a Post-Shelby County Contingency Strategy, 123 YALE L.J. ONLINE 131, 137 (2013), <http://yalelawjournal.org/2013/06/07/charlesfuentesrohwer.html>.

³³ For one such case study, see Ellen D. Katz, *South Carolina’s “Evolutionary Process,”* 113 COLUM. L. REV. SIDEBAR 55 (2013), http://www.columbialawreview.org/wp-content/uploads/2013/03/55_Katz.pdf.

³⁴ Regarding the enforcement function of More Information Requests, see Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER (Anna Henderson, ed. 2007).

community groups to flag changes that merited special scrutiny.³⁵ Some Attorneys General were probably more solicitous of minority communities than others,³⁶ but to the extent that DOJ cared about minority voting rights, the structure of Section 5 made the path from “becoming concerned” to “blocking the change” easy and inexpensive to navigate.

The contrast with Section 2 could not be more dramatic. Section 2 disputes are adjudicated in judicial rather than administrative fora; the legal standard for liability under Section 2 is murky; and the burden of proof falls on the party challenging the election law at issue rather than the party defending it.

Substantively, Section 2 prohibits electoral arrangements “which result[]” in members of a class of citizens defined by race or color “hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”³⁷ The courts have struggled to flesh out this abstraction. In vote dilution cases, which concern the choice between districted and at-large elections as well as the design of electoral districts, the courts created some structure by requiring plaintiffs to prove that the minority community is politically cohesive; that the racial majority votes sufficiently as a bloc to usually defeat the minority’s preferred candidates; and that the plaintiff community is sufficiently numerous and geographically concentrated to form a majority of a compact, single-member electoral district.³⁸ But these so-called *Gingles* conditions are just threshold requirements for a vote dilution claim.

Whether a statutory violation will be found turns on a further examination of the “totality of circumstances,” including the defendant jurisdiction’s history of discrimination, lingering effects of past *de jure* discrimination, racial appeals in political campaigns, informal barriers to ballot access for minority candidates, unusual features of the electoral system that may disadvantage minorities, and the strength or weakness of the state interests asserted in

³⁵ Heather K. Gerken, A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach, 106 COLUM. L. REV. 708, 724-26 (2006).

³⁶ Some commentators have worried that partisan political considerations play an excessive role in preclearance determinations, particularly for congressional and statewide redistrictings. See, e.g., Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004). For thoughtful replies to Issacharoff’s critique, see Pitts, *supra* note 31; Guy-Uriel Charles & Luis Fuentes-Rohwer, *The Politics of Preclearance*, 12 MICH. J. RACE & LAW 513-535 (2007); Ellen D. Katz, *Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All*, 23 STAN. L. & POL’Y REV. 415 (2012).

³⁷ 42 U.S.C.A. § 1973.

³⁸ This requirement traces to *Thornburg v. Gingles*, 478 U.S. 30 (1985), and has been elaborated and refined in many cases since. See, e.g., *Bartlett v. Strickland* 129 S.Ct. 1231 (2009) (holding that numerosity requirement of *Gingles* must be satisfied literally rather than functionally); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (holding that potential “influence districts” cannot provide the remedial predicate for a section 2 claim). See also Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act*, 39 U. MICH. J. L. REF. 643, 660-75 (2006) (reviewing cases from the lower courts on the *Gingles* conditions).

defense of the challenged election laws.³⁹ Still unresolved is the ultimate normative question to be answered when examining the totality of circumstances. Some courts focus on whether the minority community can elect a “roughly proportional” number of its candidates of choice.⁴⁰ Some courts use the totality-of-circumstances inquiry to assess whether the plaintiffs’ injury can fairly be traced to intentional racial discrimination, whether by conventional state actors or nominally private actors.⁴¹ (This has become known as the Section 2 causation requirement.⁴²) And other courts churn through the motions of the totality-of-circumstances analysis without stopping to explain their underlying conception of equal political opportunity.

What is clear is that Section 2’s uncertain substantive norm, coupled with its express call for a totality-of-circumstances inquiry, has made litigating Section 2 cases expensive and unpredictable. Plaintiffs must assemble local election data and hire statisticians to estimate voting patterns.⁴³ Historians may be called to speak to past practices in the locale. Candidates, elected officials, and community leaders are asked to testify about their personal experiences with bloc voting, racial campaign appeals, and the like.⁴⁴ The causation inquiry further complicates matters. Plaintiffs challenging a felon disenfranchisement rule, for example, may have to prove that state’s penal code is administered in

³⁹ These factors were enumerated in the Senate Judiciary Committee report accompanying passage of the Section 2 results test. S. REP. NO. 97-417 at 30 (1982) (hereafter “Senate Report”).

⁴⁰ This factor was prioritized—without being made decisive—by the Supreme Court in *Johnson v. De Grandy*, 512 U.S. 997, 1013-14 & n. 11 (“‘Proportionality’ as the term is used here links the number of majority-minority voting districts to minority members’ share of the relevant population.”). See Katz et al., *supra* note 38, at 730-32 (examining reliance on this factor in the lower courts).

⁴¹ See, e.g., *Goosby v. Town of Hempstead*, 180 F.3d 476, 500 (2d. Cir. 1998); *NAACP v. Thompson*, 116 F.3d 1194, 1198-1200 (7th Cir. 1997); *Teague v. Attala Cnty.*, 92 F.3d 288, 295 (5th Cir. 1996); *Lewis v. Alamance Cnty.*, 99 F.3d 600, 615 n. 12 (4th Cir. 1996); *S. Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1293 (11th Cir. 1995); *Vecenos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 80, 983 (1st Cir. 1995); *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (plurality opinion of Tjoflat, J.).

⁴² D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 590-97 (2008); Katz et al., *supra* note 38, at 670-72 (discussing caselaw). As Greiner and Katz observe, some courts roll the “causation issue” into the *Gingles* polarized-voting inquiry, and others consider it part of the “totality of circumstances.” Katz suggests—we think correctly—that little turns on this distinction.

⁴³ For local government elections, these data are rarely available in convenient electronic formats. The cost of assembling the data is often a significant barrier to bringing Section 2 claims. (Personal communication with VRA litigators.)

⁴⁴ On the importance of qualitative evidence for vote dilution litigation under Section 2, see D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 IND. L.J. 447, 492-95 (2011) (presenting case study of City of Boston); HEBERT ET AL., *supra* note 27, at 48 (noting that “[a]necdotal evidence is often used [in Section 2 cases] to supplement statistical findings”).

an intentionally discriminatory fashion.⁴⁵ Worse yet, as Jim Greiner has explained, the causation question is often posed in ways that may render it unanswerable.⁴⁶

Together, the fact-intensive nature of Section 2 claims and the uncertain standard for liability make preliminary relief hard to obtain. Veteran litigators estimate that plaintiffs have secured preliminary injunctions in only about five percent of Section 2 cases.⁴⁷ The path from “becoming concerned” to “blocking a change” is slow and arduous. Meanwhile, officials elected under racially discriminatory ground rules may pass new laws that further hinder minority candidates or otherwise disadvantage the minority community.

B. Looming Threats to Section 2

To say that Section 2 pales in comparison to Section 5 is not to say that it is toothless. There has emerged a nascent ecosystem of civil rights groups that monitor state and local governments and have some in-house capacity for litigation.⁴⁸ Also, well-funded actors such as political parties and unions sometimes finance Section 2 cases when the political stakes are high, e.g., when the litigation could shift the balance of power in a state legislature or in Congress.⁴⁹

But the Section 2 results test is under threat from two directions—one jurisprudential, the other demographic and statistical. The Supreme Court has issued a string of decisions narrowing Section 2 on the basis of the constitutional avoidance canon.⁵⁰ *Shelby County* provides fuel for accelerating this process, as the Court’s rejection of Jim-Crow history as the basis for Section 5 coverage casts doubt on the common judicial practice of emphasizing historical discrimination at the “totality of circumstances” stage of a Section 2

⁴⁵ See, e.g., *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010) (rejecting challenge to Washington State’s felony disenfranchisement rule on ground that plaintiff failed to establish intentional discrimination in criminal justice administration).

⁴⁶ Greiner, *supra* note 42, at 591-97. We discuss and respond to Greiner’s argument in Part II.B, *infra*.

⁴⁷ J. Gerald Hebert & Armand Defner, *More Observations on Shelby County, Alabama and the Supreme Court*, Campaign Legal Center Blog, Mar. 1, 2013, 18:01, http://www.clcblog.org/index.php?option=com_content&view=article&id=506:more-observations-on-shelby-county-alabama-and-the-supreme-court-.

⁴⁸ Charles & Fuentes-Rohwer, *supra* note 32.

⁴⁹ Samuel Issacharoff has argued that political parties and associated actors are typically the “real party in interest” in Section 2 cases. See Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv. L. Rev.* 593 (2002).

⁵⁰ See Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 *U. PA. L. REV.* 377, 399-404 (2012) (hereinafter, *Making Sense of Section 2*) (summarizing cases).

case.⁵¹ More generally, the normative uncertainty at the heart of Section 2 makes it difficult to assess whether the results test represents a congruent and proportional response to constitutional violations.⁵²

The other rising threat to Section 2 is that the statistical techniques used to establish minority political cohesion and white bloc voting break down if there are more than two racial groups and/or significant residential integration in the jurisdiction—which is increasingly typical. Minority cohesion and white-bloc voting have traditionally been inferred from aggregate rather than individual-level data (precinct-level election returns plus racial demographics from the Census).⁵³ This works reasonably well when there are only two racial groups and precincts are racially homogenous. But as the number of racial groups increases from two to three or four, and as neighborhoods become less homogeneous, the amount of information about racial voting patterns in the precinct-level data becomes very sparse.⁵⁴ Conclusions about racial polarization under these conditions are very sensitive to the analyst's assumptions⁵⁵—unless the analyst can supplement the aggregate data with individual-level observations obtained from exit polls and other surveys.⁵⁶ But survey data about vote choice in local elections “are almost never available” in vote dilution cases.⁵⁷

Eventually courts will catch on to the problem and start to reject Section 2 claims on the ground that the evidence of racially polarized voting is unreliable. Would-be plaintiffs who suspect a Section 2 violation may have to wait several election cycles before bringing suit, pouring money into exit polls all the while.⁵⁸

⁵¹ On *Shelby County* and history, see Joel Heller, *Shelby County and the End of History*, __ U. Memphis L. Rev. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337027. Regarding the place of history in Section 2 liability determinations, see Katz et al., *supra* note 38, at 675-97, 702-07.

⁵² Elmendorf, *Making Sense of Section 2*, *supra* note 50, at 409-14.

⁵³ For a great introduction to the statistical techniques used in vote dilution cases, see D. James Greiner, *Ecological Inference in Voting Rights Act Disputes: Where Are We Now, and Where Do We Want to Be?*, 47 JURIMETRICS J. 115 (2007).

⁵⁴ See D. James Greiner & Kevin M. Quinn, *Exit Polling and Racial Bloc Voting: Combining Individual-Level and R×C Ecological Data*, 4 ANNALS OF APPLIED STATISTICS 1774 (2010); Greiner, *Re-Solidifying Racial Bloc Voting*, *supra* note 44.

⁵⁵ On the role of arbitrary assumptions in ecological inference, see Greiner, *supra* note 53, at 126-38, 149-54.

⁵⁶ Greiner & Quinn, *supra* note 54; Adam Glynn & Jon Wakefield, *Ecological Inference in the Social Sciences*, 7 STAT. METHOD. 307 (2010) (demonstrating “the inclusion of a small amount of individual level data can dramatically improve the properties of [ecological] estimates.”).

⁵⁷ Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 197, 217 (Bernard Grofman & Chandler Davidson eds. 1992).

⁵⁸ Greiner treats this as an unavoidable consequence of his results. See Greiner, *Re-Solidifying Racial Bloc Voting*, *supra* note 44, at 482 (“the need for polls over several election cycles may be a fact of life in some multiracial polities”).

II. MAKING IT WORK: PRESUMPTIONS FOR THE CORE OF SECTION 2

Having set up the problem, we now elaborate our solution. The argument proceeds in three steps. The first step, which this Part develops, is to explain how the central factual questions on which Section 2 liability turns could be answered using rebuttable presumptions and survey data. More specifically, we will show that the presumptions can be implemented using voting-age citizens' responses to questions that are commonly found on national surveys (which rarely ask about vote choice in local elections).⁵⁹ After establishing that the core of Section 2 can be translated into such evidentiary presumptions, we will address judicial authority to create the presumptions (Part III), and statistical tools for estimating local opinion using national surveys (Part IV).

Identifying the core factual questions under Section 2 is tricky. The statutory text is opaque and the evolving case law has not created much normative clarity.⁶⁰ Further complicating matters, there are at least two distinct species of Section 2 claims—"vote dilution" claims, which concern the rules for aggregating votes into representation, and "vote denial" claims, which concern barriers to casting a valid, duly-counted ballot.⁶¹ Most courts and commentators believe that vote dilution and vote denial claims should be treated differently,⁶² but the Supreme Court has yet to hear a Section 2 vote denial case so there is no authoritative guidance.

What the courts have created so far is a doctrinal apparatus for organizing the judicial inquiry in vote dilution cases. We shall build on it here. The analysis proceeds in two steps. First come the so-called *Gingles* conditions: whether the minority community is numerous and compact enough to comprise a majority of an ordinary single-member legislative district; whether the minority community is politically cohesive; and whether the majority (typically white) community votes substantially as a bloc and usually defeats minority-preferred candidates under the status quo.⁶³ If plaintiffs fail to meet any of the

⁵⁹ National surveys rarely ask about vote choice in local elections. And even if the survey did ask about local elections, the new statistical tools for estimating local opinion from national surveys (which we explain in Part IV) could not be used to estimate vote choice in local elections. The tools assume that all survey respondents have answered the same question.

⁶⁰ See generally Elmendorf, *Making Sense of Section 2*, *supra* note 50, at 387-95.

⁶¹ For the leading treatment of the distinction between vote-dilution and vote-denial claims, see Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

⁶² For explorations of this issue, see *Goosby v. Town of Hempstead*, 180 F.3d 476, 501-02 (2d. Cir. 1998) (Leval, *J.*, concurring in the judgment) (suggesting that different standards should apply to districting claims, as opposed to barriers-to-voting claims, under Section 2); Tokaji, *supra* note 61; Elmendorf, *Making Sense of Section 2*, *supra* note 50, at 418-21.

⁶³ We say "almost certainly" rather than "certainly" because in *Bartlett v. Strickland*, the Court left open the question of whether one of the *Gingles* conditions would apply (or apply in the same way) in a case involving intentional discrimination. 556 U.S. 1, 20 (2008) ("We . . . need not consider whether intentional discrimination affects the *Gingles* analysis. . . . Our holding

Gingles conditions, they lose. If the conditions are satisfied, the court proceeds to a “totality of circumstances” analysis and decides whether to enter judgment for the plaintiffs.

On our reading of the statute and the case law—explained in more detail below—the central questions at the totality-of-circumstances stage are whether the plaintiffs’ asserted injury can plausibly be traced to intentional or subjective race discrimination (either by conventional state actors or majority group voters), and whether the proportion of “minority opportunity districts”—districts in which the minority community has a realistic chance to elect its preferred candidates—is roughly equivalent to the minority’s population share.

The presumptions suggested in this Part address the *Gingles* conditions, the related question of whether a given electoral district should be deemed a minority opportunity district, and the causation requirement.

For Section 2 to fill the gap left by *Shelby County*, each of these questions needs to be (presumptively) answerable using widely available survey data and models, so that litigants can anticipate whether the defendant or the plaintiff is likely to have the burden of persuasion on each of the key issues in the case. Where the presumptions shift evidentiary burdens to the defendant, Section 2 will function more like Section 5: it should be fairly easy for plaintiffs to block potentially discriminatory measures pre-implementation (as the presumptions speak to plaintiffs’ likelihood of success on the merits), and Section 2 will be information-forcing, as defendants anticipate and work to overcome the presumptions.⁶⁴

* * *

We want to impress upon readers that the core of Section 2 is disputed, and that even conditional on accepting a particular account of the core issues, there may be several defensible ways of resolving them using presumptions and survey data. We proceed in that spirit here, acknowledging ambiguities in the law and suggesting a range of plausible presumptions rather than trying to nail down exactly the right presumption for each issue.

This results in something of a paradox. The benefits of implementing Section 2 with rebuttable presumptions and national survey data—lower cost, more predictable litigation, with preliminary relief becoming easier to secure in

does not apply to cases in which there is intentional discrimination against a racial minority.”) The *Bartlett* Court did not say anything about “by whom,” or about how intentional discrimination might be established for purposes of this potential exception to (some? all?) *Gingles* conditions.

⁶⁴ To defeat a presumption-based inference of liability, defendants in a vote dilution case will have to either: (1) show that plaintiffs have the ability to elect their candidates of choice in their current district (overcoming the inference that the *Gingles* conditions were satisfied); (2) produce detailed evidence rebutting race-discriminatory causation; or (3) demonstrate that plaintiff-race voters in fact have the opportunity to elect a roughly proportional number of their candidates of choice, even though the number of presumptive opportunity districts falls short of rough proportionality (this requires evidence that the presumptions misclassified some districts).

parts of the country where the likelihood of racial discrimination with respect to voting is high—depend on widespread agreement about what the presumptions are and how they apply in a given case. But the murkiness of Section 2, the diversity of plausible presumptions, and, as we will later see, the discretionary modeling choices required to estimate local opinion from national surveys, may conspire to make “widespread agreement” hard to achieve. To be sure, the simple process of litigating new cases using data and models from previous cases should eventually produce a body of judicial decisions that, as a whole, sends reasonably clear signals to litigants. But the Department of Justice could also play an important role in facilitating judicial coordination on presumptions and associated data sources, or so we will argue in the next Part. For now it is enough to show that important factual questions on which Section 2 liability depends can, in principle, be answered using rebuttable presumptions and information adduced from national public opinion surveys.

A. The *Gingles* Stage: Presumptions About Racially Polarized Voting, and Opportunity Districts

As noted above, plaintiffs at the *Gingles* or threshold stage of a vote dilution case must prove that their group’s population is sufficiently numerous and geographically concentrated to form a majority of a compact single-member district; that the group is politically cohesive; and that it is usually defeated under the status quo electoral system by white bloc voting. The first question—whether a compact, majority-minority district could be created to remedy the alleged vote dilution—was rendered reasonably straightforward by the Supreme Court’s decision in *Bartlett v. Strickland*, and we won’t be concerned with it here.⁶⁵ The more difficult questions concern minority political cohesion and white bloc voting, and are typically answered via a single inquiry into racially polarized voting (RPV).⁶⁶

To gauge RPV, the analyst first classifies elections by whether they featured a putative “candidate of choice” of the minority community. Then, looking only at those elections, the analyst models the precinct-level vote for minority-preferred candidates as a function of racial demographics, and tries to

⁶⁵ *Bartlett* held that this question was to be answered literally rather than functionally. See 556 U.S. at 12-20. After *Bartlett*, then, the remedial district prong of *Gingles* can be resolved solely on the basis of demographic data from the Census Bureau. It does not require any information about voting patterns or political preferences. To be sure, in light of *LULAC v. Perry* (2006), there may be a potentially difficult question about whether the minority community is “culturally compact,” but this is not yet a well-established requirement and to the extent that it applies, it too can be resolved using Census data. See Stephanopoulos, *supra* note 24, at 29-33.

⁶⁶ Katz et al., *supra* note 38, at 664-65.

estimate the proportion of white and minority voters who supported the minority's ostensible candidate of choice.⁶⁷

The courts struggle with virtually every aspect of the RPV analysis. Part of the problem is technical: there is a massive statistical literature on how ecological inference should or should not be conducted, and it is unreasonable to expect generalist judges to resolve these arcanities. Partly the problem is line-drawing: many courts have been unable or unwilling to establish quantitative thresholds for what constitutes “legally significant” racial polarization in voting.⁶⁸

Further difficulties arise by virtue of the fact that racially polarized voting is a *contingent manifestation* rather than a *measure* of political cohesion within and political distance between racial groups. The extent of racial polarization in voting is likely to vary (holding constant the underlying level of cohesion/distance) depending on the candidates who run in any given election. A minority community with a common set of political concerns may fracture at the ballot box in a biracial election if the own-race candidate dissents from the minority community's views on an important issue; if the white candidate is better positioned to win a subsequent election (e.g., the general election) or to wield power in the legislature (perhaps because of seniority); or if the minority candidate is poorly funded or weak on valence issues.⁶⁹ A cohesive minority community may also split its vote if none of the candidates in an election is very attractive—or, conversely, if more than one strong candidate caters to the minority's concerns. And a non-cohesive minority community may well vote as a bloc in biracial elections when the candidates are pretty similar except for their race.

Legal doctrine tacitly recognizes the endogeneity of polarized voting; judges have discretion to discount or even ignore elections that the judge believes to be uninformative about political cohesion.⁷⁰ But the question of “which elections count” in the RPV analysis is hard to answer, and has been

⁶⁷ For good discussions of this process, see Katz et al., *supra* note 38, at 665-670; Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 220-32 (2007) (drawing on Section 2 practices to inform the definition of “preferred candidates of choice” under Section 5).

⁶⁸ Some courts have suggested that at least 60% of the minority community must back the same candidate in a two-way race for the community to be deemed politically cohesive. HEBERT ET AL., *supra* note 27, at 49. Similar thresholds may be applied to white bloc voting, but “the law is not clear on what constitutes legally significant [white] bloc voting.” *Id.* at 58. See also Kareem Crayton, *Sword, Shield, and Compass: The Uses and Misuses of Racially Polarized Voting Studies in Voting Rights Enforcement*, 64 RUTGERS L. REV. 973, 1016 (2012). (“One cannot identify [in the caselaw] a specific threshold or interval of bloc voting that would be sufficient for courts to find that legally cognizable RPV exists.”)

⁶⁹ Again, courts have discretion to disregard voting patterns in some elections on the ground of “special circumstances,” see Katz et al., *supra* note 38, at 672-74, but this is just an invitation to unfettered judicial discretion.

⁷⁰ See Katz et al., *supra* note 38, at 672-75 (discussing “special circumstances” doctrine).

complicated by ambiguity about the purposes of the judicial inquiry into racially polarized voting.

The *Gingles* test originated as a means of determining whether a system of at-large elections that had resulted in the consistent defeat of minority-preferred candidates could be remedied by a system of single-member districts.⁷¹ But the test has since been extended to cases about the configuration of single-member districts, and used for at least five distinct purposes: (1) confirming that plaintiffs have suffered a representational injury that can be remedied within an ordinary system of single-member districts;⁷² (2) curtailing the reach of a constitutionally suspect antidiscrimination results test;⁷³ (3) making an open-ended and opaque statutory standard more judicially manageable;⁷⁴ (4) establishing a presumption of discriminatory intent on the part of the white electorate;⁷⁵ and (5) establishing a presumption of liability.⁷⁶

These purposes lead to conflicting conclusions about which elections deserve the most weight in the RPV inquiry, and about what constitutes “legally significant” white bloc voting. For example, if the purpose of the

⁷¹ James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 55-56 (1982); Thornburg v. Gingles, 478 U.S. 30, 46 n. 12 (1986) (“The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability to elect the representatives of their choice was impaired by the selection of a multimember electoral structure.”).

⁷² This was the original rationale for the *Gingles* inquiry. See *Gingles*, 478 U.S. at 49-51; *Growe v. Emison*, 507 U.S. 25, 40-41 (explaining *Gingles* conditions in these terms).

⁷³ *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (adopting a literalistic rather than functional reading of *Gingles* to “avoid[serious constitutional concerns under the Equal Protection Clause]”); *LULAC v. Perry*, 548 U.S. 399, 446 (2006) (construing *Gingles* to foreclose influence-district claims, lest Section 2 “unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions”).

⁷⁴ This was a subsidiary theme in *Gingles*, and has since become prominent. See, e.g., *Bartlett*, 556 U.S. at 17-20 (adopting literalistic rather than functional reading of the minority population size prong of *Gingles*, in part for reasons of manageability). Cf. *Holder v. Hall*, 512 U.S. 874, 880-82 (1994) (rejecting vote-dilution challenge to single-member county executive form of government, for want of an “objective and workable” institutional alternative for comparison); cf. Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 1990s*, 80 N.C. L. REV. 1517, 1551-73 (2002) (contrasting formal and functional reading of *Gingles*).

⁷⁵ See, e.g., *LULAC v. Clements*, 999 F.2d 831, 855-59 (5th Cir. 1993); *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1993); *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1409-11 (N.D. Ill. 1997), *aff’d in part and rev’d in part on other grounds*, 141 F.3d 699 (7th Cir. 1998).

⁷⁶ See, e.g., *City of Holyoke*, 72 F.3d at 983 (stating that “cases will be rare in which plaintiffs establish the *Gingles* preconditions yet fail on a Section 2 claim because other facts undermine the original inference”). Cf. Katz et al., *supra* note 38, at 660 (noting that plaintiffs prevailed in 57 of the 68 reported decisions between 1982 and 2005 in which the court found the *Gingles* conditions to be satisfied); Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 882-89 (1995) (characterizing racially polarized voting as a proxy for the kind of wholesale exclusion that warrants special judicial solicitude under *Carolene Products*).

Gingles inquiry is to establish that plaintiff-group voters have suffered a remediable representational injury, the race of candidates is irrelevant.⁷⁷ But if the inquiry serves to establish presumptions about white discrimination against the minority community, candidate race is highly germane.⁷⁸ Similarly, if the purpose is just to establish injury, then “legally significant” white bloc voting exists whenever whites are cohesive enough to usually defeat plaintiff-preferred candidates. But if the purpose is to establish a presumption of liability, courts might reasonably insist on a “legal significance” threshold that signifies pervasive white opposition to minority interests.⁷⁹

The solution to the *Gingles* muddle is to stop using a single proxy (“racially polarized voting”) for so many disparate purposes, and to focus more directly on what should be the central elements of a vote dilution case. We understand these to be (1) proof that the plaintiffs have suffered a remediable representational injury, i.e., that plaintiffs would have a better opportunity to elect representatives they prefer in the remedial district(s) they propose; (2) evidence linking the plaintiffs’ injury to disparate treatment; and, in most cases, (3) proof that the number of minority opportunity districts falls short of the minority’s population share, in the jurisdiction as a whole. Only the first of these questions should be resolved at the threshold stage of a Section 2 case. This is a point that courts often recognize in principle, even as the RPV inquiry has come to serve so many other functions.⁸⁰

With the threshold inquiry reduced to the (original) question of whether plaintiff-voters have less opportunity for representation under the status quo than under the remedial district they propose, three issues must be addressed.⁸¹

- Do the plaintiffs belong to a racial community with district political interests or preferences, which put it at odds with the political majority? (If this condition is not met, there is no possibility of racial vote dilution.⁸²)

⁷⁷ The plaintiffs have suffered a remediable harm if their candidate lost, but would have won (or be likely to win) in a differently configured district.

⁷⁸ But even then, it may not be possible to quantify white voter discrimination against minority candidates. See Greiner, *supra* note 42, at 590-97, discussed *infra* in Part II.B.

⁷⁹ See Issacharoff, *supra* note 76, at 882-89.

⁸⁰ Many courts treat “causation” as a question to resolve at the totality of circumstances stage of a Section 2 case. See Katz et al., *supra* note 38, at 671; Greiner, *supra* note 44, at 459 n.66-68. And proportionality is always treated as a totality-of-circumstances question. See Katz et al., *supra* note 38, at 730-32.

⁸¹ In challenges to a regime of single-member districts, these questions should be answered at the level of the plaintiff’s electoral district or districts. In challenges to at-large voting systems, it is more appropriate to answer these questions at the scale of the jurisdiction as a whole.

⁸² Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1681-88 (2001) (discussing nature of the vote dilution injury).

- Do plaintiffs lack a realistic opportunity to elect their preferred representatives under the status quo voting system or electoral district? (If not, they have suffered no injury.)
- Would the plaintiffs' community have a realistic opportunity to elect its preferred representatives under the remedial alternative the plaintiff has proposed? (If not, plaintiffs have not shown their injury to be remediable.)

1. *Political Cohesion and Polarization*

Using national survey data, there are several ways to answer the question of whether plaintiffs belong to a racial community with distinct political interests or preferences, not shared by the racial majority: (1) base polarization determinations on voting-age citizens' stated political preferences ("preference polarization");⁸³ (2) base polarization determinations on citizens' interests ("interest polarization"); (3) base polarization determinations on the results of survey experiments (a variant on preference polarization). Here we briefly describe the three approaches; in Part IV, we report original empirical results on preference polarization.

Existing national surveys contain a wealth of individual-level data about respondents' policy positions, party identification, demographics, etc. With the aid of recently popularized statistical techniques, these data can be used to generate estimates of racially polarized preferences within small geographic units, such as congressional districts, state legislative districts, or counties.

Alternatively, census data can be used to establish differences between racial groups in terms of economic position, health status, incarceration rates, and the like. This approach to the polarization inquiry presumes that people vote their interests rather than their principles, which isn't always true.⁸⁴ But the interest-based approach has the advantage of not relying on litigant-generated models to produce estimates of local public opinion, as the relevant data is available from the Census Bureau at the geographic scales needed for Section 2 litigation.⁸⁵ The preference-based approach is, however, more in

⁸³ Whether the presumptions should reflect the political preferences of all voting-eligible citizens, or only registered voters or likely voters, is a question we cannot resolve here.

⁸⁴ Cf. ANDREW GELMAN ET AL., *RED STATE, BLUE STATE, RICH STATE, POOR STATE: WHY AMERICANS VOTE THE WAY THEY DO* (2006) (showing systematic regional differences in the degree to which affluent people vote their economic interests); Eitan Hersh & Clayton Nall, *A Direct-Observation Approach to Identify Small-Area Variation in Political Behavior: The Case of Income, Partisanship, and Geography* (unpublished manuscript, Sept. 9, 2013), <http://www.stanford.edu/~nall/docs/cata9.6.pdf> (showing at fine geographic scales that white support for income redistribution strongly correlates with the size of the local black population).

⁸⁵ The objective approach might be implemented with the types of factor analysis that Nick Stephanopoulos has used to measure the spatial heterogeneity of legislative districts. See Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903 (2012); Stephanopoulos, *supra* note 24.

keeping with the existing judicial focus on voter preferences,⁸⁶ as well as recent empirical evidence about geographic variation in income-based voting,⁸⁷ and ontological commitments to free will.⁸⁸

Both preference- and interest-based approaches present an analogue to the “which elections” problem in conventional RPV analyses. Call it the “which issues” or “which interests” problem. When racial groups polarize on some but not all issues, ideological dimensions, or interests, the responsible decision-maker must decide how to weight the various indicators of cohesion/polarization. But the which-issues problem—for purposes of a rebuttable presumption of cohesion/polarization—is less vexing than the which-elections problem, and less of a barrier to preliminary relief.

One reason it’s less vexing is that the rebuttable presumptions would be implemented using national survey data. This means that the same universe of issues and summary measures of preferences (or interests) will be available in all Section 2 cases. Once a circuit court decides that a particular measure suffices, either in general or for a particular type of governmental body,⁸⁹ subsequent Section 2 cases can be brought in other states and localities using the very same measures. By contrast, courts answering the polarization question with data on vote shares give the most weight to recent elections for the governmental body at issue in the case.⁹⁰ Each case therefore depends on set of election results unique to the case. The bottom line is that an evolving “common law” of racial polarization with respect to preferences or interests should provide more guidance regarding the likely outcome of the next case than has the common law of racial polarization with respect to vote shares in candidate elections.⁹¹ This has obvious implications for the availability of preliminary relief.

Second, because the presumption of racial polarization would be rebuttable, courts needn’t be perfectionist about the measure. A generic measure of ideology scaled from issue preferences (i.e., first dimension ideal points) arguably should suffice for most elections,⁹² even though citizens with the same

⁸⁶ See, e.g., *U.S. v. Blaine Cnty.*, 363 F.3d 897, 910 (9th Cir. 2004) (rejecting any approach to polarization inquiry that would require judges to “second guess voters’ understanding of their own best interests”). But see *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 430-35 (2006) (incorporating evidence of socio-economic conditions into evaluation of district’s “compactness”).

⁸⁷ See *supra* note 84.

⁸⁸ See *supra* note 84.

⁸⁹ Say, measures of educational attainment for school board elections.

⁹⁰ See *HEBERT ET AL.*, *supra* note 27, at 54-55 (noting that many courts have discounted and some even refuse to consider evidence of racial polarization in “exogenous” elections, i.e., elections for a governmental body other than that at issue in the case).

⁹¹ But it still might not provide enough guidance, without a strong assist from DOJ. See *infra* Part III.B.

⁹² On scaling ideology from issue positions, see generally Joshua D. Clinton, *Using Roll Call Estimates to Test Models of Politics*, 15 ANN. REV. POL. SCI. 79 (2012). For a treatment of some

ideal points may have important disagreements on certain issues.⁹³ Alternatively, judges could ask litigants to show the relative importance that minority and white voters attach to different issues.⁹⁴ Cohesion and polarization determinations could then be based on issue preferences weighted by their importance to minority voters. (Of course, if courts continue to regard polarized voting in biracial elections as particularly informative about the minority community's opportunity for substantive representation, the courts could invite litigants to use local voting data to rebut inferences from the presumption.)

The cleanest solution to the "which issues" problem is to base polarization determinations on preferences revealed through survey experiments.⁹⁵ For example, researchers could elicit voter preferences between pairs of hypothetical candidates whose race (photograph) and qualifications have been randomized. Observed polarization would reflect inferences that respondents make based on the candidates' race.⁹⁶

In our view, the ultimate choice among reasonable metrics for cohesion/polarization should be made in the first instance by the Department of Justice (more on this below).⁹⁷ The same goes for picking cutoffs that mark the line between presumptively polarized and presumptively non-polarized communities. The important point for present purposes is that once one recognizes the limited gatekeeping function of the *Gingles* threshold inquiry, it becomes possible to create presumptions that would perform this function *without reference to voting patterns in recent elections in the defendant jurisdiction*. The viability of a Section 2 claim need not depend on expensive expert witness analyses of local voting data; on statistically tenuous techniques of ecological inference; or on the happenstance of whether plaintiff-race candidates have recently run for office in the locale.

issue arise when the same methods are used to scale ordinary citizens' ideology, see Jeffrey B. Lewis & Chris Tausonovitch, *Has Joint Scaling Solved the Achen Objection to Miller and Stokes?* (unpublished manuscript, Feb. 6, 2013), http://www.vanderbilt.edu/csdi/miller-stokes/05_MillerStokes_LewisTausonovitch.pdf.

⁹³ See David Broockman, *An Artificial 'Disconnect'? Assuming Americans Are Reliably Ideological Masks Public Support For Policies More Extreme Than Politicians Pursue* (unpublished manuscript, Dec. 2, 2013) (on file with author).

⁹⁴ To fully implement this approach, the organizations that conduct large-N national surveys would have to be convinced to ask priorities questions alongside the issue-position questions. If DOJ asked for this information and provided some funding, we think the survey organizations would be more than happy to obtain it.

⁹⁵ The concept presented in this paragraph is currently being implemented by Elmendorf in collaboration with Kevin Quinn and Marisa Abrajano.

⁹⁶ For a related idea, see Will Bullock, Kosuke Imai, and Jacob N. Shapiro, *Statistical Analysis of Endorsement Experiments: Measuring Support for Militant Groups in Pakistan*, 19 *POL. ANAL.* 363 (2011) (randomizing group endorsement of policy positions and using Bayesian hierarchical models to infer geographic variation in support for the endorsers).

⁹⁷ See *infra* Part III.B.

2. *Gauging Minority Opportunity in an Electoral District*

The existence of significant polarization in interests or preferences between white and minority communities does not necessarily mean that particular minority plaintiffs lack a realistic opportunity to elect their candidates of choice. If the minority community is large and if polarization is not too extreme, enough white voters may “cross over” and support minority-preferred candidates for the candidates to be electable.

The question of whether a given district provides minority voters with such an “opportunity to elect” must be answered at the threshold stage of a vote-dilution case (did plaintiff-voters suffer a representational injury?); at the totality of circumstances stage (does the districting plan give the minority community the opportunity to elect a roughly proportional number of its candidates in the aggregate?); and at the remedy stage (would the defendant’s proposed remedy give the plaintiffs a fair chance to elect their candidates of choice?⁹⁸).

Historically the courts have assessed the likely performance of electoral districts with detailed inquiries into local political conditions.⁹⁹ Into the mix go the results of past elections, the extent of racial polarization, racial differences in voter eligibility and voter turnout rates, anecdotal testimony from local politicians, consultants, and interest groups, and more.¹⁰⁰

This inquiry could be fruitfully structured and simplified with rebuttable presumptions. The most straightforward solution is to presume that a district is a minority opportunity district (“MOD”) if and only if the minority community comprises at least 50% of the district’s citizen voting age population.¹⁰¹ Because the Constitution prevents the government from erecting substantial

⁹⁸ It is black-letter law that the district court must adopt the defendant-proposed remedy in a districting case if doing so would bring the defendant into compliance. *See Upham v. Seamon*, 456 U.S. 37, 43 (1982).

⁹⁹ *See* HEBERT ET AL., *THE REALIST’S*, *supra* note 27, at 56-59 (explaining that since *Gingles* courts have had to assess whether white bloc voting “usually [results in the] defeat of the minority’s preferred candidate” and that this inquiry requires courts to consider “a variety of factual circumstances”); Stephanopoulos, *supra* note 24, at 25 (discussing predictive judgments about ability-to-elect under Section 5).

¹⁰⁰ All of these factors figure into the “totality of circumstances” analysis of a Section 2 case. *See generally* Katz et al., *supra* note 38, at 675-730.

¹⁰¹ CVAP estimates from the Census are less precise than estimates of the total voting age population. Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 *CARDOZO L. REV.* 755, 774-82 (2011). This imprecision does not concern us, because the estimates would only be used to establish a rebuttable presumption, and because estimation errors should to substantial degree wash out as CVAP estimates at the level of census blocks and tracts are aggregated to the level of legislative districts.

barriers to registration and voting,¹⁰² it may be said that any district in which the minority community makes up at least half of the voting-eligible population is by definition an opportunity district. Some of these districts may not “perform” for minority candidates owing to race-correlated differences in rates of voter registration, turnout, or information about the candidates, but since Section 2 protects equality of opportunity rather than equality of results,¹⁰³ these differences arguably should be disregarded (unless they can be fairly attributed to race discrimination in violation of the 14th and 15th Amendments¹⁰⁴).

There are more nuanced alternatives to the “50% CVAP” rule, such as presuming that a district is a MOD if the minority community comprises a majority of the citizens in the district who prefer the major political party with the most support among the district’s voters;¹⁰⁵ or classifying districts based on the joint distribution of political and racial preferences in the district electorate. Space limitations preclude an adequate treatment of these alternatives here, but we plan to take them up in future work.

B. Presumptions About Causation (Subjective Discrimination)

The most urgent doctrinal question under Section 2 today is whether plaintiffs must trace their injury to subjective race discrimination, and if so, how the necessary link may be established. In *Gingles*, the Supreme Court addressed but did not resolve whether subjective race discrimination by voters matters for liability under Section 2.¹⁰⁶ In no case since has the Court even tried to explain whether and if so how liability under Section 2 depends on a evidence of intentional or subjective race discrimination. However, from the run of Supreme Court decisions limiting Section 2 on the basis of the constitutional avoidance canon, it is fair to infer that the Court’s conservative majority believes there is little if any connection between the standard for liability under Section 2 and the risk of constitutional violations.¹⁰⁷ Section 2 establishes a results test while the Constitution prohibits only disparate treatment, i.e., subjective discrimination, so on the face of things the conservative justices seem to be right.

¹⁰² Or at least barriers that are substantial for some people but not for others. See *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008); *Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621 (1969).

¹⁰³ *Johnson v. De Grandy*, 512 U.S. 997, 1014 n. 11 (1994).

¹⁰⁴ See *Salas v. Southwest Texas Junior College Dist.*, 964 F.2d 1542 (5th Cir. 1992). For a review of how other courts have handled this issue, see Katz et al., *supra* note 38, at 703-07.

¹⁰⁵ Cf. *LULAC v. Perry*, 556 U.S. 399, 485-86 (2006) (Souter, *J.*, concurring in part and dissenting in part) (suggesting this standard as a gloss on the *Gingles* numerosity requirement).

¹⁰⁶ Compare *Thornburg v. Gingles*, 478 U.S. 30, 63-74 (1986) (plurality opinion); *id.* at 83 (concurring opinion of Justice White); *id.* at 100-01 (concurring opinion of Justice O’Connor).

¹⁰⁷ Elmendorf, *Making Sense of Section 2*, *supra* note 50, at 399-403.

Yet there is an emerging sense in the lower courts that liability under Section 2 somehow depends on evidence of subjective race discrimination. As a number of courts have put it, racial disparities in voting or representational opportunities violate Section 2 only if “caused” by race or race discrimination.¹⁰⁸ On the particulars of this causation requirement the courts are all over the map. Some courts have held that proof of intentional-discrimination causation is a necessary element of a Section 2 case.¹⁰⁹ Others say it is just one factor among many to be weighed at the totality-of-circumstances stage.¹¹⁰ Some courts seem to infer causation from Jim Crow history.¹¹¹ Others insist on evidence that current voting patterns or actions by government officials manifest subjective discrimination against minority candidates.¹¹² Still other courts rebuttably presume subjective race discrimination from racially polarized voting in biracial elections.¹¹³ Judicial

¹⁰⁸ For discussion, see *HEBERT ET AL.*, *supra* note 27, at 57-58; Greiner, *supra* note 42, at 590-97; Katz et al., *supra* note 38, at 670-73. For a rare exception, see *United States v. Blaine County, Mont.*, 363 F.3d 897, 912 (9th Cir. 2004) (“Requiring proof of discriminatory motives among white voters in Blaine County would be divisive and would place an impossible burden on the plaintiffs.”).

¹⁰⁹ See, e.g., *Smith v. Salt River Project Agricultural Improvement & Power Dist.*, 109 F.3d 568 (9th Cir. 1997); *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995); *S. Christian Leadership Conference of Alabama v. Sessions*, 56 F.3d 1281, 1292 (11th Cir. 1995); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 837 (5th Cir. 1993); *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (en banc) (plurality); *Mallory v. Ohio*, 38 F. Supp. 2d 525, 575-576 (S.D. Ohio 1997) *aff’d*, 173 F.3d 377 (6th Cir. 1999).

¹¹⁰ See, e.g., *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 493-503 (2d Cir. 1999). See also *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1008-38 (D.S.D. 2004) (recognizing that causation “may be relevant” at the totality of circumstances stage of a Section 2 case).

¹¹¹ See, e.g., *Mississippi State Chapter, Operation Push v. Mabus*, 932 F.2d 400, 405 (5th Cir. 1991) (finding Section 2 violation based on disparity in voter registration rates “coupled with a history of discriminatory voter registration procedures”). For additional discussion and examples, see Katz et al., *supra* note 38, at 675-77. To be clear, the courts in such cases are not necessarily asserting that the history means that racially polarized voting (or a particular state action) has been “caused” by racial discrimination. Rather, their position seems to be that the history establishes a “totality of circumstances” connection between present-day disparate impacts and intentional discrimination by state actors.

¹¹² See cases cited in note 113, *supra*.

¹¹³ See, e.g., *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) (“The resultant inference is not immutable, but it is strong; it will endure unless and until the defendant adduces credible evidence tending to prove that detected voting patterns.”); *Milwaukee Branch of the N.A.A.C.P. v. Thompson*, 116 F.3d 1194, 99 (7th Cir. 1997) (“Proving discriminatory intent is not part of the plaintiffs’ case under § 2.”); *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 502-03 (2d Cir. 1999) (Leval, *J.*, concurring) (“Proof of [the *Gingles*] factors sufficiently supports an inference that race may have been a motivating factor to justify imposing on defendants the burden to prove that the regular defeat of minority preferred candidates is not the result of race-based intent . . .”). The rebuttable presumption is also present, though more implicit, in circuits where “causation” is considered at the totality-of-circumstances stage (rather than as part of the *Gingles* inquiry into bloc voting), and the *Gingles* factors are collectively regarded as establishing a presumption of liability. See, e.g., *Teague v. Attala Cnty.*, 92 F.3d

treatment of the Section 2 causation requirement is so varied and inconsistent that leading scholars don't even agree whether the requirement has practical bite. Ellen Katz characterizes it as a significant barrier to Section 2 claims.¹¹⁴ Jim Greiner thinks it is a nominal requirement only, regularly ignored in practice.¹¹⁵

One of us (Elmendorf) argues in a recent paper that getting the causation requirement right is essential to saving Section 2 from continued erosion, or outright constitutional invalidation, by conservative courts.¹¹⁶ Elmendorf proposes that plaintiffs be required to show to a “significant likelihood”—a more relaxed standard than “more likely than not”—that the electoral inequality to which they object resulted from subjective race discrimination by conventional state actors or the majority-group electorate.¹¹⁷

Elmendorf's gloss on the causation requirement would go a long distance toward resolving constitutional doubts about Section 2. The case for Section 2's constitutionality is very strong if, as Elmendorf argues, (1) the electorate itself becomes a state actor when it performs the “public function” of putting in office officials who will exercise the coercive authority of the state, yet (2) the question of whether a particular election outcome is unconstitutional because of electorate discrimination is nonjusticiable.¹¹⁸ Section 2 can then be understood as a statutory response to otherwise irremediable constitutional violations—a legislative undertaking that deserves special deference from the courts.¹¹⁹

But even if one rejects the idea that the electorate is state actor when putting policymakers in office, Section 2 represents a more congruent and proportional response to the risk of constitutional violations insofar as it targets jurisdictions in which citizens of other races tend to discriminate against persons of the plaintiffs' race, and plaintiff-race voters have little political influence. Elected officials are more likely to discriminate in jurisdictions where voters tend to discriminate. The officials are drawn from the population

283, 293 (5th Cir. 1996); *NNACP v. City of Niagara Falls*, 65 F.3d 1002, 1019 n. 21 (2d Cir. 1995); *Clark v. Calhoun Cnty.*, 21 F.3d 92, 97 (5th Cir. 1994); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993).

¹¹⁴ Katz et al., *supra* note 38, at 671-72 (“Proving the linkage is difficult . . . and numerous lawsuits have held that plaintiffs failed to meet their burden . . . on this point.”) (citing thirteen cases).

¹¹⁵ Greiner, *supra* note 44, at 459-60 (characterizing current burden-shifting practices as depriving the causation requirement of practical bite); Greiner, *supra* note 42, at 591 (“the causal inquiry . . . appears to matter little in actual cases unless the factual record demonstrates that candidates of minority race have enjoyed some measure of electoral success”).

¹¹⁶ Elmendorf, *Making Sense of Section 2*, *supra* note 50, at 428-48. For a recent restatement of the conservative critique of Section 2, see Roger Clegg & Hans Van Spakovsky, “*Disparate Impact*” and *Section 2 of the Voting Rights Act*, Heritage Foundation Legal Memorandum #119 (Mar. 17, 2014).

¹¹⁷ *Id.* at 417-48.

¹¹⁸ *Id.* at 428-46.

¹¹⁹ *Id.*

of voters, and if they're chosen by a prejudiced majority and need not bargain with minority representatives, they'll have great discretion to discriminate and may well be rewarded for it. Their tendency to discriminate would, however, be somewhat checked if the minority community could elect even a few responsive representatives. Minority representatives could serve as whistleblowers, for example, flagging potential civil rights violations for federal or private enforcement. And, by logrolling, minority representatives may be able to gain concessions from the majority on issues that matter particularly to the minority community.¹²⁰

The strongest argument against the Section 2 causation requirement, advanced by law professor and statistician Jim Greiner, is that it asks a question which statisticians cannot answer.¹²¹ Statisticians nowadays approach questions about causation by trying to estimate counterfactual outcomes, i.e., outcomes that would have been realized had certain "causes" (such as treatments in an experiment) been different.¹²² Like Greiner, we doubt that it is possible to estimate the number of minority candidates who *would have been elected* in a defendant jurisdiction had white voters not perceived the candidates to be nonwhite, or had white voters not harbored negative racial stereotypes or prejudices.¹²³

But these questions do not need to be answered for Section 2 to incorporate a substantive, administrable causation requirement. Greiner's argument for jettisoning the causation requirement rests on a pair of implicit premises: that the causation requirement makes sense only if it turns on statistical estimates of counterfactual election outcomes; and that judges' prior beliefs about race discrimination should have no or minimal role in the implementation of the causation requirement.

¹²⁰ For a nice summary of potential tangible benefits from minority representation, see Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 216-18 (1989).

¹²¹ Greiner, *supra* note 42, at 595.

¹²² This is known as the potential outcomes model for causal inference. The seminal modern paper is Donald B. Rubin, *Estimating Causal Effects of Treatments in Randomized and Nonrandomized Studies*, 66 J. EDUC. PSYCH. 688 (1974).

¹²³ As Greiner explains, counterfactual of "the amount white support for minority candidates that would have occurred, had whites not perceived the candidates to be minority" is hard to estimate accurately because (1) the moment of "treatment assignment" (when whites perceive the candidate's race) is hard to pin down, and varies across white voters; (2) potential candidates anticipate voter discrimination and make strategic choices about whether to run in light of voter discrimination; and (3) nominally non-racial considerations, such as partisanship or ideology, may to some extent be post-treatment and affected by whites' perception of candidates' race. See Greiner, *supra* note 42, at 590-97. As for the counterfactual of "white support for minority candidates had whites not subscribed to negative stereotypes of minorities," this is impossible to estimate without bias since racial attitudes cannot be randomized. See *infra* notes 127-128 and accompanying text.

We propose another, equally plausible way to think about it: the purpose of the causation requirement is to connect liability under Section 2 to the risk of unconstitutional race discrimination with respect to voting; and to ensure that Section 2 does not tar defendant jurisdictions based on Jim Crow history (the offense of the preclearance coverage formula per *Shelby County*). Implementation of the causation requirement may take account of prior beliefs, so long as they are widely shared—or, from a legal realist perspective, shared by the median Justice on the Supreme Court.

On this view, the essential ingredients for a workable causation requirement are a facially convincing theory about risk factors for unconstitutional race discrimination,¹²⁴ and an empirical method for ascertaining the relative severity of those risk factors across jurisdictions using current data. Working from these premises, the balance of this section sketches two sets of presumptions for the causation requirement, the first grounded on current racial attitudes, and the second on elected officials' incentive to use race as a screening device to effectuate political discrimination.¹²⁵

a. Inferring Causation from Racial Attitudes and Beliefs¹²⁶

There may be no surer proposition in constitutional law than that state action motivated by racial stereotypes or racial animus offends the Equal Protection Clause. In jurisdictions where majority-group voters subscribe to exceptionally dim views of a minority group, it is reasonable to presume that the regular defeat of minority candidates is due at least in part to constitutionally prohibited motives. To be sure, the question of whether racial attitudes “cause” disparate treatment is, for methodological purists, unanswerable. Like her race itself, a person's racial attitudes cannot be manipulated by researchers.¹²⁷ And whatever “treatments” (life experiences) may cause the development of racial stereotypes probably cause many other things as well. So even if a treatment were shown to cause both the development of negative stereotypes of minorities and a reluctance to vote for

¹²⁴ The theory has to be facially convincing, because in an important sense the relevant constitutional violations are unobservable. The Constitution's race-discrimination provisions guard against intentional/subjective discrimination but not discriminatory results, and motives are essentially unobservable.

¹²⁵ These are not the only plausible options. It may also be feasible to estimate geographic variation in disparate treatment of minority-race candidates using survey experiments. See Marisa A. Abrajano, Christopher S. Elmendorf, and Kevin M. Quinn, *Using Survey Experiments to Estimate Geographic Variation in Racially Polarized Voting* (unpublished manuscript, 2014) (on file with authors).

¹²⁶ Portions of this section previously appeared in Elmendorf & Spencer, *Preclearance*, *supra* note 16.

¹²⁷ On the centrality of randomization to causal inference, see Joshua D. Angrist & Jorn-Steffen Pischke, *Mostly Harmless Econometrics: An Empiricist's Companion* 5 (2008).

minority candidates, it would not be clear that the negative stereotypes were responsible for the subject's lack of support for minority candidates.¹²⁸

But these fine points about causal inference miss a more basic social reality: racial attitudes are conventionally understood to motivate behavior. Bigots would not be castigated if bigotry were believed to be a merely a set of attitudes unconnected to behavior. Law is a practical endeavor. Sometimes a social convention about causation is enough.¹²⁹ The constitutional troubles with Section 2 cannot be resolved by presuming white voter discrimination whenever whites and minorities tend to prefer different candidates, because that presumption cannot be squared with the commonplace understanding that many citizens vote their economic interests.¹³⁰ But, subject to two provisos, courts may infer Section 2 causation (presumptively) from evidence of whites' racial attitudes.

The first proviso is that *the measure of racial attitudes must correlate with political behavior or preferences among whites*. Section 2 is ultimately concerned with equal political opportunity.¹³¹ If whites' racial attitudes do not correlate with political behavior, there's little ground for presuming that minority-preferred candidates or policies would have fared better but for white prejudice.¹³² By contrast, if whites' racial attitudes are strongly associated with, for example, white support for minority-race candidates, it makes sense to guard against the risk of discrimination even if the causal effect of racial attitudes on vote choice cannot be established. Just as a strong correlation

¹²⁸ In all social science applications, the barriers to inference about causal pathways tend to be formidable. See Donald P. Green, Shang E. Ha & John G. Bullock, *Enough Already About Black Box Experiments: Studying Mediation is More Difficult Than Most Scholars Suppose*, 628 ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCI. 200 (2010).

¹²⁹ As Justice Souter once observed about constitutional judicial review, "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up and down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 391 (2000).

¹³⁰ Thus, we are wary of the common judicial practice (see TAN) of presuming that the causation requirement is satisfied whenever the *Gingles* preconditions have been met.

¹³¹ 42 U.S.C. 1973(b) ("A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State of political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members *have less opportunity than other members of the electoral to participate in the political process and to elect representatives of their choice.*") (emphasis added).

¹³² Plaintiffs might satisfy this proviso by showing that more prejudiced whites (per the plaintiffs' measure of prejudice) are less supportive than other whites of minority candidates compared to similar white candidates, or less supportive of a certain policies when the policy beneficiaries are portrayed as plaintiff-race rather than white. The necessary showing could be made with observational or experimental data. Of course, the showing will not be causal, in that racial attitudes themselves cannot be randomized. The showing would be correlational and therefore suggestive only.

In Part II.A.3, *infra*, we satisfy the proviso by showing that our measure of prejudice predicts vote choice in elections contested by Barack Obama.

between cholesterol levels or obesity, on the one hand, and heart disease on the other, would justify some precautionary medical or dietary interventions, so too may correlational evidence justify legal interventions.¹³³

Our second proviso is that *the measure of prejudice must capture an attitude or belief that the Constitution disallows as the basis for state action*. The VRA was adopted pursuant to Congress's power to enforce the 14th and 15th Amendments, and the Constitution as presently interpreted demands a reasonably close connection between legislation enforcing these Amendments and actual or likely constitutional violations.

We have elsewhere shown that conventional, survey-based measures of racial stereotyping easily satisfy both of these provisos, at least with respect to anti-black prejudice.¹³⁴ Accordingly, the causation question may be resolved (presumptively) in vote-dilution cases by examining whether white voting-age citizens in the defendant jurisdiction subscribe to substantially negative views of the minority group. The courts, perhaps aided by DOJ, will need to define a quantitative benchmark for what constitutes legally significant racial stereotyping for purposes of the causation question. Once this benchmark has

¹³³ Thanks to Kevin Quinn for suggestion this analogy. We would note too that the case for relying on correlational evidence in the legal setting considered here is, on its face, stronger than the case for relying on correlational evidence in the heart-disease example. In the legal setting, the causal mechanism (linking racial attitudes to behavior) is knowable to some extent through introspection or everyday social interaction, whereas in the medical setting intuition is probably not a good guide for laypersons.

¹³⁴ Elmendorf & Spencer, *Preclearance*, *supra* note 16, at 20-33. The conventional measures tap perceptions of racial differences in work ethic, intelligence, trustworthiness, and the like. These measures aren't perfect—some respondents may not understand their own biases, and others may not report their biases truthfully—but the conventional measures should suffice, at least until better measures are produced. For example, with better survey questions about “old fashioned” racism (see Leonie Huddy & Stanley Feldman, *On Assessing the Political Effects of Racial Prejudice*, 12 ANN. REV. POL. SCI. 423 (2009); with test of implicit bias (see generally Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Uses*, 54 ANN. REV. PSYCH. 297 (2003); but see Donald R. Kinder & Timothy J. Ryan, *Prejudice and Politics Re-Examined: The Political Significance of Implicit Racial Bias*, APSA 2012 Annual Meeting Paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2105240 (using gold-standard survey and finding no correlation between implicit bias and political preferences or behavior)); with evidence of on-line search practices (see Seth Stephens-Davidowitz, *The Cost of Racial Animus on a Black Presidential Candidate: Using Google Search Data to Find What Surveys Miss* (Mar. 24, 2013), <http://www.people.fas.harvard.edu/~sstephen/papers/RacialAnimusAndVotingSethStephensDavidowitz.pdf>); with survey experiments that capture persistent discrimination against minority-race candidates who are ideologically congenial to the respondent (see, e.g., Kristyn L. Karl & Timothy J. Ryan, *Statistical Discrimination or Prejudice? Examining When and Why Minority Candidates Pay a Penalty* (paper presented at 2013 Conference of the Midwest Political Science Association)); or perhaps with survey questions or experiments that capture inaccurate and unfavorable stereotyping of minority office-holders' policy positions (cf. Adam J. Berinsky et al., *Sex and Race: Are Black Candidates More Likely to be Disadvantaged by Sex Scandals?*, 33 POLIT. BEHAV. 179 (2011)).

been set, the question of whether a particular jurisdiction falls above or below it can be answered using national survey data and multilevel statistical modeling.

b. Inferring Causation from Racial Polarization in Partisanship

We are frankly uncertain about whether evidence of negative racial attitudes in the electorate should also be treated as presumptively satisfying the causation requirement in vote denial (as opposed to vote dilution) cases. In vote dilution cases, the relevant state actor in our view is the electorate itself, so evidence of white citizens' racial attitudes speaks directly to the question of whether the relief the plaintiff seeks would remedy state action that is at least significantly likely to be unconstitutional. But in vote denial cases, the state actor may be the legislature, an election administration agency, or front-line pollworkers.

For these cases, it may make more sense to tie the causation presumption to political elites' incentive to discriminate on the basis of race in allocating access to the franchise. Such an incentive may be generated by white voters' negative racial attitudes. But the incentive most clearly arises when there is a strong correlation between voters' race and their reliability as partisan voters (or as consistent voters for any other established political faction). Blacks, for example, are reliable Democratic voters.¹³⁵ So when Republicans hold the reins of power, they have political incentives to diminish black turnout. In recognition of this incentive, courts might deem the causation requirement presumptively satisfied in vote-denial cases brought by black voters against Republican-enacted voting requirements, so long as the plaintiffs show disparate impact and establish that the political incentive to discriminate holds in the defendant jurisdiction, not just in the nation generally.¹³⁶

We acknowledge that reasonable people may disagree about the propriety of inferring race discrimination, even presumptively, from "political incentives plus disparate impact." Given present political alignments, the political-incentives presumption will tend to hobble Republican but not Democratic power plays. This may make the presumption too politically fraught for the courts to adopt.¹³⁷

¹³⁵ For some evidence to this effect and a model of associated political incentives, see Cox & Holden, *supra* note 21

¹³⁶ *Cf.* *Grove v. Emison*, 507 U.S. 25, 41-42 (1993) (rejecting idea that Section 2 cases may be resolved on basis of what is typical nationally, rather than what is true in the defendant jurisdiction).

¹³⁷ An intentionalist judge might also speculate that the median member of the coalition that enacted Section 2's results test would not have supported the political-incentives presumption. The results test emerged from a bipartisan compromise. See Thomas M. Boyd & Stephan J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH & LEE L. REV. 1347, 1414-21 (1983) (detailing role of Senator Dole).

Another objection is that the political incentives presumption would capture the incentive to discriminate on the basis of partisanship, not race. Courts have long struggled to distinguish racial from political discrimination in Section 2 and equal protection cases.¹³⁸ Political discrimination is generally regarded as constitutionally innocuous, whereas race discrimination is deemed invidious.

We think the partisanship-not-race objection is unconvincing. The Equal Protection Clause prohibits state actors from classifying persons by race and subjecting them to disparate treatment, unless doing so advances a compelling state interest that cannot be protected using race-neutral means.¹³⁹ Racial animus and ugly stereotypes are not prerequisites for an equal protection violation.¹⁴⁰ It is the fact of disparate treatment on the basis of race that triggers strict scrutiny, not the reason for the treatment.

If the correlation between race and partisan voting behavior is extremely high, politically motivated state actors will have strong incentives to classify and target voters on the basis of their race. Race is generally easy to observe. Consistent partisan voting behavior is much harder to observe, for the ballot is secret and citizens don't wear their voting history on their sleeve. Because race is more readily observed than reliable partisanship, elites seeking partisan political advantage have incentives to target voters on the basis of their race.

We acknowledge that the Supreme Court has been wary about applying the anti-stereotyping logic of equal protection doctrine in cases about political discrimination. In racial gerrymandering cases, for example, the Court has crafted decision rules that make it very difficult to challenge state actions that

¹³⁸ See, e.g., Richard L. Hasen, *Race or Party? How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. FORUM (2014), http://www.harvardlawreview.org/issues/127/january14/forum_1022.php; Greiner, *supra* note 42, at 593-95; Pildes, *supra* note 74, at 1565-57; Pamela S. Karlan & Daryl Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1220-27 (1996).

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

¹⁴⁰ Judge Kozinski explains the point nicely:

The lay reader might wonder if there can be intentional discrimination without an invidious motive. Indeed there can. A simple example may help illustrate the point. Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood. *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 778 n. 1 (1990) (Kozinski, *J.*, concurring and dissenting in part).

classify voters by race, if the action can be explained as a partisan maneuver and the racial classification isn't facially evident.¹⁴¹ But the Court has never denied the proposition that disparate treatment on the basis of race in the political sphere offends the Constitution's equal protection norm.

A third objection to the political incentives approach is that it would collapse the distinction between the *Gingles* polarization inquiry and the causation question. It's not clear to us that this is a problem, but in any event the causation test need not be co-extensive with the *Gingles* polarization presumption. The minimum level of polarization needed to establish a presumption of causation could be set at a higher level, or plaintiffs might be required to adduce other evidence bearing on political incentives to discriminate (e.g., the competitiveness of elections, or minority population size).¹⁴²

It bears emphasis, finally, that the political incentives approach would not necessarily result in commonplace, Republican-preferred voting rules with a racially disparate impact being invalidated in jurisdictions with large minority populations and allowed to stand elsewhere. A defendant might rebut the inference of racial targeting by showing that voting restrictions similar to the one at issue are strongly backed by Republicans in states without a sizeable, heavily Democratic minority population. (Ordinary voter ID requirements might survive; rollbacks of Sunday early voting in communities with politically mobilized black churches probably would not.) Or defendants might show that the voting restriction is well designed to advance important state interests,¹⁴³ or that the state made a good faith effort to monitor and curtail race discrimination by administrators who implement the law.

¹⁴¹ *Easley v. Cromartie*, 532 U.S. 234 (2001); for discussion, see Elmendorf & Spencer, *Preclearance*, *supra* note 16, at 12-13.

¹⁴² The incentive to discriminate on the basis of race for political reasons is increasing in (1) the partisan cohesion of the plaintiff minority community; (2) the size of the minority community; (3) the level of political competition in the jurisdiction; and (4) the partisan cohesion of other voters (support for the other party) in the jurisdiction. This is not hard to see. Consider a law that would keep 10% of a minority community from voting, and affect no one else. The impact of this law on the partisan balance of power will be greater where all or nearly all members of the minority community vote for the same party's candidates; where the minority community is large; and where the major parties have roughly equal levels of support in the electorate. Elected officials of the white-preferred party will also have stronger incentives to engage in race-targeted voter suppression where non-plaintiff-race voters uniformly support the white-preferred party, because under these conditions there is no political reward in race-neutral forms of voter sorting or discrimination. Knowing a voter's race tells you all that can be known about whether she is likely to support or oppose you.

¹⁴³ One of the "totality of circumstances" factors that courts regularly consider in Section 2 cases is the degree to which the challenged law is tenuous or advances important state interests. *See, e.g., Houston Lawyers' Ass'n v. Tex.*, 501 U.S. 419, 426-27 (1991) (noting that the state interest in electing trial judges from districts co-extensive with the trial court's jurisdiction "is a factor to be considered by the court in evaluating whether the evidence in a particular case supports a finding [that this practice is] a vote dilution violation . . .") (emphasis in original); Katz et al., *supra* note 38, at 727-30 (reviewing case law in the lower courts).

By shifting the burden of persuasion to defendants, the courts simply acknowledge that partisan motives do not merit the same presumption of legitimacy in jurisdictions where the partisan payoff to racial discrimination is exceptional.

C. Summary

This Part has presented one account of how the core of Section 2 could be implemented using evidentiary presumptions and survey data. Ours will not be the final word. Some readers may disagree with our gloss on the core of Section 2. Others may see different and perhaps better ways to craft the presumptions. What we hope to have shown is that it is at least feasible to answer—presumptively—some of the recurring questions in Section 2 cases using national survey data, rather than the precinct-level vote tallies that have been the bread and butter of Section 2 litigation so far.

We also hope to have persuaded the reader that these presumptions—if implemented with off-the-shelf statistical models—could enable Section 2 to function more like Section 5 in regions of the country where the presumptions operate to shift evidentiary burdens to the defendants. Redistricters in such locales who do not provide minority communities with “roughly proportional” opportunities for representation would very likely face a Section 2 lawsuit in which they would carry the burden of disproving central elements of the case. Vote-denial claims would also become easier for civil rights groups to litigate. Plaintiffs would have to show that the challenged barrier to voting has a racially disparate impact,¹⁴⁴ but they could fall back on presumptions for the difficult question of race-discriminatory causation.

What remains to be established is that the courts have authority to establish the presumptions, and, further, that it is feasible to implement the presumptions using national survey data rather than case-specific surveys carried out in particular defendant jurisdictions.¹⁴⁵ We turn to these questions in the next Parts.

III. AUTHORITY, LEGAL AND OTHERWISE

It is one thing to say that Section 2 could be made to function like Section 5 if Congress authorized an administrative agency to promulgate a suitable set of geographically tailored rebuttable presumptions.¹⁴⁶ It is quite another to

¹⁴⁴ Under Section 5, by contrast, the burden was on the covered jurisdiction to show no racially retrogressive impact. *See* *Branch v. Smith*, 538 U.S. 254, 263 (2003).

¹⁴⁵ If the presumptions required original, case-specific research, they would be much more expensive to apply.

¹⁴⁶ Indeed, one possible legislative response to *Shelby County* would be to leave Section 5 and the now-invalidated coverage formula as is, while authorizing the Department of Justice to put new teeth into Section 2 with substantive rules about evidentiary presumptions.

maintain that Section 2 can function similarly without any intervening action by Congress. This Part address two objections to our position: first, that the courts lack legal authority to establish the kinds of evidentiary presumptions suggested in Part II; second, that irrespective of legal authority, the courts cannot reasonably be expected to establish these presumptions on their own. We think the second objection has force, but that the courts could nonetheless establish the presumptions in collaboration with the Department of Justice.

A. Legal Authority to Create the Presumptions

The proposition that courts lack legal authority to establish the evidentiary presumptions sketched in Part II has little force. As one of us explained in previous work, Section 2 is best understood as a common law statute.¹⁴⁷ It delegates authority to the courts to implement loosely stated substantive and evidentiary norms.¹⁴⁸ The legislative history makes clear that Section 2's results test was supposed to alleviate some of the evidentiary burdens associated with conventional intent tests in constitutional law,¹⁴⁹ but the courts were given broad discretion to shape the law going forward.

The courts have not shied from exercising this discretion. The statutory text instructs courts to base Section 2 liability determinations on the "totality of circumstances," but in *Thornburg v. Gingles*, the very first Supreme Court decision interpreting the results test, a four-Justice plurality tried to boil the matter down to whether a politically cohesive minority community had been consistently defeated at the polls.¹⁵⁰ Some years later the Supreme Court resuscitated the "totality of circumstances" inquiry and in doing so made central a factor that is not even mentioned in the legislative history: proportionality between the number of minority opportunity districts and the minority's population share.¹⁵¹

The lower courts have already developed rebuttable presumptions and burden-shifting rules in response to the Supreme Court's signals. Thus, after *Gingles*, a number of courts held that a showing of minority political cohesion plus white bloc voting gives rise to a "strong presumption" of Section 2 liability.¹⁵² Other courts, struggling with the question of whether white bloc voting is "legally significant" only if "caused" by the race of the candidate (or

¹⁴⁷ Elmendorf, *Making Sense of Section 2*, *supra* note 50, at 448-55.

¹⁴⁸ *Id.* at 417-48.

¹⁴⁹ *Id.* at 421-27.

¹⁵⁰ 478 U.S. 30, 54-58, 61-73 (1986).

¹⁵¹ *Johnson v. De Grandy*, 512 U.S. 997, 1013-24 (1994); Katz et al., *supra* note 38, at 730-31 (reporting that of 18 published cases in which courts made findings on proportionality, "the 10 lawsuits that found proportionality identified no violation of Section 2," and of the five lawsuits that "found a lack of proportionality[,] four identified a Section 2 violation").

¹⁵² The presumption also requires that the minority community be large enough to satisfy the first *Gingles* factor. For cases recognizing this presumption, see *supra* note 76.

voters), held that a showing of racially polarized voting in biracial elections gives rise to a rebuttable presumption of race-discriminatory causation.¹⁵³ In short, presumptions and burden-shifting rules are already embedded in the warp and woof of Section 2.

Crafting burden-shifting rules and presumptions to implement broadly worded statutes is a familiar exercise for the courts. Judges put teeth into Title VII and other civil rights statutes with judge-made burden-shifting rules.¹⁵⁴ The courts also borrowed evidentiary rules-of-thumb put forth in Equal Opportunity Employment Commission guidelines, such as presuming a legally significant disparate impact where minorities are hired by an employer at less than four-fifths of the rate of white hiring.¹⁵⁵ In antitrust law the courts went further, deeming certain business arrangements per-se anticompetitive.¹⁵⁶ Later the courts relaxed some of the per-se rules, in light of new economic theory and evidence.¹⁵⁷

The rebuttable presumptions sketched in Part II are consistent with the notion that lawmaking by common law courts should be evolutionary, not revolutionary. Each presumption serves to implement a norm that is already central to Section 2 liability determinations. And because the presumptions would be rebuttable, they are compatible with the statutory directive to base liability determinations on the “totality of circumstances.”¹⁵⁸

To the extent that our presumptions would work a large change in the law of Section 2, the change is in the datasets and statistical techniques on which courts and litigants rely.¹⁵⁹ National survey data on citizens’ political

¹⁵³ See *supra* note 75

¹⁵⁴ Plaintiffs’ showing of a racially disparate impact shifts the burden to the defendant to come forth with a legitimate rationale for the challenged law or practice, after which the plaintiff bears the ultimate burden of showing that the measures at issue aren’t reasonably necessary to serve the defendant’s legitimate interests. *McDonnell Douglas Corp. v. Green*, 1 U.S. 792 (1973).

¹⁵⁵ See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 443 n.4 (1982); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2678 (2009).

¹⁵⁶ See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 740-45 (2012). The voting rights analogue would be a ban on literacy tests, which Congress applied to the covered jurisdictions in 1965 and extended nationally in 1970.

¹⁵⁷ See *id.* at 751-59; see also Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 203-11 (2nd ed. 2008) (describing evolution, and emphasizing that even as the Court moved away from per-se rules, it continued to develop and apply presumptions that shifted the burden of production and in some cases the burden of proof to the defendant).

¹⁵⁸ We have imposed no limit on the “circumstances” that might be invoked to rebut inferences from the presumptions.

¹⁵⁹ To be sure, the *effect* of this change in the law could be substantial, in that Section 2 claims would probably become fairly easy to win in some parts of the country, and quite difficult to win in other areas. But even this would only accentuate existing patterns. As Peyton McCrary has shown, the vast majority of successfully litigated or settled Section 2 cases were brought in the formerly covered jurisdictions. Declaration of Dr. Peyton McCrary, *Shelby County, Ala. v.*

preferences and racial attitudes, analyzed using multilevel regression with poststratification, would partially supplant the current reliance on precinct-level election returns and ecological inference.¹⁶⁰ But there is nothing in the text or legislative history of Section 2, or in the Supreme Court's authoritative constructions of the statute, that compels judicial reliance on particular statistical tools.

Finally, on a purposive view of statutory interpretation, *Shelby County's* negation of the Section 5 preclearance regime counts strongly in favor of interpreting Section 2 so that it works more like Section 5 (so long as the reading does not push Section 2 into the same constitutionally problematic territory). The VRA as enacted in 1965—and as re-enacted in 1970, 1975, 1982, and 2006—was predicated on a handful of core premises, which our model for Section 2 adapts to the post-*Shelby County* world. The essential premises are, first, that the risk of unconstitutional race discrimination in the electoral process is higher in some parts of the country than in others; and, second, that where this risk is high, mechanisms are needed to review and in appropriate cases enjoin potentially discriminatory laws before they take effect, with the burden of proof borne by the alleged discriminator.¹⁶¹

Our presumptions mesh these premises with Section 2 while honoring *Shelby County's* understanding of when it is permissible for legislation enforcing the 14th and 15th Amendments to single out states for special burdens. *Shelby County* faulted the preclearance coverage formula for distinguishing states on the basis of old data that bore no apparent relationship to the current risk of unconstitutional race discrimination.¹⁶² Our presumptions would be implemented using current data, and would maintain a close connection between the risk of Section 2 liability (higher where evidentiary burdens are shifted to the defendant), and the risk of unconstitutional state action.

B. Judicial Competence and the Role for DOJ

That judges have legal authority to implement our approach does not mean that they will be able to do it or do it effectively on their own. Section 2 cases present very difficult technical and legal questions. Our sense from reading published opinions is that the first priority for many judges in these cases is simply to avoid embarrassment.

Holder, 811 F. Supp. 2d 424 (D.D.C. 2011) (No. 1:10-cv-00651-JDB, Document 53-2), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Shelby-Dec1-11-15-10.pdf>. The empirical results we present in Part IV, *infra*, suggest that the same jurisdictions are likely to be the most vulnerable under our presumption-driven model for Section 2 (at least with respect to the claims of African Americans).

¹⁶⁰ We say “partially” because in some cases defendants may try to rebut the inference of racial polarization using data from local elections.

¹⁶¹ See *supra* Part I.

¹⁶² 133 S.Ct. 2612, 2625-30 (2013).

Rather than wrestle with the reliability of different techniques of ecological inference, judges continue to accept questionable methods on the basis of an offhand, decades-old footnote from the Supreme Court characterizing the methods as “standard in the literature.”¹⁶³ Harvard statistician and law professor Jim Greiner wrote several outstanding papers critiquing standard ecological inference techniques and offering better alternatives;¹⁶⁴ his work has left no impression on the courts.¹⁶⁵ The continued acceptance of statistical techniques that are “standard” per their use in prior cases (even if unreliable) saves the judge from potential embarrassment, for if she errs, she makes only the same mistake as her peers.

As for the law, Section 2 offers an easy out to judges who don’t want to venture a transparent interpretation of the statute’s substantive and evidentiary norms: glide past the conceptual questions, duly note that the statutory text calls for liability determinations to be based on the “totality of circumstances,” and then recite a long list of circumstances that nominally ground your decision.

The project of crafting rebuttable presumptions to implement Section 2 requires judges to take some risks—especially insofar as it invites plaintiffs to make evidentiary showings based on new-fangled statistical techniques. And to fully realize the promise of our presumption-driven approach to Section 2, many judges must take the plunge, define the presumptions similarly, and agree on the datasets and models that litigants may use to determine which presumptions apply in a given case.

Likelihood-of-success determinations will become straightforward only if the courts coordinate on a common model and dataset, as well as common definitions of the presumptions. The incremental, disaggregated process of common law adjudication makes this coordination difficult. The obvious alternative is to assign responsibility for developing the presumptions to an administrative agency. Agencies may compel judicial coordination by issuing rules with the force of law; agencies have the necessary technical expertise; and agencies can involve a much broader swath of the public in developing the law, via advisory committees and notice-and-comment rulemaking. But Section 2 does not delegate rulemaking authority to any agency. The Department of Justice litigates Section 2 cases from time to time, but the Department has never

¹⁶³ *Thornburg v. Gingles*, 478 U.S. 30, 53 n. 20 (1986). Some judges do seem willing to accept the new, better methods only if their results accord with the older methods. See Greiner, *The Quantitative*, at 532-33.

¹⁶⁴ Greiner, *supra* note 53; Greiner, *supra* note 44; Greiner & Quinn, *supra* note 54; D. James Greiner & Kevin M. Quinn, *R×C Ecological Inference: Bounds, Correlations, Flexibility and Transparency of Assumptions*, 172 *J. Royal Statistical Society: Series A* 67 (2009); D. James Greiner, *The Quantitative Empirics of Redistricting Litigation: Knowledge, Threats to Knowledge, and the Need for Less Districting*, 29 *YALE L. & POL’Y REV.* 527 (2011).

¹⁶⁵ A Westlaw search turned up only one opinion that cites Greiner’s work on ecological inference. (In that case, a wise judge appointed Greiner’s collaborator Kevin Quinn to advise the court on statistical methods.)

issued even enforcement guidelines under Section 2, let alone guidance documents that provide a substantive interpretation of the statute.¹⁶⁶

We think the Department of Justice is nonetheless reasonably well positioned to get a presumption-driven Section 2 up and running. Though DOJ cannot bind the courts, it may issue interpretive guidelines for Section 2, which would be owed *Skidmore* deference.¹⁶⁷ Under *Skidmore*, judicial deference to agency positions varies according to the quality of the agency's decision-making process, taking account of "any factors which give an interpretation power to persuade, if lacking power to control."¹⁶⁸ Title VII provides an instructive analogy: interpretive guidelines issued by the Equal Opportunity Employment Commission have not been treated as binding on the courts, but they are given some weight and have played an important role in fleshing out Title VII's disparate impact standard.¹⁶⁹

We recognize that DOJ's track record may disincline judges to give the agency's positions on voting rights much weight under *Skidmore*. In the 1990s, DOJ pursued an aggressive policy of maximizing African American representation, which the Supreme Court eventually thwarted in a sequence of statutory and constitutional decisions.¹⁷⁰ In the 2000s, under President George W. Bush, many career staffers in the voting section departed and were replaced with new hires whom critics on the left derided as partisan hacks.¹⁷¹ Under President Obama, the Department has taken a strong stance against voter ID laws and other measures favored by Republicans, leading Republicans to levy the charge of unlawful partisanship.¹⁷² Inspector General reports in 2008 and 2012 gave credence to some of the accusations of partisanship.¹⁷³

¹⁶⁶ Personal communication with law professor and former DOJ voting rights attorney Michael Pitts.

¹⁶⁷ *Skidmore v. Swift*, 323 U.S. 134, 140 (1944).

¹⁶⁸ *Id.* at 139-40. We agree with Jennifer Nou that, in the election administration context, the *Skidmore* framework counsels for calibrating deference to "the institutional role of the actors authoring the interpretive documents and, specifically, the degree to which they are internally politically insulated." Jennifer Nou, *Sub-Regulating Elections* 15 (U. Chi. Public Law & Legal Theory No. 462, 2014).

¹⁶⁹ For example, the "four-fifths rule" in disparate impact cases originated with EEOC guidelines. See *supra* note 155. To be sure, the track record of judicial deference to EEOC positions is checkered. See Melissa M. Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *Fordham L. Rev.* 1937 (2006). Hart attributes the skepticism of some judges to a perception that the EEOC is or has been pursuing a narrowly political agenda, and not basing its rules on any material, technical expertise. As we discuss next, these same concerns could well arise with DOJ-issued guidelines under Section 2, but the concerns can be blunted if the agency takes them into account *ex ante*.

¹⁷⁰ See Michael J. Pitts, *The Voting Rights Act in the Era of Maintenance*, 59 *ALA. L. REV.* 903, 926-35.

¹⁷¹ Charlie Savage, *Report Examines Civil Rights During Bush Years*, *N.Y. TIMES*, Dec. 2, 2009.

¹⁷² Hans A. von Spakovsky, *Every Single One: The Politicized Hiring of Eric Holder's Voting Section*, *P.J. MEDIA*, Aug. 8, 2011, <http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder-s-voting-section/>; Roger Clegg & Hans A. von Spakovsky, *More Voting-Rights Challenges from Holder*, *NAT'L REV. ONLINE*, July 29, 2013,

Given this history, Section 2 guidelines issued by DOJ are unlikely to get much deference from the courts—at least not from judges affiliated with the opposing political party—unless the guidelines are also credentialed by a more politically neutral or balanced actor. One possibility is for DOJ to convene a bipartisan body such as the Bauer-Ginsberg Commission to lead the development of the guidelines.¹⁷⁴ Another, not incompatible option is for DOJ to organize a working group of preeminent political methodologists, which would recommend how to measure preferences and behaviors pertinent to Section 2 cases, how to estimate associated geographic variation, and how to validate the estimates. After receiving the working group’s recommendations, DOJ (or a Bauer-Ginsberg type body under the Attorney General) could propose quantitative cutoffs for each presumption—for example, the line between substantial and extreme correlations between race and partisanship—and initiate a notice-and-comment process to take public input on the proposal.¹⁷⁵

Provided that the Department’s working group is not stacked with plaintiff-side or defense-side experts, the guidelines that emerge from this process are likely to carry considerable weight with the courts, if only because the courts are desperate for a clear path through the technical weeds of Section 2.¹⁷⁶

If judges generally follow the DOJ’s recommendations, this will greatly reduce uncertainty about how the presumptions cut in a given case. Rather than reinventing the wheel, plaintiffs’ expert could simply download the gold-standard model and dataset from DOJ’s website, and run it for the racial group(s) and jurisdiction at issue in the case. Once the model has been accepted by a few courts, it will no longer be worthwhile for defendants to

<http://www.nationalreview.com/article/354618/more-voting-rights-challenges-holder-roger-clegg-hans-von-spakovsky>.

¹⁷³ OIG-OPR Report, A Review of the Operations of the Voting Section of the Civil Rights Division, March 2013; OIG-OPR Report, An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division, July 2008 (released publicly January 13, 2009); OIG-OPR Report, An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General, July 2008; OIG-OPR Report, An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program, June 2008.

¹⁷⁴ The Bauer-Ginsberg Commission, formally called the Presidential Commission on Election Administration, was convened by President Obama after the 2012 election to develop recommendations for reducing lines and the polls and otherwise improving the quality of the voting experience. The Commission’s leaders and namesakes were top Democratic and Republican election lawyers. Its report and recommendations are available here, <https://www.supportthevoter.gov>.

¹⁷⁵ We recognize that bipartisan agreement about interpretive guidelines under Section 2 is likely to be quite difficult to achieve, given their potential impact on voter-ID litigation and other challenges to election administration measures that have split the parties. As such, we personally favor the “impartial experts” over the “bipartisan bargain” model for developing the guidelines.

¹⁷⁶ The guidelines would carry particular weight if DOJ invests in certain model-validation exercises. See *infra* Part IV.A.

attack it in ordinary cases.¹⁷⁷ At this point, a legal regime that formally requires plaintiffs to make evidentiary showings with respect to racially polarized voting, causation, and proportionality would function *as if* it were a regime in which certain geographically delimited jurisdictions were formally presumed to manifest racially polarized voting, discriminatory intent, etc.¹⁷⁸ The gap between Section 2 and now-defunct Section 5 would be much diminished.¹⁷⁹

C. Survey Data, Without Presumptions?

Several readers of early drafts of this article questioned whether DOJ has the wherewithal to issue interpretive guidelines under Section 2, or whether courts would be willing to lay down clear, quantitative markers to distinguish (for example) presumptively polarized from presumptively non-polarized jurisdictions. However one judges such odds, we would point out that the benefits of implementing Section 2 with national survey data do not depend entirely on the creation of *de jure* evidentiary presumptions.

To illustrate, imagine that cautious judges are initially willing to consider survey-based evidence of preference polarization, racial attitudes, and incentives to discriminate only at the “totality of circumstances” stage of a Section 2 case. Once one court gives some weight to this evidence, litigants will have incentives to bring it forward in the next case, and judges will have to weigh the advantages and disadvantages of conventional and survey-based evidence. Over time, even the most cautious, incrementalist judges are likely to give progressively more weight to survey data, because survey-based estimates do not suffer from the endogeneity problems that plague efforts to infer racial

¹⁷⁷ To be sure, in rare cases where the political stakes are very high, it may be worthwhile for defendants to attack the model, just as it was worthwhile in the pre-*Shelby County* era for some covered jurisdictions to seek preclearance from the District Court of the District of Columbia rather than the Department of Justice in certain high-stakes, politically charged cases.

¹⁷⁸ We recognize that the gold-standard model would likely evolve over time, in keeping with advances in political science and statistics. Turnover in DOJ’s leadership may also lead to a revisiting of the guidelines. Continued judicial acceptance of the guidelines would of course depend on the credibility/impartiality of the process by which the Department updates them.

¹⁷⁹ It’s conceivable that a private foundation could also play the role of convener: recruiting the working group of experts, financing validation studies and other research, and making the data and models available for litigants to download. But we suspect that privately promulgated guidelines would be less influential than a similar set of guidelines issued by the Department of Justice after a public process. DOJ guidelines would communicate the Department’s enforcement priorities to potential defendants, and this alone is likely to change their behavior, given the Department’s resources for enforcement. And the *Skidmore* framework can give judicial deference to agency guidelines the imprimatur of legality, whereas judicial deference to privately promulgated guidelines would look more like abdication. The main advantage—in theory—of a private convener is that it wouldn’t be encumbered by DOJ’s recent history. See *supra* notes 170-173 and accompanying text. But it’s not clear to us that any private foundation would be able to withstand partisan attacks (which are likely, if the suggested guidelines would have the effect of benefiting the Democratic party) any better than DOJ.

polarization and discrimination from votes,¹⁸⁰ and because the informativeness of survey-derived estimates is not tied to the racial homogeneity of precincts (in contrast to statistical techniques for ecological inference).¹⁸¹

As evidence from national surveys starts to play a larger role in the adjudication of Section 2 cases, the decisions themselves will provide increasing guidance about how pending or prospective cases are likely to be resolved. For example, if the level of racial polarization in jurisdiction A is deemed “legally significant,” and if the same or higher levels of polarization exist in jurisdiction B *per the data sources and statistical models used in the previous case*, then lawyers for both parties in a newly filed case against jurisdiction B should have a pretty good sense of whether a court is likely to find legally significant polarization in B.

One might suppose that this would be true irrespective of whether the second case is litigated primarily on the basis of local election data or national survey data. Not so. If the case in B depends on local election returns, then the plaintiff will have to pay an expert to retrieve local election files from county courthouses, to digitize those records, to estimate the correlation between race and vote choice in each election, and then to make an argument about which elections are most probative of racial polarization in the community—taking account of the race of the candidates, their backing from local political elites within the minority and white communities, incumbency, the responsibilities of the office in question, the date of the election, and any other “special circumstances” which arguably bear on the degree to which racial polarization in vote choice does or does not signify racial polarization in enduring political preferences.¹⁸² Previous cases will provide some guidance about the factors to consider in judging probativeness,¹⁸³ but they cannot resolve the ultimate question of how much weight to assign to each election introduced in the case against B.¹⁸⁴ By contrast, if the decision in case A turned on a measure of ideology or racial attitudes derived from national surveys,¹⁸⁵ and if the same survey data and statistical models are deployed in case B, the holding in A will be very instructive about the likelihood of liability in case B. And the cost of

¹⁸⁰ See *supra* Part II.A.2 (explaining perils of trying to infer political cohesion and polarization from votes in actual elections), and Part II.B (discussing impediments to estimating disparate treatment of minority candidates on the basis of their race using such data).

¹⁸¹ See *supra* Part I.B (noting that recent research casts serious doubt on ability of ecological inference techniques to recover the correlation between race and vote choice if there is significant residential integration or more than two racial groups).

¹⁸² See generally Katz et al., *supra* note 38, at 668-70

¹⁸³ See *id.*

¹⁸⁴ This is so because the weight assigned to each election depends on the probativeness of every other elections in the record.

¹⁸⁵ Such as the measures introduced in Part IV.

figuring out how the holding in A cuts in case B will be minimal, assuming that the pertinent dataset and statistical models are in the public domain.¹⁸⁶

Finally, it's worth noting that courts can and often do create very informative evidentiary guideposts without using the label, "presumption." For example, though courts have rejected the proposition that proportionality between minority population share and the number of majority minority districts is an absolute defense to liability in vote dilution cases,¹⁸⁷ courts have nonetheless signaled that proportionality is very important,¹⁸⁸ and practitioners have had no trouble reading the signal.¹⁸⁹ Similar conventions may well emerge regarding survey-based evidence of racial polarization or causation, even without formal recognition of the conventions as evidentiary presumptions.

We have developed our account of a presumption-driven Section 2, implemented with national survey data, in the hopes of motivating small and not so small steps toward effective protection for minority voting rights within the existing statutory and constitutional framework. Our enthusiasm for big steps, such as the promulgation of interpretive guidelines by DOJ, should not be taken to diminish the value of even very small steps, such as the introduction of survey-based evidence at the totality of circumstances stage of a conventional Section 2 case.

IV. MODEL BUILDING AND PROVISIONAL RESULTS

This Part introduces the statistical machinery for generating estimates of public opinion within small geographic units from national surveys. We also present some empirical results, which illustrate where a presumption-driven Section 2 would probably have the most bite. We consider our results provisional because they are based on models that, while facially reasonable, have not been validated, and because there are other plausible ways of defining the presumptions.¹⁹⁰

¹⁸⁶ Large-sample surveys by political scientists are conventionally put into the public domain within a year or two of their completion. Standard tools for estimating local opinion from national surveys are also in the public domain. E.g., <https://github.com/malecki/mrp> (package in the statistical programming language R for multilevel regression with poststratification).

¹⁸⁷ *Johnson v. De Grandy*, 512 U.S. 997, 1013-14 (1994).

¹⁸⁸ *See, e.g., Black Political Task Force v. Galvin*, 300 F.Supp.2d 291, 311 (D. Mass. 2004) ("One of the most revealing questions a court can ask in assessing the totality of the circumstances is whether the affected districts exhibit proportionality."); *Campuzano v. Illinois State Bd. of Elections*, 200 F. Supp. 2d 905, 908 (2002) ("For a plan to provide minority voters equal participation in the political process, it must generally provide a number of 'effective' majority-minority districts that are substantially proportionate to the minority's share of the state's population.").

¹⁸⁹ *See, e.g., HEBERT ET AL., supra* note 27, at 36 (observing that "'proportionality,' or lack thereof," is a "particularly important" factor in vote dilution cases).

¹⁹⁰ *See supra* Part II.

A. Tools for Estimating Racial-Group Opinion Within Subnational Geographic Units¹⁹¹

Given a national survey, there are two ways of estimating opinion within particular racial groups in discrete geographic units. One is to disaggregate the data by race and geography, and, if the survey is not an equal-probability sample of the population of interest, to reweight the disaggregated data so that it matches known demographics of the target population.¹⁹² To illustrate, if one wanted to estimate Nancy Pelosi's vote share among Latinos using this approach, one would obtain data from a survey that asked about voting in congressional elections,¹⁹³ subset the data to Latinos in California's 12th Congressional District, assign weights to these respondents so that the (weighted) sample more closely approximates the demographics of the Latino population in District 12 (per Census data), and then, using the weighted sample, calculate Pelosi's reported vote share.

The problem with this approach is that even very large surveys often have few responses from members of a racial group of interest in the geographic unit of interest. For example, the Cooperative Congressional Election Survey (CCES) has about 100 respondents per congressional district.¹⁹⁴ Nancy Pelosi's district is about 6% black, 31% Asian American, and 15% Latino by citizen voting age population.¹⁹⁵ So even if the CCES had a perfectly representative sample of respondents from her district, we would have information about the political preferences of only 6 blacks, 31 Asians, and 15 Latinos. Such small samples yield only noisy, uncertain inferences about the target populations.

To obtain reasonably precise estimates of opinion by racial group within small geographic units, we are left with three options: conduct original surveys within the unit of interest and oversample racial minorities; develop statistical models that utilize information from respondents outside of the unit to estimate in-unit opinion; or pool information from a number of large-N national surveys conducted over a period of years. (If we were only interested in vote shares,

¹⁹¹ Some of the description of methodology in this section also appears in Elmendorf & Spencer, *Preclearance*, *supra* note 16.

¹⁹² Because of sampling challenges and non-response (and sometimes by design), no survey is a true equal probability sample of the target population. On reweighting, see generally CARL-ERIC SARNDAL & SIXTEN LUNDSTROM, *ESTIMATION IN SURVEYS WITH NONRESPONSE* (2006).

¹⁹³ For example, the Cooperative Congressional Election Study, <http://projects.iq.harvard.edu/cces>.

¹⁹⁴ The CCES was created for the express purpose of studying voter opinion within small geographic units, and by sample size it is the largest regularly conducted survey of American voters. See generally Stephen Ansolabehere & Douglas Rivers, *Cooperative Survey Research*, 16 ANN. REV. POL. SCI. 307 (2013).

¹⁹⁵ Alec White, *Analysis of California's Congressional Districts* (January Edition), *Races and Redistricting Blog*, Jan. 11, 2012, <http://racesandredistricting.blogspot.com/2011/12/analysis-of-californias-congressional.html>.

there would be a fourth option—ecological inference—but for reasons explained earlier we hope to avoid it.¹⁹⁶)

The “original surveys” strategy is expensive and cuts against our goal of making (presumptive) Section 2 liability easy to ascertain,¹⁹⁷ so we will not pursue it further here. The “pooling multiple surveys” strategy holds some promise, but for our purpose requires proprietary data that have not yet been released for public use.¹⁹⁸ So we are left with modeling.

A new model-building strategy, multilevel regression with poststratification, took hold among political scientists in the late 2000s and has become popular as a way to estimate public opinion on political issues within subnational jurisdictions.¹⁹⁹ Respondent opinion is modeled as a function of individual-level demographics, such as age, education, and race; geographic place of residence, such as the respondent’s congressional district; and attributes of the geographic unit, such as region, religiosity, or presidential vote share. The model yields an estimate of opinion for each “demographic type” in each geographic unit. The average or median opinion within each unit can then be approximated by weighting (post-stratifying) the estimated opinion of each demographic type in the unit by Census estimates of the number of persons of

¹⁹⁶ See *supra* notes 53-58 and accompanying text.

¹⁹⁷ The problem is not simply one of cost. If original surveys must be conducted for each case, then potential defendants may not be able to anticipate liability *ex ante* (without conducting surveys themselves), and there are likely to be case-specific disputes about survey methodology, the qualifications of the experts who conducted the survey, etc.

¹⁹⁸ This footnote explains the problem. We need a summary measure of policy agreement/disagreement between racial communities. See *supra* Part II.A.1. The best summary measure at this time is an “ideal point” scaled from policy preferences, as opposed to the respondent’s self-reported ideology or partisanship. See *infra* notes 216-221 and accompanying text. But most national surveys do not include the same policy questions, so ideal points scaled from the policy questions on each survey are not comparable across surveys. Political scientists Chris Tausanovitch and Chris Warshaw recently solved this problem by including “bridging” questions on several CCES modules; this enabled them to create a “superset” of 275,000 respondents with ideal points on the same scale. See Chris Tausanovich & Christopher Warshaw, *Measuring Constituent Policy Preferences in Congress, State Legislatures, and Cities*, 75 J. POL. 330 (2013). After this dataset is released into the public domain, it may be feasible to create reasonably precise estimates of the distribution of racial group opinion within congressional districts, counties, and other small geographic units by disaggregation (after reweighting the data to match local demographics).

¹⁹⁹ ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS (2007); Yair Ghitza & Andrew Gelman, *Deep Interactions with MRP: Election Turnout and Voting Patterns Among Small Electoral Subgroups*, 57 AM J. POL. SCI. 762 (2013); Jeffrey R. Lax & Justin H. Phillips, *How Should We Estimate Public Opinion in the States?*, 53 AM. J. POL. SCI. 107 (2009) (hereinafter, *How Should We Estimate?*); Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367 (2009); Juliana Pacheco, *Using National Surveys to Measure Dynamic U.S. State Public Opinion: A Guideline for Scholars and an Application*, 11 ST. POL. & POL’Y Q. 415 (2011); David K. Park, Andrew Gelman & Joseph Bafumi, *Bayesian Multilevel Estimation with Poststratification: State-Level Estimates from National Polls*, 12 POL. ANALYSIS 375 (2004).

that type in the unit's population. It is easy to create estimates of opinion by racial group as well.²⁰⁰ MRP has been used to estimate public opinion within states,²⁰¹ congressional districts,²⁰² state legislative districts,²⁰³ cities,²⁰⁴ and even local school board districts.²⁰⁵

The Appendix provides a non-technical explanation of how MRP works. For legal applications, understanding how MRP works is less important than appreciating its limits. MRP is an example of what statisticians call parametric or model-based estimation techniques. MRP estimates depend on assumptions about how public opinion is likely to vary with demography and geography, and there is no *a priori* right way to construct a multilevel model of public opinion. One can always build a more complicated model, with more predictor variables and more interactions between predictors. But more elaborate models are not necessarily better! Researchers have shown that more complex MRP models sometimes yield worse estimates of target-population opinion, even though the complicated model does a better job explaining opinion within the pool of survey respondents.²⁰⁶ This phenomenon, called over-fitting, arises because the estimated parameters in the more complex model capture idiosyncratic features of the sample, features that are not representative of the target population. (An important question for future work is whether machine-learning algorithms can be used to build and assess MRP models, automating this process rather than leaving it to the analyst's discretion.²⁰⁷)

The only way to firmly establish the quality of a statistical model is to validate it with out-of-sample predictions.²⁰⁸ MRP models of vote intention in

²⁰⁰ See, e.g., Elmendorf & Spencer, *Preclarance*, *supra* note 126, at 39-43 (using MRP to generate estimates of the proportion of white people within counties who subscribe to negative stereotypes of blacks).

²⁰¹ See, e.g., Ghitza & Gelman, *supra* note 199; Lax & Phillips, *How Should We Estimate?*, *supra* note 199; Pacheco, *supra* note 199. For a user-oriented introduction to the methods, see GELMAN & HILL, *supra* note 199.

²⁰² Warshaw & Rodden, *supra* note 199.

²⁰³ David E. Broockman & Christopher Skovron, What Politicians Believe About Their Constituents: Asymmetric Perceptions and Prospects for Constituency Control (working paper, 2013),

http://www.ocf.berkeley.edu/~broockma/broockman_skovron_asymmetric_misperceptions.pdf; Tausanovitch & Warshaw, *supra* note 198; Warshaw & Rodden, *supra* note 199.

²⁰⁴ Tausanovitch & Warshaw, *supra* note 198.

²⁰⁵ Michael Berkman & Eric Plutzer. *Evolution, Creationism, and the Battle to Control America's Classrooms* (2010).

²⁰⁶ Jeffrey R. Lax & Justin Philips, *How Should We Estimate Sub-National Opinion Using MRP? Preliminary Findings and Recommendation* (paper presented at 2013 annual meeting of the Midwest Political Science Association), <http://www.columbia.edu/~jrl2124/mrp2.pdf>.

²⁰⁷ If model-building is automated, this should allay concerns that the analyst jerry-rigged the model to obtain results favorable to his or her client or political party.

²⁰⁸ Cross-validation using the original sample is another possibility, but there is some basis for thinking that cross-validation may not work very well for MRP models. See Wei Wang

presidential elections have been validated with data on the actual vote shares of the candidates in each geographic unit, and MRP models of public opinion on particular policy questions have been validated with vote-share data from initiative and referendum elections in which similar policy questions are put to a vote.²⁰⁹

It is much trickier to validate MRP models concerning beliefs that are not voted on (such as general political ideology, or racial stereotypes), or opinions within a group whose ballots are not separately tabulated (e.g., whites, Latinos, Asians, and blacks). One option is to assume that the model is reasonably good if it has a good theoretical justification and the same or similar models work well in predicting vote shares in the geographic units. It seems unlikely that a model which does a good job estimating public opinion as a whole would do a bad job estimating within-group opinion, since the errors for each group would have to miraculously cancel out for the overall-opinion measure to be any good.

Relying on such assumptions is not ideal, but it's no more of a stretch than many other conventions of vote dilution litigation. Ecological inference as traditionally practiced relies on heroic assumptions (e.g., that racial-group opinion within the unit of interest is not spatially heterogeneous), elides the question of statistical precision, and uses post-hoc corrections to paper over mathematically impossible results (such as an estimate that 130% of Latino voters supported candidate A over B).²¹⁰ The analyst who uses an MRP model at least begins with individual-level data, and to the extent that she errs, she likely *underestimates* local deviation from typical patterns of opinion of the demographic group in question.²¹¹ This seems to us the appropriate epistemic posture for a federal court implementing a federal statute: assume that people in one part of the country are like people in another, except insofar as the data compel another conclusion.

The best way to validate an MRP model of within-racial-group opinion would be to conduct expensive, gold-standard surveys of public opinion within a randomly sampled subset of the geographic units. If the MRP predictions for

& Andrew Gelman, *Difficulty of Selecting Among Multilevel Models Using Predictive Accuracy* (unpublished manuscript, April 8, 2014), <http://weiwang.name/research/xval.pdf>.

²⁰⁹ To be maximally convincing, however, the validation exercise should be done using data obtained after the fitted model was placed into the public domain, so that third parties can be confident that the validation data is truly “out of sample.” Otherwise one can’t rule out the possibility that the researcher used some of the validation data to inform his model-building choices, essentially reverse engineering the model to fit the validation data. This standard is widely acknowledged in principle but rarely practiced. We are aware of no published work in political science that has validated an MRP model with data that were gathered after the model’s publication.

²¹⁰ See generally Greiner, *supra* note 53.

²¹¹ This is so because when local observations are sparse, the model pools the estimate of local opinion toward the typical opinion of the demographic type/unit type in the entire sample. For a lucid explanation and graphical illustrations, see GELMAN & HILL, *supra* note 199, ch. 12.

each racial group in each unit are close to nonparametric estimates from the validation study, the MRP model can be adjudged “good.”²¹²

Seen from one angle, the challenges of validation represent a serious obstacle to our scheme for implementing Section 2 with presumptions whose application to the case at hand would depend on MRP-generated estimates of racial group opinion. Seen from another, it represents a golden opportunity for the Department of Justice.

We have argued that judicial coordination on datasets and models is key to getting a presumption-driven Section 2 to do the work of Section 5. If the courts agree on datasets and models, litigants (and judges) will be able to figure out quickly and easily which presumptions apply in a given case.

DOJ has the time and resources for gold-standard validation studies that could cost hundreds of thousands of dollars, or more.²¹³ Most private litigants do not. If DOJ is the only player in the game whose MRP model of racial group opinion has been validated with gold standard surveys within a random sample of geographic units, judicial coordination on an MRP model is likely to occur much more quickly than if many actors (or no actors) have validated models. And it goes without saying that the “winning” model—the one on which courts eventually coordinate—is much more likely to be DOJ’s. Some defendants may still try to attack DOJ’s model by showing that its output is sensitive to modeling assumptions, but unless the defendant comes forth with better model that has been validated using demonstrably out-of-sample data,²¹⁴ DOJ’s model is likely to prevail.

B. An Illustrative Model, and Maps

To illustrate where a presumption-driven Section 2 would probably have the most bite, this section reports our provisional results on the geography of racial polarization in political preferences and racial stereotyping at the county level. The details of the model and replication code are available in the online

²¹² Short of this, one could make some headway on validation by estimating an attribute or behavior relevant to political opinion for which the true distribution within racial groups and geographic units is known. The development of proprietary “big data” about voter registration and party preference by race presents one such opportunity. Cf. Stephen Ansolabehere & Eitan Hersh, *Validation: What Big Data Reveal About Survey Misreporting and the Real Electorate*, 20 POL. ANALYSIS 437 (2012) (cross-referencing CSES self-reports of voter registration against proprietary information in Catalist database).

²¹³ UCLA political scientist Lynn Vavrek is in the process of developing new “gold standard” methods for obtaining representative samples of electorate opinion. She pays respondents a lot of money; she offers part of the compensation as a gift; and she is transparent about the purpose of the survey.

²¹⁴ By “demonstrably out of sample,” we mean data collected after the fitted model was published. (This assumes that DOJ’s model passed an out-of-sample validation.)

appendix,²¹⁵ which also shows that our results are robust to alternative model specifications.

As the measure of political preference, we use ideal points scaled from respondents' answers to binary policy questions on the 2010 Cooperative Congressional Election Survey.²¹⁶ These ideal points are summary measures of liberalism or conservativeness as revealed by stated policy preferences. Ideal points calculated in this way have become standard fare in political science research on voter behavior,²¹⁷ and they explain much more of the variation in vote choice than does self-reported ideology.²¹⁸ Ideal points scaled from policy positions are particularly valuable for comparing the political preferences of racial groups, because there is considerable between-group variation in how respondents characterize their own ideology on the liberal-to-conservative spectrum,²¹⁹ and in their willingness or ability or to express a party

²¹⁵ See www.dougspencer.org/research.html.

²¹⁶ Respondents answered 22 policy questions. We convert their answers into 38 actual or implied positions on binary choices. We generate ideal points using the “ideal()” function of the “pscl” package in R. See Simon Jackman (2012). *pscl: Classes and Methods for R Developed in the Political Science Computational Laboratory, Stanford University*. Department of Political Science, Stanford University. Stanford, California. For more information see our online appendices and replication code at <http://www.dougspencer.org/research.html>.

Recall from Part II.A.1 that there are other plausible ways of measuring political preferences. The results reported here are just illustrative.

²¹⁷ See, e.g., Joseph Bafumi & Michael C. Herron, Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress, 104 *AM. POL. SCI. REV.* 519 (2010); Cheryl Boudreau, Christopher S. Elmendorf & Scott A. MacKenzie, Lost in Space? Shortcuts and Spatial Voting in Low-Information Elections (unpublished manuscript, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232371; Stephan A. Jessee, *Partisan Bias, Political Information and Spatial Voting in the 2008 Presidential Election*, 72 *J. POL. SCI.* 327 (2010); Stephen A. Jessee, *Spatial Voting in the 2004 Presidential Election*, 103 *AM. POL. SCI. REV.* 59 (2009); Christopher Hare & Keith T. Poole, Using Optimal Classification to Analyze Public Opinion Data (unpublished manuscript, Mar. 16, 2012), http://chare.myweb.uga.edu/MPSA_OptimalClassificationPublicOpinionData.pdf; Thad Kousser, Justin Phillips & Boris Shor, Reform and Representation: Assessing California's Top-Two Primary and Redistricting Commission (working paper, Aug. 27, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2260083; Boris Shor & Jon Rogowski, Proximity Voting in Congressional Elections (working paper, May 8, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643518; Boris Shor, All Together Now: Putting Congress, State Legislatures, and Individuals in a Common Ideological Space to Assess Representation at the Macro and Micro Levels (Apr. 25, 2011) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697352; Tausanovitch & Warshaw, *supra* note 198.

²¹⁸ Shor & Rogowski, *supra* note 217, at 14 tbl. 2.

²¹⁹ See Marisa A. Abrajano, Reexamining the “Racial Gap” in Political Knowledge (2013) (unpublished manuscript, on file with authors) (showing that many Hispanic-American survey respondents interpret the word “liberal” to mean “conservative,” reflecting the different use of the term “liberal” in their country of origin or ancestry). In the on-line appendix to this article, we demonstrate that the “racial gap” in the correlation between respondent ideology and preferences in congressional and presidential elections is smaller when ideology is measured

identification.²²⁰ The scaled-ideal-point measure of political preferences is imperfect,²²¹ but it beats self-reported ideology and party identification.

To measure ideological similarity within and between racial groups, we use the average ideological distance (absolute value) between pairs of citizens of the group or groups in question, divided by the average ideological distance between pairs of citizens chosen at random from the entire population.²²² A score greater than one indicates polarization, as it signifies that the typical distance between citizens of the group(s) in question is greater than the typical distance between pairs of citizens in the population as a whole. Conversely, a score less than one indicates cohesion, i.e., greater similarity within the numerator group(s) than in the full population.²²³

For VRA purposes, one very nice feature of this approach is that it can be used to answer (presumptively) all of the political-preference questions at the *Gingles* stage of a vote dilution case. “Minority political cohesion” is assessed by sampling same-race pairs of voters for the numerator; “polarization” is assessed by sampling different-race pairs. Coalitional claims brought jointly by two or more racial groups (which have vexed the courts) present no special

using IDEAL than when ideology is measured using self-reports on the 7-point scale. See <http://www.dougspencer.org/research.html>.

²²⁰ See Zoltan L. Hajnal & Taeku Lee, *Why Americans Don’t Join the Party: Race, Immigration, and the Failure (of Political Parties) to Engage the Electorate* (2010) (showing with several data sources that Asian Americans and Hispanic American survey respondents are much less willing to express a party identification than white and African American respondents).

²²¹ It is imperfect (1) because it does not account for the importance that respondents attach to different issues; (2) because some of the variation in scaled ideal points probably reflects differences in political knowledge rather than differences in latent ideology (low-knowledge respondents may make more “errors” in stating their policy positions, see Thomas R. Palfrey & Keith T. Poole, *The Relationship Between Information, Ideology, and Voting Behavior*, 31 AM. J. POL. SCI. 511 (1987)); (3) because respondents who have ideal points “in the middle” may not agree with one another very much, see Broockman, *supra* note 94); (4) because ideal points scaled with a parametric model (as is conventional, and as we do here) may be sensitive to the set of policy questions used in the analysis, and to functional-form assumptions about voters’ utility functions, see Hare & Poole, *supra* note 217; (5) because ideal points scaled from national political issues may not capture preferences over local politics, and as such may be poorly suited to VRA claims concerning school district or city council elections, etc., see David Schleicher, *Why is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J. L. & POL. 419, 433-44 (2007) (arguing that this is likely); Boudreau et al., *supra* note 217 (showing relatively weak correlation between voters’ national party identification and their ideal points in issue space of San Francisco politics); and (6) because ideal points do not capture variation in political preferences that arise from and reflect distributional politics. (Thanks to David Schleicher for pointing out this final limitation.)

²²² In mathematical notation: $\frac{\text{ave}|x_{Ai}-x_{Bj}|}{\text{ave}|x_k-x_l|} \forall i \in A, j \in B \text{ and } k, l \in \mathcal{P}, k \neq l$. In this formula *ave* is the average (mean) operator, *x* is an ideal point, *A* and *B* index racial groups in a geographic unit, and \mathcal{P} is the entire population. When measuring within group cohesion, $A \equiv B$ and $i \neq j$.

²²³ Because ideal points establish relative but not absolute distances between voters, it is necessary to standardize the “similarity” measure in some way (such as by dividing by the standard deviation of the distance between randomly sampled pairs of voters in the entire national population).

difficulty.²²⁴ Two racial groups are presumptively jointly cohesive if the typical distance between randomly selected pairs of voters from the two groups falls below whatever threshold the courts may establish for “political cohesion” in ordinary, non-coalitional cases.

A key conceptual question is how to define “the entire population” for purposes of calculating the denominator of our cohesion/polarization measure. Should the similarity/dissimilarity of political preferences in the numerator groups be measured relative to typical similarity within the population that elects the legislative body at issue in the case, or relative to the entire national population? We think the former approach probably makes more sense. If the citizens of a county, say, divide politically on racial lines alone, the minority community is likely to have a very hard time electing the county commissioners it prefers even if the typical ideological distance between minority and majority-race voters in the county is smaller than the typical distance between voters in the national population.²²⁵ But for present purposes, it is enough to provide a simple, easily interpreted picture of geographic variation in racial polarization throughout the nation, so we will use the “national population” denominator.

One other complication needs to be mentioned. Our model estimates the *mean* ideal point for “types” of voters defined by the poststratification cells (race, age, sex, education, and geographic unit). It does not give us the full distribution of ideal points within small geographic units, which can be obtained only by conducting large surveys within each unit. However, by sampling pairs of voters from the poststratification cells, and imputing to them the mean ideal point estimated for the cell, we can still generate a picture of the *relative* distance within and between voters of different groups.²²⁶ This will tend to understate the actual diversity of opinion within the population (because we’re sampling from subgroup means, rather than individuals), but so long as we use mean ideal points from the poststratification cells in the denominator too, we will obtain a picture of whether between-racial-group differences are larger or smaller than differences across the full set of demographic cleavages in the MRP model (age, sex, race, education, and geography).²²⁷

²²⁴ As the United States becomes more racially diverse and residentially integrated, coalitional claims will become increasingly important for minority representation, because few racial communities will be able to satisfy the “majority-minority” requirement of *Gingles* (as glossed by *Bartlett v. Strickland*) on their own.

²²⁵ This assumes that voters figure out the ideological positions of candidates in the county commissioner elections, and that citizens’ ideological positions in national and local politics are highly correlated. Both assumptions are questionable. See Schleicher, *supra* note 221; Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2012 U. ILL. L. REV. 363 (2012).

²²⁶ In this exercise, the probability of choosing a voter in a given cell equals the relative frequency of voters in that cell.

²²⁷ In future work, we will pursue another strategy which may better recover the diversity of public opinion: model the ideological *distance* between pairs of voters of different types, rather

To estimate the mean ideal point of each voter type, we first subset voters by race, and fit separate models for each racial group. This allows coefficients on the predictor variables to vary across racial groups, without any “pooling” of information between groups. Put differently, we do not try to model potential commonalities across racial groups (e.g., by positing that the correlation between income and ideology is similar for each racial group), and we do not use ideal points of persons of race A to predict ideal points for persons of race B. Our county-level models include age and sex as individual-level predictors, and state as an aggregate predictor. We also include two county-level attributes: the minority percentage of the county’s population,²²⁸ and the county’s slave population in 1860.²²⁹

Figure 1 maps our results on ideological polarization between white and minority citizens at the county level. It shows that the ideological gap between white and black citizens in most counties is vastly greater than the gap between whites and Asians, and whites and Latinos. The white-black gap is most pronounced in the South, where the typical distance between whites and blacks is often twice as large as the typical distance between voting-age Americans as a whole. There is also significant white-Asian and white-Latino polarization in Texas and in a scattering of counties elsewhere, mostly by not entirely in the South.

than the mean ideal point of each voter type. Still another possibility is to sample from the residuals of an estimated model of mean opinion and use bootstrap methods to estimate between-group opinion.

²²⁸ This is motivated by the “racial threat hypothesis,” which posits that members of the majority group subscribe to worse views of the minority where the minority threatens the privilege or advantages of the majority. See *infra* note 261 and accompanying text.

²²⁹ This is motivated by a recent paper showing that white racial attitudes and ideology vary with county-level slave populations in 1860. See Avidit Acharya, Matthew Blackwell & Maya Sen, *The Political Legacy of American Slavery* (working paper, Dec. 30, 2013, <http://scholar.harvard.edu/files/msen/files/slavery.pdf>).

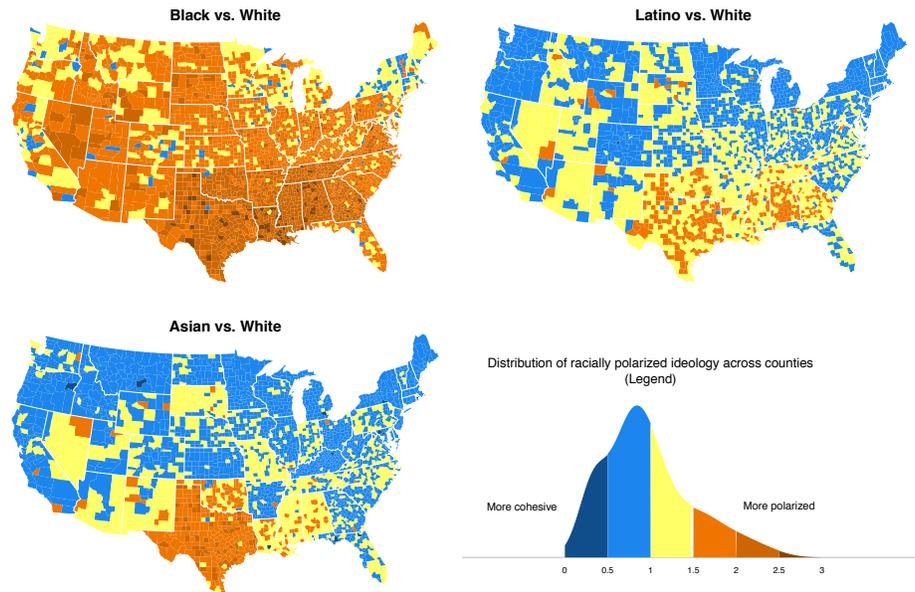


Figure 1. County-level estimates of the divergence between the average white voting-age citizen’s ideal point, and the average ideal points of black, Latino, and Asian-American voting age citizens, respectively. *Data: 2010 Cooperative Congressional Election Study (N=47,234).*

A presumption-driven Section 2 could utilize the results in Figure 1 in a couple of different ways. First, insofar as courts interpret *Gingles* to require a minimum level of racial polarization in political preferences,²³⁰ the threshold could be set, presumptively, in terms of the typical ideological distance between minority- and majority-race voters in the defendant jurisdiction.²³¹ The results in Figure 1 also speak to elites’ political incentives to discriminate on the basis of race, and thus to the Section 2 “causation” question. As we explained in Part II, a “political incentives” presumption about causation could be enriched with several other pieces of data, including the size of the minority population and the competitiveness of elections in the defendant jurisdiction.²³² But ideological distance ought to be a central consideration, in light of recent work showing that voter ideal points strongly predict the voter’s reliability as a

²³⁰ See *supra* Part II.A.1.

²³¹ Because ideal points can be rescaled so that the distance between any two citizens is arbitrarily large or small, it is necessary to standardize the measure, e.g., by dividing by the typical distance between all voting-age citizens (as we do here).

²³² One might consider too the degree of overlap in racial group ideal points, not just the distance between mean ideal points.

source of Republican or Democratic votes.²³³ Given the reluctance of some ethnic minorities to express a partisan identity,²³⁴ it makes more sense to ground a political-incentives presumption on polarization in ideal points rather than polarization in self-reported partisanship.

In Figure 2, we use the same ideal point data and MRP models to illustrate similarities between minority groups.²³⁵ Figure 2 drives home that coalitional claims brought by two or more minority groups can be analyzed in essentially the same way as claims brought by a single racial group. The courts, aided by DOJ, just need to set a quantitative threshold for what constitutes “substantial similarity” using the measure of cohesion/polarization. A cutoff of 0.5, for example, would require voters of each minority group to be twice as close to one other, on average, as voters in the full population. Minority groups who fall on the “similar” side of the threshold would be deemed presumptively jointly cohesive.²³⁶

The main takeaway from Figure 2 is that the two fastest growing racial groups in the United States, Asian Americans and Latinos, are ideologically very similar. In almost every county, the distance between Asian American and Latino voters is less than half the typical distance between voting age Americans as a whole. To date, however, Asian-Latino coalitional claims under Section 2 have been rare—and rarely successful.²³⁷ If our presumption-based approach to Section 2 were adopted, many of these claims might become winners.²³⁸

²³³ See Chris Tausanovich & Chris Warshaw, *Electoral Accountability and Representation in the U.S. House: 2004-2012*, paper presented at UC Berkeley Research Workshop on American Politics (Oct. 2013).

²³⁴ See HAJNAL & LEE, *supra* note 220.

²³⁵ In the on-line Appendix, we replicate the method of Figures 1 and 2 to map the geography of within-group political cohesion. The results are not particularly interesting: within counties, the estimated typical distance between voters of a given racial group is uniformly less than ½ of the typical distance between voting-age Americans as a whole.

²³⁶ Those on the far side could not bring a coalitional claim, unless they introduce new survey or voting data to overcome the presumption of non-cohesiveness.

²³⁷ See Chen & Lee, *supra* note 22.

²³⁸ At least if the causation requirement can be satisfied. Given space limitations, we cannot here address the question of how the causation requirement should be understood in coalitional cases.

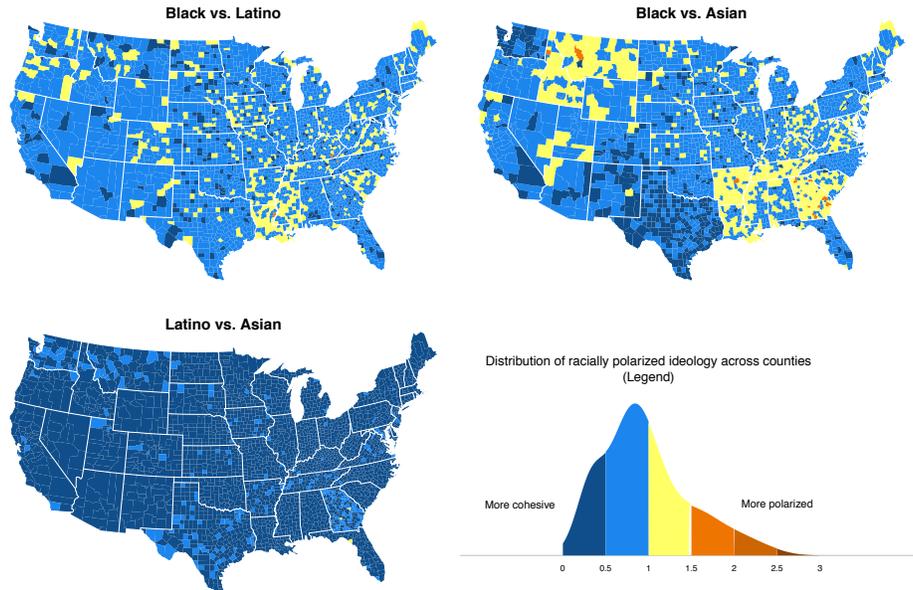


Figure 2. Difference in ideal points between minority groups. *Data: 2010 Cooperative Congressional Election Study (N=47,234).*

The map in Figure 3 summarizes racial stereotyping against blacks, Latinos, and Asians at the county level. As our measure of aggregate stereotyping against a racial group, we use the average stereotype toward the group by members of other groups in the county, normalized by the average anti-minority stereotype of all voting-age Americans.²³⁹ Like extreme polarization in ideal points, our results on the geography of racial stereotyping can be used to establish presumptions for the race-discriminatory causation question in Section 2 cases.²⁴⁰

There are striking geographic patterns to the stereotyping of blacks, Asian Americans and Latinos. Non-blacks in the former Confederacy harbor the most negative stereotypes about blacks. Anti-Latino stereotyping is strongest in

²³⁹ Formally, county-level stereotyping against group M is: $\frac{ave(S_{ik}^M)}{ave(S_j)}$ | $i \in K, i \notin M, j \in \mathcal{P}$, where S is an individual's stereotype, i and j index voting-age citizens, K is the geographic unit of interest, M is the racial group being stereotyped, and \mathcal{P} is the national population of voting-age citizens. In turn, $S_i^M = \sum_j R_{ij}^M - R_{ij}^O$, where R_{ij}^M is respondent i 's rating of minority group M on attribute j (e.g., intelligence), and R_{ij}^O is the respondent's rating of his or her own racial group on the same attribute. When computing $ave(S_j)$ | $j \in \mathcal{P}$, we take the average over persons rather than over stereotypes. (Because whites in our dataset have stereotype scores for 3 racial groups, whereas minorities have stereotype scores for only two groups (the other minority groups), taking the average over stereotypes rather than over persons would overweight the views of whites.)

²⁴⁰ See *supra* Part II.B.2.

Texas and Pennsylvania, as well in the Upper South states of Arkansas, Tennessee, and North Carolina. Anti-Asian stereotypes are most negative across counties in the Midwest, as well as in Pennsylvania and West Virginia. (For an extensive treatment of the stereotyping data, and of the relationship between anti-minority stereotyping and the respondent's candidate and policy preferences, we refer the reader to our companion article on preclearance after *Shelby County*.²⁴¹)

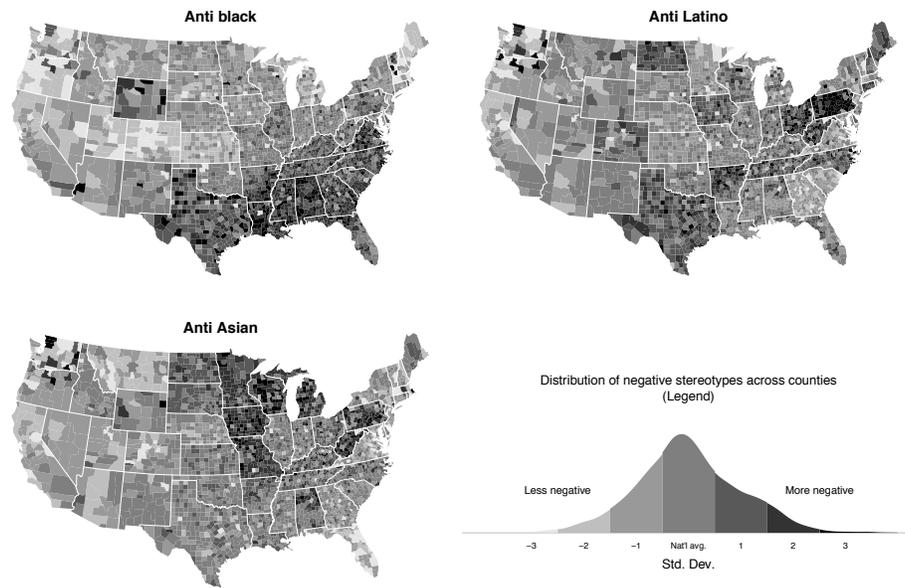


Figure 3. County-level differences in average stereotype against members of a racial group by persons of all other racial groups. For details of the metric, see note 239, *supra*. Data: 2010 Cooperative Campaign Analysis Project Survey ($N=19,187$).

Read together, Figures 1, 2, and 3 contain important lessons about what might emerge as the de facto “coverage formula” of a presumption-driven Section 2, i.e., the geographic regions in which the presumptions would operate to shift core evidentiary burdens under Section 2 to the defendant. For

²⁴¹ Elmendorf & Spencer, *Preclearance*, *supra* note 16. Note that the results on racial stereotyping at the county-level reported in the present paper are *average* stereotypes (averaged across all voting-age residents who are not members of the minority in question). In *Preclearance*, *supra* note 126, we show that the correlation between racial stereotypes and political preferences is nonlinear, and because of this we argue that it makes more sense to characterize “aggregate prejudice” within a geographic unit using the *proportion* of citizens who have substantially negative views of the minority, rather than the *average* stereotype against the minority. In a future draft of this paper, we will report the proportion of county-level residents who are estimated to have substantially negative views of the minority.

purposes of claims brought by African Americans, the presumptions' coverage would be substantially similar to Section 5's coverage pre-*Shelby County*. Black-white ideological polarization and negative stereotyping of blacks are both concentrated in the Deep South. For claims brought by Latinos and Asians, the picture is more complicated because negative stereotyping and ideological polarization with respect to these groups apparently do not go hand in hand. Asians face the worst stereotypes in the upper Midwest, but are most polarized (vis-à-vis whites) in Texas. Anti-Latino stereotyping and ideological polarization both occur in Texas and to some extent in the Upper South, but are not geographically concordant elsewhere. So even though Asians and Latinos represent good "coalitional partners" under Section 2 by dint of their ideological similarity, they may have difficulty satisfying the race-discriminatory causation element of a Section 2 claim.²⁴²

C. Next Steps

Our results speak to the feasibility of implementing Section 2 with rebuttable presumptions whose application in a given case would be determined using national survey data and MRP, but they don't establish the optimality of any particular presumption, measure of preferences, or predictive model. There is a good deal of research still to be done on these questions, and we'll close this Part by enumerating what we take to be the most important empirical projects for better grounding and targeting a presumption-driven Section 2:

- Develop other plausible measures of racial-group political preferences, and assess the sensitivity of geography-of-polarization/cohesion results to the choice of measure.²⁴³
- Investigate whether racial-group political preferences can be well represented with a single summary measure that is independent of the governmental body at issue, or whether different classes of governments (e.g., school boards, city councils, state legislatures, Congress) require different measures.²⁴⁴

²⁴² Even if the courts accept "political incentives" arguments at the causation stage of Section 2 cases, our results indicate that white-Latino and white-Asian ideological polarization (and hence political incentives to discriminate) rarely reaches the levels of white-black ideological polarization. See Fig. 1, *supra*.

²⁴³ We touch briefly on several alternative measures in Part II.A.1, *supra*. Regarding the strengths and limitations of the ideal point measure used in this paper, see *supra* notes 217-221 and accompanying text.

²⁴⁴ See *supra* note 221.

Investigate sensitivity of geography-of-polarization results to alternative specifications of the MRP model,²⁴⁵ and explore machine-learning algorithms for “impartial” model specification.²⁴⁶

- Replicate geography-of-discrimination results using alternative measures of racial attitudes.²⁴⁷
- Use MRP or other techniques to estimate the frequency of registered voters and likely voters within the poststratification cells of an MRP model of racial group opinion. (This would make it possible to ground Section 2 presumptions in the distribution of opinion among registered or likely voters, as opposed to the citizen voting-age population.²⁴⁸)
- As a check on MRP results, estimate ideological polarization among relatively large racial groups in populous geographic units by disaggregation and reweighting (rather than MRP).²⁴⁹
- If resources are available, validate MRP models with large-N surveys in a randomly selected subset of jurisdiction,²⁵⁰ or (second best) with studies of a politically relevant behavior or attitude with respect to

²⁴⁵ Cf. note 227, *supra* (discussing alternative approach to estimating ideological polarization within small geographic units).

²⁴⁶ Machine-learning methods can make model specification less dependent on the analyst’s judgment calls. See generally BERTRAND CLARKE, ERNEST FOKOUE & HAO HELEN ZHANG, *PRINCIPLES AND THEORY FOR DATA MINING AND MACHINE LEARNING* (2009). As such, they can help to allay concerns that a particular model was chosen because the analyst “liked” its results.

²⁴⁷ It would be particularly helpful to have a behavioral measure of disparate treatment or differential sympathy, one which is less vulnerable to social-desirability biases than the explicit stereotyping measure used here, and which tracks the equal protection norms against disparate treatment. For an explanation of why we rely on explicit stereotyping measures for the time being, see Elmendorf & Spencer, *Preclearance*, *supra* note 16, at 17-33. Historical and cultural studies also suggest that Asian Americans are stereotyped differently than blacks and Latinos. Specifically, Asians are often represented as “perpetual foreigners” and “model minorities.” See GARY OKIHIRO, *MARGINS AND MAINSTREAMS* (1994), ch. 5; Claire Kim, *The Racial Triangulation of Asian Americans*, 27 *POL. & SOC.* 105 (1999). We are grateful to Fred Lee for directing us to this literature. Future studies should assess the sensitivity of our geography-of-discrimination results to these alternative measures of attitudes towards Asians.

²⁴⁸ Poststratification by the population of registered or likely voters requires this prior modeling exercise because the Census Bureau asks only a small sample of Americans about voting and registration. The Voting and Registration Supplement is included in the November Current Population Survey, a monthly survey of approximately 50,000 households. See <http://www.census.gov/hhes/www/socdemo/voting/>.

²⁴⁹ The survey weights in existing large-N national datasets such as the CCES are designed to achieve balance vis-à-vis national populations. Different weights may be necessary to achieve balance vis-à-vis sub-national populations. See Ansolabehere & Rivers, *supra* note 194, at 325 (noting that this is an important open question).

²⁵⁰ See *supra* Part IV.A.

which the joint distribution of race and the behavior/attitude in the population can be treated as known.²⁵¹

- Develop protocols for converting MRP-generated presumptions into informative priors for use with Bayesian ecological inference models.²⁵²
- Develop models to estimate minority opportunity in non-majority-minority districts, so that presumptions about which districts are minority opportunity districts can be refined.²⁵³

While these research projects could greatly strengthen a presumption-driven Section 2, they are not essential to get a presumption-driven Section 2 up and running. Vote-dilution cases have long been litigated using somewhat shaky methods of ecological inference, and the courts have muddled through. The implementation of a presumption-driven Section 2 can proceed similarly. And if DOJ takes the lead in developing the presumptions and models, there is good reason to think that ongoing methodological progress will be reflected in judicial decisions, much more so than has been the case to date.²⁵⁴

V. CONCLUSION

Numerous commentators in the wake of *Shelby County* offered proposals for putting Section 5 back to work with new coverage formulas or “bail in” remedies.²⁵⁵ This paper suggests another tack: establish evidentiary presumptions under Section 2 that shift the burden of proof to defendants in

²⁵¹ See *supra* note 212.

²⁵² This is one way to structure litigants’ attempts to overcome the presumptions. Bayesian methods have been used in most recent work by leading political methodologists on ecological inference. See, e.g., Glynn & Wakefield, *supra* note 56; Greiner & Quinn, *RxC Ecological Inference*, *supra* note 164; Ori Rosen et al., *Bayesian and Frequentist Inference for Ecological Inference: The R×C Case*, 55 STATISTICA NEERLANDICA 134 (2001). But we are aware of no work to date on the establishment of informative priors for use in Bayesian EI models.

²⁵³ Cf. Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1240-41 (1999) (estimating white crossover voting for black candidates in congressional races); Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383 (2001) (same).

²⁵⁴ Cf. Part III.B, *supra* (discussing slow judicial adoption of improved methods for ecological inference).

²⁵⁵ See, e.g., Elmendorf & Spencer, *Preclearance*, *supra* note 16; Bernard Grofman, *Devising a Sensible Trigger for Section 5 of the Voting Rights Act*, 12 ELECTION L.J. 332 (2013); Morgan Kousser, *Gutting the Landmark Civil Rights Legislation*, post to Reuters.com symposium on the Voting Rights Act, June 26, 2013, <http://blogs.reuters.com/great-debate/2013/06/26/gutting-the-landmark-civil-rights-legislation/>; Overton, *supra* note 64; Richard Pildes, *One Easy, But Powerful, Way to Amend the VRA*, post to Election Law Blog, June 28, 2013, <http://electionlawblog.org/?p=52349>.

political jurisdictions where the risk of unconstitutional race discrimination with respect to voting is elevated. Where our presumptions apply, Section 2 would function much like Section 5: it would be fairly easy to block potentially discriminatory electoral reforms before they take effect, and lawmakers would have correspondingly strong incentives to gather information about the likely effects of reforms on racial minorities and mitigate adverse impacts.

Our empirical results suggest that a presumption-driven Section 2 would “cover” most of the Deep South for purposes of claims brought by African Americans, much like Section 5 prior to *Shelby County*. But the picture is more complicated for Asian Americans and Latinos. These groups, while jointly politically cohesive, are generally less ideologically polarized vis-à-vis whites than are African Americans, and the areas of greatest white-Asian and white-Latino polarization are not (consistently) the areas with the most negative stereotyping of Asians and Latinos.

The principal impediment to realizing our vision for Section 2 is the difficulty of inducing judicial coordination on what the evidentiary presumptions are and how they may be established in a given case. Congress could solve this problem by authorizing DOJ to issue substantive rules under Section 2. Yet even without a grant of rulemaking authority, DOJ may be able to induce judicial coordination by issuing guidance documents, which would be owed *Skidmore* deference, and by sponsoring model-validation studies. And if DOJ stays on the sidelines or is rebuffed by the courts, case by case litigation using national survey data has potential to gradually reform the law of Section 2, in ways that reduce the cost and increase the predictability of voting rights enforcement.

APPENDIX: AN INTUITIVE EXPLANATION OF MULTILEVEL REGRESSION WITH POSTSTRATIFICATION

Imagine that we want to estimate stereotyping of blacks by white people in the city of Boston and in the state of Massachusetts.²⁵⁶ Assume we have data from nationally representative survey of 2,000 white citizens. Because Boston comprises about 0.2% of the national population and Massachusetts about 2.1%, our sample will on average include only about four Bostonians and forty-two respondents from Massachusetts.

With sample sizes of just a handful or even a few dozen respondents, random selection will quite often yield survey samples that are considerably more or less prejudiced than the actual population of white Bostonians, or Massachusettians.²⁵⁷ Perhaps the four Bostonians who took the survey are young, highly educated women, who (let us assume) tend to be much less prejudiced than older, less affluent men. If so, the average level of prejudice in the survey sample of Bostonians is likely to badly understate average prejudice in the population, at least if there are a lot of old, poorly educated men in Boston.

MRP improves on disaggregation by using demographic and geographic identifiers to make inferences about people in one geographic unit based on survey responses from similarly situated persons elsewhere. From publicly available census data, we have a pretty good handle on how many Bostonians are young, highly educated women, and how many are old, poorly educated men.²⁵⁸ To the extent that age, education, and sex predict racial attitudes—or ideology, or anything else we care about—we could use what we learn from the 2000-person national survey about old, poorly educated men (and other demographic types) elsewhere in the country to estimate Bostonians' opinions, weighting the estimates by what the census tells us is the frequency of each demographic combination in Boston.

To be sure, the racial attitudes of white people in Boston or Massachusetts may diverge from those of their demographic doppelgangers elsewhere. If so, imputing to Bostonians the national average attitude of their respective demographic types could generate estimates of citywide opinion that are badly off base. MRP accounts for this. The most straightforward solution is to allow

²⁵⁶ We like this example because many readers have strong intuitions about how whites' racial attitudes probably vary with demography and geography.

²⁵⁷ Technically, the standard deviation of a sample mean or proportion is inversely related to the square root of the sample size.

²⁵⁸ For example, 17% of all Bostonians are under 18 years old and 10% are older than 65. The city is 54% White and 25% Black and 36% speak a language other than English in the home. The median household income is \$52,000 with 21% living below the poverty line. 79% of the city voted for Obama in 2008 and in 2012. *Sources: Census FactFinder for demographic information and Boston.com for election returns by Massachusetts city.*

the “intercept” term in the model explaining respondent prejudice as a function of the respondent’s personal demographic traits to vary with geography.

In effect this results in an upward or downward adjustment for the estimated racial attitudes of white Bostonians (or Massachusettians), based on whether the survey respondents in Boston (or Massachusetts) on average are more or less prejudiced than their demographic counterparts elsewhere. The size of the adjustment is proportional to the amount of information in the sample about people from the geographic unit. If lots of Bostonians answered the survey, we would have more confidence that any difference between their answers and those of their demographic counterparts elsewhere reflects actual differences between the underlying populations. The statistical model would make a corresponding large adjustment. But if few Bostonians were surveyed, the adjustment would be small.²⁵⁹

Now, one might think that with 4 or even 42 respondents from a geographic unit, one wouldn’t be able to infer very much about geographic variation in racial attitudes. But just as we can “borrow” information from old white men who live elsewhere to improve our estimates of the attitudes of Bostonians, so too can we borrow information from other geographic units to better understand how the attitudes of people in Boston are likely to *differ* from the attitudes of demographically similar people elsewhere.

We can, for example, model the intercept term for small geographic units as a function of some larger unit in which it is nested (e.g., Boston as a function of Massachusetts, or the Northeast Region). The larger unit of course includes more survey respondents. This modeling decision allows evidence of deviations between (1) the racial attitudes of particular demographic types within the mid-sized geographic unit (e.g., the Northeast) and (2) the attitudes of the same demographic types in the national sample, to serve (3) as evidence of the difference between people in the small unit (e.g., Boston) and citizens across the nation.

Another option is to model the intercept for geographic units as a function of unit-level characteristics that theory suggests are correlated with individual attitudes.²⁶⁰ To illustrate, the “racial threat hypothesis” posits that whites who live near large black populations will feel more threatened by blacks than other whites, and that this sense of threat will manifest itself in negative racial

²⁵⁹ For details on the adjustment process, see GELMAN & HILL, *supra* note 199, at 252-54 (2007), especially equation (12.1).

²⁶⁰ Still another possibility is to build in interactions between individual-level predictors and attributes of the geographic unit. For example, the correlation between residential integration and nonblacks’ stereotypes of blacks may vary depending on the nonblack respondent’s income. See Wendy K. Tam Cho & Neil Baer, *Environmental Determinants of Racial Attitudes Redux: The Critical Decisions Related to Operationalizing Context*, 39 AM. POL. RES. 414 (2011). For an introduction to varying slope, varying intercept models, see GELMAN & HILL, *supra* note 199, at 251-76.

stereotypes.²⁶¹ If the racial threat hypothesis is correct, then black population size in the geographic unit should be negatively correlated with whites' stereotypes, holding constant the demographic attributes of the white population. Conditional on black population size, it might also be the case that racial attitudes correlate with the degree of residential integration—either because racially tolerant people are drawn to integrated neighborhoods, or because quotidian interracial contact increases tolerance. This possibility can be accommodated by modeling the intercept term as a function of the level of residential integration in the geographic unit.

Historical factors can also be modeled. Avidit Acharya, Matthew Blackwell, and Maya Sen discovered that the conservatism and racial tolerance of Southern whites today is correlated with the slave population of their county in 1860.²⁶² In light of this finding, we include percent-slave-in-1860 as a covariate in our county-level models.²⁶³ (This is entirely consistent with the *Shelby County* view that remedies for voting discrimination ought to be grounded in current conditions; our model weights history only insofar as it actually predicts public opinion today.)

Once region and unit-level characteristics such as black population size or 1860s slaveholdings have been incorporated into the model, intercepts can be estimated for small geographic units even if there are few or no respondents in

²⁶¹ V.O. KEY, *SOUTHERN POLITICS IN STATE AND NATION* (1949); Lawrence Bobo & Vincent L. Hutchings, *Perceptions of Racial Group Competition: Extending Blumer's Theory of Group Position to a Multiracial Social Context*, 61 *AM. SOC. REV.* 951 (1996); Claudine Gay, *Seeing Difference: The Effect of Economic Disparity on Black Attitudes Toward Latinos*, 50 *AM. J. POL. SCI.* 982 (2006); Zolton Hanjal, Marisa Abrajano & Nicholas Warner, *Immigration and the Political Transformation of Whites: How Local Immigrant Context Shapes White Policy Views and Partisanship* (working paper, 2009). The racial threat hypothesis has been used to explain geographic variation in white support for policies ranging from affirmative action (see David Austin-Smith & Michael Wallerstein, *Redistribution and Affirmative Action*, 90 *J. PUB. ECON.* 1789 (2006); Caroline J. Tolbert & John A. Grummel, *Revisiting the Racial Threat Hypothesis: White Voter Support for California's Proposition 209*, 3 *ST. POL. & POL'Y Q.* 183 (2003); but see Andrea Louise Campbell, Cara Wong & Jack Citrin, "Racial Threat", *Partisan Climate, and Direct Democracy: Contextual Effects in Three California Initiatives*, 28 *POLIT. BEHV.* 129 (2006)); to redistribution (see, e.g., ALBERTO ALESINO & EDWARD GLAESER, *FIGHTING POVERTY IN THE UNITED STATES AND EUROPE: A WORLD OF DIFFERENCE* (2004); Austin-Smith & Wallerstein, *supra*; and Hersh & Nall, *supra* note 84; to support for harsh criminal laws and sanctions (see, e.g., David Jacobs, Jason T. Carmichael & Stephanie L. Kent, *Vigilantism, Current Racial Threat, and Death Sentences*, 70 *AM. SOC. REV.* 656 (2005)).

²⁶² Acharya et al., *The Political Legacy of American Slavery* (working paper, Dec. 30, 2013, <http://scholar.harvard.edu/files/msen/files/slavery.pdf>).

²⁶³ We gratefully acknowledge Heather O'Connell, who created the slavery-in-1860 dataset and shared it with us. The original publication based on this data is Heather A. O'Connell, *The Legacy of Slavery and Racial Inequality in Poverty in the Contemporary South*, 90 *SOC. FORCES* 713 (2012). We note that the coefficient for percent slave in our models of ideology predicts more conservative opinions among both whites and blacks (p-values of 0.07 and 0.05 respectively), but that there is no statistically significant correlation between percent slave and ideology among Latinos or Asians.

a given unit. Intercept estimates will continue to reflect idiosyncratic information about respondents from particular units—for example, the difference between the racial attitudes of Bostonians in the sample and the racial attitudes that the model predicts for them based on their demographics and geographic unit. The weight attached to idiosyncratic information is proportional to the number of respondents from the unit.²⁶⁴

The final step in the MRP modeling process, called poststratification, weights the estimated opinion of each demographic type (e.g., white men over the age of 65 with a high-school education or less) within a unit by the type's share of the unit's adult population (e.g., the proportion of adult Bostonians comprised of over-65 white men who did not attend college). This yields an approximation of the empirical distribution of opinion within the unit.

As we emphasized earlier, there is no *a priori* right way to construct a multi-level model of public opinion. One can always build a more complicated model. Consider again the (potential) relationship between racial attitudes and residential integration. As noted above, the analyst could account for this by adding a measure of integration to the model for the intercept term. But what if the correlation between attitudes and residential integration runs in opposite directions for highly educated and poorly educated whites? Highly educated whites who live in integrated neighborhoods are probably there by choice; poorly educated whites who end up in an integrated neighborhood may not be able to afford to move elsewhere, and may feel threatened by the minority population. To account for this possibility, the researcher could construct a “varying slope” model, in which one of the demographic predictors (education) is interacted with an attribute of the geographic unit (residential integration).

But to repeat, more complicated models are not necessarily better, as they may result in overfitting. The more parameters in the model, the more likely it is that estimates will reflect idiosyncratic patterns in the sample of observed opinion, rather than opinion in the target population. The acid test of model quality is the performance of its out-of-sample predictions, so validation ultimately depends on gathering new data.²⁶⁵

²⁶⁴ This means that models of opinion at the state level will be more strongly anchored to the actual survey responses of people in the geographic unit (state) than models of opinion at the county level.

²⁶⁵ Cross-validation using the original sample might work as a second-best alternative. *But see* Wang & Gelman, *supra* note 208 (illustrating limits of cross-validation).