

ADMINISTERING SECTION 2 OF THE VOTING RIGHTS ACT AFTER *SHELBY COUNTY*

Christopher S. Elmendorf* & Douglas M. Spencer**

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 Article 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; and second, that the courts have authority to regularize section 2 adjudication by creating rebuttable presumptions. Most 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 reduce 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.

INTRODUCTION	2144
I. SECTION 2 AS A WEAK SUBSTITUTE FOR SECTION 5	2152
A. Conventional Wisdom About Sections 2 and 5	2152
B. Looming Threats to Section 2.....	2158

* Professor of Law, University of California, Davis.

** Associate Professor of Law and Public Policy, University of Connecticut. For helpful discussions and feedback the authors thank Eric Biber, Guy Charles, Jack Chin, Heather Gerken, Mike Gilbert, Perry Grossman, Rick Hasen, Ellen Katz, Michael McDonald, Jennifer Nou, Rick Pildes, Mike Pitts, Kevin Quinn, David Schleicher, Nick Stephanopoulos, Franita Tolson, and discussants and participants at the 2014 Conference on Empirical Legal Studies, the 2014 Annual Meeting of the Midwest Political Science Association, and the Political Economy and Public Law Conference at the University of Rochester. We are also indebted to Lynn Vavreck and Simon Jackman for sharing the 2008 Cooperative Campaign Analysis Project dataset. Replication materials and appendix are available at <http://www.dougspencer.org/research.html>.

II. MAKING IT WORK: PRESUMPTIONS FOR THE CORE OF SECTION 2	2159
A. Preliminaries: Interpreting Section 2 in Constitutional Context (After <i>Shelby County</i>)	2162
B. Presumptions About “Risk Factors” for Constitutional Violations ..	2168
1. Racial Attitudes and Beliefs	2169
2. Racial Polarization in Partisanship	2172
C. Presumptions About Disparate Impact	2175
1. Vote Dilution	2176
a. Preference / Interest Divergence (“Polarization”) ..	2178
b. Minority Opportunity Districts	2180
2. Vote Denial	2183
3. Summary	2185
III. AUTHORITY, LEGAL AND OTHERWISE	2185
A. Legal Authority to Create the Presumptions	2186
B. Judicial Competence	2189
IV. MODEL BUILDING AND RESULTS	2195
A. Tools for Estimating Racial-Group Opinion Within Subnational Geographic Units	2195
B. An Illustrative Model and Maps	2204
C. Next Steps	2214
CONCLUSION	2216

INTRODUCTION

Widely lauded as one of the most effective statutes ever enacted, the Voting Rights Act of 1965 (VRA) finally made good on the promise of the Fifteenth Amendment.¹ 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 to elect representatives of their choice.”² Sections 4 and 5 target states and localities with a history of black disen-

1. See, e.g., Charles S. Bullock III & Ronald Keith Gaddie, *The Triumph of Voting Rights in the South* 323 (2009) (“The consensus is that the [VRA] has been inordinately successful.”); Samuel Issacharoff et al., *The Law of Democracy: Legal Structure of the Political Process* 514–16 (4th ed. 2012) (noting “guarantees of the Fourteenth and Fifteenth Amendments were essentially disregarded in many states” before passage of VRA, which “transformed American politics in a variety of ways”).

2. 52 U.S.C. § 10301 (Supp. II 2015). The VRA was formerly codified in various sections of Title 42, but all of its provisions have been moved to the new Title 52 as part of an editorial reclassification. U.S. House of Representatives, Office of the Law Revision Counsel, Editorial Reclassification Title 52, U.S. Code, <http://uscode.house.gov/editorialreclassification/t52/index.html> [<http://perma.cc/W9DQ-HMBJ>] (last visited Oct. 14, 2015).

franchisement, requiring these states 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?³ 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.⁴ The Court found the coverage formula (which determines the states and localities subject to preclearance) facially unconstitutional, faulting Congress for not updating the formula when Congress reauthorized section 5 in 2006.⁵ Justice Kennedy mused that section 5 was probably not needed in any event because discriminatory voting changes can also be blocked, preimplementation, by preliminary injunctions in lawsuits brought under section 2.⁶ Leading election lawyers disagree.⁷ Section 2 litigation is costly and rarely results in preliminary relief;⁸ moreover, *Shelby County* further undermines the already shaky constitutional moorings of section 2.⁹

Shelby County's impact was felt immediately. A number of states 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

3. Preclearance could also be denied if the change was adopted for discriminatory reasons. See 52 U.S.C. § 10304(a) (mandating target jurisdictions seek preclearance and demonstrate proposed restrictions “neither [have] the *purpose* nor will have the effect of” abridging voting rights on basis of race (emphasis added)).

4. 133 S. Ct. 2612, 2631 (2013).

5. *Id.* at 2628–29, 2631.

6. Transcript of Oral Argument at 37, *Shelby County*, 133 S. Ct. 2612 (No. 12-96).

7. See, e.g., Rick Hasen, “Voting Law Decision Could Sharply Limit Scrutiny of Rules,” Election Law Blog (Feb. 28, 2013, 8:00 AM), <http://electionlawblog.org/?p=47852> [<http://perma.cc/58SW-UMJN>] (“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 & Armand Derfner, More Observations on *Shelby County*, *Alabama*, and the Supreme Court, Campaign Legal Ctr. Blog (Mar. 1, 2013), <http://www.campaignlegalcenter.org/news/blog/more-observations-shelby-county-alabama-and-supreme-court> [<http://perma.cc/9MBU-V27L>] (arguing Court overestimated efficacy of preliminary injunctions under section 2).

8. Hebert & Derfner, *supra* note 7 (“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.”).

9. See *infra* section II.A (describing constitutional requirements for section 2 claims); cf. Richard Hasen, The Curious Disappearance of *Boerne* and the Future Jurisprudence of Voting Rights and Race, SCOTUSblog (June 25, 2013, 7:10 PM), <http://scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/> [<http://perma.cc/A42B-9R5T>] (“[T]he Court for now seems to have foreclosed greater deference for voting decisions under Congress’s Fifteenth amendment powers[, which] could spell trouble for Section 2 of the Voting Rights Act . . . and other laws aimed at preventing race discrimination in voting.”).

(identification) requirement, which section 5 had previously blocked.¹⁰ Voter-ID laws recently adopted in Alabama¹¹ and Virginia¹² were also freed to take effect.¹³ Two months later, North Carolina enacted a sweeping election reform bill that the president of the state's National Association for the Advancement of Colored People (NAACP) chapter called, "the worst voter suppression law since the days of Jim Crow."¹⁴ During the same month, Mississippi passed new ID requirements for voting.¹⁵ Local governments freed from preclearance also made some important changes. 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.¹⁶ 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.¹⁷ And the city of Macon, Georgia, moved the date of city elections from November to July, when black turnout has traditionally been low.¹⁸

With Congress divided and slow to respond to *Shelby County*,¹⁹ then-Attorney General Holder pledged to do all he could to protect voting

10. Ryan J. Reilly, Harsh Texas Voter ID Law "Immediately" Takes Effect After Voting Rights Act Ruling, Huffington Post (June 25, 2013, 2:04 PM), http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html [<http://perma.cc/437C-RCJW>]. Texas also announced that its legislature's 2011 redistricting maps would immediately take effect. Id. Preclearance had been denied because a three-judge panel of the District Court for the District of Columbia was "persuaded by the totality of the evidence that the plan was enacted with discriminatory intent." *Texas v. United States*, 887 F. Supp. 2d 133, 161 (D.D.C. 2012).

11. Ala. Code § 17-9-30 (2014).

12. Va. Code Ann. § 24.2-643 (2015).

13. 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. Kim Chandler, State Has Yet to Seek Preclearance of Photo Voter ID Law Approved in 2011, AL.com (June 12, 2013, 7:30 AM), http://blog.al.com/wire/2013/06/photo_voter_id.html [<http://perma.cc/FC6P-ELRH>].

14. Zachary Roth, N.C. Wants Voting Law Emails Kept Secret, MSNBC (Jan. 9, 2014, 2:54 PM), <http://www.msnbc.com/msnbc/nc-wants-voting-law-emails-kept-secret> [<http://perma.cc/4VNY-2GUK>]. North Carolina's Voter Information Verification Act takes effect January 1, 2016. N.C. Gen. Stat. § 163-166.13 (Supp. 2014).

15. Miss. Code Ann. § 23-15-563 (2015).

16. SCOTUSblog, After *Shelby County*, YouTube, at 00:25 (Nov. 4, 2013), https://www.youtube.com/watch?v=u_Eo97odboQ [<http://perma.cc/AN25-CD2D>].

17. John Suayan, Lawsuit: New Galveston Co. Electoral Map 'Racially Discriminatory,' Se. Tex. Rec. (Aug. 27, 2013, 11:49 AM), <http://setexasrecord.com/stories/510622002-laws-uit-new-galveston-co-electoral-map-racially-discriminatory> [<http://perma.cc/H874-FQ7C>].

18. Ga. Voters Surprised Macon Election Change Isn't Challenged, NPR Morning Edition (Feb. 6, 2014, 5:00 AM), <http://www.npr.org/2014/02/06/272359791/voting-right-s-act-update> (on file with the *Columbia Law Review*).

19. 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*. Voting Rights Amendment Act of 2014, H.R. 3899, 113th Cong. § 2 (2014). 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, Advancement Project, <http://www.advancementproject.org/page>

rights using the remnants of the VRA.²⁰ The Department of Justice (DOJ) challenged new voting restrictions in Texas and North Carolina under section 2,²¹ and other private and public lawsuits are in the offing.²²

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 DOJ come to understand two fundamental points. First, national survey data often contain as much or more information about core 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 many 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 these 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.²³

We show that the courts could create rebuttable presumptions under section 2 that would give the statute special bite in many jurisdictions for-

s/summary-of-the-voting-rights-amendment-act-of-2014-introduced-january-16-20#sthash.FP0BAqJb.dpuf [<http://perma.cc/8PX3-UC7J>] (last visited Sept. 2, 2015) (noting proposed coverage formula would likely cover only Texas, Mississippi, Georgia, and Louisiana), 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 Calif. L. Rev. 1123, 1166–69 (2014) [hereinafter Elmendorf & Spencer, *Preclearance*] (showing coverage formula based on racial stereotyping could reach most of the formerly covered jurisdictions).

20. See Sari Horwitz, *Justice Department to Challenge States' Voting Laws*, Wash. Post (July 25, 2013), http://www.washingtonpost.com/politics/justice-department-to-challenge-states-voting-rights-laws/2013/07/25/c26740b2-f49b-11e2-a2f1-a7acf9bd5d3a_story.html [<http://perma.cc/Y2TM-MSB2>] (“[W]e plan . . . to fully utilize the [VRA’s] remaining sections to ensure the voting rights of all American citizens are protected.”).

21. Josh Gerstein, *DOJ Challenges N.C. Voter ID Law*, Politico (Sept. 30, 2013, 12:03 AM), <http://www.politico.com/story/2013/09/justice-department-north-carolina-voter-id-law-97542.html> [<http://perma.cc/2PVQ-2F3Z>]; Press Release, Dep’t of Justice, *Justice Department to File New LawsUIT Against State of Texas over Voter I.D. Law* (Aug. 22, 2013), <http://www.justice.gov/opa/pr/justice-department-file-new-lawsuit-against-state-texas-over-voter-id-law> [<http://perma.cc/Q5G5-9J37>].

22. See Horwitz, *supra* note 20, at 2 (noting DOJ’s plan to utilize sections 2 and 3 of VRA). For a summary of election law changes in formerly covered jurisdictions since *Shelby County*, see States and Localities’ Responses to *Shelby County*, *Alabama v. Holder*, <http://www.naacpldf.org/document/states-responses-shelby-decision> [<http://perma.cc/V7AT-PZ NZ>] (last visited Oct. 14, 2015).

23. Regarding section 2 as a common law statute, see Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. Pa. L. Rev. 377, 448–55 (2012) [hereinafter Elmendorf, *Making Sense of Section 2*].

merly covered by section 5. Implemented with national survey data rather than local election tallies, the new presumptions would greatly reduce the cost and uncertainty of challenging under section 2 the kinds of election law changes that DOJ used to block under section 5. The presumptions would also go a long distance toward establishing the “likelihood of success on the merits” needed for preliminary relief.²⁴

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. Judicial rulings on the evidentiary materials in one case provide little direction for the next case down the pike because these materials vary so much from case to case (often the courts emphasize voting patterns in local elections). But if the same national data sets were deployed in case after case, the ordinary processes of common law adjudication would generate substantial guidance about whether any 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.

* * *

Plaintiffs in a section 2 case must establish, first, that the challenged election law, procedure, or practice has a racially disparate impact.²⁵ Second, plaintiffs must connect this impact to “social and historical conditions.”²⁶ In view of *Shelby County*, the required “social and historical conditions” showing is best understood as a way of testing whether the remedy the plaintiff seeks is proportionate to the present-day risk of unconstitutional race discrimination in the electoral process. Thus, we shall generally call it the “constitutional risk” requirement, rather than using the more conventional “social and historical conditions” label.

The presumptions we propose address both prongs of a section 2 claim: constitutional risk and disparate impact. The constitutional-risk requirement should be deemed rebuttably satisfied if the jurisdiction’s majority-group citizens subscribe to substantially negative stereotypes of the minority, or if there is an extremely high correlation between race and reliably partisan voting in the defendant jurisdiction (provided that actors affiliated with the white-preferred party were responsible for the election law or practice at issue).²⁷ By shifting the burden of persuasion to defendants, the courts acknowledge that partisan motives do not merit

24. See *Montana v. Suffolk Cty. Legislature*, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003) (applying likelihood-of-success standard in vote dilution case).

25. *Infra* text accompanying note 98.

26. *Infra* text accompanying note 98.

27. See *infra* sections II.B.1–II.B.2.

the same presumption of legitimacy in jurisdictions where the partisan payoff to racial discrimination is exceptional.²⁸

As for the disparate-impact prong, one must distinguish so-called “vote dilution” cases, which address the rules for aggregating votes into representation, from “vote denial” cases, which concern barriers to casting a valid, duly counted ballot.²⁹ In dilution cases, districting schemes and at-large electoral systems are generally said to have a disparate impact if—given white and minority political preferences—they prevent the minority community from electing a “roughly proportional” number of minority “candidates of choice” and additional, reasonably compact majority-minority districts could be drawn.³⁰ Racial minorities have “candidates of choice” if and only if the minority is internally politically cohesive.³¹ And unaccommodating electoral designs threaten the minority’s opportunity to elect only if political preferences are racially polarized, meaning that a politically cohesive racial majority opposes the minority’s preferred candidates.³²

Presumptions for the disparate-impact side of a vote dilution claim must therefore address racial polarization in political preferences and

28. 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, 572–76 (2011) (demonstrating black voters’ liberal ideological distribution leads both Democrats and Republicans to treat them differently than white voters in redistricting).

29. See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 702–03 (2006) (distinguishing “first generation” VRA litigation focused on vote denial claims from “second generation” litigation attacking “practices that diminish minorities’ voting strength where they were permitted to vote”).

30. See J. Gerald Hebert, Paul M. Smith, Martina E. Vandenberg & Michael B. DeSanctis, *The Realist’s Guide to Redistricting: Avoiding the Legal Pitfalls* 33–61 (2d ed. 2010) [hereinafter Hebert et al., *Realist’s Guide*] (“Although rough proportionality does not automatically protect a state from liability under Section 2, it is a strong ‘indication that minority voters have an equal opportunity, in spite of racial polarization, to participate in the political process and to elect representatives of their choice.’” (internal quotation marks omitted) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994))); Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 730–32 (2006) (discussing proportionality and noting in nearly all cases in which lower courts made finding on proportionality, liability question was resolved accordingly); cf. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 436 (2006) (beginning “totality of circumstances” inquiry by assessing proportionality, implying it is especially important factor to consider).

31. See Hebert et al., *Realist’s Guide*, supra note 30, at 48–50 (stating minority political cohesiveness can be demonstrated by “showing that a significant number of minority group members usually vote for the same candidates” (quoting *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986) (plurality opinion) (Brennan, J.))).

32. See *id.* at 45–48 (describing presence of racially polarized political preferences and voting as “linchpin” of vote dilution cases because “[i]f there is no racially polarized voting, ‘it cannot be said that the ability of minority voters to elect their chosen representatives is [less than] that of white voters’” (alteration in original) (quoting *Gingles*, 478 U.S. at 48 n.15 (plurality opinion) (Brennan, J.))).

the related question of whether a given electoral district is a “minority opportunity district” (MOD)—one that gives minority voters the opportunity to elect their “candidates of choice.”³³ Though polarization has until now been gauged on the basis of voting patterns in local elections, this Article contends that courts may rebuttably presume racial polarization if plaintiff-race minority citizens in the defendant jurisdiction substantially diverge from other citizens in terms of their policy preferences, general political ideology, or socioeconomic status.³⁴ We also offer a presumptive definition of “minority opportunity district,” based on demographics.

Presumptions about disparate impact are harder to craft for vote denial cases, in part because this body of law is still in its infancy. This Article offers two very tentative suggestions, focusing on the correlation between race or ethnicity and socioeconomic status, and on demographic divergence between the populations of eligible and actual voters.

Unlike the coverage formula for section 5 preclearance, there would be no *de jure* list of jurisdictions “covered” by the 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 most of these showings could 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. The empirical results in Part IV suggest that blacks (but not necessarily other racial groups) are likely to be protected by the presumptions throughout the Deep South, that is, 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” vote dilution claims under section 2—which has not been the case to date.³⁵ However, our results also indicate that Asian

33. See *League of United Latin Am. Citizens [LULAC]*, 548 U.S. at 427–36 (applying *Gingles* framework and using term “opportunity district” to describe districts in which minority voters have realistic chance to elect candidates of their choice); Hebert et al., *Realist’s Guide*, supra note 30, at 34–37 (introducing “*Gingles* test” for vote dilution).

34. Defendants could 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. See *infra* section II.C.

35. See generally Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. Irvine L. Rev. 359, 390–91 (2013) (finding vote dilution suits brought by Asian Americans have been “overwhelmingly unsuccessful,” and “the handful of claims involving Asian Americans all . . . concern . . . the application of VRA to multi-racial and ‘other minority’ groups”); Chelsea J. Hopkins, Comment, *The Minority Coalition’s Burden of Proof Under Section 2 of the Voting Rights Act*, 52 Santa Clara L. Rev. 623, 625 (2012) (noting in coalitional claims “courts have expressed resistance to granting relief without a heightened showing of group cohesion”). Note that the continued availability of coalitional claims under section 2 is open to question after *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion) (Kennedy, J.). See *infra* note 284.

American and Latino plaintiffs may find it harder than blacks to satisfy the “constitutional risk” requirement.

Although the approach suggested in this Article 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), litigants will be able to see 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 preimplementation preliminary relief, much as DOJ under section 5 was able 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-ID requirements, plaintiffs might obtain preliminary relief by showing that the law was adopted on a substantially party-line vote (thereby establishing partisan intent), that the burden of the law would fall mostly on low-income voters, and that race and poverty are highly correlated. Because defendants would have to rebut the inference of discrimination where the relevant presumptions apply, section 2 litigation would be costlier 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.³⁶

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 has played in the past due to recent developments in law and in statistics.

Parts II, III, and IV develop this Article’s proposal for a presumption-driven section 2. Part II identifies what we take to be the central factual

36. The recently introduced Voting Rights Amendment Act of 2014 also aims to facilitate preliminary relief under section 2, but in a different manner. Though the amendments are not entirely clear on this point, it appears 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 Amendment Act of 2014, H.R. 3899, 113th Cong. § 6(b)(4) (2014). 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.

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, judges may understandably be reluctant to exercise this authority without technical guidance from an expert agency. DOJ, assisted by an outside advisory panel, could provide a useful nudge, issuing non-binding guidelines about data sources, statistical techniques, and appropriate legal inferences. 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 online appendix provides further information about MRP.³⁷

The Supreme Court has long interpreted the VRA pragmatically.³⁸ That pragmatism is now feared by many to be the Act's undoing,³⁹ but it is also grist for the reconstruction offered here. The demise of the VRA is not inevitable.

I. SECTION 2 AS A WEAK SUBSTITUTE FOR SECTION 5

To frame this Article's 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.⁴⁰ Congress's delegation of authority to DOJ to make preclearance decisions meant that the determinations

37. Christopher S. Elmendorf & Douglas M. Spencer, Technical Appendix, Administering Section 2 of the VRA After *Shelby County*, http://www.dougspencer.org/research/s2_Appendix.pdf [<http://perma.cc/C5Y5-N4MU>] [hereinafter Elmendorf & Spencer, Technical Appendix] (last updated Jan. 7, 2015).

38. See generally Guy-Uriel E. Charles & Luis Fuentes-Rohwer, The Voting Rights Act in Winter: The Death of a Superstatute, 100 Iowa L. Rev. 1389, 1410–20 (2015) (describing weak foundations in text and legislative history of many canonical opinions).

39. See *id.* at 1420–38 (predicting further unraveling of Act in absence of normative consensus about its aims).

40. For an excellent summary of the procedural and substantive differences between sections 2 and 5 with more detail than provided here, see generally Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 Sup. Ct. Rev. 55, 62–86 [hereinafter Stephanopoulos, *The South After Shelby County*].

could be made with a minimum of legal expenses, for covered jurisdictions and would-be plaintiffs alike.⁴¹

The principal substantive standard under section 5 was reasonably clear cut. Preclearance was to be denied if the measure “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise”⁴² or if it was adopted with a discriminatory purpose.⁴³ Discriminatory intent can be hard to prove (or disprove),⁴⁴ 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.”⁴⁵ 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 candidates⁴⁶ or would create a material barrier to voting borne disproportionately by minority citizens.⁴⁷ According to law professor and for-

41. See *id.* at 65 (“[T]he DOJ shoulders much of the expense of preclearance under Section 5.”). Though covered jurisdictions were permitted to opt out of DOJ review in favor of a preclearance proceeding before the District Court for the District of Columbia, 52 U.S.C. § 10304(a) (Supp. II 2015), this option was rarely invoked, as it was much more costly for the jurisdiction seeking preclearance. See Stephanopoulos, *The South After Shelby County*, *supra* note 40, at 65 (discussing expense of judicial preclearance in contrast to inexpensive administrative preclearance).

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

43. 52 U.S.C. § 10304(b)–(c).

44. As a leading treatise notes, “the criteria used to evaluate a plan under Section 5’s purpose prong [were] vast and comprehensive.” Hebert et al., *Realist’s Guide*, *supra* note 30, at 29. Also, the “intent” standard under section 5 was essentially dormant from the date of the Supreme Court’s decision in *Reno v. Bossier Parish School Board* until the enactment of the 2006 Amendments to the VRA, which expressly abrogated that decision. Compare *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 341 (2000) (holding section 5 “does not prohibit preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose”), with Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, 578 (codified at 52 U.S.C. §§ 10302–10305, 10308–10310, 10503) (criticizing *Reno* and stating Reauthorization Act abrogates that decision).

45. Voting Rights Act Reauthorization and Amendments Act, 120 Stat. at 580–81.

46. See, e.g., *Texas v. United States*, 887 F. Supp. 2d 133, 149–51 (D.D.C. 2012) (interpreting section 5 to protect only those districts that give politically cohesive minority community opportunity to elect their preferred candidates, as opposed to simply opportunity to elect Democrats).

47. See, e.g., *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012) (denying preclearance to Texas voter-ID requirement because law would create significant barrier to voting for poor people and racial minorities were disproportionately represented among poor); *Florida v. United States*, 885 F. Supp. 2d 299, 329 (D.D.C. 2012) (denying preclearance to Florida’s reduction in early voting days because African Americans disproportionately used early voting and reduction represented “material burden” on franchise); Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Justice, to Keith Ingram, Dir. of Elections, Office of the Tex. Sec’y of State 5 (Mar. 12, 2012), http://www.brennancenter.org/sites/default/files/analysis/DOJ_Final_Letter_To_Texas_On_Voter_ID_Law.pdf [http://

mer 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.”⁴⁸

Finally, because section 5 put the burden of proof on the party seeking preclearance, the provision was information-forcing.⁴⁹ 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*.⁵⁰ If DOJ remained worried about potential 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.⁵¹

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 spending 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 DOJ. DOJ lacked the resources to give in-depth scrutiny to each of thousands of preclearance proceedings, so it relied on community groups to flag changes that merited special scrutiny.⁵² Some attorneys general were probably more solicitous of minority

perma.cc/X8GY-ZMVE] (denying preclearance because state’s own data showed Hispanics disproportionately lacked qualifying ID and statute did not adequately mitigate burdens on voters lacking qualifying ID).

48. 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) [hereinafter Pitts, *Let’s Not Call the Whole Thing Off*].

49. 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/pdf/1172_7f1ew4q.pdf [<http://perma.cc/T7KM-U7CH>] [hereinafter Charles & Fuentes-Rohwer, *Post-Shelby Contingency Strategy*] (arguing preclearance “facilitates monitoring through disclosure” by “forc[ing] the institutions with the best information about potential discriminatory practices to share that information”).

50. For one such case study, see Ellen D. Katz, *South Carolina’s “Evolutionary Process,”* 113 *Colum. L. Rev. Sidebar* 55, 58–61 (2013), <http://www.columbialawreview.org/wp-content/uploads/2013/03/Katz-113-Colum.-L-Rev-Sidebar-55.pdf> [<http://perma.cc/4F4G-WQYY>] (concluding grant of preclearance of South Carolina’s voter-ID law resulted from “evolutionary process” of state officials addressing concerns regarding law’s impact on minority voters).

51. 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* 47, 52–53, 65–67 (Anna Henderson ed., 2007) (discussing procedural steps for More Information Requests and impact on compliance).

52. See Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 *Colum. L. Rev.* 708, 725–26 (2006) (explaining DOJ initiates re-

communities than others,⁵³ 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.⁵⁴

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.”⁵⁵ The courts have struggled to flesh out this abstraction. It is generally agreed that plaintiffs must show (1) that the election law at issue has a racially disparate impact and (2) that this impact can be chalked up to the law’s “interaction” with “social and historical conditions.”⁵⁶ Most courts and commentators also agree that section 2 supports independent causes of action for “vote denial” and “vote dilution.”⁵⁷

But these generalities conceal much normative uncertainty and disagreement. The ultimate question in section 2 cases is whether the “totality of circumstances” warrant a finding of liability.⁵⁸ These “circumstances” include (but are not limited to) the defendant jurisdiction’s his-

sponse to preclearance requests by placing “informal call . . . to a civil rights group or an elected minority official to see if there is a problem” with proposed restriction).

53. 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, 1730–31 (2004) (suggesting use of preclearance for districting may permit partisan gain unlikely to be noticed or addressed). For thoughtful replies to this line of critique, see Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *The Politics of Preclearance*, 12 *Mich. J. Race & L.* 513, 534–35 (2007) (arguing “ebbs and flows of politics” are not “as noxious a development as some commentators believe” in voting rights context); 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, 419–23 (2012) (suggesting partisan use of VRA generates viable claims and responds to existing racial disputes); Pitts, *Let’s Not Call the Whole Thing Off*, *supra* note 48, at 630 (“Partisan intrigue . . . does not constitute a compelling enough reason for section 5 to slip softly out of existence.”).

54. See Stephanopoulos, *The South After Shelby County*, *supra* note 40, at 62–66 (summarizing procedural differences between sections 2 and 5); *id.* at 74–86 (discussing substantive differences in vote-dilution context); *id.* at 106–10 (discussing substantive differences in vote-denial context).

55. 52 U.S.C. § 10301 (Supp. II 2015).

56. See *infra* section II.A (discussing requirements to show proof of section 2 violations).

57. As a reminder, denial cases concern barriers to the casting of valid, duly counted ballots; dilution cases concern rules for aggregating votes into representation, such as districted versus at-large elections. See *supra* text accompanying notes 29–32.

58. *Johnson v. De Grandy*, 512 U.S. 997, 1017–18 (1994).

tory of discrimination, lingering effects of past de jure discrimination, racial appeals in political campaigns, racially polarized voting, informal barriers to ballot access for minority candidates, unusual features of the electoral system that may disadvantage minorities, and strength or weakness of the state interests asserted in defense of the challenged election laws.⁵⁹

Still unresolved is the normative question to be answered when examining the totality of circumstances.⁶⁰ In dilution cases, some courts focus on whether the minority community can elect a “roughly proportional” number of its candidates of choice.⁶¹ Other courts use the totality of circumstances inquiry to assess whether the plaintiffs’ injury can fairly be traced to disparate-treatment or intentional race discrimination, whether by conventional state actors or nominally private actors.⁶² (This has become known as the section 2 causation requirement.⁶³) And still other

59. These factors were enumerated in the Senate Judiciary Committee report accompanying passage of the section 2 results test. S. Rep. No. 97-417, at 28–29 (1982).

60. See generally Christopher S. Elmendorf, Kevin M. Quinn & Marisa A. Abrajano, *Racially Polarized Voting*, 83 U. Chi. L. Rev. (forthcoming 2016) (manuscript at 36–50), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668889 (on file with the *Columbia Law Review*) [hereinafter Elmendorf et al., *Racially Polarized Voting*] (discussing four theories of vote dilution and their conflicting implications).

61. This factor was prioritized—without being made decisive—by the Supreme Court in *De Grandy*, 512 U.S. at 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 generally Katz et al., *supra* note 30, at 730–32 (documenting lower court reliance on this factor).

62. See, e.g., *United States v. Charleston County*, 365 F.3d 341, 349 (4th Cir. 2004) (“[T]he reason for polarized voting is a critical factor in the totality analysis”); *Goosby v. Town of Hempstead*, 180 F.3d 476, 502–03 (2d Cir. 1998) (Leval, J., concurring) (“[W]here the complaint essentially alleges that voters of the protected class have had little success electing candidates of their choice, and where correction would require radical political restructuring I believe courts should not find a violation in the absence of race-based intent.”); *Lewis v. Alamance County*, 99 F.3d 600, 616 n.12 (4th Cir. 1996) (“We think the best reading of the several opinions in *Gingles* . . . is one that treats causation as irrelevant in the inquiry into the . . . preconditions, but relevant in the totality of circumstances inquiry” (citations omitted)); *S. Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1293–94 (11th Cir. 1995) (“[T]here was ample evidence in the record to support the [district] court’s conclusion that factors other than [candidate] race, such as party politics and availability of qualified [black] candidates, were driving the election results”); *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 982–83 (1st Cir. 1995) (explaining plaintiffs’ showing of strong correlation between voter race and vote choice gives rise to inference of racial bias on part of white electorate, which may be rebutted with evidence “voting patterns can most logically be explained by factors unconnected to the intersection of race with the electoral system”); *Nipper v. Smith*, 39 F.3d 1494, 1523–25 (11th Cir. 1994) (en banc) (plurality opinion) (Tjoflat, C.J.) (adopting similar presumption and burden-shifting rule); see also *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 989 F.2d 831, 849–63 (5th Cir. 1993) (en banc) (holding white bloc voting within meaning of third prong of *Gingles* is not “legally significant” unless “caused” by race).

63. See D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 Harv. L. Rev. 533, 590–97 (2008) [hereinafter Greiner, *Causal Inference*] (discussing courts’ use of

courts churn through the motions of the totality of circumstances analysis without stopping to explain their underlying conception of equal political opportunity.⁶⁴ In vote denial cases, the role of the totality of circumstances inquiry is, if anything, even more unsettled.⁶⁵ The factors highlighted by Congress in enacting the results test were gleaned from earlier vote dilution cases, and courts and commentators disagree about how (if at all) they bear on vote denial cases.⁶⁶ Problems of vote denial simply were not part of the congressional debates.⁶⁷

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.⁶⁸ 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.⁶⁹ The causation inquiry further complicates matters. Plaintiffs challenging a felon disenfranchisement rule, for example, may have to prove that the state's penal code is administered in an intentionally discriminatory fashion.⁷⁰ Worse yet, as Jim Greiner has explained, the causa-

causation element when adjudicating section 2 cases); Katz et al., *supra* note 30, at 670–72 (discussing case law). 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. *Id.* at 671.

64. See Elmendorf et al., *Racially Polarized Voting*, *supra* note 60 (manuscript at 37) (“Most judicial opinions in vote dilution cases are nominally atheoretical.”).

65. Cf. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014) (“[T]here is a paucity of appellate case law evaluating the merits of Section 2 claims in the vote-denial context.”). Compare Tokaji, *supra* note 29, at 709–26 (arguing most of Senate Report factors are not relevant to vote denial cases), with *Veasey v. Perry*, 29 F. Supp. 3d 896, 918–19 (S.D. Tex. 2014) (relying on Senate Report factors in case about voter-ID requirement).

66. See *supra* note 65.

67. See Thomas M. Boyd & Stephan J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 *Wash. & Lee L. Rev.* 1347, 1356–425 (1983) (recounting legislative history, which was entirely focused on vote dilution).

68. For local government elections, these data are rarely available in convenient electronic formats and assembling the data is often a significant cost in section 2 litigation. See *infra* text accompanying note 157.

69. On the importance of qualitative evidence for vote dilution litigation under section 2, see Hebert et al., *Realist's Guide*, *supra* note 30, at 48 (“Anecdotal evidence is often used [in Section 2 cases] to supplement statistical findings.”); D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 *Ind. L.J.* 447, 484–87 (2011) [hereinafter Greiner, *Re-Solidifying Racial Bloc Voting*] (discussing types of qualitative evidence that can help judges make inferences about racial polarization).

70. See, e.g., *Farrakhan v. Gregoire*, 623 F.3d 990, 992 (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).

tion question has often been posed in ways that may render it unanswerable.⁷¹

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 5% of section 2 cases.⁷² 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.

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.⁷³ Also, well-funded actors such as political parties and unions sometimes finance section 2 cases when the political stakes are high, for example, when the litigation could shift the balance of power in a state legislature or in Congress.⁷⁴ However, the section 2 results test is under threat from two directions—one jurisprudential, the other demographic and statistical.

B. *Looming Threats to Section 2*

The Supreme Court has issued a string of decisions narrowing section 2 on the basis of the constitutional avoidance canon.⁷⁵ *Shelby County* provides an accelerant, as the Court’s rejection of Jim Crow history as the rationale for section 5 coverage casts doubt on the common judicial practice of grounding section 2 “social and historical conditions” findings on the same history.⁷⁶ 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.⁷⁷

The other rising threat to section 2 is that the statistical techniques used to establish minority political cohesion and white bloc voting tend to break down if there are more than two racial groups or significant res-

71. Greiner, *Causal Inference*, supra note 63, at 591–97.

72. Hebert & Derfner, supra note 7.

73. See Charles & Fuentes-Rohwer, *Post-Shelby Contingency Strategy*, supra note 49, at 123–24 (describing litigation efforts of civic groups under section 5).

74. Samuel Issacharoff has argued that political parties and associated actors typically have the most to gain in section 2 cases. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 *Harv. L. Rev.* 593, 646 (2002) (describing “clear partisan gain” for political parties in redistricting litigation).

75. See Elmendorf, *Making Sense of Section 2*, supra note 23, at 399–404 (summarizing cases).

76. See infra section II.A (describing threshold for section 2 relief after *Shelby County*).

77. Elmendorf, *Making Sense of Section 2*, supra note 23, at 409–14 (evaluating and contrasting competing normative understandings of section 2).

identical 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).⁷⁸ 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.⁷⁹ Conclusions about racial polarization under these conditions are tenuous—unless the analyst can supplement the aggregate data with individual-level observations obtained from exit polls and other surveys.⁸⁰ But survey data about vote choice in local elections “are almost never available” in vote dilution cases.⁸¹

Courts may well 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.⁸²

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 central factual questions on which section 2 liability turns could, in principle, be translated into rebuttable evidentiary presumptions, implemented cheaply and predictably using national survey

78. 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* 115, 123–50 (2007) [hereinafter Greiner, *Ecological Inference*].

79. See D. James Greiner & Kevin M. Quinn, *Exit Polling and Racial Bloc Voting: Combining Individual-Level and R×C Ecological Data*, 4 *Annals Applied Stats.* 1774, 1776 (2010) [hereinafter Greiner & Quinn, *Exit Polling and Racial Bloc Voting*] (describing challenges to modeling voting patterns as diversity increases); Greiner, *Re-Solidifying Racial Bloc Voting*, *supra* note 69, at 465–68 (“[M]ore racial groups mean more moving parts.”).

80. See Adam Glynn & Jon Wakefield, *Ecological Inference in the Social Sciences*, 7 *Stat. Method.* 307, 307 (2010) (demonstrating “inclusion of a small amount of individual level data can dramatically improve the properties of [the] estimates”); Greiner & Quinn, *Exit Polling and Racial Bloc Voting*, *supra* note 79, at 1777 (“[O]ur hybrid estimator allows inferences unavailable from either the exit poll or the ecological inference model alone.”).

81. 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).

82. Greiner treats this as an unavoidable consequence of his results. See Greiner, *Re-Solidifying Racial Bloc Voting*, *supra* note 69, at 482 (“The need for polls over several election cycles may be a fact of life in some multiracial polities.”).

data and standard statistical models.⁸³ After establishing that the core of section 2 can be translated into such presumptions, we will address judicial authority to create the presumptions (Part III) and statistical tools for estimating local opinion using national surveys (Part IV).

Where the presumptions apply, defendants would have to rebut the inference of a statutory violation, much like state and local governments in preclearance proceedings under section 5 carried the burden of proof. Section 2 would therefore become information forcing in much the same way as section 5. And, assuming that the presumptions apply predictably and at low cost, it will be easy for civil rights groups and potential defendants to figure out *ex ante* who is likely to bear the burden of proof (and on which questions) in a section 2 case.⁸⁴ Potential defendants that are “covered” *de facto* by the presumptions would know this, and, like jurisdictions that were covered *de jure* under the preclearance regime, would have incentives to anticipate and mitigate potential disparate impacts whenever they change their election laws.⁸⁵ If they do not, plaintiffs should be able to obtain preliminary relief, even preimplementation, as the presumptions would go a long distance toward establishing the necessary “likelihood of success on the merits.”

The use of national survey data and standard statistical models is very important for low-cost, predictable implementation. Instead of gathering case-specific datasets, prospective litigants should be able to go online, download the relevant dataset and statistical model, and figure out which presumptions apply. Because the same datasets and models would be used in case after case, each judicial decision would provide considerable guidance about the next case. This is not true of section 2 today because the cases tend to be litigated on the basis of voting patterns in local elections.⁸⁶ The candidates and issues in these elections vary from

83. 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 (explained 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.

84. Though not quite so easy as looking up the jurisdiction’s name on the list of covered jurisdictions under section 5.

85. In one important respect, a presumption-driven section 2 would actually be more powerful than erstwhile section 5. Under section 5, state and local governments were never liable for leaving in place existing laws with a racially disparate impact; only *changes* to the jurisdiction’s electoral arrangements could be challenged on an “impact” (rather than intent) theory. See 52 U.S.C. § 10304(a) (Supp. II 2015) (applying when covered jurisdiction “shall enact or seek to administer” new voting restriction). By contrast, the results test of section 2 allows status-quo arrangements to be challenged. 52 U.S.C. § 10301(b).

86. “Polarized voting” is the central issue in vote dilution cases, see Elmendorf et al., *Racially Polarized Voting*, *supra* note 60 (manuscript at 8–15) (reviewing evolution of racial polarization “test”), and one factor among many that courts may consider in vote denial cases, see Christopher Elmendorf, Judge Easterbrook on the Voting Rights Act: Asking Good Questions, Making Bad Law, *Election Law at Moritz* (Oct. 8, 2014), <http://moritzlaw.osu.edu/election-law/article/?article=12965> [<http://perma.cc/P8YG-VM3Z>] (noting

one jurisdiction to the next, so a court's determination in one case about, for example, what constitutes a "legally significant" level of polarized voting generally does not carry over to the next case.⁸⁷

This argument comes with an important caveat. The benefits of implementing section 2 with rebuttable presumptions and national survey data—lower cost and more predictable litigation, with preliminary relief becoming easier to secure in 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 widespread agreement may be hard to achieve. The courts are not of one mind about the meaning of section 2,⁸⁸ and even conditional on a particular gloss on section 2's meaning, the presumptions could be defined in a variety of ways.⁸⁹ In addition, estimating local opinion from national survey data depends on various discretionary modeling choices, inviting "battles of the experts" even if the courts have reached agreement on how to define the presumptions.⁹⁰

Guidance from an administrative agency such as DOJ may be necessary to solve the judicial coordination problem.⁹¹ 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 national survey data.

The argument of this Part unfolds as follows. Section II.A presents a *Shelby County*-informed gloss on the central elements of a section 2 claim. It argues that plaintiffs must show (1) that the challenged practice has a racially disparate impact (the "disparate impact prong") and (2) that the remedy sought is a reasonable response to recent, unconstitutional race discrimination or the present and future risk of unconstitutional race discrimination in the defendant jurisdiction (the "constitutional risk prong").

racially polarized voting is important in vote denial cases due to consideration of social and historical conditions). Evidence of racial polarization or its absence in so-called "endogenous" elections—elections to the governmental body at issue in the case—typically receives the most weight. Elmendorf et al., *Racially Polarized Voting*, supra note 60 (manuscript at 25).

87. For a detailed examination of how the racially polarized voting inquiry works in practice today, see Elmendorf et al., *Racially Polarized Voting*, supra note 60 (manuscript at 15–35).

88. See generally Elmendorf, *Making Sense of Section 2*, supra note 23, at 386–403 (describing Supreme Court's "ongoing uncertainty about the meaning of Section 2, the Court's worries about the effects of Section 2 on racial politics, and the Court's doubts about the constitutionality of Section 2"); Elmendorf et al., *Racially Polarized Voting*, supra note 60 (manuscript at 36–49) (summarizing federal judges' "competing normative theories" in vote dilution cases).

89. See *infra* sections II.B–II.C (suggesting evidentiary presumptions).

90. See *infra* note 221 and accompanying text (discussing evidentiary showings for crafting rebuttable presumptions for section 2).

91. See *infra* notes 222–231 and accompanying text (suggesting possibility of greater DOJ action to limit judicial discretion in setting presumptions).

Section II.B suggests that the constitutional risk prong can be satisfied with evidence of racial stereotyping in the defendant jurisdiction or possibly with evidence of an extreme correlation between race and reliable partisan voting. Section II.C sketches out some tentative presumptions for the disparate-impact prong, focusing on electoral district demographics (for dilution cases), and racial gaps in voter participation rates as well as impacts by socioeconomic class (for denial cases).

A. *Preliminaries: Interpreting Section 2 in Constitutional Context (After Shelby County)*

In order to translate the core factual questions under section 2 into evidentiary presumptions, one must first establish what those questions are and whether there are specific legal constraints that the presumptions must respect. These questions are tricky. As noted above, the statutory text is opaque and the evolving case law has not created much normative clarity.⁹²

Ours is a practical project, so rather than begin with some idealized account of section 2, we begin with an account that we think a broad range of judges could accept—including those in the center of the current Supreme Court. The Court has repeatedly signaled its discomfort with section 2, often using the constitutional avoidance canon to justify narrow constructions.⁹³ The constitutional problem in a nutshell is this: Section 2 establishes a results test, but the Fourteenth and Fifteenth Amendments prohibit only subjective discrimination⁹⁴ on the basis of race.⁹⁵ Though the Supreme Court has stated that Congress, when enforcing the Fourteenth Amendment, may prohibit some conduct that

92. See generally Elmendorf, Making Sense of Section 2, *supra* note 23, at 387–95 (“There is certainly no plain meaning to this statutory standard, and the legislative history is opaque in critical respects.”).

93. *Id.* at 379–403.

94. A terminological note: The term “subjective discrimination” is used here as a catchall for intentional and disparate-treatment discrimination. Though the terms “intentional discrimination” and “disparate treatment discrimination” are sometimes used interchangeably by the courts, disparate treatment—treating person *A* differently than person *B* because of *A*’s race—need not be intentional. It may result from biases or preferences of which the decisionmaker is unaware. See generally Symposium on Behavioral Realism, 94 Calif. L. Rev. 945 (2006) (covering various forms of implicit bias in human behavior and intersection with law). The Supreme Court’s recent decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), strongly signals that even unintended disparate treatment on the basis of race generally violates the Fourteenth Amendment. See Samuel R. Bagenstos, Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After *Inclusive Communities*, 101 Cornell L. Rev. (forthcoming) (manuscript at 17) (on file with the *Columbia Law Review*) (noting Court “referred not just to ‘disguised animus’ but also to ‘unconscious prejudices’” in describing discriminatory intent uncovered by disparate impact doctrine (quoting *Inclusive Cmty.*, 135 S. Ct. at 2522)).

95. See Elmendorf, Making Sense of Section 2, *supra* note 23, at 399–403 (describing how constitutional concerns facilitate narrow reading of section 2 by conservative Justices).

does not violate the Constitution, the Court has imposed a tailoring requirement: Enforcement measures must be “congruent and proportional” to the record or threat of constitutional violations.⁹⁶ It is doubtful that a pure disparate-impact standard could satisfy this requirement.⁹⁷

But plaintiffs in a section 2 case must show more than disparate impact. Rather, as many courts have stated, plaintiffs must establish not only (1) that the challenged election law, procedure, or practice has a racially disparate impact on the minority’s opportunity to participate in the political process (in vote denial cases) or to elect representatives of its choice (in vote dilution cases) but also (2) that this disparate impact can be chalked up to the “interact[ion]” of the challenged provisions with “social and historical conditions.”⁹⁸

The answer to those who doubt section 2’s constitutionality lies in the murky “social and historical conditions” requirement. It should be interpreted to maintain a nexus between liability under the statutory results test and actual or threatened constitutional violations. The showing ought to establish that unconstitutional race discrimination in the electoral process is at least “significantly likely” to occur or to have occurred in the defendant jurisdiction and that the remedy the plaintiff seeks is a reasonable response to the risk of constitutional violations.⁹⁹ To avoid confusion, we suggest relabeling the “social and historical conditions requirement” as the “constitutional risk requirement.”

In an important sense, the “social and historical conditions” or “constitutional risk” showing is section 2’s counterpart to the coverage formula for section 5. Because the coverage formula for section 5 tracked historical, unconstitutional race discrimination,¹⁰⁰ preclearance could be denied on the basis of retrogressive impact alone, without any further showing to establish a nexus between the remedy—denial of preclearance—and constitutional violations (at least until the coverage formula began to seem dated). But because section 2 applies nationally and thus to many state and local governments with no history of entrenched, *de jure* race discrimination, it is necessary for plaintiffs to make a further, case-specific

96. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

97. See Elmendorf, Making Sense of Section 2, *supra* note 23, at 400–01 (claiming racially disproportionate election outcomes alone may not justify application of section 2 as “congruent and proportional” under *Boerne*).

98. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (plurality opinion) (Brennan, J.); see also *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014) (extending this idea to vote denial claims); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 554–55 (6th Cir. 2014) (same).

99. See Elmendorf, Making Sense of Section 2, *supra* note 23, at 417–47 (stating plaintiffs in section 2 cases must show significant likelihood of link between injury and “race-biased decisionmaking”).

100. Technically, the coverage formula used proxies: low rates of voter participation and the use of “tests or devices” to disqualify voters. But the formula was reverse engineered to cover most of the Jim Crow South. See *South Carolina v. Katzenbach*, 383 U.S. 301, 329–30 (1966) (describing coverage formula and its purpose).

showing that judicial intervention to remedy the racial disparity is justified.

A few caveats are in order. There is no settled judicial understanding of the “social and historical conditions” requirement in section 2 cases. Some judges have said it simply corroborates that the racially disparate impact “is not merely a product of chance.”¹⁰¹ So understood, the “social and historical conditions” showing need not say anything about the nexus between the remedy the plaintiffs seek and the risk of constitutional violations. Indeed, in most cases the showing would be redundant with the evidence of disparate impact. The impacts with which section 2 is concerned (minority representation and minority voter participation) result from the “interaction” of the challenged measure with large numbers of people (voters or potential voters and candidates or potential candidates), usually across a substantial number of elections.¹⁰² Under such conditions, large racial disparities are very unlikely to occur due to chance alone.¹⁰³ A showing of racially disparate impact will in most cases establish by implication that there exists *some* set of race-correlated “social conditions” (e.g., wealth, education, employment, political interest, church attendance, car ownership, newspaper readership, etc.) that account for the disparity.

In point of fact, however, most courts addressing “social and historical conditions” in a section 2 case focus not on socioeconomic conditions generally, but rather on subjective race discrimination and its legacy—precisely what the courts ought to focus on if the purpose of the showing is to identify risk factors for unconstitutional race discrimination in the electoral process.¹⁰⁴ Typical considerations include Jim Crow history, housing

101. E.g., *Frank v. Walker*, 17 F. Supp. 3d 837, 876–77 (E.D. Wis. 2014), rev’d on other grounds, 768 F.3d 744 (7th Cir. 2014). This also seems to have been the understanding of the plurality in *Gingles*, 478 U.S. 30, which tried to boil vote dilution law down to the simple question of whether minority-preferred candidates were almost always defeated. See *id.* at 46–51 (plurality opinion) (Brennan, J.).

102. For example, the measurement of impact may factor elections over several cycles for every seat in a legislative chamber or congressional delegation. Cf. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 436–37 (2006) (holding “proportionality” in section 2 challenge to statewide redistricting is to be assessed on statewide basis).

103. This follows from a statistical theorem called the “law of averages” or “law of large numbers.” For an introduction, see David Freedman et al., *Statistics* 273–84 (4th ed. 2007) (providing mathematical explanations and exercises to demonstrate law of averages).

104. Many such factors were laid out in an influential Senate Committee report (although not characterized by the Committee as “risk factors” for constitutional violations). See Katz et al., *supra* note 30, at 648–50 (“The Senate Report identified several factors, now known as ‘the Senate Factors,’ for courts to use when assessing whether a particular practice or procedure results in prohibited discrimination in violation of Section 2.”). For a particularly clear judicial statement interpreting the social-and-historical-conditions requirement much as we suggest, see *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014) (“[The] burden must in part be caused by or linked to social and historical conditions that *have or currently produce discrimination* against members

segregation, racially polarized voting (often assumed to manifest discrimination against minority candidates), public and private discrimination in employment and education, racial campaign appeals, etc.¹⁰⁵ These are risk factors for unconstitutional state action in the electoral process insofar as they bespeak a world in which race discrimination is pervasive.

Some courts go further and expressly read section 2 as requiring proof of race-discriminatory “causation”—evidence that the injury for which plaintiffs seek redress resulted from subjective discrimination by conventional state actors or by voters.¹⁰⁶ On the particulars of this causation requirement, the courts are all over the map. Some courts say it is a necessary element of a section 2 case.¹⁰⁷ Others say it is just one factor among many to be weighed.¹⁰⁸ Some courts seem to infer causation from

of the protected class.” (emphasis added) (citations omitted) (internal quotation marks omitted)).

105. See generally Katz et al., *supra* note 30, at 661–730 (discussing judicial treatment of “Senate Report” factors). For recent exemplars, see, e.g., *League of Women Voters*, 769 F.3d at 238–47 (emphasizing history of discrimination); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 556–59 (6th Cir. 2014) (emphasizing discrimination in education and employment as well as in electoral process).

106. See generally Hebert et al., *Realist’s Guide*, *supra* note 30, at 57–58 (“[A] number of courts have held that a plaintiff cannot win a Section 2 case where racially polarized voting is caused by reasons other than racial animus.”); Greiner, *Causal Inference*, *supra* note 63, at 590–97 (stating “prevailing view” is that “section 2 does contemplate . . . causal inquiry”); Katz et al., *supra* note 30, at 670–73 (“Courts in nine judicial circuits now expressly or implicitly incorporate causation.”). For a rare exception, see *United States v. Blaine County*, 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.”).

107. See, e.g., *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997) (requiring section 2 plaintiffs to demonstrate causal connection between challenged voting practice and prohibited discriminatory result); *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) (“[T]he ultimate burden of persuading the factfinder that the voting patterns were engendered by race rests with the plaintiffs.”); *S. Christian Leadership Conference of Ala. v. Sessions*, 56 F.3d 1281, 1292 (11th Cir. 1995) (finding lack of “discriminatory purposes” in place requirements and lack of “discriminatory intent” in size of judicial election districts); *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (en banc) (plurality opinion) (Tjoflat, C.J.) (“[I]f the evidence shows . . . that the community is not motivated by racial bias in its voting patterns, then a case of vote dilution has not been made.”); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 862 (5th Cir. 1993) (en banc) (“[A]n inquiry into the causes underlying polarized voting is appropriate”); *Mallory v. Ohio*, 38 F. Supp. 2d 525, 575–76 (S.D. Ohio 1997) (stating plaintiffs must prove “deprivation of the minority group’s right to equal participation must be on account of a classification, decision, or practice that depends on race or color” (quoting *Nipper*, 39 F.3d at 1515)), *aff’d*, 173 F.3d 377 (6th Cir. 1999).

108. See, e.g., *Goosby v. Town of Hempstead*, 180 F.3d 476, 493–503 (2d Cir. 1999) (holding causation is relevant factor to be considered in totality of the circumstances inquiry); see also *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1008–38 (D.S.D. 2004) (recognizing causation “may be relevant” at totality of circumstances stage of section 2 case).

Jim Crow history.¹⁰⁹ Others insist on evidence that current voting patterns or actions by government officials manifest subjective discrimination against minority candidates.¹¹⁰ Still other courts rebuttably presume subjective race discrimination from racially polarized voting in biracial elections.¹¹¹ Judicial 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.¹¹² Jim Greiner thinks it is a nominal requirement only, regularly ignored in practice.¹¹³

109. See, e.g., *Miss. State Chapter, Operation Push v. Mabus*, 932 F.2d 400, 405 (5th Cir. 1991) (affirming district court finding of 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 30, at 675–77 (describing courts’ findings about the “nature, frequency, and recentness” of discrimination). 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.

110. See, e.g., *Uno*, 72 F.3d at 983 (“If proven, these preconditions give rise to an inference that racial bias is operating through the medium of the targeted electoral structure to impair minority political opportunities.”).

111. See, e.g., *Goosby*, 180 F.3d at 502–03 (Leval, J., concurring) (“Proof of [*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 . . .”); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (“Proving discriminatory intent is not part of the plaintiffs’ case under § 2.”); *Uno*, 72 F.3d at 983 (“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 can most logically be explained by factors unconnected to the intersection of race with the electoral system.”). 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 County*, 92 F.3d 283, 294 (5th Cir. 1996) (holding plaintiffs need not prove “causal connection” between past discrimination and depressed minority participation); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993) (holding district court must “explain with particularity” finding for defendant in section 2 case where “white voters voting as a bloc . . . defeat the candidate of choice of a politically cohesive minority group”); see also *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995) (citing *Jenkins*, 4 F.3d at 1135); *Clark v. Calhoun County*, 21 F.3d 92, 97 (5th Cir. 1994) (same).

112. Katz et al., *supra* note 30, at 671–72 & n.145 (citing thirteen cases and noting “[p]roving the linkage is difficult . . . and numerous lawsuits have held that plaintiffs failed to meet their burden . . . on this point”).

113. Greiner, *Causal Inference*, *supra* note 63, at 591 (“[T]he 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.”); Greiner, *Re-Solidifying Racial Bloc Voting*, *supra* note 69, at 459–60 (characterizing current burden-shifting practices as depriving causation requirement of practical bite).

In any event, our aim is not to extract from the case law some majority or plurality view of the causation or social-and-historical-conditions requirement. Rather, the intention is to gloss it in a manner that a broad range of judges could accept, including those—such as the median Justice on the current Supreme Court—who are leery of equalizing, race-conscious state action except as a remedy for subjective race discrimination. As noted above¹¹⁴ and explained at length elsewhere, the “risk factors” interpretation effectively reconciles the results test of section 2 with the jurisprudential premises of the conservative center.¹¹⁵ The point of the showing is to establish that the relief the plaintiff seeks is reasonably well tailored to remedy or prevent constitutional violations. Plaintiffs need not prove that constitutional violations in fact occurred, or that they necessarily will occur in the future. But plaintiffs must establish a *significant likelihood or risk* of unconstitutional race discrimination in the electoral process. Accordingly, this Article will refer to this element of the plaintiff’s case not as the “social and historical conditions” requirement or the “causation” requirement, but rather as the “constitutional risk” or “risk factors” requirement.

One might suppose that constitutional risk could be established, at least in the Deep South, merely by invoking Jim Crow history. Remedies under section 2 can certainly be characterized as remedying the lingering effects of generations of unchecked discriminatory state action in the South.¹¹⁶ Numerous lower courts have in fact emphasized Jim Crow history as part of the “social and historical conditions” inquiry.¹¹⁷ But in *Shelby County v. Holder*, the Supreme Court denied the legitimacy of history as a basis for subjecting state and local governments to preclearance under section 5.¹¹⁸ *Shelby County* asks instead for evidence of *current* race discrimination, not historical discrimination; the Court was unwilling to assume that state and local governments that engaged in de jure discrimination half a century ago are today more likely than other subnational

114. See supra notes 98–100 and accompanying text (noting “social and historical conditions” requirement may maintain nexus between liability under results test and actual or threatened constitutional violations).

115. See Elmendorf, Making Sense of Section 2, supra note 23, at 417–47 (developing interpretation of section 2 grounded in statute’s “legislative history and constitutional context”).

116. See Pamela S. Karlan, Two Section Twos and Two Section Fives: Voting Rights and Remedies After *Flores*, 39 Wm. & Mary L. Rev. 725, 738–40 (1998) (discussing remedies to racial bloc voting that “dampen the present effects of . . . past external discrimination”).

117. See Katz et al., supra note 30, at 676 (noting “[m]any courts” evaluating social and historical conditions discussed discrimination from nineteenth and early twentieth centuries, including “literacy tests, grandfather clauses, poll taxes, white primaries, . . . voter registration requirements, . . . [and] state laws mandating segregation”).

118. See Joel Heller, *Shelby County* and the End of History, 44 U. Mem. L. Rev. 357, 359–60 (2013) (noting Court’s rejection of section 5 formula relying on historical data); see also *Shelby County v. Holder*, 133 S. Ct. 2612, 2629 (2013) (holding Congress “cannot rely simply on the past” and must use “current data” for coverage formula).

political units to discriminate unconstitutionally.¹¹⁹ *Shelby County* is of a piece with many other Supreme Court decisions setting time limits on remedies for past de jure discrimination.¹²⁰ It is therefore doubtful that the Court will treat purely historical evidence as sufficient to establish a current risk of constitutional violations in section 2 cases. And it is equally unlikely that the Court will view results-oriented remedies under section 2 as a “congruent” response to constitutional violations that took place long ago.¹²¹

Plaintiffs will be on much stronger ground if they can make the constitutional risk showing using *current data*, focusing on the *present-day* risk of unconstitutional race discrimination in the electoral process. History must be downplayed. Working from these premises, the balance of this Part sketches a set of rebuttable presumptions that could be used to implement the constitutional-risk and disparate-impact prongs of section 2.

B. *Presumptions About “Risk Factors” for Constitutional Violations*

The essential ingredients for a workable showing of “constitutional risk” under section 2 are a facially convincing theory about risk factors for unconstitutional race discrimination and an empirical method for ascertaining the relative severity of those risk factors across jurisdictions using current data. The theory has to be facially convincing because the relevant constitutional violations are difficult to observe. Social scientists can track outcomes—minority registration and turnout, the election of minority candidates, etc.—but as presently interpreted, the Fourteenth and Fifteenth Amendments are indifferent to outcomes as such. What makes a racially disparate outcome unconstitutional is not the extent of the disparity but whether it results from subjective discrimination, and such discrimination is hard to detect.

Accordingly, this section suggests a pair of constitutional risk presumptions that speak to motive and propensities for disparate treatment.

119. 133 S. Ct. at 2625–31.

120. See, e.g., *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247 (1991) (“From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination.”). As Gary Orfield and Chungmei Lee observe, “The basic position of the Court during the past 16 years has been that the constitutional violations arising from a history of segregation and inequality, when proved, justify race conscious remedies but only for a limited time.” Gary Orfield & Chungmei Lee, *Historic Reversals, Accelerating Resegregation, and the Need for New Integration Strategies*, Report of the Civil Rights Project/*Proyecto Derechos Civiles*, UCLA 7 (2007), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf> [http://perma.cc/6G5B-GG85]; cf. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

121. Cf. *Shelby County*, 133 S. Ct. at 2624–29 (recounting “dramatic[]” improvements in minority political participation in South over last fifty years); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009) (“Things have changed in the South.”).

One is grounded on current racial attitudes, the other on elected officials' incentive to use race as a screening device to effectuate political discrimination.¹²²

1. *Racial Attitudes and Beliefs*.¹²³ — 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. It is also plausible to suppose that in these communities, the adoption or maintenance of electoral arrangements that disadvantage minorities tends to occur in part because of motives or beliefs that the Constitution disallows as the basis for state action. Locally elected officials are selected from and by the residents, and if majority-race residents denigrate the minority, these officials will probably be rewarded (or at least not punished) at the ballot box if they suppress minority political participation or representation.¹²⁴

To be sure, it doesn't follow from the existence of negative racial attitudes on the part of the white majority that minority candidates or minority voters will in fact suffer disparate-treatment discrimination. Indeed, the question of whether racial attitudes "cause" disparate treatment is, for methodological purists, unanswerable. Like her race itself,¹²⁵ a person's racial attitudes cannot be manipulated by researchers, and without manipulation of the supposed "cause" there is no way to determine with certainty the effects of that cause.¹²⁶ Moreover, 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 minority candidates, it would not

122. 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 & Kevin M. Quinn, *Using Experiments to Estimate Racially Polarized Voting* 27–35 (Univ. Cal. Davis Legal Studies Research Paper, No. 419, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2569982 (on file with the *Columbia Law Review*) [hereinafter Abrajano et al., *Using Experiments*] (demonstrating technical feasibility of experiment with non-representative sample survey).

123. Portions of this section previously appeared in Elmendorf & Spencer, *Preclearance*, supra note 19, at 1137–38.

124. Note also that vote dilution remedies can be conceptualized as a response to unconstitutional state action *by the electorate*, see Elmendorf, *Making Sense of Section 2*, supra note 23, at 430–47.

125. See D. James Greiner & Donald B. Rubin, *Causal Effects of Perceived Immutable Characteristics*, 93 *Rev. of Econ. & Stat.* 775, 776 (2011) (“[A]ttributes are not subject to change by intervention.”).

126. See *id.* at 775 (noting impossibility of manipulating immutable traits “in a way analogous to administering a treatment in a randomized experiment”). On the centrality of manipulation/randomization to causal inference, see Joshua D. Angrist & Jörn-Steffen Pischke, *Mostly Harmless Econometrics: An Empiricist's Companion* 5 (2008).

be clear that the negative stereotypes were responsible for the subject's lack of support for minority candidates.¹²⁷

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 merely a set of attitudes unconnected to behavior. Law is a practical endeavor. Sometimes a social convention about causation is enough.¹²⁸ Subject to two provisos, the "constitutional risk" element of a section 2 claim can be deemed (presumptively) satisfied if plaintiffs show that majority-race citizens harbor negative attitudes about the minority.¹²⁹

The first proviso is that *the measure of racial attitudes must correlate with political behavior or preferences among white (majority-race) voters*.¹³⁰ Section 2

127. 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 Am. Acad. Pol. & Soc. Sci.* 200, 200 (2010) (arguing statistical methods used to study mediation are flawed and require strong assumptions to answer questions).

128. 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 or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000). Consider also the torts doctrine of *res ipsa loquitur*, which clearly rests on generally shared beliefs (rather than data) about how things work in the world. See Jane Stapleton, Law, Causation, and Common Sense, 8 *Oxford J. Legal Stud.* 111, 112 (1988) (reviewing H.L.A. Hart's work on role of "common sense" in legal treatments of causation).

129. Note that although conservative judges have generally rejected the idea that there is a compelling interest in remedying societal discrimination, Congress's power to remedy societal discrimination may be considerably greater when such discrimination proximately affects voting and election outcomes. See Elmendorf, Making Sense of Section 2, *supra* note 23, at 430–36 (arguing electorate as a whole is state actor when it performs "public function" of putting in office officials who exercise coercive power of state); Ellen D. Katz, Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts, 101 *Mich. L. Rev.* 2341, 2355–60 (2003) (noting Waite Court left room for Congress to attack race discrimination insofar as it prevented blacks from voting). Notably, the conservative judges who have read a race-discriminatory "causation" requirement into section 2 have accepted that race discrimination *by the electorate* furnishes the necessary causal link. See, e.g., *Nipper v. Smith*, 39 F.3d 1494, 1515–24 (11th Cir. 1994) (en banc) (plurality opinion) (Tjoflat, C.J.) (concluding plaintiff may prove discrimination by showing "objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme"); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 862 (5th Cir. 1994) (en banc) (stating plaintiffs' causation requirement satisfied by showing "failure to elect representatives of their choice is attributable to white bloc voting rooted in racial considerations").

130. 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 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

is ultimately concerned with equal political opportunity.¹³¹ If whites' racial attitudes do not correlate with political behavior, there is little ground for presuming that minority-preferred candidates or policies would have fared better but for white prejudice. 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 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.¹³²

The second proviso is that *the racial-attitude measure must capture an attitude or belief that the Constitution disallows as the basis for state action*. Many political scientists have sought to quantify what they call “racial resentment” or “modern” racism, using survey questions that ask about support for federal welfare programs, affirmative action, and interventions by the “government in Washington” to improve the social and economic welfare of blacks.¹³³ Racists no doubt give predictable answers to these questions, but there is nothing unconstitutional about predicating state action on the belief that federal welfare programs are a waste of money, or the view that affirmative action and efforts by the “government in Washington” to improve the welfare of blacks have been counterproductive. Because of this, it is tenuous to infer a likelihood of unconstitutional race discrimination from the prevalence of “racial resentment.”

However, as we have shown elsewhere, conventional survey-based measures of *racial stereotyping*, which tap perceptions of racial differences in work ethic, intelligence, and trustworthiness, easily satisfy both of the

be causal in that racial attitudes themselves cannot be randomized. The showing would be correlational and therefore suggestive only. In section IV.B, *infra*, we satisfy the proviso by showing that our measure of prejudice predicts vote choice in elections contested by Barack Obama. See *infra* text accompanying notes 298–300.

131. See 52 U.S.C. 10301(b) (Supp. II 2015) (“A violation . . . is established if, based on the totality of the circumstances, it is shown that . . . members of a [protected] class of citizens . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” (emphasis added)).

132. Thanks to Kevin Quinn for suggesting this analogy. 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.

133. See, e.g., Donald R. Kinder & Lynn M. Sanders, *Divided by Color: Racial Politics and Democratic Ideals* 15–18 (1996) (analyzing national surveys on equal opportunity, racially based federal assistance, and affirmative action to assess public views of racial matters); Christopher Tarman & David O. Sears, *The Conceptualization and Measurement of Symbolic Racism*, 67 J. Pol. 731, 736–37 (2005) (describing use of surveys to test theory of symbolic racism).

provisos.¹³⁴ Accordingly, the “constitutional risk” question may be resolved (presumptively) by examining whether white voting-age citizens in the defendant jurisdiction subscribe to substantially negative stereotypes of the minority group. The courts, perhaps aided by DOJ, will need to define a quantitative benchmark for what constitutes legally significant racial stereotyping.¹³⁵ Once this benchmark has 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.

2. *Racial Polarization in Partisanship*. — Instead of (or in addition to) focusing on discrimination in the electorate, courts might ground “constitutional risk” presumptions on whether public officials have cause to discriminate against the racial minority so as to perpetuate their hold on power. Under certain conditions, those in power may benefit from suppressing minority participation irrespective of whether the officials (or majority-race voters) negatively stereotype the character or abilities of the minority.

This political incentive to discriminate 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.¹³⁶ 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 constitutional-risk requirement presumptively satisfied in cases brought by black voters against Republican-enacted voting requirements or redistricting plans 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.¹³⁷

To be sure, 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 would tend to hobble Republican but not Democratic

134. See Elmendorf & Spencer, *Preclearance*, supra note 19, at 1142–55 (explaining why survey data can capture racial attitudes correlated with political attitudes Constitution disallows as basis for state action). 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. The conventional measures may also be weaker for non-black minorities. But until better measures are produced, the conventional measures should suffice.

135. See *infra* section III.B (discussing need for courts to coordinate common presumptions and develop “legally significant” racial stereotyping standard for section 2 litigation).

136. For some evidence of this and a model of associated political incentives, see Cox & Holden, supra note 28, at 564–79.

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

efforts to adjust electoral ground rules for partisan advantage.¹³⁸ This may make the presumption too politically fraught for the courts to adopt.¹³⁹

Another objection is that the political incentives presumption would really capture incentives 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.¹⁴⁰ Political discrimination is generally regarded as constitutionally innocuous, whereas race discrimination is deemed invidious.¹⁴¹

Despite its roots in some important election law cases,¹⁴² the partisanship-not-race objection is hard to square with broader constitutional principles. 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.¹⁴³ Racial animus and ugly stereotypes are not pre-

138. In recent years, Republicans have promoted reforms that would make it harder for low-income and young people (groups disproportionately comprised of racial minorities) to vote, whereas Democrats have sought to expand turnout among the same demographics. See Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* 163–67 (2012) (describing recent debates between Republicans and Democrats over voter fraud and voter-ID election laws as battles of “access versus integrity”).

139. 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 Boyd & Markman, *supra* note 67, at 1414–20 (detailing role of Senator Bob Dole in facilitating compromise on 1982 Amendments to VRA).

140. See Greiner, *Causal Inference*, *supra* note 63, at 593–95 (arguing courts make incorrect assumptions about impact of race on political processes); 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* 58, 67–70 (2014), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/forvoll127_hasen.pdf [<http://perma.cc/K2T5-GX4B>] (discussing cases in which Court could not separate unconstitutional gerrymandering based on race from permissible redistricting based on party considerations); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 *Calif. L. Rev.* 1201, 1220–27 (1996) (arguing courts’ difficulty disaggregating race and politics in section 2 cases is caused by race and political affiliation being “substantially correlated”); 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, 1565–67 (2002) [hereinafter Pildes, *Voting-Rights Law*] (“The Supreme Court’s key engagement with these amendments reflects deep divisions on whether separating racial from partisan reasons for differences in preferences between black and white voters is appropriate.”).

141. See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (“We must determine whether there is adequate support for the District Court’s key findings, particularly the ultimate finding that the legislature’s motive was predominantly racial, not political.”).

142. *Id.*

143. 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 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 gender-based classifications utilizing stereotypes violate Equal Protection Clause “even when some statistical support can be conjured up for the generalization”).

requisites for an equal protection violation.¹⁴⁴ 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 do not wear their voting history on their sleeves. 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.

That said, 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 classify voters by race if the action can be explained as a partisan maneuver and the racial classification is not facially evident.¹⁴⁵ 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.¹⁴⁶

It bears emphasis, finally, that the political incentives approach would not necessarily result in commonplace, Republican-preferred vot-

144. 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. County of Los Angeles, 918 F.2d 763, 778 n.1 (1990) (Kozinski, J., concurring and dissenting in part).

145. See *Easley*, 532 U.S. at 258 (holding plaintiffs challenging electoral district on ground race "predominated" over other considerations in its design must show defendant could have achieved its political objectives equally well using more racially heterogeneous districts); see also Elmendorf & Spencer, *Preclearance*, supra note 19, at 1134-35 (discussing *Easley*). It is perhaps a sign of changes to come, however, that the Court's most recent decision concerning a "racial predominance" claim, *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015), does not mention *Easley's* requirement.

146. Indeed, in *Voinovich v. Quilter*, 507 U.S. 146 (1993), the Court seemed to accept that racial vote dilution undertaken for partisan political reasons would be unconstitutional. *Id.* at 159-60 (holding evidence did not support district court's finding that redistricting authority "sought to minimize the Democratic Party's power by diluting minority voting strength," but not questioning district court's premise that intentional race discrimination undertaken for partisan purposes is constitutionally proscribed).

ing requirements 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,¹⁴⁷ or that the state made a good faith effort to monitor and curtail race discrimination by administrators who implement the law.

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.

To summarize, “constitutional risk” may be inferred, presumptively, from evidence of widespread negative stereotyping of the minority or (at least arguably) from evidence that the state actors responsible for the challenged electoral arrangements had strong partisan incentives to discriminate against the racial minority. The next question—and the subject of the next section—is whether analogous presumptions can be crafted for the disparate impact prong of section 2 cases.

C. *Presumptions About Disparate Impact*

As noted above, section 2 is concerned with two quite different sorts of impacts: racial disparities in opportunities to cast a valid, duly counted ballot (the issue in vote denial cases) and racial disparities in opportunities to secure representation (the issue in vote dilution cases). Because dilution and denial can occur independently of one another,¹⁴⁸ different presumptions are needed for each class of cases.

147. 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., *Hous. Lawyers’ Ass’n v. Texas*, 501 U.S. 419, 426–27 (1991) (noting state interest in electing trial judges from districts coextensive with 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”); Katz et al., *supra* note 30, at 727–30 (reviewing case law in lower courts).

148. The issue in typical dilution cases is whether the rules for translating votes into representation make it difficult for the minority community to secure representation—given the distribution of political preferences in the electorate—even if minorities can vote without hindrance. See generally Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 *Harv. L. Rev.* 1663, 1671–81 (2001) [hereinafter Gerken, *Understanding*] (explaining concept of dilution as it developed in courts).

1. *Vote Dilution*. — Though there is still ample room for disagreement about the meaning of disparate impact in dilution cases,¹⁴⁹ most courts assess disparate impact by comparing the number of MODs—districts in which the minority community can elect its “candidates of choice”—with some benchmark conception of the appropriate or fair number of MODs.¹⁵⁰ Arguably the dominant approach is to treat “rough proportionality” as the fairness benchmark (equivalence between the minority’s population share and its share of electoral districts), but only insofar as proportionality can be achieved within a system of compact single-member districts drawn in accordance with traditional criteria.¹⁵¹

To evaluate disparate impact, then, a court must establish whether the racial minority has distinct political preferences that set it apart from the majority group¹⁵² and if so, whether or to what extent the minority can elect its candidates of choice. (Absent some racial divergence in political preferences or interests, it does not make sense to speak of minority-race voters as a group having “candidates of choice.”¹⁵³)

It follows that evidence of racial polarization may come into play under the “disparate impact” as well as the “constitutional risk” prong of a dilution case—although evidence that a court deems sufficient under one prong may not satisfy the other. For example, a court might reasonably

149. See generally Elmendorf et al., *Racially Polarized Voting*, supra note 60 (manuscript at 37–42) (contrasting four theories of racial vote dilution).

150. Some courts also weigh opportunities for minority influence through channels other than the election of “candidates of choice.” See *id.* (manuscript at 38–40) (discussing “coalitional breakdown” theory of vote dilution, and associated cases).

151. See Hebert et al., *Realist’s Guide*, supra note 30, at 59 (“[P]roportionality has become an increasingly crucial issue in Section 2 cases.”); see also Katz et al., supra note 30, at 730–32 (noting in nearly all cases in which lower courts made finding on proportionality, liability question was resolved accordingly); cf. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 436 (2006) (beginning “totality of circumstances” inquiry by assessing proportionality, implying it is especially important factor to consider). Note, however, that *LULAC*’s ultimate finding of liability was not grounded on the lack of proportionality, and in a subsequent opinion Judge Easterbrook expressly rejected the proportionality benchmark in favor of something like “the number of majority minority districts that probably would have been drawn by an automated redistricting algorithm following traditional criteria.” *Gonzalez v. City of Aurora*, 535 F.3d 594, 599–600 (7th Cir. 2008). And it is certainly clear that the state has no obligation to achieve “proportionality” except insofar as it can be done by drawing reasonably compact, majority-minority districts. This follows from *LULAC*, which counts only “reasonably compact” majority-minority districts in the proportionality analysis, see 548 U.S. at 437–38, and which declares, “there is no § 2 right to a district that is not reasonably compact,” *id.* at 430 (citing *Abrams v. Johnson*, 521 U.S. 74, 111–12 (1997)).

152. See *Thornburg v. Gingles*, 478 U.S. 30, 47–51 (1986) (plurality opinion) (Brennan, J.) (“If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.”); Hebert et al., *Realist’s Guide*, supra note 30, at 48–50 (discussing meaning of minority political cohesiveness).

153. See Gerken, *Understanding*, supra note 148, at 1677–79 (considering importance of group vote aggregation in influencing political process).

require extreme polarization in partisanship under the constitutional risk prong while holding that evidence of a statistically significant difference in policy preferences establishes preference polarization under the impact prong.¹⁵⁴

Notice too that under the impact prong, evidence of racial divergence in political preferences or interests is clearly necessary but just as clearly not sufficient. Whether the minority community has the opportunity to elect a roughly proportional number of its candidates of choice depends not only on the extent of preference polarization but also the geographic distribution of voters of each racial group and the rules for aggregating votes into outcomes. Courts need tools for determining whether any particular legislative district is an MOD.

Presently, judges resolve the group-cohesion/polarization and opportunity-district questions using estimates of white and minority voting patterns in recent elections in the defendant jurisdiction.¹⁵⁵ These estimates are created by ecological inference from aggregate data—vote tallies and demographics at the precinct level.¹⁵⁶ Generating the estimates is costly. Expert witnesses must retrieve several years' worth of precinct-level election results from county courthouses, digitize the data, merge it with demographic data from the Census, and then apply several different statistical tools for estimating the correlation between race and vote choice.¹⁵⁷ Litigants then do battle over which elections are most “probative” of group political cohesion and minority opportunity.¹⁵⁸ Courts muddle through; the relevant legal doctrines give trial judges enormous discretion but not much guidance about how to exercise it.¹⁵⁹

This process could be greatly streamlined if the courts recognized rebuttable presumptions about racial-group cohesion and MODs, presumptions whose application would depend on national survey data rather than local election results. The next two sections survey the possibilities, beginning with the question of preference/interest divergence and then moving on to the question of whether a district should be counted as an MOD.

154. Subtle differences in different courts' normative theories of vote dilution may also lead the courts to expect different kinds of showings of preference polarization. See Elmendorf et al., *Racially Polarized Voting*, supra note 60 (manuscript at 42–49) (explaining conflicting implications of several normative theories of dilution).

155. See generally *id.* (manuscript at 15–35) (reviewing and explaining judicial practice).

156. See generally Greiner, *Ecological Inference*, supra note 78 (evaluating ecological inference methods used in assessing racial voting patterns).

157. Interview with VRA Litigator, in Chi., Ill. (Apr. 6, 2014); Telephone Interview with Voting Rights Expert Witness (Jan. 3, 2014).

158. See Elmendorf et al., *Racially Polarized Voting*, supra note 60 (manuscript at 24–27) (detailing selection and weighting of elections).

159. See *id.* (manuscript at 33) (“[T]here are no established quantitative cutoffs to distinguish polarized from non-polarized communities, no clear-edge rules about which elections to include in the polarization analysis and how to weight them, and . . . racial assumptions are . . . baked into the statistical tools . . .”).

a. *Preference/Interest Divergence (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);¹⁶⁰ (2) base polarization determinations on citizens' interests (interest polarization); or (3) base polarization determinations on the results of survey experiments (a variant on preference polarization). This section briefly describes the three approaches; Part IV reports 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 is not always true.¹⁶¹ 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 are available from the Census Bureau at the geographic scales needed for section 2 litigation.¹⁶² The preference-based approach is, however, more in keeping with the existing judicial focus on voter preferences,¹⁶³ as well as recent empirical evi-

160. Whether the presumptions should reflect the political preferences of all voting-eligible citizens, or only registered voters or likely voters, is a question this Article does not resolve.

161. Cf. Andrew Gelman et al., *Red State, Blue State, Rich State, Poor State: Why Americans Vote the Way They Do* 48–54 (expanded paperback ed. 2010) (showing systematic regional differences in degree to which affluent people vote their economic interests); Eitan Hersh & Clayton Nall, *The Primacy of Race in the Geography of Income-Based Voting: New Evidence from Public Voting Records*, *Am. J. Pol. Sci.* (forthcoming 2015), <http://www.stanford.edu/~nall/docs/cata9.6.pdf> [<http://perma.cc/P9RB-L6SX>] (exploring geographic variation in correlation between income and partisan voting).

162. 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, *The South After Shelby County*, *supra* note 40, at 94–101 (describing refinements to factor analysis method of evaluating districts' spatial diversity); Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 *Harv. L. Rev.* 1903, 1907 (2012) (synthesizing socioeconomic data from Census to produce “single figure for each [congressional] district that shows . . . how spatially homogeneous or heterogeneous the district is”).

163. See, e.g., *United States v. Blaine County*, 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 Am.

dence about geographic variation in income-based voting and ontological commitments to free will.¹⁶⁴

Both preference- and interest-based approaches present challenges when racial groups polarize on some but not all issues, ideological dimensions, or interests. The responsible decisionmaker must decide how to weight the various indicators of cohesion or polarization. But this problem—for purposes of a rebuttable presumption of cohesion or polarization—is less vexing and less of a barrier to preliminary relief than the analogous problem, in a conventional racial polarization analysis, of deciding *which elections* to include in the analysis and how to weight them.¹⁶⁵

One reason it is 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,¹⁶⁶ 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 usually give the most weight to recent elections for the governmental body at issue in the case.¹⁶⁷ Each case therefore depends on sets 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.¹⁶⁸ This has obvious implications for the availability of preliminary relief.

Second, because the presumption of racial polarization would be rebuttable, courts need not be perfectionist about the measure. A generic measure of ideology scaled from issue preferences (i.e., first dimension

Citizens v. Perry, 548 U.S. 399, 430–35 (2006) (incorporating evidence of socioeconomic conditions into evaluation of district’s “compactness”).

164. *Supra* note 163.

165. Courts struggle all the time with whether to include or how to weight voting data from white versus white elections, primary elections, and elections to governmental bodies other than the one at issue. See Elmendorf et al., *Racially Polarized Voting*, *supra* note 60 (manuscript at 24–27, 29–31) (observing courts have “opted for loose guidelines” on types of elections to weigh in analysis, causing disagreement over probative value of “monoracial,” primary, and “exogenous” elections).

166. One example would be measures of educational attainment used in school board election cases.

167. See Hebert et al., *Realist’s Guide*, *supra* note 30, at 54–55 (noting many courts have discounted, and some even refuse to consider, evidence of racial polarization in “exogenous” elections, i.e., elections for governmental body other than one at issue in case).

168. This common law still might not provide enough guidance without a strong assist from DOJ. See *infra* notes 222–231 (discussing DOJ’s ability to induce judicial coordination by issuing section 2 interpretive rules).

ideal points) arguably should suffice for most elections,¹⁶⁹ even though citizens with the same ideal points may have important disagreements on certain issues.¹⁷⁰ Alternatively, judges could ask litigants to show the relative importance that minority and white voters attach to different issues.¹⁷¹ Cohesion and polarization determinations could then be based on issue preferences weighted by their importance to minority voters. Of course, any court that continued to regard polarized voting in local elections as particularly informative about group political cohesion could invite litigants to rebut the presumption with local voting data.

Perhaps the cleanest solution to the “which issues” problem is to base polarization determinations on preferences revealed through survey experiments. One of us shows in a working paper that this can be done by asking voters to choose between pairs of hypothetical candidates whose race and endorsements have been randomized.¹⁷²

Whichever measure one favors, the important point for present purposes is that it is feasible to create presumptions about within-group political similarity and between-group political difference *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.

b. *Minority Opportunity Districts*. — The existence of significant polarization in interests or preferences between white and minority communities does not necessarily mean that particular minority plaintiffs lack

169. 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) (reviewing methods of analyzing and interpreting roll call voting to determine ideology). For a treatment of some issues that arise when the same methods are used to scale ordinary citizens' ideology, see generally Jeffrey B. Lewis & Chris Tausanovitch, *Has Joint Scaling Solved the Achen Objection to Miller and Stokes?* (Feb. 6, 2013) (unpublished manuscript), http://www.vanderbilt.edu/csdi/miller-stokes/05_MillerStokes_LewisTausanovitch.pdf [<http://perm.a.cc/62Z6-W37K>] (arguing methodologies for estimating legislator ideology from roll call voting are incompatible with public opinion polls).

170. See David E. Broockman, *An Artificial “Disconnect” 16–19* (Oct. 24, 2014) (unpublished manuscript) (on file with the *Columbia Law Review*) (illustrating voters with average responses across several issues appear moderate but provide extreme responses to single issues).

171. To fully implement this approach, the organizations that conduct large-scale 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.

172. See Abrajano et al., *Using Experiments*, *supra* note 122, at 13–18 (detailing study methodology). For a related idea, see generally Will Bullock, Kosuke Imai & Jacob N. Shapiro, *Statistical Analysis of Endorsement Experiments: Measuring Support for Militant Groups in Pakistan*, 19 *Pol. Analysis* 363 (2011) (randomizing group endorsement of policy positions and using Bayesian hierarchical models to infer geographic variation in support for endorsers).

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. So polarization *alone* is not enough to establish a presumption of dilution (disparate impact). The court needs some way of gauging whether particular districts are minority opportunity districts and then comparing the share of MODs to the minority’s population share.¹⁷³

Historically the courts have assessed the likely “performance” of electoral districts with detailed inquiries into local political conditions.¹⁷⁴ 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.¹⁷⁵

One straightforward way to simplify this inquiry is to presume that a district is an MOD if and only if the minority community composes at least 50% of the district’s citizen voting age population (CVAP).¹⁷⁶ Because the Constitution prevents the government from erecting substantial barriers to registration and voting,¹⁷⁷ it may be said that any district in which the minority community makes up at least half of the voting-eligible

173. This assumes that what is being challenged is a system of single-member districts. If the plaintiffs were challenging at-large elections or multi-member districts, then what would be needed is a method for assessing minority opportunity under that system.

174. See Hebert et al., *Realist’s Guide*, supra note 30, at 56–59 (explaining since *Gingles* courts have had to assess whether white bloc voting “usually [results in] defeat of the minority’s preferred candidate” and this inquiry requires courts to consider “a variety of factual circumstances” (internal quotation marks omitted)); Stephanopoulos, *The South After Shelby County*, supra note 40, at 80 (discussing predictive judgments about ability-to-elect under section 5).

175. All of these factors figure into the “totality of circumstances” analysis of a section 2 case. See generally Katz et al., supra note 30, at 675–730 (discussing “Senate Factors”).

176. CVAP estimates from the Census are less precise than estimates of the total voting age population. See 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, 773–82 (2011) (arguing difficulties obtaining reliable citizenship data should lead Court to clarify total voting age population is appropriate metric for demonstrating size of minority community). 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.

177. At the least, the Constitution prevents the government from erecting barriers that are substantial for some people but not for others. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 198–200 (2008) (finding burdens imposed by Indiana voter-ID law not sufficiently substantial to invalidate statute partly because of mitigations to protect those burdened by law); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) (“[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest.”).

population is by definition an opportunity district.¹⁷⁸ 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,¹⁷⁹ these differences arguably should be disregarded (unless they can be fairly attributed to race discrimination in violation of the Fourteenth and Fifteenth Amendments¹⁸⁰).

In recent years, voting rights claimants have often argued that strictly majority-minority districts are not necessary to provide the “opportunity to elect” minority candidates of choice, and indeed that such districts may weaken the minority community’s overall political influence by wasting minority votes.¹⁸¹ Certainly there are more nuanced alternatives to the “50% CVAP” rule, such as presuming that a district is an MOD if the minority community composes a majority of the citizens in the district who prefer the major political party with the most support among the district’s voters;¹⁸² 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.¹⁸³

178. See *Jeffers v. Beebe*, 895 F. Supp. 2d 920, 930–33 (E.D. Ark. 2012) (holding after *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion) (Kennedy, J.), any district which is majority-minority by voting-eligible citizens is minority opportunity district as matter of law).

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

180. See *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) (noting protected class would be entitled to section 2 relief if turnout disparities were attributable to prior official discrimination); Theane Evangelis, Note, *The Constitutionality of Compensating for Low Minority Voter Turnout in Districting*, 77 N.Y.U. L. Rev. 796, 808 (2002) (“The Supreme Court’s current equal protection doctrine requires strict scrutiny review for race-conscious state policies, including excessively race-conscious districting.”).

181. This issue is front and center in pending constitutional challenges to statewide redistricting maps in Alabama and North Carolina. See *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1262, 1274 (2015) (vacating district court decision rejecting plaintiffs’ claim Alabama violated Fourteenth Amendment by drawing majority-minority districts not reasonably necessary to comply with VRA); see also *Dickson v. Rucho*, 135 S. Ct. 1843 (2015) (vacating similar decision of North Carolina Supreme Court for reconsideration in light of *Alabama Legislative Black Caucus*).

182. Cf. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 485–86 (2006) (Souter, J., concurring in part and dissenting in part) (suggesting this standard as gloss on *Gingles* numerosity requirement).

183. It might also be argued that the minority-opportunity-district presumption should account for race-correlated differences in voter turnout. Reasoning thus, some courts have applied a “65%” rather than a “50%” rule of thumb, see, e.g., *Barnett v. City of Chicago*, 141 F.3d 699, 702–03 (7th Cir. 1998) (“A black-majority ward, then, is one that is at least 65 percent black on a total-population basis . . .”); *Ketchum v. Byrne*, 740 F.2d 1398, 1416 (7th Cir. 1984) (“Numerous courts have either specifically adopted or tacitly approved the use of this 65% figure.”), although this convention appears to have faded. See Pildes, *Voting-Rights Law*, supra note 140, at 1527–28 (“[B]y 1990, the 65% rule was considered exceptional.”). Evangelis, supra note 180, at 801, argues that adjusting for turnout in this way is unconstitutional.

2. *Vote Denial.* — Crafting disparate-impact presumptions for vote denial cases is difficult. The range of election rules and practices that might be challenged on a denial theory is vast and so too the range of possible remedies.

The vote denial cases are quite new, and there is not yet much law on what constitutes a material, legally significant impact.¹⁸⁴ The Seventh Circuit per Judge Easterbrook recently suggested that section 2 is violated only if the challenged barrier to voting is pointless,¹⁸⁵ facially discriminatory,¹⁸⁶ or hard for diligent voters to comply with.¹⁸⁷ The district court in the same case characterized the burden very differently, focusing on racial disparities in the incidence of compliance costs and the likelihood of a correlative disparity in rates of voter participation.¹⁸⁸ In the Sixth Circuit, a slight rollback in the days available for early voting was deemed sufficiently impactful to violate section 2.¹⁸⁹ Yet an earlier Sixth Circuit decision ruled out section 2 challenges to felon disenfranchisement laws on the theory that the felon had no one but himself to blame for getting disenfranchised.¹⁹⁰ An analogous voter-fault argument easily could have been used to dismiss the early-voting claim.

Because the law is inchoate and the cases diverse, rebuttable presumptions for the disparate-impact prong of a vote denial case must be ventured tentatively. In that cautious spirit, we offer two ideas. First, material burdens on the franchise that are disproportionately borne by low-income citizens may be presumed to have a racially disparate impact in

184. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014) (“[T]here is a paucity of appellate case law evaluating the merits of Section 2 claims in the vote-denial context.”).

185. See *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (“[U]nless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter.”).

186. See *id.* (“[The Wisconsin voter-ID statute] extends to every citizen an equal opportunity to get a photo ID.”); *id.* at 754 (“It is better to understand [the results test] as an equal-treatment requirement . . . than as an equal-outcome command . . .”).

187. See *id.* at 752–53 (reviewing evidence of racial disparities in possession of qualifying photo ID and in documents required to obtain qualifying photo ID and concluding, “[a]lthough these findings document a disparate outcome, they do not show a ‘denial’ of anything by Wisconsin”).

188. See *Frank v. Walker*, 17 F. Supp. 3d 837, 870–78 (E.D. Wis. 2014) (discussing racial disparities in rates of possession of qualifying ID as well as documentation needed to obtain ID, linking these to socioeconomic disparities, and emphasizing “under the dominant framework used by scholars to study voter turnout, even small increases in the costs of voting can deter a person from voting”), *rev’d*, 768 F.3d 744.

189. See *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 549–60 (6th Cir. 2014) (finding disparate impact and applying “Senate factors” to conclude early-voting restrictions burdened black voters and are linked to “social and historical conditions”).

190. *Wesley v. Collins*, 791 F.2d 1255, 1261–62 (6th Cir. 1986) (“Nor are felons disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment.”); see also *Ortiz v. City of Philadelphia*, 28 F.3d 306, 315–17 (3d Cir. 1994) (rejecting challenge to law purging voters who have registered but failed to vote in past from voter rolls on ground that voter is at fault).

those jurisdictions where Census data show that minority-race citizens are substantially worse off economically than members of the majority group. Much remains to be worked out here. What measure of economic well-being should be used? What constitutes a “substantial” between-group disparity in economic well-being?

All that said, the idea that disparate impacts by class can serve as a proxy for perhaps harder-to-observe disparate racial impacts is already gaining traction in the lower courts. It is reflected in recent judicial opinions addressing photo-ID requirements for voting in Wisconsin and Texas,¹⁹¹ and rollbacks in early voting and same-day voter registration in Ohio and North Carolina.¹⁹² The idea also draws support from the legislative history of section 2, which shows that Congress was quite concerned about socioeconomic disparities between racial groups manifesting as political inequalities.¹⁹³

The other presumption goes to the question of materiality: Any voting requirement that has the demonstrable effect (compared to some feasible regulatory alternative) of skewing the racial/ethnic makeup of the population of actual voters, relative to the population of voting-eligible citizens, should be presumptively regarded as materially burdensome. Almost certainly, this showing would have to be made using data from a range of jurisdictions, because a simple before-and-after comparison of voter participation in the defendant jurisdiction could be very misleading. Minority turnout in a single jurisdiction may fluctuate for any number of reasons unrelated to the legal change.¹⁹⁴ Courts should accept such evidence from other jurisdictions, so long as the demographics of the relevant minority populations are not grossly dissimilar.

191. See *Veasey v. Perry*, 71 F. Supp. 3d 627, 660–64 (S.D. Tex. 2014) (tying conclusions about racially disparate impact to finding that voter-ID law is more burdensome for poor and poor are disproportionately minority), *aff'd in part, vacated in part*, No. 14-41127, 2015 WL 4645642 (5th Cir. Aug. 5, 2015); *Frank*, 17 F. Supp. 3d at 870–79 (same); see also *Texas v. Holder*, 888 F. Supp. 2d 113, 140–43 (D.D.C. 2012) (denying preclearance to Texas voter-ID requirement, based on retrogressive effect inferred from correlation between race and poverty), *vacated on other grounds*, 133 S. Ct. 2886 (2013).

192. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014) (using disparate impact viewed in context of social and historical conditions to find election reform law “textbook example of Section 2 vote denial”); *Husted*, 768 F.3d at 555–57 (linking disparate reductions in voting opportunities to social and historical conditions that “produce discrimination against African Americans”).

193. S. Rep. No. 97-417, at 29 n.114 (1982) (“[D]isproportionate educational[,] employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of black participation . . . is depressed, plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the depressed . . . participation.” (citations omitted)).

194. Cf. Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 Election L.J. 85, 96–98 (2009) (demonstrating difficulty of detecting small turnout effects).

Unlike the presumptions discussed above for constitutional risk, racial polarization, and minority opportunity districts, the presumptions for vote-denial “impact” could not be implemented with national public opinion data. At best they are rough guidelines that may help courts as they struggle to produce a reasonably consistent body of law, notwithstanding judges’ contrasting intuitions about the burdens that any “reasonable voter” ought to bear without complaint and the difficulty of detecting racially disparate impacts amidst all the fluctuations in voter registration and turnout.¹⁹⁵

3. *Summary.* — This Part has presented one account of how the core of section 2 could be implemented using evidentiary presumptions and current survey data, in keeping with the *Shelby County* Court’s sense that race-based remedial measures ought to be justified by the current risk of unconstitutional race discrimination. 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 defendants would carry the burden of disproving central elements of the case. Vote-denial claims would also become easier for civil rights groups to litigate.

What remains to be established is that the courts have authority to establish the presumptions and, further, that it is feasible to implement (most of) the presumptions using national survey data rather than case-specific studies carried out in particular defendant jurisdictions.¹⁹⁶ 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

195. Cf. Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 *Hastings Const. L.Q.* 643, 657 (2008) (arguing by focusing on turnout impacts in vote-denial cases arising under Constitution, judges can bridge normative differences regarding “reasonable voter” capacities).

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

substantive rules about evidentiary presumptions.¹⁹⁷ It is quite another to maintain that section 2 can function similarly without any intervening action by Congress. This Part addresses 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 such presumptions.

A. *Legal Authority to Create the Presumptions*

The proposition that courts lack legal authority to establish evidentiary presumptions under section 2 has little force. As one of us explained in previous work, section 2 is best understood as a common law statute.¹⁹⁸ It delegates authority to the courts to implement loosely stated substantive and evidentiary norms.¹⁹⁹ 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,²⁰⁰ 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 the Supreme Court's first vote dilution case under 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.²⁰¹ Some years later the 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 MODs and the minority's population share.²⁰²

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

198. Elmendorf, *Making Sense of Section 2*, *supra* note 23, at 448–55.

199. See *id.* at 417–48 (discussing "helpful guidance" provided to courts by section 2 and legislative history in implementing equal voting norms).

200. See *id.* at 421–27 (noting legislative history reveals plaintiffs "may not be required" to meet "conventional evidentiary standards").

201. See *Thornburg v. Gingles*, 478 U.S. 30, 63 (1986) (plurality opinion) (Brennan, J.) ("[M]ultimember districts may impair the ability of blacks to elect representatives of their choice where blacks vote sufficiently as a bloc as to be able to elect their preferred candidates in a black majority, single-member district and . . . a white majority votes . . . as a bloc . . . to defeat the candidates . . .").

202. See *Johnson v. De Grandy*, 512 U.S. 997, 1013–24 (1994) (finding totality of circumstances did not support vote dilution claim because number of minority districts was "substantially proportional" to minority population share); Katz et al., *supra* note 30, at 730–31 (reporting of eighteen published cases in which courts made findings on proportionality, "[t]he 10 lawsuits that found proportionality identified no violation of

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.²⁰³ Other courts, struggling with the question of whether white bloc voting is "legally significant" only if "caused" by the race of the candidate (or voters), held that a showing of racially polarized voting in biracial elections gives rise to a rebuttable presumption of race-discriminatory causation.²⁰⁴ Courts have also used rules of thumb about the minority population share needed to ensure that an electoral district functions as an MOD.²⁰⁵ 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.²⁰⁶ Courts also borrowed evidentiary rules of thumb put forth in Equal Employment Opportunity Commission (EEOC) 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.²⁰⁷ In antitrust law, the courts went further, deeming certain business arrangements per se anticompetitive.²⁰⁸ Later courts relaxed some of the per se rules in light of new economic theory and evidence.²⁰⁹

Section 2," and of the five lawsuits that "found a lack of proportionality[,] . . . four identified a Section 2 violation").

203. 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 111.

204. See *supra* note 111 (listing cases considering causation in totality of circumstances inquiry).

205. See *supra* notes 182–183 and accompanying text (discussing "65%" rule of thumb for identifying minority opportunity districts).

206. 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 are not reasonably necessary to serve the defendant's legitimate interests. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973).

207. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 586–87 (2009) (finding prima facie case of disparate-impact liability shown, as EEOC's 80% rule was violated); *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995 n.3 (1988) (noting lower courts' use of EEOC's four-fifths rule); *Connecticut v. Teal*, 457 U.S. 440, 443 n.4 (1982) (acknowledging district court's finding of disparate impact under EEOC's 80% rule).

208. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. Cal. L. Rev. 733, 744–45 (2012) (discussing shift from rule of reason analysis towards per se liability). 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. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315.

209. See Gavil, *supra* note 208, at 751–59 (noting courts' recognition of inadequacy of per se liability); see also Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 202–11

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.²¹⁰

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.²¹¹ National survey data on citizens' political preferences and racial attitudes, analyzed using MRP, would partially supplant the current reliance on precinct-level election returns and ecological inference.²¹² 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.²¹³

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, provided of course that the reading does not push section 2 into the same constitutionally problematic territory.²¹⁴ The VRA as enacted in 1965—and as reenacted in 1970, 1975, 1982, and 2006²¹⁵—was predicated on a handful of core premises, which our model for section 2 adapts to the

(2d ed. 2008) (describing evolution and application of presumptions shifting burden of production—and in some cases, burden of proof—to defendant, even as Court moved away from *per se* rules).

210. This Article imposes no limit on the “circumstances” that might be invoked to rebut inferences from the presumptions.

211. 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 at 12, *Shelby County v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011) (No. 1:10-cv-00651-JDB), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Shelby-Dec1-11-15-10.pdf> [<http://perma.cc/DN92-BCYN>]. The empirical results presented in Part IV, *infra*, suggest that the same jurisdictions are likely to be the most vulnerable under the presumption-driven model for section 2 (at least with respect to claims of African Americans).

212. Using the proposed statistical model would only “partially” displace reliance on precinct-level results because in some cases, defendants may try to rebut the inference of racial polarization using data from local elections.

213. Notably, the seminal decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986) (plurality opinion) (Brennan, J.), which reoriented vote dilution law around the estimation of candidates' vote shares by racial group, states that evidence that members of a racial group tend to vote for the same candidates is simply “*one way* of proving the political cohesiveness necessary to a vote dilution claim.” *Id.* at 56 (emphasis added).

214. See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 426–28 (1989) (defining purposive statutory interpretation).

215. Katz et al., *supra* note 30, at 646–47.

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.²¹⁶

The presumptions suggested here mesh these premises with section 2 while honoring *Shelby County's* understanding of when it is permissible for legislation enforcing the Fourteenth and Fifteenth Amendments to single out states for special burdens. *Shelby County* faulted the preclearance coverage formula for distinguishing among states on the basis of old data that bore no apparent relationship to the current risk of unconstitutional race discrimination.²¹⁷ The 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*

That judges have legal authority to implement our approach does not mean 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 section 2 opinions is that the first priority for many judges is simply to avoid embarrassment.

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.”²¹⁸ Harvard statistician and law professor Jim Greiner wrote several outstanding papers critiquing standard ecological inference techniques and offering better alternatives;²¹⁹ his work has left no impression on the courts.²²⁰

216. See *supra* notes 40–51 and accompanying text (describing key elements and goals of section 5).

217. *Shelby County v. Holder*, 133 S. Ct. 2612, 2625–30 (2013) (“[T]he coverage formula that Congress reauthorized in 2006 ignores these developments, keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”).

218. *Gingles*, 478 U.S. at 53 n.20 (plurality opinion) (Brennan, J.). Some judges do seem willing to accept the new, better methods only if their results accord with the older methods. 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, 532–33 (2011) [hereinafter Greiner, *Quantitative Empirics*].

219. Greiner, *Ecological Inference*, *supra* note 78; Greiner & Quinn, *Exit Polling and Racial Bloc Voting*, *supra* note 79; Greiner, *Quantitative Empirics*, *supra* note 218; Greiner, *Re-Solidifying Racial Bloc Voting*, *supra* note 69; D. James Greiner & Kevin M. Quinn, *RxC Ecological Inference: Bounds, Correlations, Flexibility and Transparency of Assumptions*, 172 *J. Royal Stat. Soc’y: Series A* 67 (2009) [hereinafter Greiner & Quinn, *RxC Ecological Inference*].

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 if plaintiffs are invited 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, particularly given the wide range of plausible evidentiary presumptions.²²¹ 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. DOJ litigates section 2 cases from time to time but has never issued enforcement guidelines or interpretive rules under section 2.²²²

It is conceivable that DOJ could nonetheless induce judicial coordination by issuing interpretive rules under section 2. These rules would be advisory only, not binding, but they would be owed *Skidmore* deference.²²³

220. A Westlaw search turned up only one opinion that cites Greiner’s work on ecological inference. *Levy v. Lexington County*, No. 3:03-3093-MBS, 2012 WL 1229511, at *6 (D.S.C. Apr. 12, 2012) (discussing Greiner, *Re-Solidifying Racial Bloc Voting*, supra note 69). In *Levy*, a wise judge appointed Greiner’s collaborator Kevin Quinn to advise the court on statistical methods. *Id.* at *4 n.4.

221. See supra Part II (discussing wide range of possible presumptions to make section 2 viable stand in for section 5).

222. Interview with Michael Pitts, Professor, Ind. Univ. Robert H. McKinney Sch. of Law, and former trial attorney, Voting Section, U.S. Dep’t of Justice.

223. Under *Skidmore v. Swift*, 323 U.S. 134 (1944), judicial deference to agency positions varies according to the quality of the agency’s decisionmaking process, taking account of any “factors which give [an interpretation] power to persuade, if lacking power to

Title VII provides an instructive analogy: Interpretive guidelines issued by the EEOC 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.²²⁴ To be sure, some considerations cut against judicial deference, such as the fact that DOJ has often been accused of partisanship in the administration of voting rights laws.²²⁵ But

control." Id. at 139–40. We agree with Professor 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*, 2013 Sup. Ct. Rev. 135, 152.

224. For example, the “four-fifths rule” in disparate impact cases originated with EEOC guidelines. See cases cited *supra* note 207. To be sure, the track record of judicial deference to EEOC positions is checkered. See Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 *Fordham L. Rev.* 1937, 1949–61 (2006) (attributing skepticism of some judges to perception EEOC is or has been pursuing narrowly political agenda and not basing its rules on any material or technical expertise). As discussed 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*.

225. 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. Charlie Savage, *Report Examines Civil Rights During Bush Years*, *N.Y. Times* (Dec. 2, 2009), http://www.nytimes.com/2009/12/03/us/politics/03rights.html?_r=1 (on file with the *Columbia Law Review*). Under President Obama, DOJ has taken a strong stance against voter-ID laws and other measures favored by Republicans, leading Republicans to levy the charge of unlawful partisanship. See Roger Clegg & Hans A. von Spakovsky, *More Voting-Rights Challenges from Holder*, *Nat'l Rev. Online* (July 29, 2013), <http://www.nationalreview.com/article/354618/more-voting-rights-challenges-holder-roger-clegg-hans-von-spakovsky> [<http://perma.cc/7SFG-254H>] (“[The Obama] administration has a highly politicized Civil Rights Division, and using the Voting Rights Act to achieve partisan ends is nothing new for it.”); Hans A. von Spakovsky, *Every Single One: The Politicized Hiring of Eric Holder’s Voting Section*, *PJ Media* (Aug. 8, 2011), <http://pjmedia.com/blog/every-single-one-the-politicized-hiring-of-eric-holder-s-voting-section/> [<http://perma.cc/4RD5-G28C>] (“[T]he Civil Rights Division at the Department of Justice is engaging in politicized hiring in the career civil service ranks . . . nearly unprecedented in scope and significantly eclips[ing] anything the Bush administration was even *accused* of doing.”).

Inspector General reports in 2008 and 2012 gave credence to some of the accusations of partisanship. U.S. Dep’t of Justice, Office of the Inspector Gen., *A Review of the Operations of the Voting Section of the Civil Rights Division 117–80* (2013) (addressing allegations of Voting Section employees mistreated on basis of political ideology); U.S. Dep’t of Justice, Office of the Inspector Gen. & U.S. Dep’t of Justice, Office of Prof’l Responsibility, *An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division* (2008) (summarizing investigation “into allegations that political or ideological affiliations were considered in hiring, transferring, and assigning cases to career attorneys in the Civil Rights Division”); U.S. Dep’t of Justice, Office of the Inspector Gen. & U.S. Dep’t of Justice, Office of Prof’l Responsibility, *An Investigation of Allegations of Politicized Hiring in the Department of Justice Honors Program and Summer Law Intern Program* (2008) (describing results of investigation into “whether the political or ideological affiliations of applicants were improperly considered in the selection of candidates for the [Attorney General]’s Honors Program and the Summer Law Intern Program . . . from 2002 to 2006”); U.S. Dep’t of Justice, Office of Prof’l Responsibility & U.S. Dep’t of Justice, Office of the Inspector Gen., *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* (2008)

if DOJ structured the process for developing the rules so as to preempt the charge of partisanship,²²⁶ appellate courts might well defer because DOJ rulemaking would save the courts from having to make difficult technical determinations and because adoption of the rules would make section 2 litigation less subject to the whims of individual trial judges.²²⁷

If judges generally followed DOJ's recommendations, this would greatly reduce uncertainty about how the presumptions cut in a given case. Rather than reinventing the wheel, plaintiffs' experts 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 attack it in ordinary cases.²²⁸ At this point, a legal regime that formally requires plaintiffs to make evidentiary showings with respect to constitutional risk and disparate impact would function *as if* it were a regime in which certain geographically delimited jurisdictions were formally presumed to be at risk of unconstitutional race discrimination in the electoral process and in which certain electoral structures (in these jurisdictions) are presumed to have a disparate impact.²²⁹ The gap between section 2 and now-defunct section 5 would be much diminished.

(investigating "allegation that Goodling," DOJ's White House Liaison, "inappropriately used political or ideological affiliations in the hiring process for career [DOJ] employees").

226. For example, by assigning rule development to a technical or bipartisan body not controlled by political appointees at DOJ.

227. See Christopher S. Elmendorf, *Advisory Rulemaking and the Future of the Voting Rights Act*, 14 *Election L.J.* 260, 270–75 (2015) (assessing costs and benefits of judicial deference to DOJ guidelines under section 2 from perspective of appellate judges). Professor Ross argues that the Supreme Court has shown no inclination to defer to agencies on questions that implicate constitutional interpretation. Bertrall Ross, *Denying Deference: Civil Rights and Judicial Resistance to Administrative Constitutionalism*, 2014 *U. Chi. Legal Forum* 223, 228. Ross's argument implies—and we agree—that the Court would not defer to DOJ's decisions about, for example, whether section 2 still provides a remedy for constitutional violations that occurred during the Jim Crow era. But so long as DOJ works from the Court's own constitutional premises, Ross's argument provides no basis for doubting judicial deference to agency positions on technical questions about evidentiary presumptions. As explained *supra* notes 94–97, our presumptions build on an interpretation of section 2 meant to reconcile the results test with the current Supreme Court's constitutional understandings.

228. 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 DOJ in certain high-stakes, politically charged cases. See, e.g., Rick Hasen, *Alabama Bypassing DOJ in Favor of Court Seeking Preclearance of Redistricting Plan*, *Election Law Blog* (Sept. 14, 2011, 7:54 AM), <http://electionlawblog.org/?p=23078> [<http://perma.cc/R4TK-GPSA>] ("The pattern continues of Republicans in covered jurisdictions not trusting the Obama Administration's DOJ on Voting Rights Act preclearance of controversial redistricting plans.").

229. 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

But what if DOJ is rebuffed by the courts or stays on the sidelines? That would retard the process of developing a presumption-driven section 2 implemented with national survey data, but gradual change would remain possible. For example, rather than asking courts to adopt new presumptions under *Gingles*, litigants could introduce survey evidence of racial polarization and racial stereotyping to supplement vote-share evidence under *Gingles*, or as part of the “totality of circumstances.” Once one court gives some weight to this evidence, other 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 problems that make it difficult to infer preference polarization and voter discrimination from vote shares for “minority candidates of choice,”²³⁰ and because survey-based estimation does not involve ecological inference.²³¹

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. That argument would turn on factors such as 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

would of course depend on the credibility/impartiality of the process by which the Department updates them.

230. See Elmendorf et al., Racially Polarized Voting, *supra* note 60 (manuscript at 50–71) (explaining perils of trying to infer political cohesion and polarization from votes in actual elections).

231. See *id.* (manuscript at 71–73, 81–89) (explaining ecological inference depends on racial homogeneity assumptions similar to those Supreme Court has disavowed); see also Greiner, Re-Solidifying Racial Bloc Voting, *supra* note 69, at 465–68 (explaining ecological inference often yields unreliable estimates where there are more than two racial groups and significant residential integration).

“special circumstances” that arguably bear on the degree to which racial polarization in vote choice does or does not signify racial polarization in enduring political preferences.²³² Previous cases will provide some guidance about the factors to consider in judging probativeness,²³³ but they cannot resolve the ultimate question of how much weight to assign to each election introduced in the case against *B*.²³⁴ (It is telling that the lower courts have consistently rejected arguments for numeric bloc-voting “cutoffs” under *Gingles*.²³⁵) By contrast, if the decision in case *A* turned on a measure of ideology or racial attitudes derived from national surveys²³⁶ 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 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.²³⁷

Finally, it is 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,²³⁸ courts have nonetheless signaled that proportionality is very important²³⁹ and practitioners have had no trouble reading the signal.²⁴⁰

232. See generally Elmendorf et al., *Racially Polarized Voting*, supra note 60 (manuscript at 33) (“[I]nterracial elections are more probative than same-race elections [and] endogenous elections are more probative than exogenous elections.”); Katz et al., supra note 30, at 668–70 (discussing factors relevant to identifying probative elections).

233. See Elmendorf et al., *Racially Polarized Voting*, supra note 60 (manuscript at 24–27, 29–31) (discussing different courts’ interpretations of probativeness).

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

235. See Elmendorf et al., *Racially Polarized Voting*, supra note 60 (manuscript at 33) (“As things stand today, there are no established quantitative cutoffs to distinguish polarized from non-polarized communities.”).

236. See infra notes 242–250 and accompanying text (describing use of national survey data to develop reliable measures of local racial attitudes).

237. 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., Mike Malecki, *Multilevel Regression and Poststratification*, Github (May 1, 2014), <https://github.com/malecki/mrp> [<https://perma.cc/S8MY-JEKE>] (providing public domain package in statistical programming language R for MRP).

238. See *Johnson v. De Grandy*, 512 U.S. 997, 1013–14 (1994) (explaining different levels of proportionality may still violate VRA).

239. 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. Ill. State Bd. of Elections*, 200 F. Supp. 2d 905, 908 (N.D. Ill. 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.”).

Similar conventions may well emerge regarding survey-based evidence of constitutional risk, racial polarization, and minority opportunity, even without formal recognition of the conventions as evidentiary presumptions.

In summary, the courts quite clearly have legal authority to create evidentiary presumptions along the lines suggested in Part II. The incremental process of common law adjudication is not ideal for this purpose, but even a gradual increase in judicial reliance on national survey data in section 2 cases would yield a corresponding increase in the degree to which section 2 precedents are informative about the likely resolution of future cases (in keeping with the model of a presumption-driven section 2). DOJ may be able to accelerate this process by issuing advisory guidelines under section 2.

What remains to be considered is where a presumption-driven section 2 would likely have the most bite. In particular, would the regions of the country formerly subject to the section 5 preclearance regime end up “covered” de facto by evidentiary presumptions under section 2? This is the subject of the next Part.

IV. MODEL BUILDING AND RESULTS

This Part introduces the statistical machinery for generating estimates of public opinion within small geographic units from national surveys and presents some initial empirical results. We consider our results provisional because they are based on models that, while facially reasonable, have not been validated with out-of-sample data, and because the corresponding presumptions could be defined in other ways.²⁴¹

A. *Tools for Estimating Racial-Group Opinion Within Subnational Geographic Units*²⁴²

Given a national survey dataset, there are two commonly used techniques for 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.²⁴³ The second approach is to model responses to the survey question as a function of the respondent’s demo-

240. See, e.g., Hebert et al., *Realist’s Guide*, supra note 30, at 36 (observing “‘proportionality,’ or lack thereof,” is “particularly important” factor in vote dilution cases).

241. See supra note 122 and accompanying text (describing other methods of defining presumptions).

242. Some of the description of methodology in this section also appears in Elmendorf & Spencer, *Preclearance*, supra note 19, at 1156–57.

243. 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-Erik Särndal & Sixten Lundström, *Estimation in Surveys with Nonresponse* 43–53 (2005).

graphic and geographic attributes, making inferences about public opinion in one geographic unit based on the responses of similarly situated respondents elsewhere. This is done using MRP.

To illustrate the difference between the two approaches, imagine that we want to estimate the racial attitude of white people in the city of Boston and in the state of Massachusetts. Assume we have data from a nationally representative sample of 2,000 white citizens. Because Boston contains about 0.2% of the national population and Massachusetts about 2.1%, our sample would include, on average, 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 Bay Staters.²⁴⁴ 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. Reweighting the data to the known distribution of “demographic types” in the population is not a good fix, because some types are likely to be absent from the sample entirely (only four Bostonians took the survey), and because the small number who did take the survey may be highly unrepresentative of their type (not all young, highly educated women have the same opinions).²⁴⁵

One solution to this problem is to pool together the responses from multiple surveys over time and then disaggregate the pooled surveys by race and geography. This strategy holds some promise, but for our purpose requires proprietary data that have not yet been released for public use.²⁴⁶ Another possible solution would be to conduct original surveys

244. In technical terms, the standard deviation of a sample mean or proportion is inversely related to the square root of the sample size. Large representative survey samples of the adult U.S. population are rare. One important sample is the Cooperative Congressional Election Survey (CCES), which was created for the express purpose of studying voter opinion within small geographic units, and by sample size is the largest regularly conducted survey of American voters, with about 100 respondents per congressional district. See generally Stephen Ansolabehere & Douglas Rivers, *Cooperative Survey Research*, 16 *Ann. Rev. Pol. Sci.* 307 (2013) (describing CCES).

245. Also, if some units in the sample receive much more weight than other units, this blows up the variance of the sample-mean estimator—meaning that the estimate is a very imprecise proxy for the true population mean. See Roderick J.A. Little & Donald B. Rubin, *Statistical Analysis with Missing Data* 49 (2d ed. 2002) (“[Propensity weighting] removes nonresponse bias, but . . . may yield estimators with extremely high variance because respondents with very low estimated response propensity receive large nonresponse weights and may be unduly influential in estimates of means and totals.”).

246. This footnote explains the problem. We need a summary measure of policy agreement/disagreement between racial communities. The best summary measure at this time is an “ideal point” scaled from policy preferences. See *infra* notes 275–280 and accompanying text (discussing advantages of scaled ideal point measure, compared to self-

within the unit of interest. This strategy cuts against our goal of making (presumptive) section 2 liability easy to ascertain,²⁴⁷ so we do not pursue it further here.²⁴⁸

Given a single national survey, MRP improves on disaggregation by using demographic and geographic identifiers to make inferences about similarly situated respondents. From publicly available Census data, we know how many Bostonians are young, highly educated women and how many are old, poorly educated men.²⁴⁹ To the extent that age, education, and sex predict racial attitudes, or any other opinion of interest, we can use what we learn from the 2,000-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.

reported ideology or partisanship). 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 modules on the CCES; this enabled them to create a "superset" of 275,000 respondents with ideal points on the same scale. See Chris Tausanovitch & Christopher Warshaw, *Measuring Constituent Policy Preferences in Congress, State Legislatures, and Cities*, 75 J. Pol. 330, 332 (2013) (describing compilation of surveys in creation of "supersurvey"). 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).

247. 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 the survey methodology, the qualifications of the experts who conducted the survey, etc.

248. If we were only interested in vote shares, there would be a fourth option, ecological inference, but for reasons explained earlier we hope to avoid it. See *supra* text accompanying notes 78–82 (noting conclusions drawn from ecological inference are "tenuous" when more than two racial groups are involved or if jurisdiction is significantly integrated).

249. For example, Boston is 48% male, 17% of all residents are under eighteen years old, and 10% are older than sixty-five. The city is 54% white and 24% black and 36% speak a language other than English in the home. Just 20% of Boston residents graduated from college (compared to the national average of 26.3%). The median household income in Boston is \$53,601 with 21% living below the poverty line. United States Census Bureau, American FactFinder, <http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (enter "Boston, MA" in search bar; then follow "General Population and Housing Characteristics" hyperlink) (last visited Oct. 14, 2015) (data on file with the *Columbia Law Review*) (providing 2010 Census data). In both 2008 and 2012, about 78.5% of the city's voters voted for Obama in the general election. Sec'y of the Commonwealth of Mass., 2008 President General Election, Suffolk County, http://electionstats.state.ma.us/elections/view/14274/filter_by_county:Suffolk [<http://perma.cc/2V7G-7RU3>]; Sec'y of the Commonwealth of Mass., 2012 President General Election, Suffolk County, http://electionstats.state.ma.us/elections/view/22515/filter_by_county:Suffolk [<http://perma.cc/U2DU-3NB8>].

If so, imputing to Bostonians the average attitude of their respective demographic types could generate estimates of citywide opinion that are badly off base. MRP accounts for this by allowing the intercept term in the regression model to vary with geography. In other words, the estimated racial attitude of white Bostonians is adjusted upward or downward depending on whether the survey respondents in Boston 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 reflects actual differences between the underlying populations. In this case, the statistical model would make a corresponding large adjustment. However, if few Bostonians were surveyed, the adjustment would be small.²⁵⁰

The flexibility of MRP extends beyond weighted adjustments based on sample size. With just four or even forty-two respondents in each geographic unit, it would be difficult 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—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 midsized geographic units (Northeast Region) and (2) the attitudes of the same demographic types in the national sample, to serve as evidence of the difference between people in the small unit (Boston) and citizens across the nation. Another option is to model the intercept for geographic units as a function of unit-level characteristics, such as residential segregation, that theory suggests are correlated with individual attitudes.²⁵¹ Still another possibility is to build in interactions between individual-level predictors and attributes of the geographic unit. For example, the correlation between residential inte-

250. See Andrew Gelman & Jennifer Hill, *Data Analysis Using Regression and Multilevel/Hierarchical Models* 6–8, 252–54 (2007) (explaining multilevel regression produces precision-weighted average of “complete pooling” and “no pooling” estimators). In the running example, the complete-pooling estimator is an average of responses from all geographic units; the no-pooling estimator is an average of just those responses from the target unit, i.e., Boston. The no-pooling estimator would be imprecise (hence given little weight) if there were few responses from the target unit.

251. See *id.* at 254–59 (discussing models featuring unit-level predictors).

gration and white stereotyping of blacks may depend on the income of white respondents.²⁵²

Once region- and unit-level characteristics such as black population size or residential integration have been incorporated into the model, intercepts can be estimated for small geographic units even if there are

252. 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, 416 (2011) (“[S]cholars have found that socioeconomic conditions and economic disparities mediate how various social contexts translate into prejudicial attitudes.”). The “racial threat hypothesis” posits that whites who live near large black or other minority populations will feel more threatened by the minority group and that this sense of threat will manifest itself in negative racial stereotypes. See Marisa Abrajano & Zoltan Hajnal, *White Backlash* 117–18 (2015) (suggesting “larger out-groups can represent a threat to members of the in-group” because “proximity tends to enhance real or perceived competition for scarce resources”); V.O. Key, *Southern Politics in State and Nation* 665–68 (1949) (focusing attention on Southern counties with large black population, characterized as “hard core of the political South”); Lawrence Bobo & Vincent L. Hutchings, *Perceptions of Racial Group Competition: Extending Blumer’s Theory of Group Position to a Multiracial Context*, 61 *Am. Soc. Rev.* 951, 953 (1996) (noting individuals who “face racially changing neighborhoods . . . are most likely to feel threatened by competition from members of other minority groups”); Claudine Gay, *Seeing Difference: The Effect of Economic Disparity on Black Attitudes Toward Latinos*, 50 *Am. J. Pol. Sci.* 982, 995 (2006) (addressing “behavior of white Americans, whose hostility toward minority outgroups rises in direct proportion to the size of the proximate minority population”). The racial threat hypothesis has been used to explain geographic variation in white support for policies such as affirmative action. See David Austen-Smith & Michael Wallerstein, *Redistribution and Affirmative Action*, 90 *J. Pub. Econ.* 1789, 1791 (2006) (“A low-income white voter . . . may prefer a party that opposes redistribution . . .”); Caroline Tolbert & John A. Grummel, *Revisiting the Racial Threat Hypothesis: White Voter Support for California’s Proposition 209*, 3 *St. Pol. & Pol’y Q.* 183, 197 (2003) (“[O]ur findings that whites oppose affirmative action as their neighborhoods become more racially diverse regardless of race is more consistent with the cultural backlash hypothesis . . .”). But see Andrea Louise Campbell et al., “Racial Threat”, *Partisan Climate, and Direct Democracy: Contextual Effects in Three California Initiatives*, 28 *Pol. Behav.* 129, 141 (2006) (“The proportion of black residents in a county . . . did not affect vote choice on the affirmative action proposition.”). This hypothesis has also been used to understand geographic variation in support for redistribution. See Alberto Alesino & Edward Glaeser, *Fighting Poverty in the United States and Europe: A World of Difference* 148–50 (2004) (analyzing effect of “racial fractionalization” on redistribution support); Austen-Smith & Wallerstein, *supra*, at 1790 (addressing effect of “social cleavages” on redistribution); Hersh & Nall, *supra* note 161, at 13 (addressing “spatial regime” of state and substate regions in explaining voting behavior). Finally, the hypothesis is also helpful to understanding geographic variation in support for harsh criminal laws and sanctions. See David Jacobs et al., *Vigilantism, Current Racial Threat, and Death Sentences*, 70 *Am. Soc. Rev.* 656, 660 (2005) (“Theory suggests that whites will make greater demands for punitive measures after expansions in black presence.”). 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 correlated 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.

few or no respondents in 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.²⁵³

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 sixty-five who did not attend college), within a unit by the type's share of the unit's adult population. This yields an approximation of the empirical distribution of opinion within the unit.

MRP has become very popular among political scientists as a way to estimate public opinion on political issues within subnational jurisdictions.²⁵⁴ It has been used to estimate opinion within states,²⁵⁵ congressional districts,²⁵⁶ state legislative districts,²⁵⁷ cities,²⁵⁸ and even local school

253. 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 where there is more "shrinkage" to the average response of similarly situated respondents. See Gelman & Hill, *supra* note 250, at 254 (noting averages from counties with larger sample sizes yield multilevel estimates "close to the county averages," while averages from counties with smaller sample sizes are pulled closer to overall state averages).

254. See Gelman & Hill, *supra* note 250, at 8 (noting multilevel modeling is essential for forecasting state-by-state outcomes of U.S. presidential elections); Yair Ghitza & Andrew Gelman, Deep Interactions with MRP: Election Turnout and Voting Patterns Among Small Electoral Subgroups, 57 *Am. J. Pol. Sci.* 762, 763–64 (2013) (explaining statistical method and role of poststratification in modeling voting patterns); Jeffrey R. Lax & Justin H. Phillips, Gay Rights in the States: Public Opinion and Policy Responsiveness, 103 *Am. Pol. Sci. Rev.* 367, 369 (2009) (using MRP for "estimates of *state-level policy-specific* opinion"); Jeffrey R. Lax & Justin H. Phillips, How Should We Estimate Public Opinion in the States?, 53 *Am. J. Pol. Sci.* 107, 109 (2009) [hereinafter Lax & Phillips, *How Should We Estimate?*] (lauding simplicity of MRP analysis); Julianna 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, 420 (2011) (describing MRP as "superior" aggregation method); David K. Park, Andrew Gelman & Joseph Bafumi, Bayesian Multilevel Estimation with Poststratification: State-Level Estimates from National Polls, 12 *Pol. Analysis* 375, 377 (2004) (describing application of multilevel estimation with poststratification to elections).

255. See, e.g., Ghitza & Gelman, *supra* note 254, at 774–75 (using MRP to analyze vote choice and turnout of demographic subgroups within states); Lax & Phillips, *How Should We Estimate?*, *supra* note 254, at 120 (concluding MRP, "if implemented using a single, large national survey, produces estimates of state-level public opinion that are virtually as accurate as those it generates using 10 or more surveys"); Pacheco, *supra* note 254, at 419 (explaining "MRP . . . allows for the inclusion of various demographic predictors to estimate state public opinion"). For a user-oriented introduction to the methods, see Gelman & Hill, *supra* note 250, at 1–11 (providing brief introduction to multilevel regression modeling and motivations).

256. See Christopher Warshaw & Jonathan Rodden, How Should We Measure District-Level Public Opinion on Individual Issues?, 74 *J. Pol.* 203, 216 (2012) ("MRP yields esti-

board districts.²⁵⁹ The technique has been validated—and shown to outperform disaggregation—in a number of instances where mean public opinion (or something close to it) within small geographic units can actually be observed, such as vote shares for presidential candidates, or vote shares on local referenda that address an issue that also appears on a national survey.²⁶⁰

But for legal applications, it is also important to appreciate MRP's limitations. 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. 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 more elaborate models are not necessarily better. Researchers have shown that more complex MRP models sometimes yield worse estimates of target-population

mates of issue-specific district public opinion that are consistently superior to disaggregated means or presidential vote shares.").

257. See Tausanovitch & Warshaw, *supra* note 246 (stating MRP estimates had higher correlation with 2008 presidential vote shares than disaggregated estimates at state legislative district level); Warshaw & Rodden, *supra* note 256, at 218 (concluding MRP "can produce reliable estimates for state legislative districts on many issues"); David E. Broockman & Christopher Skovron, *What Politicians Believe About Their Constituents: Asymmetric Misperceptions and Prospects for Constituency Control 13–14* (July 17, 2015) (unpublished manuscript), http://stanford.edu/~dbroock/papers/broockman_skovron_asymmetric_misperceptions.pdf [<http://perma.cc/L5QT-XH3A>] (describing steps taken to apply MRP to state legislative districts).

258. See Tausanovitch & Warshaw, *supra* note 246, at 335–36 (stating MRP estimates had higher correlation with 2008 presidential vote shares than disaggregated estimates at city level).

259. Michael Berkman & Eric Plutzer, *Evolution, Creationism, and the Battle to Control America's Classrooms 83–87* (2010) (detailing MRP's advantages in estimating local support for teaching of evolution).

260. See, e.g., Warshaw & Rodden, *supra* note 256, at 211 ("[T]he MRP estimates are better predictors of referendum results than the disaggregated estimates. The MRP estimates have higher correlations with the referenda results for each issue and state, and generally smaller mean absolute errors.").

opinion, even though the complicated model does a better job explaining opinion within the pool of survey respondents.²⁶¹ This phenomenon, called overfitting, arises because the estimated parameters in the more complex model capture idiosyncratic features of the sample that are not representative of the target population.²⁶²

There are, in principle, two ways of dealing with the overfitting problem. One is to choose among candidate MRP models using a technique known as cross-validation, whereby the data are randomly partitioned into, say, ten equally sized chunks; the model is fit ten times sequentially using all but one of the data chunks; and the quality of the model's predictions are evaluated by comparing them to the actual observations in the "left out" chunk of data.²⁶³ With sufficiently large samples, cross-validation usually provides a fairly accurate estimate of true, out-of-sample prediction error—that is, how close the model's predictions are likely to be to the actual observations in a new sample drawn at random from the population.²⁶⁴ But a recent paper raises questions about whether cross-validation reliably chooses the better MRP model.²⁶⁵

The other solution is to validate the MRP model with true, out-of-sample observations of average public opinion (or a good proxy for average opinion) within the geographic units and demographic strata of interest.²⁶⁶ As noted above, MRP models of vote intention in 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 on similar policy proposals.²⁶⁷

261. Jeffrey R. Lax & Justin H. Philips, *How Should We Estimate Sub-National Opinion Using MRP? Preliminary Findings and Recommendations 18–24* (Apr. 10, 2013) (unpublished manuscript), <http://www.columbia.edu/~jrl2124/mrp2.pdf> [<http://perma.cc/CK75-2ENZ>] (finding tweaks to baseline model generate “modest gains at best and in some cases may actually reduce the performance of MRP”).

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

263. For an introduction to cross-validation, see Trevor Hastie et al., *The Elements of Statistical Learning: Data Mining, Inference, and Prediction* 241–47 (2d ed. 2009).

264. See *id.* at 247–49 (demonstrating cross-validation on hypothetical predictor and finding cross-validation error is close to true expected prediction error).

265. Wei Wang & Andrew Gelman, *Difficulty of Selecting Among Multilevel Models Using Predictive Accuracy*, 7 *Stat. & Its Interface* 1, 1 (2014) (demonstrating while cross-validation might give satisfactory estimates of pointwise out-of-sample prediction error, it may not always be ideal for model comparison).

266. See *supra* note 260 and accompanying text (providing example of MRP predicting actual local referendum results).

267. 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 are truly “out of sample.” Otherwise, one

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 that performs well 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 is no more of a stretch than many other conventions of vote dilution litigation. Ecological inference as traditionally practiced relies on heroic assumptions,²⁶⁸ elides questions about 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*).²⁶⁹ 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.²⁷⁰ This seems 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 each racial group in each unit are close to nonparametric estimates from the validation study, the MRP model can be adjudged “good.”²⁷¹ Seen from one angle, the challenges of validation rep-

cannot 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.

268. A key assumption is that the political opinion of members of a racial group is uncorrelated with the demographic makeup of the neighborhood in which the person lives. See generally Elmendorf et al., *Racially Polarized Voting*, supra note 60 (manuscript at pt. III.C, app. A) (“To estimate candidates’ vote shares by racial group, the analyst assumes that the *proportion of white and minority voters who support each candidate is about the same in each precinct . . .*”).

269. See generally Greiner, *Ecological Inference*, supra note 78, at 162–63 (highlighting how ecological inference approach can result in logically impossible estimates).

270. 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 250, at 251–77.

271. 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”

resent serious obstacles to the proposed scheme of 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 DOJ.

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.²⁷² Most private litigants do not. If DOJ is the only player in the game whose 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,²⁷³ 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 original 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 online²⁷⁴ and the online appendix also shows that the results are robust to alternative model specifications.

As section II.B.1 argued, the stereotyping results could be incorporated into a “constitutional risk” presumption. The political-preference results could be used to establish whether minority preferences are sufficiently distinct from the preferences of others to support a vote dilution

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, 445–58 (2012) (cross-referencing CCES self-reports of voter registration against proprietary information in Catalist database).

272. UCLA political scientist Lynn Vavreck 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. Lynn Vavreck, *Presentation to Research Workshop in American Politics*, University of California, Berkeley (Spring 2013).

273. 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.)

274. Douglas M. Spencer, *The Geography of Voter Discrimination*, www.dougspencer.org/research/geography_of_discrimination.html [<http://perma.cc/N32H-HP8G>] (last visited Oct. 21, 2015).

claim (potential disparate impact, as explained in section II.C.1). And, at least for judges who deem race discrimination for partisan purposes impermissible, the preference–polarization results could also figure into constitutional-risk findings (section II.B.2).

The political preference measure used in this section is a one-dimensional ideal point scaled from respondents' answers to binary policy questions on the 2010 Cooperative Congressional Election Study (CCES).²⁷⁵ 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,²⁷⁶ and they explain much more of the variation in vote choice than

275. Respondents answered twenty-two policy questions. We convert their answers into thirty-eight actual or implied positions on binary choices. We generate ideal points using the “ideal()” function of the “pscl” package in R. Simon Jackman, pscl: Political Science Computational Library, Stanford University, The Comprehensive R Archive Network (Mar. 29, 2015), <https://cran.r-project.org/web/packages/pscl/index.html> [<http://perma.cc/S MK2-HH68>]. For more information see Elmendorf & Spencer, Technical Appendix, *supra* note 37; see also Christopher S. Elmendorf & Douglas M. Spencer, An Intuitive Explanation of MRP, Administering Section 2 of the VRA After *Shelby County*, http://www.dougs pencer.org/research/geography_of_discrimination/s2_Appendix_MRP.pdf [<http://perma.cc/3CRA-AGN5>] (last updated Jan. 7, 2015).

Recall from section II.C.1 that there are other plausible ways of measuring political preferences. *Supra* text accompanying notes 152–153. The results reported here are just illustrative.

276. 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, 521 (2010) (“Within studies of representation, there is movement toward comparing voters’ preferences with legislator roll call voting behavior (i.e., with legislator *ideal points*.”); Cheryl Boudreau, Christopher S. Elmendorf & Scott A. MacKenzie, Lost in Space? Shortcuts and Spatial Voting in Low-Information Elections, 68 *Pol. Res. Q.* (forthcoming 2015) (manuscript at 10), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2232371 (on file with the *Columbia Law Review*) (incorporating estimation of ideal points for candidates and voters in study design); Stephen A. Jessee, Partisan Bias, Political Information and Spatial Voting in the 2008 Presidential Election, 72 *J. Pol.* 327, 328 (2010) (discussing voters’ ideal points and spatial utility model of voting); Stephen A. Jessee, Spatial Voting in the 2004 Presidential Election, 103 *Am. Pol. Sci. Rev.* 59, 67 (2009) (noting bill parameters in ideal point model are identical for respondent answering survey question and for senator voting on proposal); Tausanovitch & Warshaw, *supra* note 246, at 231–32 (“We assume that both citizens and legislators have a unique set of policies that they ‘prefer’ to all others. This point in the policy space is called an ‘ideal point.’”); Christopher Hare & Keith T. Poole, Using Optimal Classification to Analyze Public Opinion Data 3–12 (Mar. 16, 2012) (unpublished manuscript) (on file with the *Columbia Law Review*) (explaining use of scaling methods to estimate voters’ ideal points); Thad Kousser, Justin Phillips & Boris Shor, Reform and Representation: A New Method Applied to Recent Electoral Changes 8 (Aug. 19, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2260083> (on file with the *Columbia Law Review*) (describing methodology of “measuring . . . ideology of a sample of voters . . . by comparing their answers to the same comprehensive set of policy questions” to obtain “common space ideological estimates”); Boris Shor, Congruence, Responsiveness, and Representation in American State Legislatures 4 (Aug. 25, 2014) (unpublished manuscript), <http://ssrn.com/abstract=1697352> (on file with the *Columbia Law Review*) (describing use of “standard ideal point estimation techniques” to construct “common ideological space” for politicians and

does self-reported ideology.²⁷⁷ 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 spectrum²⁷⁸ and in their willingness to express a party identification.²⁷⁹ The scaled-ideal-point measure of political preferences is imperfect,²⁸⁰ but it beats self-reported ideology and party identification.

constituents); Boris Shor & Jon C. Rogowski, *Ideology and the US Congressional Vote 12, 13 & tbl.2* (July 15, 2015) (unpublished manuscript), <http://ssrn.com/abstract=2650028> (on file with the *Columbia Law Review*) (detailing surveys used to “characterize the ideological locations” of survey respondents).

277. See Shor & Rogowski, *supra* note 276, at 12–13 (explaining ideal points method avoids problem of “projection” because respondents are “unlikely to adopt the issue position of their favored local House candidate” on significant policy issues).

278. See Marisa Abrajano, *Reexamining the “Racial Gap” in Political Knowledge*, 77 *J. Pol.* 44, 46 (2015) (showing many Latino American survey respondents interpret word “liberal” to mean “conservative,” reflecting different use of term “liberal” in their country of origin or ancestry). In the technical online 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 using ideal points than when ideology is measured using self-reports on the seven-point scale. Elmendorf & Spencer, *Technical Appendix*, *supra* note 37, at 9–10 & tbl.1.

279. 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* 89 *tbl.3.2*, 108–10 *tbls.4.2 & 4.3* (2011) (showing Asian American and Hispanic American survey respondents are much less willing to express party identification than African American respondents).

280. 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, 529–30 (1987) (concluding low-information voters are more likely to be indifferent and unpredictable in voting behavior)); (3) because respondents who have ideal points “in the middle” may not agree with one another very much, see Broockman, *supra* note 170, at 29–30 (observing individuals appearing in ideological middle sometimes have “dramatic differences” in preferences with respect to specific policy domains); (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 276, at 6–7 (noting parametric models impose constraint “that mass political attitudes are uniformly structured across the electorate[.]” entailing assumptions about voters’ utility curves); (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 Boudreau et al., *supra* note 276 (manuscript at 21–22) (showing relatively weak correlation between voters’ national party identification and their ideal points in issue space of San Francisco politics); 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 this is likely); 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.)

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.²⁸¹ A score greater than one indicates polarization, as it signifies that the typical distance between two members of the group(s) in question is greater than the typical distance between a pair of citizens in the population as a whole. Conversely, a score less than one indicates cohesion, that is, greater similarity within the numerator group(s) than in the full population.²⁸²

For VRA purposes, one very nice feature of this approach is that it can be used to answer (presumptively) all of the group cohesion questions in 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 difficulty.²⁸³ 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, noncoalitional cases. (To be sure, it is an open question whether coalitional claims remain available under section 2 after *Bartlett v. Strickland*.²⁸⁴)

281. In mathematical notation: $\frac{\text{ave}|x_{Ai}-x_{Bj}|}{\text{ave}|x_k-x_l|}$ | $i \in \mathcal{A}, j \in \mathcal{B}$ 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 (the populations of which are \mathcal{A} and \mathcal{B}), and \mathcal{P} is the entire population. When measuring within group cohesion, $A = B$ and $i \neq j$.

282. 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).

283. 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*, 556 U.S. 1 (2009) (plurality opinion) (Kennedy, J.)—on their own.

284. *Bartlett* forecloses “crossover” claims brought by minorities who do not compose 50% of the proposed remedial district but would be able to control the district together with white allies. *Id.* at 14–15 (plurality opinion) (Kennedy, J.) (“Nothing in § 2 grants special protection to a minority group’s right to form political coalitions.”). Though *Bartlett* expressly reserves the question of coalitional claims brought by two minority groups who *together* surmount the 50% threshold, some commentators not unreasonably see *Bartlett* as foretelling the demise of coalitional claims. See, e.g., Lauren R. Weinberg, Note, Reading the Tea Leaves: The Supreme Court and the Future of Coalitional Claims Under Section 2 of the Voting Rights Act, 91 Wash. U. L. Rev. 411, 433 (2013) (concluding *Bartlett* and *Perry v. Perez*, 132 S. Ct. 934 (2011), “strongly suggest that if and when the issue of coalition districts is directly presented,” Court will hold they are not “afforded protection under section 2”). On the other hand, coalitional claims present none of the line-drawing problems that so troubled the *Bartlett* plurality, nor do they depend on the existence of serious fractures in the white voting “bloc” (fractures which, as *Bartlett* ob-

A key conceptual question is how to define “the entire population” for purposes of calculating the denominator of the cohesion/polarization measure. Should the similarity/dissimilarity of political preferences in the numerator group(s) 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, say, a county, divide politically on racial lines alone, the minority community may 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 any two voters in the national population.²⁸⁵ But for present purposes, it is enough to provide a simple, easily interpreted picture of geographic variation in racial polarization throughout the nation, so the “national population” denominator will be used.²⁸⁶

One other complication needs to be mentioned. The 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 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, one can still generate a picture of the *relative* distance within and between voters of different groups.²⁸⁷ This will tend to understate the actual diversity of opinion within the population (because sampling is done from subgroup means, rather than individuals), but so long as mean ideal points from

serves, would create “serious tension” with the third prong of *Gingles*, see *Bartlett*, 556 U.S. at 16 (plurality opinion) (Kennedy, J.)). Either the two minority groups together compose 50% of the proposed remedial district or they do not. Either they are jointly politically cohesive or they are not. This is quite different than the “crossover”-type claim at issue in *Bartlett*, in which a minority group that composes a minority of the proposed remedial district claims the ability to control it in coalition with some indeterminate sub-population of the less-than-fully-cohesive white majority. The lower courts have split on the availability of coalitional claims, with most courts allowing them in principle, but the relevant decisions mostly predate *Bartlett*. See Hopkins, *supra* note 35, at 635–36 (summarizing cases).

285. 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 generally Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. Ill. L. Rev. 363 (discussing lack of voter knowledge about candidates’ positions, particularly in subnational elections); Schleicher, *supra* note 280 (arguing voter ideology in local and national issue spaces is likely to be only weakly correlated).

286. We use the Integrated Public Use Census Microdata as our estimate of the national population. Steven Ruggles, J. Trent Alexander, Katie Genadek, Ronald Goeken, Matthew B. Schroeder & Matthew Sobek, *Integrated Public Use Microdata Series: Version 5.0*, Univ. of Minn. (2010), <https://usa.ipums.org/usa/index.shtml> [<https://perma.cc/Y65N-KRWJ>].

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

the poststratification cells are used for the denominator, the model will capture 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).²⁸⁸

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 one county-level attribute: the minority percentage of the county’s population.²⁸⁹

Figure 1 maps the 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 but not entirely in the South.

288. In future work, we will pursue another strategy that may better recover the diversity of public opinion: modeling the ideological *distance* between pairs of voters of different types, rather 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.

289. 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 *supra* note 252 (discussing racial threat hypothesis). For a review of this literature and some interesting new results, see Ryan D. Enos, *What the Demolition of Public Housing Teaches Us About the Impact of Racial Threat on Political Behavior*, 109 *Am. J. Pol. Sci.* (forthcoming 2015) (manuscript at 1–2, 11–16) (on file with the *Columbia Law Review*) (studying impact of exogenous removal of black community caused by reconstruction of Chicago public housing on white voting, finding white turnout fell over 10% and “pro-Republican leanings of voters near projects” declined after projects demolished, supporting racial threat hypothesis).

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 CITIZENS²⁹⁰

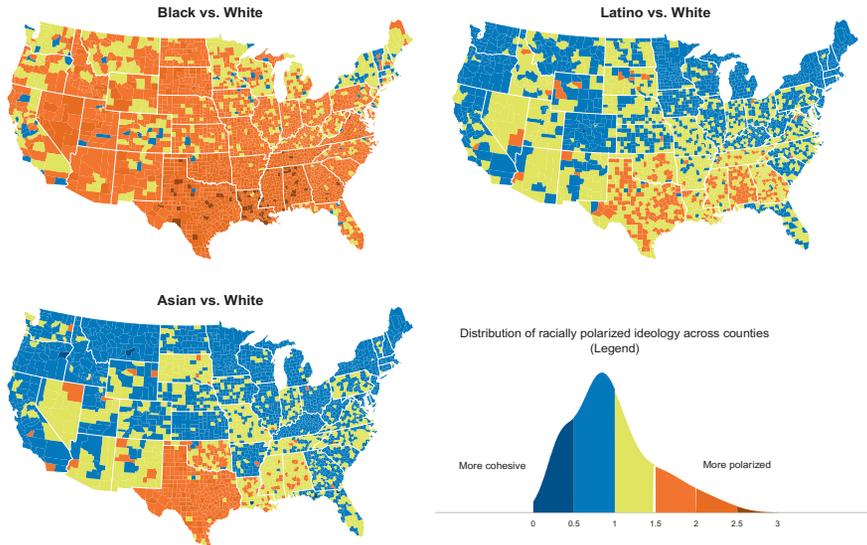
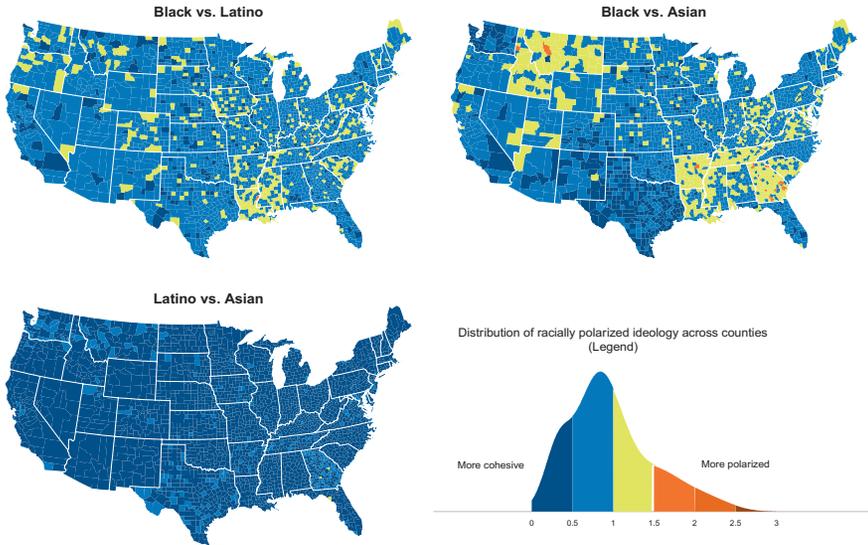


Figure 2 uses the same ideal point data and MRP models to illustrate similarities between minority groups.²⁹¹ Figure 2 drives home that coalitional claims brought by two or more minority groups can be analyzed in essentially the same way as claims brought by a single racial group. The courts, aided by 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 that fall on the “similar” side of the threshold would be deemed presumptively jointly cohesive.²⁹²

290. Data: 2010 Cooperative Congressional Election Study (N=47,234).

291. In the technical online 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 one half of the typical distance between voting-age Americans as a whole. Elmendorf & Spencer, Technical Appendix, *supra* note 37, at 12, 13 & tbl.2.

292. Those on the far side could not bring a coalitional claim unless they introduce new survey or voting data to overcome the presumption of noncohesiveness.

FIGURE 2: DIFFERENCE IN IDEAL POINTS BETWEEN MINORITY GROUPS²⁹³

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.²⁹⁴ 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.²⁹⁵ If the presumption-based approach to section 2 were adopted, many of these claims might become winners.²⁹⁶

The map in Figure 3 summarizes racial stereotyping against blacks, Latinos, and Asians at the county level.²⁹⁷ The map is color coded to re-

293. Data: 2010 Cooperative Congressional Election Study (N=47,234).

294. Note that our models do not distinguish among Latino populations by national origin. We pool information across Cuban Americans, Mexican Americans, Puerto Ricans, and others. One may fairly question whether the resulting estimates are reliable for Cuban Americans, who may be more conservative on average than the other Latino populations. Cf. *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1570–72 (1992), *aff'd in part, rev'd in part sub nom. Johnson v. De Grandy*, 512 U.S. 997 (1994), in which the trial court found that African Americans and Cuban Americans in Dade County, Florida, had very different political preferences.

295. See Chen & Lee, *supra* note 35, at 391 (describing “paucity of Asian American-focused litigation”).

296. At least if the constitutional risk requirement can be satisfied. Given space limitations, the question of how this requirement should be understood in coalitional cases cannot be addressed here.

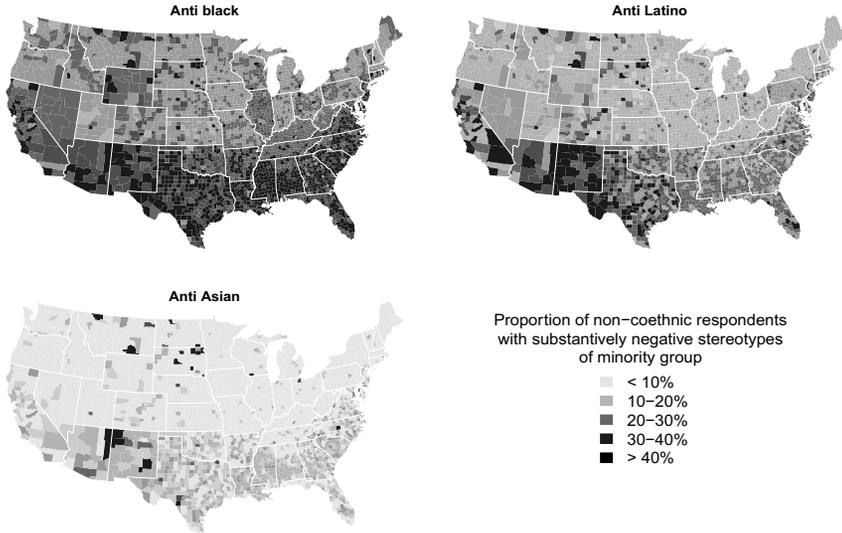
297. Formally, county-level stereotyping against group M is: $\frac{\text{ave}(S_{ik}^M)}{\text{ave}(S_j)}$ | $i \in \mathcal{K}, j \in \mathcal{P}, \{i, j\} \notin \mathcal{M}$, where S is an individual’s stereotype, i and j index voting-age citizens, \mathcal{K} is the voting-age citizen population of the county of interest (K), M is the racial group being stereotyped, \mathcal{M} is the population of that racial group, \mathcal{P} is the national population of voting-age citizens, and the averages are taken over \mathcal{K} and \mathcal{P} (exclusive of M), respectively. In turn,

flect the proportion of residents in each county that harbor a substantially negative stereotype of each racial group. We distinguish substantial from insubstantial negative stereotyping based on the predictive value of racial stereotypes with respect to vote choice. More specifically, we model the probability of voting for Obama in 2008 as a function of anti-black stereotyping, political ideology, party identification, age, sex, race, education, income, and region among respondents to the 2008 Annenberg National Election Survey and the 2008 Cooperative Campaign Analysis Project survey.²⁹⁸ Respondents who view blacks more *positively* than whites were no more or less likely to vote for Obama than the national median voter. Respondents whose views of blacks are more than one standard deviation more *negative* than the national average were much less likely to vote for Obama than Hillary Clinton in the 2008 primary, less likely to vote for Obama than John McCain in the 2008 general election, and much more likely to be “Democratic defectors” who voted for John Kerry in 2004 and McCain in 2008. Based on this relationship, we use the anti-black stereotyping value that is one standard deviation more negative than the national average (a value of 2.49 on a 12-point scale) as the cutoff for identifying substantial negative stereotyping. Figure 3 plots the proportion of respondents in each county that exceed this cutoff.

$S_i^M = \sum_z R_{iz}^M - R_{iz}^O$, where R_{iz}^M is respondent i 's rating of minority group M on attribute z (e.g., intelligence), and R_{iz}^O is the respondent's rating of his or her own racial group on the same attribute.

298. The balance of this paragraph summarizes the modeling and results in Elmendorf & Spencer, *Preclearance*, *supra* note 19, at 1143–56.

FIGURE 3: COUNTY-LEVEL DIFFERENCES IN THE PROPORTION OF NON-COETHNIC SURVEY RESPONDENTS WITH SUBSTANTIALLY NEGATIVE STEREOTYPES OF EACH MINORITY GROUP²⁹⁹



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 New Mexico, Arizona, Southern California, and Southwestern Texas. Substantial anti-Asian stereotyping is much less prevalent across the country, yet relatively strong in New Mexico and a few counties in the upper Midwest.

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—that is, the geographic regions in which the presumptions would operate to shift core evidentiary burdens to the defendant. For 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 “coa-

299. Data: 2010 Cooperative Campaign Analysis Project Survey (N=19,187).

litional partners” under section 2 by dint of their ideological similarity, they may have difficulty satisfying the constitutional-risk element of a section 2 claim.³⁰⁰

C. *Next Steps*

The modeling and results reported here speak to the feasibility of implementing section 2 with rebuttable presumptions whose application in a given case would be determined using national survey data, but this Article does not 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 this Part closes by enumerating 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.³⁰¹
- 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.³⁰²
- Investigate sensitivity of geography-of-polarization results to alternative specifications of the MRP model³⁰³ and explore machine-learning algorithms for “impartial” model selection and specification.³⁰⁴
- Replicate geography-of-discrimination results using alternative measures of racial attitudes.³⁰⁵

300. Even if the courts accept the “partisan incentives” arguments about constitutional risk, the 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. *Supra* Fig.1.

301. We touch briefly on several alternative measures in section II.C.1, *supra* notes 152–153. Regarding the strengths and limitations of the ideal point measure used in this Article, see *supra* notes 276–280 and accompanying text.

302. See *supra* note 280 and accompanying text (noting potential imperfections of measuring political preference by ideal points).

303. Cf. *supra* note 288 (discussing alternative approach to estimating ideological polarization within small geographic units).

304. See *supra* note 262. 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) (explaining machine-learning methods and model building). As such, they can help to allay concerns that a particular model was chosen because the analyst “liked” its results.

305. It would be particularly helpful to have a behavioral measure of disparate treatment or differential sympathy, one that is less vulnerable to social-desirability biases than the explicit stereotyping measure used here, and that tracks the equal protection norms

- 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.³⁰⁶)
- If resources are available, validate MRP models with large-N surveys in a randomly selected subset of jurisdiction,³⁰⁷ or (second best) with studies of a politically relevant behavior or attitude with respect to which the joint distribution of race and the behavior/attitude in the population can be treated as known.³⁰⁸
- Develop protocols for converting MRP-generated presumptions into informative priors for use with Bayesian ecological inference models.³⁰⁹
- Develop models to estimate minority opportunity in non-majority-minority districts, so that presumptions about which districts are minority-opportunity districts can be refined.³¹⁰

against disparate treatment. For an explanation of why we rely on explicit stereotyping measures for the time being, see Elmendorf & Spencer, *Preclearance*, *supra* note 19, at 1143–44. 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* 134–42 (1994) (describing historical characterization of Asian Americans as “yellow peril” and “model minority”); Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 *Pol. & Soc’y* 105, 106, 118 (1999) (noting triangulation of Asian Americans as “outsiders or aliens” and as “model minority” compared to blacks). 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.

306. 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 survey of approximately 50,000 households. Voting and Registration, U.S. Census Bureau, <http://www.census.gov/hhes/www/socdemo/voting/> [<http://perma.cc/W5EU-XELG>] (last modified July 16, 2015).

307. See *supra* notes 235–267 and accompanying text (suggesting techniques for estimating opinions of racial groups in specific geographic units).

308. See *supra* note 271 (suggesting data about voter registration and party preference by race could be one such attribute).

309. 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. E.g., Glynn & Wakefield, *supra* note 80; Greiner & Quinn, *RxC Ecological Inference*, *supra* note 219; Ori Rosen et al., *Bayesian and Frequentist Inference for Ecological Inference: The RxC 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 Ecological Inference models.

310. 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, 1407–09 (2001) (same).

While these research projects could greatly strengthen a presumption-driven section 2, they are not essential to get it up and running. Vote dilution cases have long been litigated using somewhat shaky methods of ecological inference and the courts have muddled through.³¹¹ The implementation of a presumption-driven section 2 can proceed similarly.

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.³¹² This Article suggests another tack: Establish evidentiary presumptions under section 2 that shift the burden of proof to defendants in political jurisdictions where the risk of unconstitutional race discrimination with respect to voting is elevated. Where the 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 ex ante incentives to gather information about the likely effects of reforms on racial minorities and to mitigate adverse impacts.

The empirical results reported in this Article 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.

Perhaps the greatest challenge for realizing a presumption-driven section 2, implemented with national survey data, is getting the courts to define and operationalize the presumptions similarly. Congress could solve this problem by authorizing DOJ to issue substantive rules under

311. See *supra* notes 218–220 and accompanying text (considering Greiner’s critiques of ecological inference and lack of attention paid by courts).

312. See, e.g., Elmendorf & Spencer, Preclearance, *supra* note 19, at 1127–28 (proposing new section 5 coverage formula); Bernard Grofman, Devising a Sensible Trigger for Section 5 of the Voting Rights Act, 12 *Election L.J.* 332, 334 (2013) (suggesting new “trigger” conditions for section 5); Morgan Kousser, Gutting the Landmark Civil Rights Legislation, *Reuters: Analysis & Opinion* (June 26, 2013), <http://blogs.reuters.com/great-debate/2013/06/26/gutting-the-landmark-civil-rights-legislation> [<http://perma.cc/36XX-XJ9U>] (recommending updated coverage formula and automatic “bail in” solutions); Spencer Overton, How to Update the Voting Rights Act, *Huffington Post* (June 25, 2013, 12:52 PM), http://www.huffingtonpost.com/spencer-overton/how-to-update-the-voting_b_3497350.html [<http://perma.cc/W23X-L97T>] (“Congress should update the coverage formula to require that states and localities with recent voting rights violations preclear new election law changes.”); Richard Pildes, One Easy, but Powerful, Way to Amend the VRA, *Election Law Blog* (June 28, 2013, 6:53 AM), <http://electionlawblog.org/?p=52349> [<http://perma.cc/K7M3-NWGU>] (advocating revision of section 3’s “bail-in” provision).

section 2. 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 some potential to gradually reform the law of section 2, in ways that reduce the cost and increase the predictability of voting rights enforcement.

