Administering Section 2 of the VRA After Shelby County


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Abstract. Until the Supreme Court put an end to it in Shelby County v. Holder, Section 5 of the Voting Rights Act was widely regarded as an effective, low-cost tool for blocking potentially discriminatory changes to election laws and administrative practices. The provision the Supreme Court left standing, Section 2, is generally seen as expensive, cumbersome and almost wholly ineffective at blocking changes before they take effect. This paper argues that the courts, in partnership with the Department of Justice, could reform Section 2 so that it fills much of the gap left by the Supreme Court’s evisceration of Section 5. The proposed reformation of Section 2 rests on two insights: first, that national survey data often contains as much or more information than precinct-level vote margins about the core factual matters in Section 2 cases; 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.

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INTRODUCTION

Widely lauded as one of the most effective statutes ever enacted, the Voting Rights Act (VRA) of 1965 finally made good on the promise of the 15th Amendment. The VRA outlaws the use of “tests or devices” as a prerequisite to voting, and Section 2 of the statute further prohibits state and local governments from structuring elections in a manner “which results” in members of a group defined by race or color “hav[ing] less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.”

Sections 4 and 5 target states and localities with a history of black disenfranchisement, requiring them to obtain prior approval from the federal government before implementing any changes to their election laws. The principal question in these “preclearance” proceedings is a simple one: Would the change make minority voters worse off? 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. The Court faulted Congress for not updating the coverage formula (which determines the states and localities subject to preclearance) when Congress reauthorized Section 5 in 2006. Justice Kennedy mused that Section 5 was probably not needed in any event because discriminatory voting changes can also be blocked, pre-implementation, by preliminary injunctions in lawsuits brought under Section 2. Leading election lawyers think this risible. Section 2 litigation is costly and rarely results in preliminary relief; moreover, *Shelby County* further undermines the already shaky constitutional moorings of Section 2.

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2. Preclearance could also be denied if the change was adopted for discriminatory reasons.
5. See, e.g., Eileen O’Connor, *Shelby County v. Holder* and the Fate of Section 5 of the Voting Rights Act, http://www.lawyerscommittee.org/projects/voting_rights/page?id=0139; Rick Hasen, post to Election Law Blog, Feb. 28, 2013, 8:30 am (“Justice Kennedy seems to mistakenly believe that section 2 liability plus preliminary injunctions would be just as good as section 5 liability”); J. Gerald Hebert & Armand Derfner, More Observations on *Shelby County*, Alabama and the Supreme Court, post to Campaign Legal Center Blog, March 1, 2013, 6:01 pm.
6. *Hebert & Derfner, supra* note 5 (“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.”).
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Shelby County’s impact was felt immediately. A number of state and local governments that had been subject to the preclearance process quickly adopted or implemented new, restrictive voting laws. For example:

- The day Shelby County was decided, Texas announced that it was implementing its strict voter ID requirement, which had been blocked under Section 5. See Ryan J. Reilly, Harsh Texas Voter ID Law ‘Immediately’ Takes Effect After Voting Rights Ruling, THE HUFFINGTON POST, June 25, 2013, http://www.huffingtonpost.com/2013/06/25/texas-voter-id-law_n_3497724.html.

- Texas’s Attorney General announced that the Legislature’s 2011 redistricting maps would immediately take effect. (Preclearance had been denied because a three-judge panel of the District Court of DC was “persuaded by the totality of the evidence that the plan was enacted with discriminatory intent.”)

- Two months after Shelby County, North Carolina enacted a sweeping election reform bill which the president of the state’s NAACP chapter called, “the worst voter suppression law since the days of Jim Crow.” During the same month, Mississippi passed new ID requirements for voting.

- 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.

- 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.

- The city of Macon, Georgia moved the date of city elections from November to July, when black turnout has traditionally been low.


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


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With Congress divided and slow to respond to Shelby County, Attorney General Holder pledged to do all he could to protect voting rights using the remnants of the VRA. The Department of Justice challenged new voting restrictions in Texas and North Carolina under Section 2, and other private and public lawsuits are in the offing.

This Article takes up the question of whether Section 2 can be made to function like erstwhile Section 5 in the post-Shelby County world. We argue that it can—provided that courts, litigators, and the Department of Justice come to understand two fundamental points. First, national survey data often contain as much or more information about 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.

We show that the courts could create rebuttable presumptions under Section 2 that would give the statute special bite in many jurisdictions formerly covered by Section 5. Implemented with national survey data rather than local election tallies, the new presumptions would greatly reduce the cost and uncertainty of challenging under Section 2 the kinds of election law changes that the Department of Justice used to block under Section 5. The presumptions would also go a long distance toward establishing the “likelihood of success on the merits” needed for preliminary relief.

16 It was not until January 2014 that the civil rights community and its allies in Congress came forth with draft legislation responding to Shelby County. The bill would bring only four of the formerly covered states back under Section 5, see Summary of the Voting Rights Amendment Act of 2014, http://www.advancementproject.org/pages/summary-of-the-voting-rights-amendment-act-of-2014-introduced-january-16-20#sthash.PoBAqJb.dpuf, notwithstanding that much broader coverage (using a different formula) is readily justified, see Christopher S. Elmendorf & Douglas M. Spencer, The Geography of Racial Stereotyping: Evidence and Implications for VRA Pre clearance After Shelby County, 102 CAL. L. REV. 1123 (2014) (hereinafter, “Elmendorf & Spencer, Pre clearance”).


19 Horwitz, supra note 17. For a summary of election law changes in formerly covered jurisdictions since Shelby County, see http://www.naacpldf.org/document/states-responses-shelby-decision.
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 that the challenged election law, procedure, or practice has a racially disparate impact. They must also connect this impact to “social and historical conditions.” We interpret the required “social and historical conditions” showing—in view of Shelby County—not as device for screening out claims in which the disparate impact is random and thus likely to prove transient, but rather 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” or “causation” label.

The presumptions we propose address both prongs of a Section 2 claim: disparate impact, and constitutional risk. We argue that 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). By shifting the burden of persuasion to defendants, the courts acknowledge that partisan motives do not merit the same presumption of legitimacy in jurisdictions where the partisan payoff to racial discrimination is exceptional.

As for the disparate-impact prong, we must differentiate two species of Section 2 claims. So-called “vote dilution” claims address the rules for aggregating votes into representation, such as the design of legislative districts,

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20 See infra Part II.
21 See infra Part II.
22 Where there is an extreme correlation between race and partisanship, opposing-party actors have incentives to target and burden voters on the basis of their race, race being easier to observe than reliable partisanship. See generally Adam B. Cox & Richard T. Holden, Reconsidering Racial and Partisan Gerrymandering. 78 U. Chi. L. REV. 553 (2011).
whereas “vote denial” cases concern barriers to casting a valid, duly counted ballot.\textsuperscript{23} In dilution cases, districting schemes and at-large electoral systems are generally said to have a disparate impact if—they prevent the minority community from electing a “roughly proportional” number of minority “candidates of choice.”\textsuperscript{24} Racial minorities have “candidates of choice” if and only if the group is internally politically cohesive.\textsuperscript{25} And unaccommodating electoral designs are understood to threaten the minority opportunity only if a politically cohesive racial majority opposes the minority’s preferred candidates.\textsuperscript{26} This is called racial polarization.\textsuperscript{27}

Presumptions for the disparate-impact side of a vote dilution claim must therefore address racial polarization in political preferences, and the related question of whether a given electoral district is a “minority opportunity district”—one which gives minority voters the opportunity to elect their “candidates of choice.” Though polarization has until now been gauged on the basis of voting patterns in local elections, we argue 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. 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. 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. We offer 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 \textit{de jure} list of jurisdictions “covered” by our Section 2 presumptions. Rather, plaintiffs would have to make evidentiary showings at the start of their case to establish which presumptions apply. We demonstrate in Part IV that 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. Our empirical results suggest that blacks (but not necessarily other racial groups) are likely to be protected by the presumptions.

\textsuperscript{25} \textit{Id.} at 48-50.
\textsuperscript{26} \textit{Id.} at 50-59.
\textsuperscript{27} \textit{Id.} at 45-59.
throughout the Deep South, *i.e.*, in most of the formerly covered jurisdictions. The two fastest growing racial groups in the United States, Asian Americans and Latinos, are jointly politically cohesive almost everywhere. This implies that Asians and Latinos ought to have considerable success bringing “coalitional” vote dilution claims under Section 2—which has not been the case to date. However, our results also indicate that Asian American and Latino plaintiffs may find it harder than blacks to satisfy the “constitutional risk” requirement.

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

State and local officials in the *de facto* covered jurisdictions would have to disprove central elements of a Section 2 case, much as covered jurisdictions bore the burden of proof in preclearance proceedings under Section 5. This shifting of evidentiary burdens should make it fairly easy for plaintiffs to obtain pre-implementation preliminary relief, much as DOJ under Section 5 was able to block suspicious changes before they took effect. In a redistricting case, for example, plaintiffs could establish the requisite “likelihood of success” by showing that the defendant failed to create a roughly proportional number of presumptive opportunity districts when it was feasible to do so. Or, in a challenge to voter identification requirements, plaintiffs might obtain preliminary relief by showing that the law was adopted on a substantially partisan 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 more costly for defendants than for plaintiffs, incentivizing defendants to settle quickly and on terms favorable to the plaintiffs. Lawmakers and election administrators in these jurisdictions would have correspondingly strong *ex ante* incentives to safeguard minority voting rights.

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29 The recently introduced Voting Rights Act Amendments of 2014 also aim to facilitate preliminary relief under Section 2, but in a different manner. As we read the Amendments, they would replace the traditional four-prong test for a preliminary injunction with a simple weighing of relative hardship (to defendants and to plaintiffs), without any consideration of the plaintiffs’ likelihood of success on the merits. See Voting Rights Act Amendments of 2014, H.R. 3899, 113th Cong. § 6(b)(4). 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.
The balance of this Article unfolds as follows. Part I provides a brief overview of Sections 2 and 5. It also explains the conventional wisdom that (weak, cumbersome) Section 2 is no substitute for (potent, efficient) Section 5, as well as the less widely appreciated fact that Section 2 may not be able to play in the future even the limited role it as played in the past, due to recent developments in law and in statistics.

Parts II, III, and IV develop our proposal for a presumption-driven Section 2. Part II identifies what we take to be the central factual questions in Section 2 cases and explains how they could be answered using evidentiary presumptions and survey data. Part III steps back and considers the courts’ authority to create the presumptions suggested in Part II. We argue that judicial authority to establish the presumptions is pretty straightforward as a matter of law. However, Department of Justice guidelines—developed with the assistance of a technical advisory panel and issued through notice-and-comment rulemaking—would be very helpful for inducing judicial coordination on what the presumptions are and how they may be proven in a given case. Part IV turns to empirical methods and results. We introduce the art and science of multilevel regression with poststratification (MRP), a recently developed tool for estimating local opinion from national survey data, and we present some initial results and maps, highlighting regions of the country likely to be covered de facto by the presumptions. The online Appendix provides further information about MRP.30

I. SECTION 2 AS A WEAK SUBSTITUTE FOR SECTION 5

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

A. Conventional Wisdom About Sections 2 and 5

The potency of Section 5 is commonly attributed to its substitution of administrative for judicial procedures; its establishment of a fairly bright-line results test; and, critically, its placement of the burden of proof on the party seeking preclearance.31 Congress’s delegation of authority to the Department of Justice to make preclearance decisions meant that the determinations could be


31 For an excellent summary of the differences between Sections 2 and 5 with more detail than we provide here, see Nicholas Stephanopoulos, The South After Shelby County, 2013 SUP. CT. REV. 55, 62-86.
made with a minimum of legal expenses, for covered jurisdictions and would-be plaintiffs alike.32

The principal substantive standard under Section 5 was reasonably clear-cut. Preclearance was to be denied if the measure was adopted with a discriminatory purpose, or “would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”33 Discriminatory intent can be hard to prove (or disprove),34 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.”35 DOJ and the courts denied preclearance when a change would reduce the number or reliability of electoral districts that provide minorities with an opportunity to elect minority candidates,36 or would create a material barrier to voting borne disproportionately by minority citizens.37 According to law professor and former DOJ staff attorney Michael Pitts, “local officials and their demographers” in the covered jurisdictions were “acutely cognizant of the standards for approval and typically tried to steer very clear of anything that would raise concerns with the Attorney General.”38

32 Though covered jurisdictions were permitted to opt out of DOJ review in favor of a preclearance proceeding District Court for the District of Columbia, this option was rarely invoked, as it was much more costly for the jurisdiction seeking preclearance.
34 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., supra note 24, at 29.
36 See, e.g., Texas v. United States, 887 F.Supp.2d 133, 149-151 (D.D.C. 2012) (interpreting Section 5 to protect only those districts that give a political cohesive minority community the opportunity to elect their preferred candidates, as opposed to simply the opportunity to elect a Democrat).
37 See, e.g., Florida v. United States, 885 F.Supp.2d 299 (D.D.C. 2012) (denying preclearance to Florida’s reduction in early voting period, on ground that early voting had been disproportionately used by African Americans and reduction in early voting days represented a “material burden” on the franchise); Letter from Thomas E. Perez, Assistant Attorney General, U.S. Department of Justice, to Keith Ingram, Director of Elections, Office of the Texas Secretary of State, Mar. 12, 2012, http://www.brennancenter.org/sites/default/files/analysis/DOJ_Final_Letter_To_Texas_On_Voter_ID_Law.pdf (denying preclearance because state’s own data showed that Hispanics disproportionately lacked qualifying ID, and because the statute did not adequately mitigate burdens on voters who lacked qualifying ID); Texas v. Holder, 888 F.Supp.2d 113 (D.D.C. 2013) (denying preclearance to Texas voter ID requirement, on the ground that the law would create a significant barrier to voting for poor people, and that racial minorities were disproportionately represented among the poor);
38 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).
Finally, because Section 5 put the burden of proof on the party seeking preclearance, the provision was information-forcing. 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. 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.

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 the Department of Justice. 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. Some Attorneys General were probably more solicitous of minority communities than others, but to the extent that DOJ cared about minority voting rights, the structure of Section 5 made the path from “becoming concerned” to “blocking the change” easy and inexpensive to navigate.

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

Substantively, Section 2 prohibits electoral arrangements “which result[]” in members of a class of citizens defined by race or color “having less

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


opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 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.” Most courts and commentators also agree that Section 2 supports independent causes of action for “vote denial” and “vote dilution.” (Again, denial cases concern barriers to the casting of valid, duly counted ballots; dilution cases concern rules for aggregating votes into representation, such as districted vs. at-large elections.)

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. These “circumstances” include (but are not limited to) the defendant jurisdiction’s history 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 the strength or weakness of the state interests asserted in defense of the challenged election laws.

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

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45 See infra Part II.A.
47 These factors were enumerated in the Senate Judiciary Committee report accompanying passage of the Section 2 results test. S. REP. NO. 97-417 at 30 (1982) (hereafter “Senate Report”).
49 This factor was prioritized—without being made decisive—by the Supreme Court in Johnson v. De Grandy, 512 U.S. 997, 1013-14 & n. 11 (“‘Proportionality’ as the term is used here links the number of majority-minority voting districts to minority members’ share of the relevant population.”). See generally Ellen D. Katz et al., Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act, 39 U. MICH. J. L. REF. 643, 730-32 (2006) (documenting lower court reliance on this factor).
50 See, e.g., Goosby v. Town of Hempstead, 180 F.3d 476, 500 (2d. Cir. 1998); NAACP v. Thompson, 116 F.3d 1194, 1198-1200 (7th Cir. 1997); Teague v. Attala Cnty., 92 F.3d 288, 295 (5th Cir. 1996); Lewis v. Alamance Cnty., 99 F.3d 600, 615 n. 12 (4th Cir. 1996); S.
causation requirement.\(^5\)) And still other courts churn through the motions of the totality-of-circumstances analysis without stopping to explain their underlying conception of equal political opportunity.\(^5\) In vote denial cases the role of the totality-of-circumstances inquiry is if anything even more unsettled.\(^5\)

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.\(^5\) 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.\(^5\) The causation inquiry further complicates matters. Plaintiffs challenging a felon disenfranchisement rule, for example, may have to prove that state’s penal code is administered in an intentionally discriminatory fashion.\(^5\) Worse yet, as Jim Greiner has explained, the causation question has often been posed in ways that may render it unanswerable.\(^5\)

Together, the fact-intensive nature of Section 2 claims and the uncertain standard for liability make preliminary relief hard to obtain. Veteran litigators estimate that plaintiffs have secured preliminary injunctions in only about five

\(^{51}\) Christian Leadership Conference of Ala. v. Sessions, 56 F.3d 1281, 1293 (11th Cir. 1995); Vecenos De Barrio Uno v. City of Holyoke, 72 F.3d 973, 80, 983 (1st Cir. 1995); Nipper v. Smith, 39 F.3d 1494, 1524 (11th Cir. 1994) (plurality opinion of Tjoflat, J.).

\(^{52}\) D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 533, 590-97 (2008); Katz et al., *supra* note 49, at 670-72 (discussing caselaw). As Greiner and Katz observe, some courts roll the “causation issue” into the Gingles polarized-voting inquiry, and others consider it part of the “totality of circumstances.” Katz suggests—we think correctly—that little turns on this distinction.


\(^{54}\) Compare Tokaji, *supra* note 23, at 709-26 (arguing that most of the 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). *Cf.* League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224, 239 (4th Cir. 2014) (“there is a paucity of appellate case law evaluating the merits of Section 2 claims in the vote-denial context”).

\(^{55}\) For local government elections, these data are rarely available in convenient electronic formats. The cost of assembling the data is often a significant barrier to bringing Section 2 claims. (Personal communication with VRA litigators.)

\(^{56}\) On the importance of qualitative evidence for vote dilution litigation under Section 2, see D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 IND. L.J. 447, 492-95 (2011) (presenting case study of City of Boston); HEBERT ET AL., *supra* note 24, at 48 (noting that “[a]ncedotal evidence is often used [in Section 2 cases] to supplement statistical findings”).

\(^{57}\) See, e.g., Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (rejecting challenge to Washington State’s felony disenfranchisement rule on ground that plaintiff failed to establish intentional discrimination in criminal justice administration).

\(^{58}\) Greiner, *supra* note 51, at 591-97.
percent of Section 2 cases. The path from “becoming concerned” to “blocking a change” is slow and arduous. Meanwhile, officials elected under racially discriminatory ground rules may pass new laws that further hinder minority candidates or otherwise disadvantage the minority community.

B. Looming Threats to Section 2

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

But the Section 2 results test is under threat from two directions—one jurisprudential, the other demographic and statistical. The Supreme Court has issued a string of decisions narrowing Section 2 on the basis of the constitutional avoidance canon. Shelby County provides fuel for accelerating this process, 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.

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.

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 and/or significant residential integration in the jurisdiction—which is increasingly typical. Minority cohesion and white-bloc voting have traditionally been inferred from aggregate rather than individual-level data (precinct-level election returns plus racial

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59 Charles & Fuentes-Rohwer, supra note 39.
60 Samuel Issacharoff has argued that political parties and associated actors are typically the “real party in interest” in Section 2 cases. See Issacharoff, Gerrymandering and Political Cartels, 116 Harv. L. Rev. 593 (2002).
61 See Elmendorf, Making Sense of Section 2, supra note 48, at 399-404 (summarizing cases).
62 See infra Part II.A.
63 Elmendorf, Making Sense of Section 2, supra note 48, at 409-14.
demographics from the Census). 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. Conclusions about racial polarization under these conditions are very sensitive to the analyst’s assumptions—unless the analyst can supplement the aggregate data with individual-level observations obtained from exit polls and other surveys. But survey data about vote choice in local elections “are almost never available” in vote dilution cases.

There is a serious risk that courts will 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.

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 presumption, implemented cheaply and predictably using national survey data and standard statistical models. After establishing that the core of Section 2 can be translated into such presumptions, we will address judicial authority to create the

64 For a great introduction to the statistical techniques used in vote dilution cases, see D. James Greiner, Ecological Inference in Voting Rights Act Disputes: Where Are We Now, and Where Do We Want to Be?, 47 JURIMETRICS J. 115 (2007).
65 See D. James Greiner & Kevin M. Quinn, Exit Polling and Racial Bloc Voting: Combining Individual-Level and RxC Ecological Data, 4 ANNALS OF APPLIED STATISTICS 1774 (2010); Greiner, Re-Solidifying Racial Bloc Voting, supra note 55.
66 On the role of arbitrary assumptions in ecological inference, see Greiner, supra note 64, at 126-38, 149-54.
67 Greiner & Quinn, supra note 65; Adam Glynn & Jon Wakefield, Ecological Inference in the Social Sciences, 7 STAT. METHOD. 307 (2010) (demonstrating “the inclusion of a small amount of individual level data can dramatically improve the properties of [ecological] estimates.”).
69 Greiner treats this as an unavoidable consequence of his results. See Greiner, Re-Solidifying Racial Bloc Voting, supra note 55, at 482 (“the need for polls over several election cycles may be a fact of life in some multiracial polities”).
70 National surveys rarely ask about vote choice in local elections. And even if the survey did ask about local elections, the new statistical tools for estimating local opinion from national surveys (which we explain in Part IV) could not be used to estimate vote choice in local elections. The tools assume that all survey respondents have answered the same question.
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. 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. If they do not, plaintiffs should be able to obtain preliminary relief, even pre-implementation, 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. The candidates and issues in these elections vary from 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 doesn’t carry over to the next case.

Our argument comes with an important caveat. The benefits of implementing Section 2 with rebuttable presumptions and national survey data—lower cost, more predictable litigation, with preliminary relief becoming

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71 Though not quite so easy as looking up the jurisdiction’s name on the list of covered jurisdictions.
72 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. By contrast, the results test of Section 2 allows status-quo arrangements to be challenged.
73 “Polarized voting” is the central issue in vote dilution cases, see Elmendorf et al., Racially Polarized Voting, supra note 48, at 6-47, and one factor among many that courts may consider in vote denial cases, see Christopher S. Elmendorf, Judge Easterbrook on the Voting Rights Act: Asking Good Questions, Making Bad Law (Oct. 8, 2014), Election Law @ Moritz, http://moritzlaw.osu.edu/election-law/article/?article=12965.
74 For a detailed examination of how the racially polarized voting inquiry works in practice today, see Elmendorf et al., Racially Polarized Voting, supra note 48, at 22-47.
Administering Section 2 After Shelby County

It is 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, and even conditional on a particular gloss on Section 2’s meaning, the presumptions could be defined in a variety of ways. (Later on, we will also see that 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.)

Rulemaking by an administrative agency such as the Department of Justice may be necessary to solve the judicial coordination problem. We take this up in Part III. 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.

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

Before we can translate core factual questions under Section 2 into evidentiary presumptions, we 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.

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. The constitutional problem in a nutshell is this: Section 2 establishes a results test, but the 14th and 15th Amendments prohibit only disparate-treatment/intentional discrimination on the basis of race, so it would seem that Section 2 is not a “congruent and proportional” response to actual or threatened constitutional violations. (A terminological note: we shall use the term “subjective

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75 See generally Elmendorf, Making Sense of Section 2, supra note 48; Elmendorf et al., Racially Polarized Voting, supra note 48.
76 See infra Parts II.B & C.
77 See infra Part III.
78 See generally Elmendorf, Making Sense of Section 2, supra note 48, at 387-95; Racially Polarized Voting, supra note 48.
79 Elmendorf, Making Sense of Section 2, supra note 48, at 379-404.
81 Elmendorf, Making Sense of Section 2, supra note 48, at 399-403.
discrimination” as a catchall for intentional discrimination, disparate treatment, and any other form of differentiation by race that the Constitution disfavors."

Our answer is this: 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.”

As we understand it, the function of the “social and historical conditions” showing is 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.

In an important sense, the “social and historical conditions” 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, preclearance could be denied on the basis of regressive impact alone, without any further showing to establish a nexus between the remedy (denial of preclearance) and constitutional violations. 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 showing that judicial intervention to remedy the racial disparity is justified. At least this is so if one accepts the jurisprudential premises of the Supreme Court’s current conservative majority—to wit, (1) that state action with a racially disparate impact is unconstitutional only if it results from subjective discrimination, and (2) that statutory remedies under the congressional enforcement provisions of the 14th and 15th Amendments must be “congruent and proportional” to the risk of constitutional violations.

Now, some caveats. There is no settled judicial understanding of the “social and historical conditions” requirement in Section 2 cases. Some judges

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83 Elmendorf, Making Sense of Section 2, supra note 48, at 417-47.

84 Technically, the coverage formula used a proxy: 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. South Carolina v. Katzenbach, 383 U.S. 301, 329 (1966).

85 Elmendorf, Making Sense of Section 2, supra note 48, at 428-47.
have said it simply corroborates that the racially disparate impact “is not merely a product of chance.” 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, minority voter participation) result from the “interaction” of the challenged measure with large numbers of people (voters or potential voters, candidates and potential candidates), usually across a substantial number of elections. Under such conditions, substantial racial disparities are very unlikely to occur due to chance alone. In most cases, a showing of racially disparate impact establishes 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, whatever) that account for the disparity.

In point of fact, however, courts when addressing “social and historical conditions” in a Section 2 case usually focus not on socioeconomics 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. Typical considerations include: Jim Crow history, housing segregation, racially polarized voting (often assumed to manifest discrimination against minority candidates), public and private discrimination in employment and education, racial campaign appeals, etc. These are all risk factors for unconstitutional

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86 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 Thornburg v. Gingles, 478 U.S. 30 (1986), which tried to boil vote dilution law down the simple question of whether minority candidates were almost always defeated. See id. at 46-51.

87 E.g., elections over several cycles for every seat in a legislative chamber or congressional delegation. Cf. League of United Latin American Citizens v. Perry, 548 U.S. 399, 436-37 (2006) (holding that “proportionality” in a Section 2 challenge to a statewide redistricting is to be assessed on a statewide basis).

88 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 ch. 16 (4th ed. 2007).

89 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 49, at 648-50. For a particular clear judicial statement interpreting the social-and-historical-conditions requirement much as we suggest, see League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014) (stating that the “burden must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class”) (emphasis added, internal quotation marks and citations omitted).

90 See generally Katz et al., supra note 49, at 661-730 (discussing judicial treatment of the “Senate Report” factors). For recent exemplars, see, e.g., League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224, 238-47 (4th Cir. 2014) (emphasizing history of discrimination); Ohio State Conference of N.A.A.C.P. v. Husted, 768 F.3d 524,
state action in the electoral process, 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.91 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.92 Others say it is just one factor among many to be weighed.93 Some courts seem to infer causation from Jim Crow history.94 Others insist on evidence that current voting patterns or actions by government officials manifest subjective discrimination against minority candidates.95 Still other courts rebuttably presume subjective race discrimination from racially polarized voting in biracial elections.96 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. Jim Greiner thinks it is a nominal requirement only, regularly ignored in practice.

In any event, our purpose here is not to extract from the case law some majority or plurality view of the causation/social-and-historical-conditions requirement. Rather, we want 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 above and explained at length elsewhere, we think our “risk factors” interpretation effectively reconciles the results test of Section 2 with the jurisprudential premises of the conservative center. 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. In keeping with our interpretation, we shall 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 remedies for the lingering effects of generations of unchecked constitutional violations in the South. Numerous lower courts have in fact emphasized Jim Crow history as part of the “social and historical conditions” inquiry. But in Shelby County v. Holder, the

97 Katz et al., supra note 49, at 671-72 (“Proving the linkage is difficult . . . and numerous lawsuits have held that plaintiffs failed to meet their burden . . . on this point.”) (citing thirteen cases).
98 Greiner, supra note 55, at 459-60 (characterizing current burden-shifting practices as depriving the causation requirement of practical bite); Greiner, supra note 51, at 591 (“the causal inquiry . . . appears to matter little in actual cases unless the factual record demonstrates that candidates of minority race have enjoyed some measure of electoral success”).
99 Elmendorf, Making Sense of Section 2, supra note 48, at 418-47.
101 See Katz et al., supra note 49, at 675-97.
Supreme Court denied the legitimacy of history as basis for subjecting state and local governments to preclearance under Section 5.\textsuperscript{103} 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 in the 1960s are today more likely than other state and local governments to discriminate unconstitutionally.\textsuperscript{104} 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 half a century ago.\textsuperscript{105} Shelby County is of a piece with many other Supreme Court decisions setting time limits on remedies for past de jure discrimination.\textsuperscript{106}

Plaintiffs will be on much stronger ground if they can make the constitutional risk showing using current data, while focusing on the present-day risk of unconstitutional race discrimination in the electoral process. After Shelby County, 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 both the constitutional-risk and the disparate-impact prongs of Section 2.

\textbf{B. Presumptions About “Risk Factors” for Constitutional Violations}

The essential ingredients for a workable “constitutional risk” (a/k/a “causation” or “social and historical conditions”) showing under Section 2 are a

\textsuperscript{102} 133 S.Ct. 2612 (2013).
\textsuperscript{103} See Heller, supra note 62.
\textsuperscript{104} 133 S.Ct. at 2625-31.
\textsuperscript{105} Cf. Shelby County, 133 S.Ct. at 2624-29 (recounting “dramatic[]” improvements in minority political participation in the South over the last fifty years). See also Nw. Austin Mun. Utility Dist. No. 1 v. Holder, 557 U.S. 193, 202 (2009) (“Things have changed in the South.”).
\textsuperscript{106} See, e.g., Bd. of Educ. of Oklahoma City 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 7, Report of the Civil Rights Project/Proyecto Derechos Civiles, UCLA (August 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. Cf. Grutter v. Bollinger, 539 U.S. 306, 343 (2006) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”)
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 14th and 15th 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.

In recognition of this, we suggest a pair of constitutional risk presumptions that speak to motive, or propensities for disparate treatment. One is grounded on current racial attitudes, the other on elected officials’ incentive to use race as a screening device to effectuate political discrimination. ¹⁰⁷

1. **Racial Attitudes and Beliefs** ¹⁰⁸

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. ¹⁰⁹

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

¹⁰⁷ 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 Survey Experiments to Estimate Racially Polarized Voting (Jan. 31, 2015) (unpublished manuscript) (on file with authors).

¹⁰⁸ Portions of this section previously appeared in Elmendorf & Spencer, Preclearance, supra note 16.

¹⁰⁹ 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 48, at 430-47.
purists, unanswerable. Like her race itself, 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. 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 be clear that the negative stereotypes were responsible for the subject’s lack of support for minority candidates.

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. Subject to two provisos, we think 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.

111 Id. On the centrality of manipulation/randomization to causal inference, see JOSHUA D. ANGRIST & JORN-STEFFEN PISCHKE, MOSTLY HARMLESS ECONOMETRICS: AN EMPRICIST’S COMPANION 5 (2008).
112 In all social science applications, the barriers to inference about causal pathways tend to be formidable. See Donald P. Green, Shang E. Ha & John G. Bullock, Enough Already About Black Box Experiments: Studying Mediation is More Difficult Than Most Scholars Suppose, 628 ANNALS OF THE AM. ACADEMY OF POL. & SOC. SCI. 200 (2010).
113 As Justice Souter once observed about constitutional judicial review, “The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up and down with the novelty and plausibility of the justification raised.” Nixon v. Shrink Missouri Gov’t PAC, 528 U.S. 377, 391 (2000).
114 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 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 that the Waite Court left room for Congress to attack race discrimination insofar as it prevented blacks from voting); Elmendorf, Making Sense of Section 2, supra note 48, at 430-36 (arguing that the electorate as a whole is a state actor when it performs the “public function” of putting in office officials who exercise the coercive power of the state). 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) (plurality opinion of Tjoflat, J.); LULAC v. Clements, 999 F.2d 831 (5th Cir. 1994) (en banc).
The first proviso is that the measure of racial attitudes must correlate with political behavior or preferences among white (majority-race) voters. Section 2 is ultimately concerned with equal political opportunity. If whites’ racial attitudes do not correlate with political behavior, there’s little ground for presuming that minority-preferred candidates or policies would have fared better but for white prejudice. 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.

Our 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. Racists no doubt give predictable answers to these questions, but there is nothing unconstitutional about state action being predicated on the belief that federal welfare programs are a waste of money, or 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

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115 Plaintiffs might satisfy this proviso by showing that more prejudiced whites (per the plaintiffs’ measure of prejudice) are less supportive than other whites of minority candidates compared to similar white candidates, or less supportive of a certain policies when the policy beneficiaries are portrayed as plaintiff-race rather than white. The necessary showing could be made with observational or experimental data. Of course, the showing will not be causal, in that racial attitudes themselves cannot be randomized. The showing would be correlational and therefore suggestive only. In Part II.A.3, infra, we satisfy the proviso by showing that our measure of prejudice predicts vote choice in elections contested by Barack Obama.

116 42 U.S.C. 1973(b) (“A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State of political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electoral to participate in the political process and to elect representatives of their choice.”) (emphasis added).

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

likelihood of unconstitutional race discrimination from the prevalence of “racial resentment.”

However, as we have shown elsewhere, conventional survey-based measures of racial stereotyping easily satisfy both of our provisos. 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. 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 could ground “constitutional risk” presumptions on public officials’ incentive to discriminate against the minority so as to perpetuate their hold on power. Under certain condition, 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 racial 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. 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.

We acknowledge that reasonable people may disagree about the propriety of inferring race discrimination, even presumptively, from “political incentives

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119 Elmendorf & Spencer, Preclearance, supra note 16, at 20-33. The conventional measures tap perceptions of racial differences in work ethic, intelligence, trustworthiness, and the like. These measures aren’t perfect—some respondents may not understand their own biases, and others may not report their biases truthfully. The conventional measures may also be weaker for non-black minorities. But until better measures are produced, the conventional measures should suffice.

120 For some evidence to this effect and a model of associated political incentives, see Cox & Holden, supra note 22.

121 Cf. Growe v. Emison, 507 U.S. 25, 41-42 (1993) (rejecting idea that Section 2 cases may be resolved on basis of what is typical nationally, rather than what is true in the defendant jurisdiction).
plus disparate impact.” Given present political alignments, the political-incentives presumption would tend to hobble Republican but not Democratic power plays. This may make the presumption too politically fraught for the courts to adopt.122

Another objection is that the political incentives presumption would capture the incentive to discriminate on the basis of partisanship, not race. Courts have long struggled to distinguish racial from political discrimination in Section 2 and equal protection cases.123 Political discrimination is generally regarded as constitutionally innocuous, whereas race discrimination is deemed invidious.

We think the partisanship-not-race objection is unconvincing. The Equal Protection Clause prohibits state actors from classifying persons by race and subjecting them to disparate treatment, unless doing so advances a compelling state interest that cannot be protected using race-neutral means.124 Racial animus and ugly stereotypes are not prerequisites for an equal protection violation.125 It is the fact of disparate treatment on the basis of race that triggers strict scrutiny, not the reason for the treatment.

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

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

Garza v. Cnty. of Los Angeles, 918 F.2d 763, 778 n. 1 (1990) (Kozinski, J., concurring and dissenting in part).
If the correlation between race and partisan voting behavior is extremely high, politically motivated state actors will have strong incentives to classify and target voters on the basis of their race. Race is generally easy to observe. Consistent partisan voting behavior is much harder to observe, for the ballot is secret and citizens don’t wear their voting history on their sleeve. Because race is more readily observed than reliable partisanship, elites seeking partisan political advantage have incentives to target voters on the basis of their race.

We acknowledge that the Supreme Court has been wary about applying the anti-stereotyping logic of equal protection doctrine in cases about political discrimination. In racial gerrymandering cases, for example, the Court has crafted decision rules that make it very difficult to challenge state actions that classify voters by race, if the action can be explained as a partisan maneuver and the racial classification isn’t facially evident. 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.

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

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127 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. See id. at 159-60.
128 One of the “totality of circumstances” factors that courts regularly consider in Section 2 cases is the degree to which the challenged law is tenuous or advances important state interests. See, e.g., Houston Lawyers’ Ass’n v. Tex., 501 U.S. 419, 426-27 (1991) (noting that the state interest in electing trial judges from districts co-extensive with the trial court’s jurisdiction “is a factor to be considered by the court in evaluating whether the evidence in a particular case supports a finding [that this practice is] a vote dilution violation . . . .”)(emphasis in original); Katz et al., supra note 49, at 727-30 (reviewing case law in the lower courts).
C. Presumptions About Disparate Impact

It goes without saying that plaintiffs challenging an electoral rule or structure on the ground that it results in discrimination must make a showing of disparate impact. In typical vote dilution cases, the impact concerns the minority’s opportunity to elect its candidates of choice. In vote denial cases, the question is whether the state has erected barriers to voting whose burden falls disproportionately on minority-race citizens.

I. Vote Dilution

Though there is still ample room for disagreement about the meaning of disparate impact in dilution cases,129 the dominant approach today is to ask whether the minority group has been deprived of the opportunity to elect a roughly proportional number of its candidates of choice.130 To figure this out, the court must first determine whether the racial minority has distinct political preferences that set it apart from the majority group.131 This is known as “racial polarization.”132 In the absence of racial polarization, it does not make sense to speak of minority-race voters as a group having “candidates of choice.”133 But if political preferences do prove to be polarized, the court must determine whether the defendant’s electoral system, in conjunction with majority-race voting patterns, operates to prevent the minority community from electing “candidates of choice” in rough proportion to the minority’s population share.134

To gauge disparate impact, then, the courts need a measure of polarization, and a tool for determining whether any particular legislative district is a minority opportunity district. 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.135 These estimates are created by ecological inference from aggregate data—vote tallies and demographics at the precinct level.136

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129 See generally Elmendorf et al., Racially Polarized Voting, supra note 48, at 9-16 (contrasting three theories of racial vote dilution).
130 See HEBERT ET AL, supra note 24, at 59 (“proportionality has become an increasingly crucial issue in Section 2 cases”).
132 HEBERT ET AL, supra note 24, at 45-59.
134 Id. at 59-61.
136 See generally Greiner, supra note 64.
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. Litigants then do battle over which elections are most “probative” of group political cohesion and minority opportunity. \(^{137}\) Courts muddle through; the relevant legal doctrines give trial judges enormous discretion but not much guidance about how to exercise it. \(^{138}\)

This process could be greatly streamlined if the courts recognized rebuttable presumptions about racial group cohesion and minority opportunity districts, presumptions whose application would depend on national survey data rather than local election results. As we’ll see next, there are a number of options.

a. Political Cohesion and Polarization

Using national survey data, there are several ways to answer the question of whether plaintiffs belong to a racial community with distinct political interests or preferences, not shared by the racial majority: (1) base polarization determinations on voting-age citizens’ stated political preferences (“preference polarization”); \(^{139}\) (2) base polarization determinations on citizens’ interests (“interest polarization”); (3) base polarization determinations on the results of survey experiments (a variant on preference polarization). Here we briefly describe the three approaches; in Part IV, we report original empirical results on preference polarization.

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

Alternatively, census data can be used to establish differences between racial groups in terms of economic position, health status, incarceration rates, and the like. This approach to the polarization inquiry presumes that people vote their interests rather than their principles, which isn’t always true. \(^{140}\) But

\(^{137}\) Elmendorf et al., *Racially Polarized Voting*, supra note 48, at 22-47.

\(^{138}\) *Id.*

\(^{139}\) Whether the presumptions should reflect the political preferences of all voting-eligible citizens, or only registered voters or likely voters, is a question we do not resolve here.

\(^{140}\) Cf. Andrew Gelman et al., *Red State, Blue State, Rich State, Poor State: Why Americans Vote the Way They Do* (2006) (showing systematic regional differences in the degree to which affluent people vote their economic interests); Eitan Hersh & Clayton Nall, A Direct-Observation Approach to Identify Small-Area Variation in Political Behavior: The Case of Income, Partisanship, and Geography (unpublished manuscript, Sept. 9, 2013), http://www.stanford.edu/~nall/docs/cata9.6.pdf (showing at fine geographic
the interest-based approach has the advantage of not relying on litigant-generated models to produce estimates of local public opinion, as the relevant data is available from the Census Bureau at the geographic scales needed for Section 2 litigation. The preference-based approach is, however, more in keeping with the existing judicial focus on voter preferences, as well as recent empirical evidence about geographic variation in income-based voting, and ontological commitments to free will.

Both preference- and interest-based approaches present challenges when racial groups polarize on some but not all issues, ideological dimensions, or interests. The responsible decision-maker must decide how to weight the various indicators of cohesion/polarization. But this problem—for purposes of a rebuttable presumption of cohesion/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. (Courts struggle all the time with whether to include or how to weight voting data from white vs. white elections, primary elections, and elections to governmental bodies other than the one at issue in the case.)

One reason it’s less vexing is that the rebuttable presumptions would be implemented using national survey data. This means that the same universe of issues and summary measures of preferences (or interests) will be available in all Section 2 cases. Once a circuit court decides that a particular measure suffices, either in general or for a particular type of governmental body, 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. Each case therefore

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141 The objective approach might be implemented with the types of factor analysis that Nick Stephanopoulos has used to measure the spatial heterogeneity of legislative districts. See Stephanopoulos, Spatial Diversity, 125 Harv. L. Rev. 1903 (2012); Stephanopoulos, supra note 31.
143 See supra note 140.
144 See supra note 140.
145 Elmendorf et al., Racially Polarized Voting, supra note 48, at 22-47.
146 Say, measures of educational attainment for school board elections.
147 See Hebert et al., supra note 24, at 54-55 (noting that many courts have discounted and some even refuse to consider evidence of racial polarization in “exogenous” elections, i.e., elections for a governmental body other than that at issue in the case).
depends on set of election results unique to the case. The bottom line is that an evolving “common law” of racial polarization with respect to preferences or interests should provide more guidance regarding the likely outcome of the next case than has the common law of racial polarization with respect to vote shares in candidate elections.\textsuperscript{148} This has obvious implications for the availability of preliminary relief.

Second, because the presumption of racial polarization would be rebuttable, courts needn’t be perfectionist about the measure. A generic measure of ideology scaled from issue preferences (i.e., first dimension ideal points) arguably should suffice for most elections,\textsuperscript{149} even though citizens with the same ideal points may have important disagreements on certain issues.\textsuperscript{150} Alternatively, judges could ask litigants to show the relative importance that minority and white voters attach to different issues.\textsuperscript{151} Cohesion and polarization determinations could then be based on issue preferences weighted by their importance to minority voters. (Of course, any court that continues 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 forthcoming paper that this can be done by asking voters to choose between pairs of hypothetical candidates whose race and endorsements have been randomized.\textsuperscript{152}

In our view, the ultimate choice among reasonable metrics for cohesion/polarization should be made in the first instance by the Department of Justice (more on this below).\textsuperscript{153} The same goes for picking cutoffs that mark

\begin{footnotesize}
\begin{enumerate}
\item But it still might not provide enough guidance, without a strong assist from DOJ. See \textit{infra} Part III.B.
\item On scaling ideology from issue positions, see generally Joshua D. Clinton, \textit{Using Roll Call Estimates to Test Models of Politics}, 15 ANN. REV. POL. SCI. 79 (2012). For a treatment of some issue arise when the same methods are used to scale ordinary citizens’ ideology, see Jeffrey B. Lewis & Chris Tausanovitch, Has Joint Scaling Solved the Achen Objection to Miller and Stokes? (unpublished manuscript, Feb. 6, 2013), http://www.vanderbilt.edu/csdl/miller-stokes/05_MillerStokes_LewisTausanovitch.pdf.
\item To fully implement this approach, the organizations that conduct large-N national surveys would have to be convinced to ask priorities questions alongside the issue-position questions. If DOJ asked for this information and provided some funding, we think the survey organizations would be more than happy to obtain it.
\item For a related idea, see Will Bullock, Kosuke Imai & Jacob N. Shapiro, \textit{Statistical Analysis of Endorsement Experiments: Measuring Support for Militant Groups in Pakistan}, 19 POL. ANAL. 363 (2011) (randomizing group endorsement of policy positions and using Bayesian hierarchical models to infer geographic variation in support for the endorsers).
\item See \textit{infra} Part III.B.
\end{enumerate}
\end{footnotesize}
the line between presumptively polarized and presumptively non-polarized communities. 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 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.

Historically the courts have assessed the likely performance of electoral districts with detailed inquiries into local political conditions.\(^{154}\) 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.\(^{155}\)

One straightforward way to simplify this inquiry is to presume that a district is a minority opportunity district (“MOD”) if and only if the minority community comprises at least 50% of the district’s citizen voting age population.\(^{156}\) Because the Constitution prevents the government from erecting substantial barriers to registration and voting,\(^{157}\) it may be said that any district in which the minority community makes up at least half of the voting-eligible population is by definition an opportunity district. Some of these districts may

\(^{154}\) See HEBERT ET AL, supra note 24, at 56-59 (explaining that since Gingles courts have had to assess whether white bloc voting “usually [results in the] defeat of the minority’s preferred candidate” and that this inquiry requires courts to consider “a variety of factual circumstances”); Stephanopoulos, supra note 31, at 25 (discussing predictive judgments about ability-to-elect under Section 5).

\(^{155}\) All of these factors figure into the “totality of circumstances” analysis of a Section 2 case. See generally Katz et al., supra note 49, at 675-730.

\(^{156}\) CVAP estimates from the Census are less precise than estimates of the total voting age population. Nathaniel Persily, The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them, 32 CARDOZO L. REV. 755, 774-82 (2011). This imprecision does not concern us, because the estimates would only be used to establish a rebuttable presumption, and because estimation errors should to substantial degree wash out as CVAP estimates at the level of census blocks and tracts are aggregated to the level of legislative districts.

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,158 these differences arguably should be disregarded (unless they can be fairly attributed to race discrimination in violation of the 14th and 15th Amendments159).

There are more nuanced alternatives to the “50% CVAP” rule, such as presuming that a district is a MOD if the minority community comprises a majority of the citizens in the district who prefer the major political party with the most support among the district’s voters;160 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.

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,161 although this convention appears to have faded.162

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 relatively new, and there is not yet much law on what constitutes a material, legally significant impact.163 The Seventh Circuit per Judge Easterbrook recently took the view that if the vast majority of ordinary citizens comply with the challenged voting requirements without too much difficulty, there has been no denial of “opportunity to participate in the political process” within the meaning of Section 2.164 The district court in the same case characterized the burden very differently, focusing on the small percentage of the population for whom compliance would be particularly

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159 See Salas v. Sw. Tex. Junior College Dist., 964 F.2d 1542 (5th Cir. 1992). For a review of how other courts have handled this issue, see Katz et al., supra note 49, at 703-07.
161 See, e.g., Barnett v. City of Chicago, 141 F.3d 699, 702-03 (7th Cir. 1998); Ketchum v. Byrne, 740 F.2d 1398, 1410-14 (7th Cir. 1984).
163 League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224, 239 (4th Cir. 2014) (“there is a paucity of appellate case law evaluating the merits of Section 2 claims in the vote-denial context”).
164 Frank v. Walker, 768 F.3d 744, 750-55 (7th Cir. 2014).
difficult.\textsuperscript{165} In the Sixth Circuit, a slight rollback in the days available for early voting was deemed sufficiently impactful to violate Section 2.\textsuperscript{166} 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.\textsuperscript{167} 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 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? (Perhaps the poverty rate.) 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 harder-to-observe disparate racial impacts is already gaining traction in the lower courts. It is reflected in recent judicial opinions addressing photo ID requirement for voting in Wisconsin and Texas\textsuperscript{168} and rollbacks in early voting and same-day voter registration in Ohio and North Carolina.\textsuperscript{169} 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.\textsuperscript{170}

The other presumption we suggest goes to the question of materiality: Any voting requirement that has the demonstrable effect (compared to some feasible

\textsuperscript{165} Frank v. Walker, 17 F.Supp.3d 837, 854-57, 870-76 (E.D. Wis. 2014), rev’d 768 F.3d 744 (7th Cir. 2014).
\textsuperscript{166} Ohio State Conf. of N.A.A.C.P. v. Husted, 768 F.3d 524, 549-60 (6th Cir. 2014).
\textsuperscript{169} Ohio State Conf. of N.A.A.C.P. v. Husted, 768 F.3d 524, 555-57 (6th Cir. 2014); League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224, 246 (4th Cir. 2014).
\textsuperscript{170} S. REP. NO. 97-417 at 29 n. 114 (“[D]isproportionate educational[,] employment, income level and living conditions arising from past discrimination tend to depress minority political participation. When these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the depressed level of participation.”) (citations omitted).
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 will 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. Courts should accept such evidence from other jurisdictions, so long as the demographics of the relevant minority populations aren’t grossly dissimilar.

Unlike the presumptions we suggested above for constitutional risk, racial polarization, and minority opportunity districts, these 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 “reasonable voters” ought to surmount, and notwithstanding the difficulty of detecting racially disparate impacts amidst all the fluctuations in voter registration and turnout.

3. Summary

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

We also hope to have persuaded the reader that these presumptions, if implemented with off-the-shelf statistical models, could enable Section 2 to function more like Section 5 in regions of the country where the presumptions operate to shift evidentiary burdens to the defendants. Redistricters in such locales who do not provide minority communities with “roughly proportional” opportunities for representation would very likely face a Section 2 lawsuit in which defendants would carry the burden of disproving central elements of the

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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.\(^{173}\) We turn to these questions in the next Parts.

III. \textbf{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 substantive rules about evidentiary presumptions.\(^{174}\) It is quite another to maintain that Section 2 can function similarly without any intervening action by Congress. This Part address two objections to our position: first, that the courts lack legal authority to establish the kinds of evidentiary presumptions suggested in Part II; second, that irrespective of legal authority, the courts cannot reasonably be expected to establish these presumptions on their own. We think the second objection has force, but that the courts could nonetheless establish the presumptions in collaboration with the Department of Justice.

A. \textbf{Legal Authority to Create the Presumptions}

The proposition that courts lack legal authority to establish the 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.\(^{175}\) It delegates authority to the courts to implement loosely stated substantive and evidentiary norms.\(^{176}\) 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,\(^{177}\) 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 Court’s first vote dilution case under the results test, a four-Justice plurality tried to boil the matter down to whether a politically

\(^{173}\) If the presumptions required original, case-specific research, they would be much more expensive to apply.

\(^{174}\) Indeed, one possible legislative response to \textit{Shelby County} would be to leave Section 5 and the now-invalidated coverage formula as is, while authorizing the Department of Justice to put new teeth into Section 2 with substantive rules about evidentiary presumptions.

\(^{175}\) Elmendorf, \textit{Making Sense of Section 2}, supra note 48, at 448-55.

\(^{176}\) \textit{Id.} at 417-48.

\(^{177}\) \textit{Id.} at 421-27.
cohesive minority community had been consistently defeated at the polls.\textsuperscript{178} Some years later the Supreme Court resuscitated the “totality of circumstances” inquiry and in doing so made central a factor that is not even mentioned in the legislative history: proportionality between the number of minority opportunity districts and the minority’s population share.\textsuperscript{179}

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.\textsuperscript{180} 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.\textsuperscript{181} Courts have also used rules of thumb about the minority population share needed to ensure that an electoral district functions as a minority opportunity district.\textsuperscript{182} 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.\textsuperscript{183} The courts also borrowed evidentiary rules-of-thumb put forth in Equal Opportunity Employment Commission guidelines, such as presuming a legally significant disparate impact where minorities are hired by an employer at less than four-fifths of the rate of white hiring.\textsuperscript{184} In antitrust law the courts went further, deeming certain business arrangements per se anticompetitive.\textsuperscript{185} Later

\textsuperscript{179} Johnson v. De Grandy, 512 U.S. 997, 1013-24 (1994); Katz et al., supra note 49, at 730-31 (reporting that of 18 published cases in which courts made findings on proportionality, “the 10 lawsuits that found proportionality identified no violation of Section 2,” and of the five lawsuits that “found a lack of proportionality[,] four identified a Section 2 violation’
\textsuperscript{180} 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 96.
\textsuperscript{181} See supra note 96.
\textsuperscript{182} See supra notes 161-162 and accompanying text.
\textsuperscript{183} Plaintiffs’ showing of a racially disparate impact shifts the burden to the defendant to come forth with a legitimate rationale for the challenged law or practice, after which the plaintiff bears the ultimate burden of showing that the measures at issue aren’t reasonably necessary to serve the defendant’s legitimate interests. McDonnell Douglas Corp. v. Green, 1 U.S. 792 (1973).
the courts relaxed some of the per-se rules, in light of new economic theory and evidence.\footnote{186}

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.”\footnote{187}

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.\footnote{188} National survey data on citizens’ political preferences and racial attitudes, analyzed using multilevel regression with poststratification, would partially supplant the current reliance on precinct-level election returns and ecological inference.\footnote{189} But there is nothing in the text or legislative history of Section 2, or in the Supreme Court’s authoritative constructions of the statute, that compels judicial reliance on particular statistical tools.

Finally, on a purposive view of statutory interpretation, *Shelby County*’s negation of the Section 5 preclearance regime counts strongly in favor of interpreting Section 2 so that it works more like Section 5 (so long as the reading does not push Section 2 into the same constitutionally problematic territory). The VRA as enacted in 1965—and as re-enacted in 1970, 1975, 1982, and 2006—was predicated on a handful of core premises, which our model for Section 2 adapts to the post-*Shelby County* world. The essential premises are, first, that the risk of unconstitutional race discrimination in the electoral process is higher in some parts of the country than in others; and,

\footnote{186} See id. at 751-59; see also ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 203-11 (2nd ed. 2008) (describing evolution, and emphasizing that even as the Court moved away from per-se rules, it continued to develop and apply presumptions that shifted the burden of production and in some cases the burden of proof to the defendant).

\footnote{187} We have imposed no limit on the “circumstances” that might be invoked to rebut inferences from the presumptions.

\footnote{188} To be sure, the effect of this change in the law could be substantial, in that Section 2 claims would probably become fairly easy to win in some parts of the country, and quite difficult to win in other areas. But even this would only accentuate existing patterns. As Peyton McCrary has shown, the vast majority of successfully litigated or settled Section 2 cases were brought in the formerly covered jurisdictions. Declaration of Dr. Peyton McCrary, Shelby County, Ala. v. Holder, 811 F. Supp. 2d 424 (D.D.C. 2011) (No. 1:10-cv-00651-JDB, Document 53-2), available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/Shelby-Dec1-11-15-10.pdf. The empirical results we present in Part IV, infra, suggest that the same jurisdictions are likely to be the most vulnerable under our presumption-driven model for Section 2 (at least with respect to the claims of African Americans).

\footnote{189} We say “partially” because in some cases defendants may try to rebut the inference of racial polarization using data from local elections.
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.\textsuperscript{190}

Our presumptions mesh these premises with Section 2 while honoring \textit{Shelby County}’s understanding of when it is permissible for legislation enforcing the 14\textsuperscript{th} and 15\textsuperscript{th} Amendments to single out states for special burdens. \textit{Shelby County} faulted the preclearance coverage formula for distinguishing states on the basis of old data that bore no apparent relationship to the current risk of unconstitutional race discrimination.\textsuperscript{191} Our presumptions would be implemented using current data, and would maintain a close connection between the risk of Section 2 liability (higher where evidentiary burdens are shifted to the defendant), and the risk of unconstitutional state action.

\textbf{B. Judicial Competence and the Role for DOJ}

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 opinions is that the first priority for many judges in these cases 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.”\textsuperscript{192} Harvard statistician and law professor Jim Greiner wrote several outstanding papers critiquing standard ecological inference techniques and offering better alternatives;\textsuperscript{193} his work has left no impression on the courts.\textsuperscript{194} 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.

\textsuperscript{190} See supra Part I.
\textsuperscript{191} 133 S.Ct. 2612, 2625-30 (2013).
\textsuperscript{192} Thornburg v. Gingles, 478 U.S. 30, 53 n. 20 (1986). Some judges do seem willing to accept the new, better methods only if their results accord with the older methods. See Greiner, The Quantitative, at 532-33.
\textsuperscript{193} Greiner, \textit{supra} note 64; Greiner, \textit{supra} note 55; Greiner & Quinn, \textit{supra} note 65; D. James Greiner & Kevin M. Quinn, \textit{RxC Ecological Inference: Bounds, Correlations, Flexibility and Transparency of Assumptions}, 172 J. Royal Statistical Society: Series A 67 (2009); D. James Greiner, \textit{The Quantitative Empirics of Redistricting Litigation: Knowledge, Threats to Knowledge, and the Need for Less Districting}, 29 \textit{YALE L. \\& POLY REV}. 527 (2011).
\textsuperscript{194} A Westlaw search turned up only one opinion that cites Greiner’s work on ecological inference. (In that case, a wise judge appointed Greiner’s collaborator Kevin Quinn to advise the court on statistical methods.)
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. The obvious alternative is to assign responsibility for developing the presumptions to an administrative agency. Agencies may compel judicial coordination by issuing rules with the force of law; agencies have the necessary technical expertise; and agencies can involve a much broader swath of the public in developing the law, via advisory committees and notice-and-comment rulemaking. But Section 2 does not delegate rulemaking authority to any agency. The Department of Justice litigates Section 2 cases from time to time, but the Department has never issued enforcement guidelines or interpretive rules under Section 2.\footnote{195}

We think the Department of Justice is nonetheless reasonably well positioned to get a presumption-driven Section 2 up and running. Though DOJ cannot bind the courts, it may issue interpretive rules, which would be owed Skidmore deference.\footnote{196} Under Skidmore, judicial deference to agency positions varies according to the quality of the agency’s decision-making process, taking account of “any factors which give an interpretation power to persuade, if lacking power to control.”\footnote{197} Title VII provides an instructive analogy: interpretive guidelines issued by the Equal Opportunity Employment Commission have not been treated as binding on the courts, but they are given some weight and have played an important role in fleshing out Title VII’s disparate impact standard.\footnote{198}

\footnote{195} Personal communication with law professor and former DOJ voting rights attorney Michael Pitts.

\footnote{196} Skidmore v. Swift, 323 U.S. 134, 140 (1944).

\footnote{197} 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.

\footnote{198} For example, the “four-fifths rule” in disparate impact cases originated with EEOC guidelines. See supra note 184. To be sure, the track record of judicial deference to EEOC
We recognize that DOJ’s track record may disincline judges to give the agency’s positions on voting rights much weight under Skidmore. In the 1990s, DOJ pursued an aggressive policy of maximizing African American representation, which the Supreme Court eventually thwarted in a sequence of statutory and constitutional decisions. 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. Under President Obama, the Department has taken a strong stance against voter ID laws and other measures favored by Republicans, leading Republicans to levy the charge of unlawful partisanship. Inspector General reports in 2008 and 2012 gave credence to some of the accusations of partisanship.

Given this history, Section 2 guidelines issued by DOJ are unlikely to get much deference from the courts—at least not from judges affiliated with the opposing political party—unless the guidelines are also credentialed by a more

positions is checkered. See Melissa M. Hart, Skepticism and Expertise: The Supreme Court and the EEOC, 74 Fordham L. Rev. 1937 (2006). Hart attributes the skepticism of some judges to a perception that the EEOC is or has been pursuing a narrowly political agenda, and not basing its rules on any material, technical expertise. As we discuss next, these same concerns could well arise with DOJ-issued guidelines under Section 2, but the concerns can be blunted if the agency takes them into account ex ante.

Professor Ross argues more generally 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, __ U. Chi. Legal Forum __ (forthcoming 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535190. Ross’s argument implies—that the Court would not defer to DOJ decisions about, for example, whether Section 2 still provides a remedy for constitutional violations that occurred during the Jim Crow era. But his argument also suggests that the Court would defer to DOJ on technical questions about evidentiary presumptions, so long as DOJ works from the Court’s own constitutional premises. As we explained in Part II.A, supra, our presumptions build on an interpretation of Section 2 meant to reconcile the results test with the current Supreme Court’s constitutional understandings.

politically neutral or balanced actor. One possibility is for DOJ to convene a bipartisan body such as the Bauer-Ginsberg Commission to lead the development of the guidelines. Another, not incompatible option is for DOJ to organize a working group of preeminent political methodologists, which would recommend how to measure preferences and behaviors pertinent to Section 2 cases, how to estimate associated geographic variation, and how to validate the estimates. After receiving the working group’s recommendations, DOJ (or a Bauer-Ginsberg type body under the Attorney General) could propose quantitative cutoffs for each presumption—for example, the line between substantial and extreme correlations between race and partisanship—and initiate a notice-and-comment process to take public input on the proposal.

Provided that the Department’s working group is not stacked with plaintiff-side or defense-side experts, the guidelines that emerge from this process are likely to carry considerable weight with the courts, if only because the courts are desperate for a clear path through the technical weeds of Section 2.

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

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

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

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

206 To be sure, in rare cases where the political stakes are very high, it may be worthwhile for defendants to attack the model, just as it was worthwhile in the pre-Shelby County era for some covered jurisdictions to seek preclearance from the District Court of the District of Columbia rather than the Department of Justice in certain high-stakes, politically charged cases.
disparate impact.\textsuperscript{207} The gap between Section 2 and now-defunct Section 5 would be much diminished.\textsuperscript{208}

C. Survey Data, Without Presumptions?

Even if DOJ stays on the sidelines and the courts decline to create formal evidentiary presumptions, litigants may be able to gradually reform Section 2 by introducing survey evidence of racial polarization and racial stereotyping 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 racial polarization in political preferences, and voter discrimination, from vote shares for “minority candidates of choice.”\textsuperscript{209} and because survey-based estimation does not involve ecological inference.\textsuperscript{210}

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

\textsuperscript{207} We recognize that the gold-standard model would likely evolve over time, in keeping with advances in political science and statistics. Turnover in DOJ’s leadership may also lead to a revisiting of the guidelines. Continued judicial acceptance of the guidelines would of course depend on the credibility/impartiality of the process by which the Department updates them.

\textsuperscript{208} See generally Elmendorf et al., \textit{Racially Polarized Voting}, supra note 48.

\textsuperscript{209} See supra Part II.A.2 (explaining perils of trying to infer political cohesion and polarization from votes in actual elections), and Part II.B (discussing impediments to estimating disparate treatment of minority candidates on the basis of their race using such data).

\textsuperscript{210} See supra Part I.B (noting that recent research casts serious doubt on ability of ecological inference techniques to recover the correlation between race and vote choice if there is significant residential integration or more than two racial groups).
elections are most probative of racial polarization in the community—taking account of the race of the candidates, their backing from local political elites within the minority and white communities, incumbency, the responsibilities of the office in question, the date of the election, and any other “special circumstances” which arguably bear on the degree to which racial polarization in vote choice does or does not signify racial polarization in enduring political preferences.  

Previous cases will provide some guidance about the factors to consider in judging probativeness, but they cannot resolve the ultimate question of how much weight to assign to each election introduced in the case against B. By contrast, if the decision in case A turned on a measure of ideology or racial attitudes derived from national surveys, 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.

Finally, it’s worth noting that courts can and often do create very informative evidentiary guideposts without using the label, “presumption.” For example, though courts have rejected the proposition that proportionality between minority population share and the number of majority minority districts is an absolute defense to liability in vote dilution cases, courts have nonetheless signaled that proportionality is very important, and practitioners have had no trouble reading the signal. 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.

211 See generally Katz et al., supra note 49, at 668-70; Elmendorf et al., Racially Polarized Voting, supra note 48.
212 See id.
213 This is so because the weight assigned to each election depends on the probativeness of every other elections in the record.
214 Such as the measures introduced in Part IV.
215 Large-sample surveys by political scientists are conventionally put into the public domain within a year or two of their completion. Standard tools for estimating local opinion from national surveys are also in the public domain. E.g., https://github.com/malecki/mrp (package in the statistical programming language R for multilevel regression with poststratification).
217 See, e.g., Black Political Task Force v. Galvin, 300 F.Supp.2d 291, 311 (D. Mass. 2004) (“One of the most revealing questions a court can ask in assessing the totality of the circumstances is whether the affected districts exhibit proportionality.”); Campuzano v. Illinois State Bd. of Elections, 200 F. Supp. 2d 905, 908 (2002) (“For a plan to provide minority voters equal participation in the political process, it must generally provide a number of ‘effective’ majority-minority districts that are substantially proportionate to the minority's share of the state's population.”).
218 See, e.g., HEBERT ET AL, supra note 24, at 36 (observing that “‘proportionality,’ or lack thereof,” is a “particularly important” factor in vote dilution cases).
We have developed our account of a presumption-driven Section 2, implemented with national survey data, in the hopes of motivating small and not so small steps toward effective protection for minority voting rights within the existing statutory and constitutional framework. Our enthusiasm for big steps, such as the promulgation of interpretive guidelines by DOJ, should not be taken to diminish the value of even very small steps, such as the introduction of survey-based evidence as part of the “totality of circumstances” in conventional Section 2 cases.

IV. MODEL BUILDING AND RESULTS

This Part introduces the statistical machinery for generating estimates of public opinion within small geographic units from national surveys. We also present some empirical results, which illustrate where a presumption-driven Section 2 would probably have the most bite. We consider our results provisional because they are based on models that, while facially reasonable, have not been validated with out-of-sample data, and because there are other plausible ways of defining the presumptions.219

A. Tools for Estimating Racial-Group Opinion Within Subnational Geographic Units220

Given a national survey, there are two ways of estimating opinion within particular racial groups in discrete geographic units. One is to disaggregate the data by race and geography, and, if the survey is not an equal-probability sample of the population of interest, to reweight the disaggregated data so that it matches known demographics of the target population.221 To illustrate, if one wanted to estimate Nancy Pelosi’s vote share among Latinos using this approach, one would obtain data from a survey that asked about voting in congressional elections,222 subset the data to Latinos in California’s 12th Congressional District, assign weights to these respondents so that the (weighted) sample more closely approximates the demographics of the Latino population in District 12 (per Census data), and then, using the weighted sample, calculate Pelosi’s reported vote share.

The problem with this approach is that even very large surveys often have few responses from members of the racial group of interest in the geographic

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219 See supra Part II.
220 Some of the description of methodology in this section also appears in Elmendorf & Spencer, Preclearance, supra note 16.
221 Because of sampling challenges and non-response (and sometimes by design), no survey is a true equal probability sample of the target population. On reweighting, see generally CARL-ERIC SÁRNDAŁ & SIXTEN LUNDSTROM, ESTIMATION IN SURVEYS WITH NONRESPONSE (2006).
222 For example, the Cooperative Congressional Election Study, http://projects.iq.harvard.edu/cces.
unit of interest. For example, the Cooperative Congressional Election Survey (CCES) has about 100 respondents per congressional district.\textsuperscript{223} Nancy Pelosi’s district is about 6% black, 31% Asian American, and 15% Latino by citizen voting age population.\textsuperscript{224} So even if the CCES had a perfectly representative sample of respondents from her district, we would have information about the political preferences of only 6 blacks, 31 Asians, and 15 Latinos. Such small samples yield only noisy, uncertain inferences about the target populations.

To obtain reasonably precise estimates of opinion by racial group within small geographic units, we are left with three options: conduct original surveys within the unit of interest and oversample racial minorities; develop statistical models that utilize information from respondents outside of the unit to estimate in-unit opinion; or pool information from a number of large-N national surveys conducted over a period of years. (If we were only interested in vote shares, there would be a fourth option—ecological inference—but for reasons explained earlier we hope to avoid it.\textsuperscript{225})

The “original surveys” strategy cuts against our goal of making (presumptive) Section 2 liability easy to ascertain,\textsuperscript{226} so we will not pursue it further here. The “pooling multiple surveys” strategy holds some promise, but for our purpose requires proprietary data that have not yet been released for public use.\textsuperscript{227} So we are left with modeling.

\textsuperscript{223} The CCES was created for the express purpose of studying voter opinion within small geographic units, and by sample size it is the largest regularly conducted survey of American voters. See generally Stephen Ansolabehere & Douglas Rivers, Cooperative Survey Research, 16 ANN. REV. POL. SCI. 307 (2013).


\textsuperscript{225} See supra notes 64-69 and accompanying text.

\textsuperscript{226} The problem is not simply one of cost. If original surveys must be conducted for each cases, then potential defendants may not be able to anticipate liability ex ante (without conducting surveys themselves), and there are likely to be case-specific disputes about survey methodology, the qualifications of the experts who conducted the survey, etc.

\textsuperscript{227} This footnote explains the problem. We need a summary measure of policy agreement/disagreement between racial communities. See supra Part II.A.1. The best summary measure at this time is an “ideal point” scaled from policy preferences, as opposed to the respondent’s self-reported ideology or partisanship. See infra notes 249-254 and accompanying text. But most national surveys do not include the same policy questions, so ideal points scaled from the policy questions on each survey are not comparable across surveys. Political scientists Chris Tausanovitch and Chris Warshaw recently solved this problem by including “bridging” questions on several CCES modules; this enabled them to create a “superset” of 275,000 respondents with ideal points on the same scale. See Chris Tausanovitch & Christopher Warshaw, Measuring Constituent Policy Preferences in Congress, State Legislatures, and Cities, 75 J. POL. 330 (2013). After this dataset is released into the public domain, it may be feasible to create reasonably precise estimates of the distribution of racial group opinion within congressional districts, counties,
Administering Section 2 After Shelby County

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

MRP has been used to estimate public opinion within states, congressional districts, state legislative districts, cities, and even local school board districts.

and other small geographic units by disaggregation (after reweighting the data to match local demographics).


See, e.g., Elmendorf & Spencer, Preclarance, supra note 16, at 39-43 (using MRP to generate estimates of the proportion of white people within counties who subscribe to negative stereotypes of blacks).

See, e.g., Ghitza & Gelman, supra note 228; Lax & Phillips, How Should We Estimate?, supra note 228; Pacheco, supra note 228. For a user-oriented introduction to the methods, see Gelman & Hill, supra note 228.

Warshaw & Rodden, supra note 228.


Michael Berkman & Eric Plutzer, Evolution, Creationism, and the Battle to Control America’s Classrooms (2010).
In an on-line appendix, we provide a non-technical explanation of how MRP works.\footnote{See Christopher S. Elmendorf and Douglas M. Spencer, An Intuitive Explanation of Multilevel Regression and Poststratification, available at http://www.dougspencer.org/research/s2_Appendix_MRP.pdf.} For legal applications, it is equally 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 \textit{a priori} right way to construct a multilevel model of public opinion. One can always build a more complicated model, with more predictor variables and more interactions between predictors. But more elaborate models are not necessarily better! Researchers have shown that more complex MRP models sometimes yield worse estimates of target-population opinion, even though the complicated model does a better job explaining opinion within the pool of survey respondents.\footnote{Jeffrey R. Lax & Justin Philips, How Should We Estimate Sub-National Opinion Using MRP? Preliminary Findings and Recommendation (Apr. 10, 2013) (working paper), http://www.columbia.edu/~jrl2124/mrp2.pdf.} This phenomenon, called over-fitting, arises because the estimated parameters in the more complex model capture idiosyncratic features of the sample, features that are not representative of the target population.\footnote{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 jerry-rigged the model to obtain results favorable to his or her client or political party. Cross-validation using the original sample is another possibility, but some researchers have argued that cross-validation often does not work very well for MRP models. See Wei Wang & Andrew Gelman, Difficulty of Selecting Among Multilevel Models Using Predictive Accuracy (Apr. 8, 2014) (unpublished manuscript), http://weiwang.name/research/xval.pdf.} The only way to firmly establish the quality of a statistical model is to validate it with out-of-sample predictions.\footnote{Cross-validation using the original sample is another possibility, but some researchers have argued that cross-validation often does not work very well for MRP models. See Wei Wang & Andrew Gelman, Difficulty of Selecting Among Multilevel Models Using Predictive Accuracy (Apr. 8, 2014) (unpublished manuscript), http://weiwang.name/research/xval.pdf.} 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.\footnote{To be maximally convincing, however, the validation exercise should be done using data obtained after the fitted model was placed into the public domain, so that third parties can be confident that the validation data is truly “out of sample.” Otherwise one can’t rule out the possibility that the researcher used some of the validation data to inform his model-building choices, essentially reverse engineering the model to fit the validation data. This standard is widely acknowledge 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.}

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’s no more of a stretch than many other conventions of vote dilution litigation. Ecological inference as traditionally practiced relies on heroic assumptions (e.g., that racial-group opinion within the unit of interest is not spatially heterogeneous), elides the question of statistical precision, and uses post-hoc corrections to paper over mathematically impossible results (such as an estimate that 130% of Latino voters supported candidate A over B).\(^{240}\) 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.\(^{241}\) This seems to us the appropriate epistemic posture for a federal court implementing a federal statute: assume that people in one part of the country are like people in another, except insofar as the data compel another conclusion.

The best way to validate an MRP model of within-racial-group opinion would be to conduct expensive, gold-standard surveys of public opinion within a randomly sampled subset of the geographic units. If the MRP predictions for each racial group in each unit are close to nonparametric estimates from the validation study, the MRP model can be adjudged “good.”\(^{242}\)

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

We have argued that judicial coordination on datasets and models is key to getting a presumption-driven Section 2 to do the work of Section 5. If the

\(^{240}\) See generally Greiner, supra note 64.

\(^{241}\) 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 228, ch. 12.

\(^{242}\) Short of this, one could make some headway on validation by estimating an attribute or behavior relevant to political opinion for which the true distribution within racial groups and geographic units is known. The development of proprietary “big data” about voter registration and party preference by race presents one such opportunity. Cf. Stephen Ansolabehere & Eitan Hersh, Validation: What Big Data Reveal About Survey Misreporting and the Real Electorate, 20 POL. ANALYSIS 437 (2012) (cross-referencing CCES self-reports of voter registration against proprietary information in Catalist database).
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. 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, 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 online, where we also show that the results are robust to alternative model specifications. As we argued in Part II.B, the stereotyping results could be incorporated into a “constitutional risk” presumption. The political-preference results lend themselves to presumptions about racial polarization. Also, because the measure of political preference that we employ correlates strongly with consistent partisan voting, the political preference results speak to constitutional risk as well (at least for judges who deem race discrimination for partisan purposes impermissible). As the measure of political preference, we use ideal points scaled from respondents’ answers to binary policy questions on the 2010 Cooperative

243 UCLA political scientist Lynn Vavrek is in the process of developing new “gold standard” methods for obtaining representative samples of electorate opinion. She pays respondents a lot of money; she offers part of the compensation as a gift; and she is transparent about the purpose of the survey.
244 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.)
246 See supra Part II.C.1.
248 See supra Part II.B.
scaled-ideal-point measure of political preferences is imperfect, but it beats self-reported ideology and party identification.

To measure ideological similarity within and between racial groups, we use the average ideological distance (absolute value) between pairs of citizens of the group or groups in question, divided by the average ideological distance between pairs of citizens chosen at random from the entire population. 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, i.e., greater similarity within the numerator group(s) than in the full population.

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. Two survey respondents are much less willing to express a party identification than white and African American respondents).

It is imperfect (1) because it does not account for the importance that respondents attach to different issues; (2) because some of the variation in scaled ideal points probably reflects differences in political knowledge rather than differences in latent ideology (low-knowledge respondents may make more “errors” in stating their policy positions, see Thomas R. Palfrey & Keith T. Poole, The Relationship Between Information, Ideology, and Voting Behavior, 31 AM. J. POL. SCI. 511 (1987)); (3) because respondents who have ideal points “in the middle” may not agree with one another very much, see Broockman, supra note 151); (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 250; (5) because ideal points scaled from national political issues may not capture preferences over local politics, and as such may be poorly suited to VRA claims concerning school district or city council elections, etc., see David Schleicher, Why is There No Partisan Competition in City Council Elections? The Role of Election Law, 23 J. L. & POL. SCI. 419, 433-44 (2007) (arguing that this is likely); Boudreau et al., supra note 250 (showing relatively weak correlation between voters’ national party identification and their ideal points in issue space of San Francisco politics); and (6) because ideal points do not capture variation in political preferences that arise from and reflect distributional politics. (Thanks to David Schleicher for pointing out this final limitation.)

In mathematical notation: \[ \frac{\text{ave}(|x_i - x_j|)}{\text{ave}(|x_k - x_l|)} \] for all \( i \in A, j \in B \) and \( k, l \in P \). In this formula \( \text{ave} \) is the average (mean) operator, \( x \) is an ideal point, \( A \) and \( B \) index racial groups in a geographic unit, and \( P \) is the entire population. When measuring within group cohesion, \( A = B \). 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).

As the United States becomes more racially diverse and residentially integrated, coalitional claims will become increasingly important for minority representation, because
rational groups are presumptively jointly cohesive if the typical distance between
randomly selected pairs of voters from the two groups falls below whatever
threshold the courts may establish for “political cohesion” in ordinary, non-
coalitional cases.

A key conceptual question is how to define “the entire population” for
purposes of calculating the denominator of our cohesion/polarization measure. Should the similarity/dissimilarity of political preferences in the numerator
groups be measured relative to typical similarity within the population that
elects the legislative body at issue in the case, or relative to the entire national
population? We think the former approach probably makes more sense. If the
citizens of a county, say, divide politically on racial lines alone, the minority
community is likely to have a very hard time electing the county commissioners
it prefers even if the typical ideological distance between minority and
majority-race voters in the county is smaller than the typical distance between
any two voters in the national population.\footnote{258} But for present purposes, it is
easy to provide a simple, easily interpreted picture of geographic variation in
racial polarization throughout the nation, so we will use the “national population” denominator.\footnote{259}

One other complication needs to be mentioned. Our model estimates the
mean ideal point for “types” of voters defined by the poststratification cells
(race, age, sex, education, and geographic unit). It does not give us the full
distribution of ideal points within small geographic units, which can be
obtained only by conducting large surveys within each unit. However, by
sampling pairs of voters from the poststratification cells, and imputing to them
the mean ideal point estimated for the cell, we can still generate a picture of the
relative distance within and between voters of different groups.\footnote{260} This will
tend to understate the actual diversity of opinion within the population (because
we’re sampling from subgroup means, rather than individuals), but so long as
we use mean ideal points from the poststratification cells in the denominator
too, we will obtain a picture of whether between-racial-group differences are

\footnotetext{258}{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

\footnotetext{259}{We use the Integrated Public Use Census Microdata as our estimate of the national

\footnotetext{260}{In this exercise, the probability of choosing a voter in a given cell equals the relative
frequency of voters in that cell.}
larger or smaller than differences across the full set of demographic cleavages in the MRP model (age, sex, race, education, and geography).\textsuperscript{261}

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.\textsuperscript{262}

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

\textsuperscript{261} In future work, we will pursue another strategy which may better recover the diversity of public opinion: model the ideological distance between pairs of voters of different types, rather 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.

\textsuperscript{262} 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. 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*, *Am. J. Pol. Sci.* (forthcoming 2015), http://people.hmdc.harvard.edu/~renos/papers/EnosChicago/EnosChicago.pdf.
In Figure 2, we use the same ideal point data and MRP models to illustrate similarities between minority groups. Figure 2 drives home that coalitional claims brought by two or more minority groups can be analyzed in essentially the same way as claims brought by a single racial group. The courts, aided by DOJ, just need to set a quantitative threshold for what constitutes “substantial similarity” using the measure of cohesion/polarization. A cutoff of 0.5, for example, would require voters of each minority group to be twice as close to one other, on average, as voters in the full population. Minority groups who fall on the “similar” side of the threshold would be deemed presumptively jointly cohesive.

In the technical on-line appendix, we replicate the method of Figures 1 and 2 to map the geography of within-group political cohesion. The results are not particularly interesting: within counties, the estimated typical distance between voters of a given racial group is uniformly less than ½ of the typical distance between voting-age Americans as a whole. See Appendix B, http://www.dougspencer.org/research/geography_of_discrimination/s2_Appendix.pdf. Those on the far side could not bring a coalitional claim, unless they introduce new survey or voting data to overcome the presumption of non-cohesiveness.
The main takeaway from Figure 2 is that the two fastest growing racial groups in the United States, Asian Americans and Latinos, are ideologically very similar. In almost every county, the distance between Asian American and Latino voters is less than half the typical distance between voting age Americans a whole. To date, however, Asian-Latino coalitional claims under Section 2 have been rare—and rarely successful.\textsuperscript{265} If our presumption-based approach to Section 2 were adopted, many of these claims might become winners.\textsuperscript{266}

The map in Figure 3 summarizes racial stereotyping against blacks, Latinos, and Asians at the county level. As our measure of aggregate stereotyping against a racial group, we use the average stereotype toward the group by members of other groups in the county, normalized by the average anti-minority stereotype of all voting-age Americans.\textsuperscript{267}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{distribution_of_racially_polarized_ideology_across_counties.png}
\caption{Difference in ideal points between minority groups. \textit{Data}: 2010 Cooperative Congressional Election Study ($N=47,234$).}
\end{figure}

\textsuperscript{265} See Chen & Lee, supra note 28.

\textsuperscript{266} At least if the causation requirement can be satisfied. Given space limitations, we cannot here address the question of how the causation requirement should be understood in coalitional cases.

\textsuperscript{267} Formally, county-level stereotyping against group $M$ is:

$$\frac{\text{avg}(S_{iM})}{\text{avg}(S_j)} | i \in K, i \notin M, j \in P,$$

where $S$ is an individual’s stereotype, $i$ and $j$ index voting-age citizens, $K$ is the geographic unit of interest, $M$ is the racial group being stereotyped, and $P$ is the national population of voting-age citizens. In turn, $S_{iM}^K = \sum_j R_{ij}^M - R_{ij}^0$, where $R_{ij}^M$ is respondent $i$’s rating of
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 Texas and Pennsylvania, as well in the Upper South states of Arkansas, Tennessee, and North Carolina. Anti-Asian stereotypes are most negative across counties in the Midwest, as well as in Pennsylvania and West Virginia.

(For an extensive treatment of the stereotyping data, and of the relationship between anti-minority stereotyping and the respondent’s candidate and policy preferences, we refer the reader to our companion article on preclearance after Shelby County.)

**Figure 3.** County-level differences in average stereotype against members of a racial group by persons of all other racial groups. For details of the metric, see note 267, *supra.* Data: 2010 Cooperative Campaign Analysis Project Survey (N=19,187).

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minority group $M$ on attribute $j$ (e.g., intelligence), and $R^p_j$ is the respondent’s rating of his or her own racial group on the same attribute. When computing $\text{ave}(S_j) \mid j \in P$, we take the average over persons rather than over stereotypes. (Because whites in our dataset have stereotype scores for 3 racial groups, whereas minorities have stereotype scores for only two groups (the other minority groups), taking the average over stereotypes rather than over persons would overweight the views of whites.)

268 Elmendorf & Spencer, *Preclearance, supra* note 16.
Read together, Figures 1, 2, and 3 contain important lessons about what might emerge as the *de facto* “coverage formula” of a presumption-driven Section 2, *i.e.*, the geographic regions in which the presumptions would operate to shift core evidentiary burdens under Section 2 to the defendant. For purposes of claims brought by African Americans, the presumptions’ coverage would be substantially similar to Section 5’s coverage pre-*Shelby County*. Black-white ideological polarization and negative stereotyping of blacks are both concentrated in the Deep South. For claims brought by Latinos and Asians, the picture is more complicated because negative stereotyping and ideological polarization with respect to these groups apparently do not go hand in hand. Asians face the worst stereotypes in the upper Midwest, but are most polarized (vis-à-vis whites) in Texas. Anti-Latino stereotyping and ideological polarization both occur in Texas and to some extent in the Upper South, but are not geographically concordant elsewhere. So even though Asians and Latinos represent good “coalitional partners” under Section 2 by dint of their ideological similarity, they may have difficulty satisfying the constitutional risk element of a Section 2 claim.269

C. Next Steps

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

- Develop other plausible measures of racial-group political preferences, and assess the sensitivity of geography-of-polarization/cohesion results to the choice of measure.270
- 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

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269 Even if the courts accept our “partisan incentives” arguments about constitutional risk, our results indicate that white-Latino and white-Asian ideological polarization (and hence political incentives to discriminate) rarely reaches the levels of white-black ideological polarization. See Fig. 1, *supra*.

270 We touch briefly on several alternative measures in Part II.A.1, *supra*. Regarding the strengths and limitations of the ideal point measure used in this paper, see *supra* notes 250-254 and accompanying text.
governments (e.g., school boards, city councils, state legislatures, Congress) require different measures.  

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

• Replicate geography-of-discrimination results using alternative measures of racial attitudes.

• 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.)

• If resources are available, validate MRP models with large-N surveys in a randomly selected subset of jurisdiction, or (second best) with studies of a politically relevant behavior or attitude with respect to

271 See supra note 254.
272 Cf. note 261, supra (discussing alternative approach to estimating ideological polarization within small geographic units).
273 Machine-learning methods can make model specification less dependent on the analyst’s judgment calls. See generally BERTRAND CLARKE, ERNEST FOKOUE & HAO HELEN ZHANG, PRINCIPLES AND THEORY FOR DATA MINING AND MACHINE LEARNING (2009). As such, they can help to allay concerns that a particular model was chosen because the analyst “liked” its results.
274 It would be particularly helpful to have a behavioral measure of disparate treatment or differential sympathy, one which is less vulnerable to social-desirability biases than the explicit stereotyping measure used here, and which tracks the equal protection norms against disparate treatment. For an explanation of why we rely on explicit stereotyping measures for the time being, see Elmendorf & Spencer, Preclearance, supra note 16, at 17-33. Historical and cultural studies also suggest that Asian Americans are stereotyped differently than blacks and Latinos. Specifically, Asians are often represented as “perpetual foreigners” and “model minorities.” See GARY OKIHIRO, MARGINS AND MAINSTREAMS (1994), ch. 5; Claire Kim, The Racial Triangulation of Asian Americans, 27 POL. & SOC. 105 (1999). We are grateful to Fred Lee for directing us to this literature. Future studies should assess the sensitivity of our geography-of-discrimination results to these alternative measures of attitudes towards Asians.
275 Poststratification by the population of registered or likely voters requires this prior modeling exercise because the Census Bureau asks only a small sample of Americans about voting and registration. The Voting and Registration Supplement is included in the November Current Population Survey, a monthly survey of approximately 50,000 households. See http://www.census.gov/hhes/www/socdemo/voting/.
276 See supra Part IV.A.
which the joint distribution of race and the behavior/attitude in the population can be treated as known.\textsuperscript{277}

- Develop protocols for converting MRP-generated presumptions into informative priors for use with Bayesian ecological inference models.\textsuperscript{278}

- Develop models to estimate minority opportunity in non-majority-minority districts, so that presumptions about which districts are minority opportunity districts can be refined.\textsuperscript{279}

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. The implementation of a presumption-driven Section 2 can proceed similarly. And if DOJ takes the lead in developing the presumptions and models, there is good reason to think that ongoing methodological progress will be reflected in judicial decisions, much more so than has been the case to date.\textsuperscript{280}

\textsuperscript{277} See supra note 242.

\textsuperscript{278} This is one way to structure litigants’ attempts to overcome the presumptions. Bayesian methods have been used in most recent work by leading political methodologists on ecological inference. See, e.g., Glynn & Wakefield, supra note 67; Greiner & Quinn, RxC Ecological Inference, supra note 193; Ori Rosen et al., Bayesian and Frequentist Inference for Ecological Inference: The R×C Case, 55 Statistica Neerlandica 134 (2001). But we are aware of no work to date on the establishment of informative priors for use in Bayesian EI models.


\textsuperscript{280} Cf. Part III.B, supra (discussing slow judicial adoption of improved methods for ecological inference).
V. CONCLUSION

Numerous commentators in the wake of *Shelby County* offered proposals for putting Section 5 back to work with new coverage formulas or “bail in” remedies. This paper 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 our presumptions apply, Section 2 would function much like Section 5: it would be fairly easy to block potentially discriminatory electoral reforms before they take effect, and lawmakers would have correspondingly strong *ex ante* incentives to gather information about the likely effects of reforms on racial minorities and mitigate adverse impacts.

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

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

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