VOTING RIGHTS LITIGATION AFTER *SHELBY COUNTY*: MECHANICS AND STANDARDS IN SECTION 2 VOTE DENIAL CLAIMS

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INTRODUCTION

Last year in *Shelby County v. Holder*,[1] the Supreme Court dramatically altered the legal landscape around elections and set the stage for a new chapter in voting rights litigation. The Court struck down Section 4(b) of the Voting Rights Act of 1965 (VRA),[2] which had singled out sixteen states (or parts of states) that were mostly located in the South for special federal oversight, holding that the statute "punish[ed] for the past," and failed to "identify those jurisdictions to

* Director, ACLU Voting Rights Project. I would like to offer my thanks to Janai Nelson, Spencer Overton, and Dan Tokaji for helpful conversations and insights about Section 2 and the new vote denial. I also wish to thank my colleagues at the ACLU Voting Rights Project, Julie Ebenstein, Sophia Lin Laken, Laughlin McDonald, and Sean Young, for similar conversations, and also for their camaraderie, inspiration, and in Sophia's case, research assistance. All errors are my own. Although portions of this Article are based on positions that the ACLU has taken in past and ongoing litigation under the Voting Rights Act, the views expressed herein are my own and should not be attributed to the ACLU.

1. 133 S. Ct. 2612 (2013).

2. 42 U.S.C. § 1973b(b) (2012).

be singled out on a basis that makes sense in light of current conditions."[3] In so ruling, the Court effectively eliminated the decades-old regime of Section 5 preclearance,[4] which had required "covered" jurisdictions—those listed in Section 4(b)—to obtain federal approval prior to making any changes to their voting laws.

The now inoperative Section 5 had defined much of the legal context in which voting rights disputes took place over the last 50 years. Before *Shelby County*, Section 5 essentially froze the voting status quo in place, preventing any covered jurisdiction from enacting or administering any change to its voting laws unless and until the jurisdiction could demonstrate that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color . . . ."[5] By locking voting laws into place and placing the burden on covered jurisdictions to establish nondiscrimination, the Section 5 preclearance regime had for decades been a powerful tool to deter the adoption or prevent the implementation of discriminatory voting laws in those parts of the country where voting discrimination had proved stubbornly persistent.

For civil rights advocates, the timing of *Shelby County* could hardly have been worse, as the number of voting-related controversies has exploded in recent years.[6] Disputes over issues such as strict voter ID requirements, truncated early voting periods, and the elimination of practices designed to enhance access, such as same-day registration, have become frequent fodder for state legislative battles around the country; thirty-three states introduced ninety-two bills restricting voter access during 2013 alone.[7]

Indeed, the swift reaction of many previously covered states to tighten restrictions on voting in the weeks that immediately followed the Court's decision seemed to vindicate Justice Ginsburg's warning that "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[8] The ensu-

3. *Shelby Cnty.*, 133 S. Ct. at 2629.

4. 42 U.S.C. § 1973c (2012).

5. 42 U.S.C. § 1973c(a) (2012).

6. Leading election law scholar Richard Hasen has coined the term the "voting wars" to describe the all-out combat that has erupted between partisans and activists on opposite sides of the ideological spectrum trading allegations of voter fraud and voter suppression. *See generally* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012).

7. *Voting Laws Roundup 2013*, BRENNAN CTR. FOR JUSTICE (Dec. 19, 2013), http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup.

8. *Shelby Cnty.*, 133 S. Ct. at 2650 (Ginsburg, J., dissenting).

ing downpour included efforts during the second half of 2013, by nine formerly covered states, to enact or impose new measures that would make access to the ballot more difficult, including: the imposition of strict new voter ID requirements in Alabama, Mississippi, North Carolina, Texas, and Virginia; the re-institution of a controversial voter purge program in Florida, which a year earlier had erroneously flagged citizens for removal from the state's voter rolls; and a sweeping elections bill in North Carolina that, among other things, cut a week of early voting, prohibited same-day registration, and eliminated a number of practices designed to encourage young people to register to vote.[9]

To be sure, this new wave of restrictive laws affects voters of all racial groups, leading some academics such as Richard Hasen[10] and Samuel Issacharoff[11] to call for race-neutral approaches to adjudicating legal disputes in this area.[12] However, the VRA's remaining core provision, Section 2[13]—which establishes a *nationwide* prohibition on racially discriminatory voting laws—rather than more novel constitutional theories, is likely to provide the legal framework through which many of these disputes are resolved in the near future. This is in part because many of the challenged practices disproportionately burden minority voters,[14] thus making Section 2 a logical choice under which

9. *See* Kara Brandeisky & Mike Tigas, *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 1, 2013, 12:24 PM), http://www.propublica.org/article/voting-rights-by-state-map; Mark Binker, *Q&A: Changes to NC election laws*, WRAL.COM (Aug. 12, 2013), http://www.wral.com/election-changes-coming-in-2014-2016/12750290/. I note that Florida has since announced that it has suspended its voter purge program based on renewed concerns as to its inaccuracy, *see* Bill Cotterell, *Florida non-citizen voter purge postponed: elections official*, REUTERS, Mar. 27, 2014, http://www.reuters.com/article/2014/03/27/us-usa-florida-politics-idUSBREA2Q2DH20140327?irpc=932, only to see the program enjoined in the Eleventh Circuit. *See* Arcia v. Fla. Sec'y of State, 746 F.3d 1273, 1286 (11th Cir. 2014).

10. *See* Richard L. Hasen, *Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 62 (2014).

11. *See* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 100 (2013).

12. And indeed, many practitioners, including myself in my capacity as Director of the ACLU's Voting Rights Project, have advanced race-neutral theories in recent voting rights litigation. *See, e.g.*, Complaint at 21–22, League of Women Voters of N.C. v. North Carolina, No. 1:13-cv-00660 (M.D.N.C. Aug. 12, 2013).

13. 42 U.S.C. § 1973(a) (2012) (prohibiting any voting law that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color").

14. *See, e.g.*, South Carolina v. United States, 898 F. Supp. 2d 30, 40 (D.D.C. 2012) (finding racial disparities in rate of ID ownership in South Carolina, but precleaving South Carolina's voter ID law based on broad exceptions permitting people

to challenge these laws. Moreover, litigants have been bringing claims under Section 2 for decades, such that the statute now provides a rich jurisprudential context in which to litigate voting disputes, at least when compared to relatively more novel constitutional theories about general burdens on the right to vote. And, as Spencer Overton has persuasively argued, race-neutral remedies are likely to be insufficient to prevent clear instances of voting discrimination at the local level.[15]

The challenge for voting rights litigators, however, is that, although courts have been interpreting and applying Section 2 for decades, most of the Section 2 case law does not concern the type of measures that have lately stirred so much controversy concerning access to registration and the ballot. There is something of an irony to this state of affairs. When the VRA was enacted in 1965, "the principal method" of voting discrimination involved the "[d]iscriminatory administration of voting qualifications," i.e., barriers to registration such as literacy tests, good character examinations, and other devices that were designed or administered to prevent African Americans from registering to vote.[16] But as African American enfranchisement swiftly skyrocketed in the wake of the VRA's passage,[17] the techniques of discrimination shifted largely to what have been described as "second generation" barriers:[18] namely, efforts to minimize or dilute the voting power of minority voters, by, for example, submerging minority voters within an at-large electoral scheme where, although they will be able to cast a ballot, they will not be able to elect a candidate of their choice.[19] Because such efforts became the dominant mode of voting discrimination in the years immediately after the pas-

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without ID to cast a regular ballot); Texas v. Holder, 888 F. Supp. 2d 113, 144 (D.D.C. 2012) (finding that Texas's voter ID law disproportionately affected minority voters, who were more likely to live in poverty in Texas and would be burdened by the significant costs of obtaining underlying documentation and travel expenses to obtain a government-issued photo ID), *vacated*, 133 S. Ct. 2886 (2013); Florida v. United States, 885 F. Supp. 2d 299, 364 (D.D.C. 2012) (per curiam) (finding that cutbacks to early voting would disproportionately affect minority voters, who more frequently rely on early in-person voting opportunities).

15. *See* Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19, 20 (2013).

16. South Carolina v. Katzenbach, 383 U.S. 301, 312–13 (1966).

17. *See* Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1054 (2013).

18. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991) ("[F]irst generation [barriers are] direct impediments to electoral participation [and include] registration and voting barriers. Once [first generation] obstacles were surmounted . . . the focus shifted to second generation, indirect structural barriers such as at large, vote-diluting elections.").

19. *See* Ho, *supra* note 17, at 1054–58.

sage of the VRA, they became the focus of VRA litigation, and thus much of the Section 2 case law concerns such dilutive techniques; comparatively less Section 2 case law concerns laws that impose barriers to voting.[20]

But what is old is new again. Disputes over voting rights in recent years have come once again to revolve frequently around issues of access to registration opportunities and the ballot itself.[21] Daniel Tokaji has coined the term the "new vote denial" to refer to a series of recent cases that may "be seen as a throwback to the early days of voting rights enforcement."[22] Of course, these barriers are not as blatantly discriminatory as the literacy tests and poll taxes of the past, but they similarly constitute barriers to voter access that in many cases disproportionately affect minority voters. And their proliferation has shown few signs of abatement.

Following *Shelby County*, Section 2 will be the chief tool that civil rights advocates use to fight these barriers. Like Section 5, Section 2 also prohibits voting laws that have a discriminatory purpose or effect.[23] But there are significant differences between the mechanics of Section 2 litigation and the Section 5 preclearance regime. Moreover, given that the vast majority of Section 2 litigation has taken place within the context of challenges to vote-dilution schemes—and, indeed, the substantive standard for liability under Section 2's (non-intent) "results" test was developed almost exclusively in that context—it is not entirely clear how Section 2 will operate against the "new vote denial" in practice.

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20. *See, e.g.*, Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 692 (2006) ("[T]here has been much less focus on the statute's application to vote denial cases."); Nicholas O. Stephanopoulos, *The South After Shelby County* (Univ. of Chi. Law Sch., Pub. Law Working Paper No. 451, 2013), *available at* http://ssrn.com/abstract=2336749.

21. To be sure, much of the practical value of Section 5 was its effect in stopping dilutive practices, particularly at the local level, where the major political parties and advocacy groups rarely commit the resources necessary to litigate. As Spencer Overton has argued, the loss of Section 5 may have the most practical significance in the dilution context, rather than in the context of statewide vote denial practices. *See* Overton, *supra* note 15, at 24–26. For the purposes of this Article, however, I concentrate on the types of statewide vote denial practices that are likely to absorb much of the attention around voting rights controversies in the near term, and which represent a relatively undeveloped area of Section 2 jurisprudence.

22. *See* Tokaji, *supra* note 20, at 718.

23. *See* 42 U.S.C. § 1973(a) (2012) (Section 2, prohibiting voting laws that "result[ ] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color"); 42 U.S.C. § 1973c(a) (Section 5, prohibiting changes to voting laws unless they "neither ha[ve] the purpose nor will have the effect of denying or abridging the right to vote on account of race or color").

This Article attempts to sketch a picture of what Section 2 vote denial litigation after *Shelby County*, mainly by offering some initial thoughts on two closely related questions: (1) How will Section 2 litigation be different for litigants, as a practical matter, from the Section 5 preclearance regime in the context of vote denial?; and (2) How will the substantive standard for vote denial violations under Section 2 differ from the retrogression standard under Section 5?

With regard to the first question, there are clear differences in the mechanics of Section 2 litigation that will make it harder for the victims of discriminatory vote denial practices to vindicate their rights. Most obviously, Section 2 places the burden of proof on victims of discrimination rather than on a jurisdiction seeking to change its voting laws. Perhaps more importantly, though, Section 2 litigation will often proceed more slowly and will be more costly than Section 5 preclearance, significantly limiting Section 2's effectiveness.

The answer to the second question posed above, regarding the substantive standard under Section 2, is a bit trickier. It seems likely that plaintiffs challenging a discriminatory vote denial measure under Section 2 may have to prove more factors than they would have needed to block preclearance under Section 5. However, it is not entirely clear what "other" factors courts will focus on. My observations are therefore preliminary and equivocal in nature. As I explain below, based on the limited case law in this context, it seems that courts may require Section 2 plaintiffs to establish additional factors tending to show that the disparate impact of a challenged vote denial practice is not merely a statistical accident. Specifically, courts may require plaintiffs to show that the disparate impact is intimately bound in a larger context of racialized politics or racial discrimination within the subject jurisdiction, which inhibits the ability of minority voters to participate equally within that process.

Navigating the practical and substantive challenges associated with Section 2 litigation will not be an easy task for voting rights litigators. But there are some guideposts from the existing case law, which I hope will prove helpful.

I.
Practical Differences Between Sections 2 and 5

Before addressing differences between the substantive standard for violations of Sections 2 and 5, it is worth observing several mechanical differences between the two statutes that will make it more difficult for civil rights advocates to block discriminatory voting laws in the post-*Shelby County* world. In particular, three differences

stand out: the burden of proof, the cost of litigation, and the pace of litigation. These factors combine to make success under Section 2 both more challenging and less impactful.

First and most obviously, the placement of the burden of proof under Section 2 is different.[24] While jurisdictions seeking to change their voting laws and obtain preclearance under Section 5 previously had the burden of proof in demonstrating that their proposed changes had neither a discriminatory purpose nor effect,[25] now plaintiffs challenging such laws under Section 2 will bear the burden of proof of establishing discriminatory purpose or effect.

On paper, this should actually make little difference. It is rare that evidence in a case is in equipoise (i.e., fifty-fifty in favor of the plaintiffs and the defendants), such that the placement of the burden of proof on one party or another should be outcome determinative. Indeed, Section 5 cases were frequently decided on the basis of affirmative proof of discrimination, rather than the mere absence of proof of non-discrimination. For example, in the recent Texas redistricting litigation under Section 5, the court refused to pre-clear Texas's statewide redistricting plans under Section 5's intent standard, not because Texas had simply failed to prove a negative (i.e., an absence of discriminatory intent) but because of affirmative evidence of improper discriminatory purpose, noting that the "parties ha[d] provided more evidence of discriminatory intent than we have space, or need, to address here."[26]

As a practical matter, however, it seems possible that the placement of the burden of proof may improperly affect how courts *weigh* evidence. To be clear, there is no statutory basis for this. Nevertheless, there is a danger that courts will treat the placement of the burden of proof under Section 2 as in some sense demanding a stronger evidentiary showing from the opponents of allegedly discriminatory voting laws. Indeed, divergent results in two recent cases concerning early voting reductions in Florida—one brought under Section 2, and the other under Section 5—demonstrate precisely that the placement of the burden of proof may in fact be outcome-determinative in voting cases. Despite almost identical evidentiary records, the early voting reductions in five Florida counties subject to preclearance were

24. *See* Brown v. Detzner, 895 F. Supp. 2d 1236, 1250 (M.D. Fla. 2012) (explaining that the party bearing the burden of proof differs in cases under Section 2 and Section 5).

25. 42 U.S.C. § 1973c(a) (2012).

26. Texas v. United States, 887 F. Supp. 2d 133, 161 n.32 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013).

blocked under Section 5, but were permitted on a statewide basis in separate Section 2 litigation.[27] In fact, the Florida court hearing the Section 2 claim openly acknowledged that the different placement of the burden of proof in Section 2 cases played "a significant role in the Court's decision."[28]

One has to be cautious about drawing general conclusions from a single example. But it is not unreasonable to think that success may be harder to come by for opponents of vote-denial measures litigating under Section 2. Recent empirical work by Nicholas Stephanopoulos supports this intuition: despite the fact that Section 5—unlike Section 2—only applied to a small subsection of the country,[29] there have been far more Section 5 denials of preclearance to franchise restrictions (seventy-three since 1982) than successful Section 2 vote denial cases (eighteen, in comparison to nineteen unsuccessful cases).[30] Of course, the sheer number of Section 5 denials in comparison to successful Section 2 cases in this context may be attributable to something other than where the burden of proof lies under the different provisions. But the fact that Section 2 has been invoked far less frequently to successfully block vote denial measures seems telling.

Beyond the burden of proof, voting cases under Section 2 are complex affairs, rendering them more expensive and slower than ordinary civil litigation. Of course, all federal litigation is costly and slow, but Section 2 cases are in a class of their own:

> [Section 2 cases] are among the most difficult cases tried in federal court. According to a study published by the Federal Judicial Center, voting rights cases impose almost four times the judicial workload of the average case. Indeed, voting cases are more work

27. *Compare* Florida v. United States, 885 F. Supp. 2d 299, 337 (D.D.C. 2012) (per curiam) (blocking reduction of early voting in five Florida counties under Section 5 of the VRA) *with* Brown v. Detzner, 895 F. Supp. 2d 1236, 1255 (M.D. Fla. 2012) (permitting same reductions statewide in Florida, under Section 2, on essentially identical record).

28. *Brown*, 895 F. Supp. 2d at 1251.

29. Section 5 covered only sixteen states in whole or in part, constituting less than one-fourth of the nation's population and roughly one-third of the nation's minority population. *See* Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 655 (2006); *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 44 (2006) (statement of Chandler Davidson, Professor Emeritus, Rice University).

30. *See* Stephanopoulos, *supra* note 20, at 44.

> intensive than all but five of the sixty-three types of cases that come before the federal district courts.[31]

Given the substantial time that such litigation takes, as well as the need for plaintiffs to present testimony from a variety of experts such as demographers, social scientists, and statisticians, Section 2 cases may sometimes cost over $2 million to litigate,[32] vastly outstripping the costs that might be incurred under the typical Section 5 review process, which gave jurisdictions the option of obtaining non-judicial administrative review through the Department of Justice, to be completed within a statutory 60-day period.[33] The costs of Section 2 litigation are particularly challenging for plaintiffs seeking to challenge voting changes at the local level,[34] where Section 5 has been employed most frequently.[35]

Moreover, the 60-day administrative process under Section 5 was much faster than litigation. Thus, jurisdictions almost always opted to complete Section 5 review administratively.[36] But even when adjudicated through litigation rather than administrative review, preclearance proceedings tended to finish rather quickly, as courts generally ordered rapid case management schedules in Section 5 litigation. For example, in three high-profile Section 5 cases in 2012, concerning

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31. *See An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 141 (2006) (statement of Laughlin McDonald, Director, ACLU Voting Rights Project); *see also Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 96 (2006) (statement of Rob McDuff, Att'y, Jackson, Mississippi).

32. *See Understanding the Benefits and Costs of Section 5 Pre-clearance: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 20 (2006) (statement of Armand Derfner, Voting Rights Att'y, Derfner, Altman and Wilborn).

33. 42 U.S.C. § 1973c(a) (2006).

34. *See Voting Rights Act: Section 5 of the Act — History, Scope & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 48 (2005) (prepared statement of Anita Earls, Director of Advocacy, UNC Ctr. for Civil Rights) ("In many ways, the greatest impact of Section 5 is seen in local communities and particularly in rural areas, where minority voters are finally having a voice on school boards, county commissions, city councils, water districts and the like. Voters in these communities do not have access to the means to bring litigation under Section 2 of the Act, yet they are often the most vulnerable to discriminatory practices . . . .").

35. *See* 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, 612 (2005) (noting that 92.5% of Section 5 objections from 2000 to 2005 were to discriminatory changes to voting laws at the local level).

36. *About Section 5 of the Voting Rights Act*, U.S. DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited May 1, 2014) (noting that over 99% of between 4,500 and 5,500 Section 5 submissions received annually, containing between 14,000 and 20,000 voting changes, were reviewed administratively).

early voting cutbacks in Florida and strict voter ID laws in Texas and South Carolina, the district courts hearing the cases ordered that litigation—including fact and expert discovery, dispositive motions, and trial—be completed in periods ranging from four to eight months.[37]

The motivation underlying the courts' decisions to order such truncated timelines is not difficult to discern: although the purpose of Section 5 is to freeze the status quo in place so as to ensure that changes to voting laws are non-discriminatory *before* they are implemented—in order, as Chief Justice Warren famously put it, to "shift the advantage of time and inertia from the perpetrators of the evil to its victims"[38]—courts frequently sought to adjudicate Section 5 matters with alacrity due to federalism concerns. That is, courts sought to enable a state to seek preclearance on an expedited basis so that, if successful, the state could implement changes to its election laws as quickly as possible.

But the same judicial urgency is not always present in Section 2 cases in which, by the time of litigation, an allegedly discriminatory voting law has already been adopted. As noted, recent Section 5 litigation over early voting cutbacks and strict voter ID laws during 2012 was completed in a little as four months, in order to achieve resolution prior to the November 2012 elections.[39] By contrast, current ongoing Section 2 litigation over similar provisions in North Carolina is scheduled to take *over eighteen months* and will not reach final judgment until after the November 2014 elections.[40]

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37. The Florida early voting Section 5 litigation was scheduled over eight months. *See* Scheduling and Procedures Order at 5, Florida v. United States, 820 F. Supp. 2d 85 (D.D.C. 2011) (No. 1:11-cv-01428), ECF No. 61 (discovery period commencing on Nov. 2, 2011); Scheduling and Procedures Order at 6, Florida v. United States, 820 F. Supp. 2d 85 (D.D.C. 2011) (No. 1:11-cv-01428), ECF No. 87 (scheduling trial to commence on June 19, 2012). The South Carolina Section 5 voter ID litigation was scheduled in under six months. *See* Scheduling and Procedures Order at 6, South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012) (No. 1:12-cv-00203) (discovery commenced on April 13, 2012); Third Revised Scheduling and Procedures Order at 3, South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012) (No. 1:12-cv-00203) (oral argument at conclusion of proceedings scheduled for September 24, 2012). The Texas voter ID Section 5 litigation was scheduled over four months. *See* Initial Scheduling Order at 1, Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) (No. 12-128) (discovery opened on March 14, 2012); Scheduling Order at 3, Texas v. Holder, 888 F. Supp. 2d 113 (D.D.C. 2012) (No. 12-128) (trial commencing on July 9, 2012).

38. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966), *abrogated by* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

39. *See supra* note 37 and accompanying text.

40. *See* Scheduling Order at 4, NAACP v. McCrory, No. 1:13-cv-00658 (M.D.N.C. Dec. 13, 2013) (discovery commencing in December 2013, with trial scheduled for July 2015).

Admittedly, this is only one (albeit high-profile) example, and it is again difficult to draw conclusions based on a single case. But looking at these different schedules, it is hard to draw any conclusion other than that courts may accord more weight to the state's interest in establishing a new status quo than to the individual's interest in preserving the old one. Put more bluntly, the same degree of judicial solicitude often accorded to a state's assertion of sovereignty is not always available for the individual's right to vote free from racial discrimination. This is so even though, in a Section 2 case, the integrity of the very democratic processes that would legitimize the state's sovereign laws has been called into question. Even if the North Carolina Section 2 litigation is ultimately successful, judgment may come too late to affect the impending election (unless preliminary relief is awarded beforehand), and there will be no do-over. Thus, even where Section 2 cases are successful, it is possible that they will have less of a practical impact than an objection or preclearance litigation under Section 5. In the time that it takes to litigate a successful Section 2 case, one or more elections may be held, with the benefits of incumbency vesting in the winners of elections conducted under a discriminatory regime.[41]

In sum, the basic mechanics of Section 2 litigation render it a less potent tool at combating vote denial measures than was Section 5, even without taking into account the fact that Section 2 places the burden of proof on plaintiffs. That is, even if Section 2 plaintiffs are ultimately successful, the remedy afforded under the statute may be less effective than was the Section 5 prophylaxis.

II.
THE SUBSTANTIVE STANDARD FOR VOTE DENIAL UNDER SECTION 2

And what about the substantive standard for Section 2 in vote denial cases? Here, too, it seems that differences between Sections 2 and 5 may make it more difficult to block discriminatory vote denial measures in the post-*Shelby County* landscape. That being said, the precise contours of Section 2's standard for liability in the vote denial context are a bit unclear, and worth exploring.

Before considering the standard under Section 2, it may be helpful to briefly review the substantive standard for violations under Sec-

41. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 43–44 (2005).

tion 5's (non-intent-based) effects prong, which is relatively clear. Section 5 prohibits any change to voting that would cause a "retrogression" in the position of minority voters, i.e., anything that would "make members of [a minority] group worse off than they had been before the change[ ] with respect to their effective exercise of the electoral franchise."[42] In the vote denial context, this essentially meant any change to voting laws that (1) imposed greater burdens on the right to vote than previously existed, and (2) had a disparate impact on minority voters.

For example, in the Section 5 Florida early voting case discussed above,[43] the district court blocked implementation of "a dramatic reduction" to Florida's early voting period based on two findings: (1) that cutbacks "would make it materially more difficult" to cast a ballot,[44] and (2) that "minority voters disproportionately use early in-person voting, and therefore will be disproportionately affected by the changes in early voting procedures."[45] Thus, the standard, while not expressly articulated in the court's opinion, is relatively easy to discern: a burden on voting, plus a disproportionate impact on minority voters, equals a violation of Section 5.

Section 2 is somewhat less clear. The Supreme Court has formulated Section 2's (non-intent) results standard as follows: the "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives."[46] This standard has been well-developed in the redistricting context, but has been applied less frequently in the vote denial context.[47] I will briefly set forth three possible models for Section 2 vote denial liability, none of which are mutually exclusive (i.e., they could be combined into various configurations, or modified slightly to incorporate various elements of each other). After briefly discussing these three models for Section 2 vote denial liability, I will turn to the case law to see what standards have been employed in practice by the few courts to have adjudicated Section 2 claims in this context.

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42. 28 C.F.R. § 51.54(b) (2013).

43. *See supra* note 27 and accompanying text.

44. Florida v. United States, 885 F. Supp. 2d 299, 364, 371 (D.D.C. 2012) (per curiam).

45. *Id.* at 364.

46. Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

47. *See* Tokaji, *supra* note 20, at 692.

A. Three Models for Liability

In this section, I describe three distinct, but non-mutually exclusive, models for Section 2 vote denial liability, and discuss several pros and cons of each approach.

1. Disparate Impact Burden-Shifting

Section 2's results test could borrow from the familiar burden-shifting framework of disparate impact statutes such as Title VII[48] or the Fair Housing Act (FHA).[49] In essence, these statutes permit a plaintiff to establish a *prima facie* case on the basis of a disparate impact alone (i.e., that a challenged practice disproportionately affects minorities). Upon such a showing, the burden shifts to the defendant to articulate and establish a valid, race-neutral reason for the challenged practice. If the defendant can do so, the burden then flips back to the plaintiff, who may still prevail upon a showing of an alternative policy that could accomplish the defendant's articulated rationale, but without the accompanying disparate impact. In practice, this means that plaintiffs ultimately have to show two things to prevail: (1) that a challenged practice has a disparate impact on minorities; and (2) that the state could accomplish its legitimate ends with an alternative policy that does not incur such an impact.

An analogous burden-shifting framework under Section 2 for vote denial claims could function similarly: A plaintiff could establish a *prima facie* case by showing that a challenged voting law places a burden on voting, and that this burden falls disproportionately on minority voters, perhaps either that it fell more heavily or more frequently on minority voters. For example, in the context of a voter ID law, there could be evidence that: (1) obtaining a required government-issued ID is burdensome, particularly for poorer voters who cannot afford the costs of the underlying documents necessary to obtain a government-issued ID, and/or travel-related expenses necessary to obtain an ID; and (2) that minority voters are disproportionately represented among that group of voters.[50] Upon such a showing, the burden

48. *See* 42 U.S.C. § 2000e-2(k) (2012) (setting forth the burden-shifting framework in employment discrimination cases alleging disparate impact); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (establishing the disparate impact standard under Title VII).

49. *See* 24 C.F.R. § 100.500(c) (2013).

50. This is precisely the approach that the Texas voter ID court adopted in blocking implementation of the Texas voter ID law under Section 5. *See* Texas v. Holder, 888 F. Supp. 2d 113, 144 (D.D.C. 2012) ("[U]ncontested record evidence conclusively shows that the implicit costs of obtaining SB 14-qualifying ID will fall most heavily

would then shift to the defendant to establish that the law advances a valid, race-neutral electoral purpose, such as to preserve election integrity. If the defendant could do so, a plaintiff could still prevail by demonstrating that other means short of a strict voter ID law could accomplish the same objectives to a substantially similar degree.

A simple disparate impact burden-shifting framework along these lines has some obvious pros. It is consistent with Section 2's express "results" standard, in that it does not require proof of discriminatory intent, and it involves a relatively simple test to understand and apply, drawing on an existing framework with which the courts have substantial experience in other contexts. From the perspective of plaintiffs challenging vote denial practices, this framework may contain the easiest standard to satisfy of the three outlined in this Article, as a *prima facie* case can be established on the basis of showing a disparate impact alone (although I note that the ultimate determination of liability would depend upon a refutation of the state's asserted interest, and the difficulty of meeting that burden would depend largely on the level of deference accorded the state[51]).

On the other hand, there are some obvious cons to the burden-shifting approach. Although this framework is well-established under Title VII and the FHA, some courts have rejected the notion that a statistical racial disparity in terms of an election law's impact, by itself, is sufficient to establish Section 2 liability.[52] That, combined with the skepticism that some current members of the Supreme Court have expressed concerning the constitutionality of disparate impact statutes generally,[53] suggests that plaintiffs may want to tread carefully before

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on the poor and that a disproportionately high percentage of African Americans and Hispanics in Texas live in poverty."), *vacated*, 133 S. Ct. 2886 (2013).

51. In this sense, a Section 2 standard framed along these lines, while presenting a relatively lower bar when compared to the other models described below, would still be less stringent than Section 5's retrogression standard, insofar as it would permit a jurisdiction to escape liability even where a law indisputably causes a disparate impact, upon a showing of a valid race-neutral rationale for the law. Thus, if a court is overly deferential to a state's proffered rationale for a law, then this burden-shifting framework may not be as strong as it might initially seem. *See, e.g.*, Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 194–200, (2008) (upholding Indiana's voter ID law on facial challenge, based, *inter alia*, on state's proffered rationale of voter fraud and voter confidence, despite an absence of any evidence of fraud in Indiana that could have been prevented by the law, or actual evidence that the law increased voter confidence).

52. *See infra* text accompanying notes 67–75.

53. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 594–96 (2009) (Scalia, J., concurring) (questioning the constitutionality of Title VII's disparate impact standard). The Court has also recently granted *certiorari* in two cases concerning the FHA's disparate impact standard. *See* Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011), *cert. granted*, 133 S. Ct. 2824 (2013)

asserting that a disparate impact, by itself, is sufficient to establish Section 2 liability.

2. The Senate Factors

When Congress amended Section 2 to incorporate a results standard in 1982, the accompanying Senate report was intended to guide courts in assessing liability under the new standard.[54] The report set forth nine factors, principally intended for use in the redistricting context, which a court may consider in its analysis:

> (1) the history of voting-related discrimination in the State or political subdivision;
> (2) the extent to which voting in the elections of the State or political subdivision is racially polarized;
> (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group;
> (4) the exclusion of members of the minority group from candidate slating processes;
> (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
> (6) the use of overt or subtle racial appeals in political campaigns;
> (7) the extent to which members of the minority group have been elected to public office in the jurisdiction;
> (8) whether elected officials are unresponsive to the particularized needs of the members of the minority group; and
> (9) whether the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous.[55]

(subsequently settled out of court); Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010), *cert. granted*, 132 S. Ct. 548 (2011) (same). This has lead commentators to conclude that the current court, if given an opportunity, would find that the FHA does not permit disparate impact claims. *See, e.g.*, Brian J. Connolly, *U.S. Supreme Court Fair Housing Act case settles, disparate impact stays put for now*, LEXOLOGY (Nov. 14, 2013), http://www.lexology.com/library/detail.aspx?g=ddb534c9-6dc4-4e91-99c5-9f1740a0154e.

54. S. REP. NO. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07.

55. *Id.*

These non-exclusive, non-required[56] factors ("Senate Factors") were developed primarily as a way of identifying situations in which at-large elections (where the jurisdiction as a whole selects all of its representatives) or multimember electoral arrangements (as opposed to single-member districts, which are more familiar to most voters today) did not simply fail to elect minority-preferred candidates, but denied minority voters an equal opportunity in the political processes in a manner that might properly be described as discriminatory.[57] That is, Congress was sensitive to two competing concerns: On the one hand, Congress was well aware that, despite the fall of blatantly discriminatory barriers such as literacy tests, certain electoral arrangements such as at-large elections could effectively continue to lock minority voters out of the political process.[58] And yet, they were also wary of inscribing a requirement of proportional representation into the VRA.[59]

Something of a compromise position had been articulated by the Supreme Court in *White v. Regester* a decade before the 1982 amendments; namely that an at-large or multimember system could be actionable, but not where the failure of minority voters to elect their preferred candidates was merely the result of being outvoted. Rather, plaintiffs would also have to:

> produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.[60]

The Senate Factors were intended to guide that inquiry as a set of factors that, if established, could show that the inability of minority voters to elect their preferred candidates under a particular electoral arrangement was not simply the result of losing fair and square, but that the opportunity for minority voters to compete in elections was itself constrained in some respects, thus tainting the outcome.

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56. Thornburg v. Gingles, 478 U.S. 30, 45 (1986) (quoting S. REP. NO. 97-417, at 29) (noting that the list of factors "is neither comprehensive nor exclusive," and " 'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other' ").

57. *See* S. REP. NO. 97-417, at 28–29; *see also Gingles*, 478 U.S. at 46–51.

58. *See* Shaw v. Reno, 509 U.S. 630, 640–41 (1993) (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969)) ("[I]t soon became apparent that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices . . . [to] reduce or nullify minority voters' ability, as a group, 'to elect the candidate of their choice.' ").

59. *See* Whitcomb v. Chavis, 403 U.S. 124, 154–55 (1971).

60. White v. Regester, 412 U.S. 755, 766 (1973).

Leaving aside the question of how or why these particular factors could be relevant outside of the vote dilution context, which I will discuss below,[61] courts could adapt a Senate Factors framework to the vote denial context by requiring plaintiffs to establish: (1) that a voting practice imposes a burden; (2) that this burden falls disproportionately on minority voters; (3) and this occurs within the presence of one or more of the Senate Factors.

There are many advantages of such a framework. It draws more directly on Section 2's legislative history and existing case law than the other models described here. Litigators on both sides and courts have substantial experience in applying the Senate Factors over the last three decades. And, as explained below, the Senate Factors are probative of discriminatory intent, while also explaining how ostensibly race-neutral laws may in fact perpetuate a long-standing pattern of exclusion of minority voters.[62]

On the other hand, plaintiffs framing a vote denial claim around the Senate Factors may be vulnerable in certain respects. The Senate Factors were developed in the context of vote dilution litigation, which is concerned with the underlying value of aggregating votes to affect election outcomes, not the mere act of participation itself (which may be at risk regardless of electoral results).[63] That is why many of the factors—such as racially polarized voting (Senate Factor 2), or the presence of practices like staggered terms or numbered posts, which make it harder for minority voters to elect their preferred candidates in at-large elections (Senate Factor 3)—concern *how* people vote, rather than their *ability* to vote at all. Thus, a number of courts have rejected the Senate Factors as irrelevant in the context of vote denial claims, including a recent decision striking down Wisconsin's voter ID law under Section 2.[64]

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61. *See infra* text accompanying notes 94–110.

62. *See infra* text accompanying notes 94–108.

63. *See, e.g.*, Tokaji, *supra* note 20, at 718–19.

64. *See* Frank v. Walker, Nos. 11-CV-01128, 12-CV-00185, 2014 WL 1775432, at *24 (E.D. Wis. Apr. 29, 2014) ("[T]he federal courts have largely disregarded the Senate Factors in Section 2 cases that do not involve challenges to at-large elections, redistricting plans, and the like."); *see also* Brown v. Detzner, 895 F. Supp. 2d 1236, 1245 n.13 (M.D. Fla. 2012) ("[G]iven the context of this case, the Court finds the [Senate] factors to be of limited usefulness."); Simmons v. Galvin, 575 F.3d 24, 42 n.24 (1st Cir. 2009) (internal citations and quotation marks omitted) (noting that the Senate Factors are "of little use in vote denial cases"); Stewart v. Blackwell, 356 F. Supp. 2d 791, 799–800 (N.D. Ohio 2004), *vacated*, 473 F.3d 692 (6th Cir. 2007) (discussing a case from the Central District of California and noting that "the test from *Thornburg v. Gingles* . . . did not apply to the Voting Rights Act claim because it was a vote denial claim").

Below, I will sketch out a preliminary explanation of why some of the Senate Factors could be considered relevant in some vote denial cases. But for our purposes here, it is sufficient to recognize two points. First, it is not immediately obvious why the Senate Factors should be relevant in vote denial cases. And second, this is far from a merely theoretical concern, as the failure of Section 2 plaintiffs to articulate a clear rationale for the relevance of particular Senate Factors could potentially expose them to what I call "defeat by bean-counting." That is, if Section 2 plaintiffs rely on evidence of a few of the Senate Factors, without explaining the relevance of *those particular factors*, then a court could interpret the *absence of other factors*—even if those factors are wholly irrelevant in the vote denial context—to weigh against liability, notwithstanding the Supreme Court's acknowledgment that there is no requirement that plaintiffs prove any particular number of factors.[65] And, in fact, at least one court has done just that, rejecting a Section 2 claim to a felon disenfranchisement law in Washington State due to the absence of a host of factors that, strictly speaking, were not particularly relevant in the context of that specific challenge.[66]

3. The Causal Nexus

Some courts adjudicating Section 2 vote denial claims have held that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry."[67] Rather, they have required that the plaintiffs establish some sort of causal link between race, the challenged practice, and the allegedly discriminatory result. Thus, in *Smith v. Salt River Agricultural Improvement & Power District*, the Ninth Circuit held that the fact that a real property requirement for voting in a special utility district had a racially disproportionate impact was not, by itself, a sufficient basis for liability under Section 2.[68] Similarly, the Third Circuit, in *Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Di-*

65. *See* Thornburg v. Gingles, 478 U.S. 30, 45–46 (1986).

66. *See* Farrakhan v. Gregoire, No. CV-96-076, 2006 WL 1889273, at *6–9 (E.D. Wash. July 7, 2006) (order granting defendant's motion for summary judgment), *rev'd*, 590 F.3d 989 (9th Cir. 2010), *aff'd on reh'g en banc*, 623 F.3d 990 (9th Cir. 2010) (per curiam). I note, of course, that felon disenfranchisement laws may present a special context, in which courts apply different standards not generally employed in other Section 2 cases. *See Farrakhan*, 623 F.3d at 993 (holding that discriminatory *intent* is necessary to find Section 2 liability in a challenge to a felon disenfranchisement law, notwithstanding Section 2's clear incorporation of a "results" standard).

67. Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997).

68. *See id.* at 596.

vision,[69] rejected a Section 2 challenge to Philadelphia's practice of purging voters who fail to turn out and vote after two years, despite the fact that minority voters were statistically more likely to be purged through that process.[70] In both cases, the courts required there to be some sort of "causal nexus" between race, the challenged voting practice, and the practice's disparate impact.[71]

This causal-nexus framework is something of a moving target and has been articulated in quite different ways, as the courts seem to be confused as to what, precisely, this requirement actually entails. One formulation, which could be called the "proximate causation" model,[72] has been suggested by courts that have required something along the lines of proximate causation between a challenged practice and reduced minority participation.[73] In one sense, this should not be a difficult standard to meet, as a law will typically only be challenged under Section 2 where it will have a demonstrable disparate impact. On the other hand, if the requirement is interpreted as demanding that plaintiffs demonstrate that a law causes a measurable differential effect on minority turnout, then it could present an impossible standard. There are myriad factors that can affect turnout in a given election, making it difficult to isolate and measure the turnout effects of a particular electoral practice.[74] Such a measurable effect on turnout should not be the standard for liability, which should instead be based on the imposition of burdens on voters, rather than whether voters demonstrate sufficient fortitude to overcome those burdens. Moreover, as explained further below, there is a serious tension between the common understanding that Section 2 requires plaintiffs to establish the Senate Factors—which, generally speaking, constitute evidence that sociohistorical conditions contribute to depressed minority political participation—and requiring plaintiffs to establish that a challenged practice

69. 28 F.3d 306 (3d Cir. 1994).

70. *See id.* at 313–14.

71. *See id.* at 312; *Salt River*, 109 F.3d at 595.

72. Stephanopoulos, *supra* note 20, at 108.

73. *See, e.g.*, Gonzalez v. Arizona, 677 F.3d 383, 405–07 (9th Cir. 2012) (quoting *Salt River*, 109 F.3d at 595) (holding that "proof of 'causal connection between the challenged voting practice and the prohibited discriminatory result' is crucial," and rejecting the challenge to the voter ID law where plaintiffs adduced evidence that there was a history of discrimination in Arizona but no evidence that lower participation rates among Latinos were attributable to the voter ID law itself).

74. *See, e.g.*, JAN E. LEIGHLEY & JONATHAN NAGLER, WHO VOTES NOW?: DEMOGRAPHICS, ISSUES, INEQUALITY AND TURNOUT IN THE UNITED STATES 3–4 (2014); Brad T. Gomez et al., *The Republicans Should Pray for Rain: Weather, Turnout, and Voting in U.S. Presidential Elections*, 69 J. POL. 649, 649 (2007).

(rather than social factors) is itself *the* cause of a measurable decline in minority turnout.

An alternative formulation, which could be called the "race causation" model, would be to require that plaintiffs show that there exists some sort of causal relationship between *race* and the disparate impact caused by the challenged practice. In other words, plaintiffs would be required to show that the disparate impact of an electoral law is not merely the product of chance, but is directly and intimately connected to race in some respect.

Of course, that begs the question: connected to race *how* exactly? This race causation model could take a strong form or a softer form. The strong form would essentially be akin to a requirement of proving intentional discrimination by the state. This is essentially the model the Ninth Circuit employed in the felon disenfranchisement context, where it held that the disparate racial impact of a state's criminal disenfranchisement law cannot be a basis for liability absent a showing of intentional discrimination in either the enactment or administration of the disenfranchisement law itself, or in the operation of a state's criminal justice system.[75] In this model, essentially, a plaintiff must prove that *intentional* discrimination is the sole or primary cause of a law's disparate impact.

Although quite narrow, this strong form of the race causation model would arguably provide slightly broader protections than the Fourteenth and Fifteenth Amendments, which generally forbid laws that are themselves motivated by or administered with discriminatory intent.[76] For example, the enactment of a facially neutral law may violate the Fourteenth Amendment if its enactment were motivated by an improper discriminatory purpose, even if the law would otherwise be permissible.[77] In order to violate the Fourteenth Amendment, the alleged discrimination must be *internal* to the challenged law itself. Here, by contrast, a plaintiff could establish liability based on inten-

75. Farrakhan v. Gregoire, 623 F.3d 990, 993 (9th Cir. 2010) (en banc) (per curiam) ("[W]e hold that plaintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law based on the operation of a state's criminal justice system must at least show that the criminal justice system is infected by *intentional* discrimination or that the felon disenfranchisement law was enacted with such intent.").

76. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion) ("Our decisions . . . have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.").

77. *Compare* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (striking down a disenfranchisement law because it was adopted with discriminatory purpose), *with* Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974) (sustaining facial validity of criminal disenfranchisement laws).

tional state discrimination related to a voting law, even if that discrimination is *external* to the electoral system. That is, discrimination within other state systems could form a basis to challenge an electoral practice that, while race neutral in its own enactment and operation, interacts with the other systems to have a direct effect on who can participate, imagine, for instance, a Section 2 challenge to a facially neutral literacy test enacted without a discriminatory purpose, based on a showing of intentional discrimination in the state's educational system, rendering minority voters less likely to be able to pass the test.[78]

Despite arguably providing broader protection than the Fourteenth and Fifteenth Amendments, this particular articulation of the race causation model remains inappropriate because it envisions a very narrow conception of liability under Section 2 that would run directly counter to Section 2's express results standard and the Supreme Court's holding that "Congress [has] made clear that a violation of § 2 c[an] be established by proof of discriminatory *results* alone."[79] Indeed, by requiring a plaintiff to show: (1) a disparate impact, (2) discriminatory intent, and (3) a causal nexus between the two, this model would ratchet up the level of proof beyond what is normally required in intent cases, where discriminatory animus by itself is sufficient to establish liability,[80] even without disparate impact.

A softer form of the race causation model would simply require that racial discrimination—whether intentional, structural, or the result

78. *See* Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 627 (2013) ("[R]equiring that intent be proved *external to* voting is not the same as requiring that it is proved *with respect to* voting.").

79. Chisom v. Roemer, 501 U.S. 380, 404 (1991) (emphasis added); *see also* Nelson, *supra* note 78, at 627 ("[T]he problem with requiring proof of intent in the discrimination external to voting is that it fundamentally misses the point of Section 2 . . . .").

80. *See Hunter*, 471 U.S. at 229, 233 (finding constitutional violation based on discriminatory purpose in enactment of criminal disfranchisement provision of Alabama constitution). To be sure, *Hunter* also discussed the *impact* of the disfranchisement law, but did so to make clear that discriminatory impact alone, without evidence of improper intent, does not establish a constitutional violation. *See id.* at 224–25 (discussing the *Arlington Heights* factors for evidence of discriminatory intent). The question of whether discriminatory intent can, by itself, without discriminatory effect, violate the constitution presents a somewhat odd hypothetical that could be described as the "incompetent discriminator"—the actor who *intends* to discriminate but fails to actually do so effectively. *Cf.* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 331–32 (2000) (describing the Section 5 intent prong as prohibiting the "incompetent retrogressor," who enacts changes to voting laws that are intended, but fail, to actually put minority voters in a worse position).

of "implicit bias"[81]—be in some sense a cause of a challenged law's disparate impact, but would not require intentional discrimination by the state as an element of liability. For example, a challenge to a strict voter ID law could posit that the burdens of a voter ID law fall most heavily on voters in poverty; that minority voters are overrepresented among voters in poverty and, thus, are disproportionately affected by the law; and that this overrepresentation is not a freak accident but rather is caused in part by race (for example, a legacy and continuing patterns of discrimination in that jurisdiction by both the private and public sectors in areas such as education, housing, employment, and health).

A framework for Section 2 vote denial liability built around causation has some advantages for plaintiffs. Embracing a soft causation requirement might resolve the concerns, raised in *Ortiz* and *Salt River*, that plaintiffs should be required to demonstrate more than a statistical disparity in order to establish liability. By requiring plaintiffs to show a link between the challenged practice's impact and differential treatment by race—whether intentional or unconscious—in a law's adoption, administration, or the background circumstances in which it operates, this framework would both cabin the number of claims a plaintiff can bring (excluding claims based on disparate impacts alone, and thus limiting Section 2's reach) and would establish a link to unconstitutional conduct. Generally speaking, Congress must establish a record of constitutional violations as a necessary predicate for the exercise of its enforcement authority under the Fourteenth Amendment,[82] if not under all of the Reconstruction Amendments. By predicating liability on the existence of at least *some* unconstitutional conduct, this interpretation would help defend Section 2's results standard from suggestions that it exceeds congressional authority. Additionally, the soft race causation model comports in some sense with basic intuitions about why laws with a disparate racial impact should be viewed as suspect. The mere statistical fact that the burdens of a law may fall differently on different racial groups is not *per se* problematic. Rather, it is when the disparate impact of a law reinforces existing patterns of discrimination and inequality that we ought to be suspicious.

To be sure, an approach along these lines has some obvious drawbacks as well. It comes close, even in a soft form, to conceding

81. *See* Nelson, *supra* note 78, at 620–26 ("Implicit bias refers to discrimination that occurs unintentionally based on assumptions and prejudices that operate beneath the actor's radar of cognition.").

82. *See* City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

discriminatory intent as a requirement in Section 2 cases, which runs contrary to the statute's plain language and Congress's clear intent to establish a results standard for liability. In so doing, it imposes a high burden on plaintiffs, possibly too high to satisfy if a court requires a particularly tight causal nexus between differential treatment by race (even in unrelated socio-economic spheres) and the impact of a challenged practice. If the causal nexus asserted is too attenuated, courts that are skeptical of race-conscious remedies may reject claims in this context,[83] in the same manner that courts have rejected remedying past general societal discrimination as an insufficiently direct justification for remedial affirmative action programs.[84]

Before turning to how courts have actually applied Section 2 in vote denial cases, however, I note briefly that these three frameworks, though distinct, are not mutually exclusive and could be combined in various ways. For example, courts could employ a burden-shifting framework, but require that a plaintiff show a disparate impact plus some of the Senate Factors and/or a causal nexus to race in order to establish a *prima facie* case. Similarly, courts could require plaintiffs to prove some combination of the Senate Factors, so long as those particular factors helped establish a causal link between race and the challenged practice's disparate impact. The point is that, although these frameworks are distinct, they can be mixed and matched in various combinations.

B. How Courts Have Applied Section 2 in Vote Denial Cases

Regardless of whether any particular framework makes the most sense *a priori*, courts adjudicating Section 2 cases in the era of the new vote denial are likely to draw primary guidance from past courts have done in the past. Thus, in thinking about how courts are likely to apply Section 2 in future vote denial cases, it is probably most helpful to look at how they have applied it in the past, and to see what, if any, lessons can be gleaned.

Ellen Katz's definitive study of electronically reported (i.e., available on Westlaw or Lexis) Section 2 cases counts 331 cases reported between 1982 (when Section 2 was amended to include a re-

83. *See, e.g.*, Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 317 (3d Cir. 1994) ("It is not enough, in an attack on a non-voting purge law, simply to express distress over the very real societal disadvantages that afflict some members of minority groups. Such sympathy and concern, though shared by all of us, are extraneous to the legal challenge mounted by Ortiz.").

84. *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (rejecting the notion that societal discrimination can be a valid justification for affirmative action admissions program).

sults standard) and 2005 (the year of the study).[85] As Nicholas Stephanopoulos has noted, very few of these cases—none from the Supreme Court—concern vote denial.[86] Stephanopoulos's own research, including cases reported since the Katz study, indicates that there have been only thirty-seven electronically reported Section 2 vote denial cases since 1982, of which only eighteen can be described as "successful"[87] (not including the very recent decision in Wisconsin striking down that state's voter ID law under Section 2[88]). And, because the term "success" as used by Katz encompasses all cases in which favorable outcomes were obtained for plaintiffs—including settlements in which the court rendered no opinion on the merits[89]—the number of cases containing useful analysis of Section 2's application in the vote denial context is even smaller.

A quick look at these eighteen cases, however, does suggest a few lessons.[90] Half of the eighteen successful Section 2 cases invoke the "totality of the circumstances." The Senate Factors are not cited consistently, but some of them appear more often than others. The most frequently cited factor was a history of discrimination in the jurisdiction at issue (Senate Factor 1, cited six times[91]); followed by discrimination in socio-economic areas external to voting (Senate Factor 5, cited four times[92]); and a lack of responsiveness of elected officials to the needs of minority communities (Senate Factor 8, cited three times[93]). Courts in future cases may therefore concentrate on

85. *See* Katz et al., *supra* note 29, at 652, 654.

86. *See* Stephanopoulos, *supra* note 20, at 41 & n.228.

87. *See id.* at 44 & n.253, 66 tbl.6.

88. *See* Frank v. Walker, 11-CV-01128, 2014 WL 1775432 (E.D. Wis. Apr. 29, 2014).

89. *See* Katz et al., *supra* note 29, at 653 n.35.

90. *See infra* Table 1 (listing summary statistics for the number of successful Section 2 cases relying on evidence of particular Senate Factors, as well as other factors that courts deemed relevant to liability).

91. *See* Brooks v. Gant, No. CIV. 12-5003, 2012 WL 4482984, at *7 (D.S.D. Sept. 27, 2012) (order denying defendant's motion to dismiss); Spirit Lake Tribe v. Benson Cnty., No. 2:10-cv-00095, 2010 WL 4226614, at *2 (D.N.D. Oct. 21, 2010) (order granting in part and denying in part motion for preliminary injunction); Diffenderfer v. Gomez-Colon, 587 F. Supp. 2d 338, 348 (D.P.R. 2008) (discussing history of discrimination, but primarily in context of equal protection claim raised in addition to VRA claim), *vacated as moot*, 587 F.3d 445 (1st Cir. 2009); Roberts v. Wamser, 679 F. Supp. 1513, 1529, 1531 (E.D. Mo. 1987), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989); Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1263 (N.D. Miss. 1987); Harris v. Graddick, 593 F. Supp. 128, 133 (M.D. Ala. 1984).

92. *See Spirit Lake Tribe*, 2010 WL 4226614, at *3; United States v. Berks Cnty., 277 F. Supp. 2d 570, 581 (E.D. Pa. 2003); *Roberts*, 679 F. Supp. at 1529, 1531; *Miss. State Chapter, Operation Push*, 674 F. Supp. at 1264–65.

93. *See Roberts*, 679 F. Supp. at 1529, 1531; *Miss. State Chapter, Operation Push*, 674 F. Supp. at 1265–66; Conn. Citizen Action Grp. v. Pugliese, No. N. 84-431, 1984

these particular factors—especially the first and fifth factors—in determining liability under Section 2.

TABLE 1 – FACTORS CITED IN SUCCESSFUL SECTION 2 CASES

Senate Factor	Description of Factor	Number of Cases Citing Factor
	"Totality of Circumstances"	9
1	History of discrimination	6
2	Racial polarization in voting	1
3	Use of voting practices that may enhance the opportunity for discrimination	1
4	Access to candidate slating process	1
5	Continuing socio-economic effects of discrimination	4
6	Racial appeals in political campaigns	1
7	Lack of minority candidate success	2
8	Lack of responsiveness by elected officials	3
9	Tenuousness of the policy underlying the challenged practice	2
—	Causal link/how factors interact with practice to produce discriminatory effect	3
—	Discriminatory intent	2
—	Present discrimination	1
—	Language barriers	2
—	Gingles preconditions	1
—	Other social/demographical factors explaining disparate impact	3
—	Psychological effect of past discrimination	2

But why should any of these factors matter in vote denial cases? Recall that the Senate Factors were developed in the redistricting context, and were meant to show that an at-large or similar electoral arrangement was unlawful, not merely because it failed to enable minority voters to elect their preferred candidates, but because it did so in a context where minority voters lacked equal opportunities to participate in the political process. In that context, the Senate Factors serve to limit Section 2 by raising the bar for liability: minority voters

U.S. Dist. LEXIS 24869, *12–13 (D. Conn. Sept. 27, 1984) (order granting preliminary injunction).

must show not only that they have been unable to elect their preferred candidates, they must also show that this is in part because of a lack of equal opportunities to participate. This in turn serves as a check on racial proportionality by not permitting plaintiffs to state a claim wherever they fail to achieve representation commensurate with their numbers—rather, additional factors must be present as well, which will not be present in every case.

It is not immediately obvious that these factors (or others) should be relevant in the vote denial context, but I will propose a few possible explanations. First, as I[94] and others[95] have argued, many of the Senate Factors constitute forms of evidence that the Supreme Court has deemed to be probative of intentional discrimination in the electoral context. For example, the Supreme Court has recognized that racially polarized voting (Senate Factor 2) indicates a heightened risk of intentional race-based decision-making: such patterns "bear heavily on the issue of purposeful discrimination" because "[v]oting along racial lines allows those elected to ignore Black interests without fear of political consequences . . . ."[96] Similarly, the Supreme Court has recognized that other Senate Factors, including the "unresponsiveness of elected officials to minority interests [Senate Factor 8], a tenuous state policy underlying the [challenged practice] [Senate Factor 9], and the existence of past discrimination [Senate Factor 1]," may be "relevant to the issue of intentional discrimination."[97] Moreover, given that a

94. *See* Ho, *supra* note 17, at 1059–62.

95. *See, e.g.*, Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections and Common Law Statutes*, 160 U. PENN. L. REV. 377, 417, 424–27 (2012) (arguing that the Senate Factors may establish a "significant likelihood" of improper race-based decisionmaking); Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 76 (2006) (arguing that "intent remains an aspect of Section 2" liability).

96. Rogers v. Lodge, 458 U.S. 613, 623 (1982). *See also* Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1398 (2010) ("[W]hen candidate preferences coincide with racial group membership, there is greater risk that incumbent-protecting or partisan election-related behavior on the part of the legislature will have race-based effects. To put it concretely, when those who write election laws under such circumstances succumb to the tendency to enact regulations that benefit their electoral prospects, they enact laws with discriminatory effects. If blacks all vote Democrat and whites all vote Republican, for instance, an election law that seeks to perpetuate Republican control will often have discriminatory effects, even if it is not unconstitutional. The likelihood that partisan or even merely incumbent-entrenching behavior will have a disparate impact on voting rights is greater under conditions of race-based voting.").

97. *Rogers*, 458 U.S. at 619 & n.8, 620–27. *See also* United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1571 (11th Cir. 1984) ("[A] tenuous explanation . . . is circumstantial evidence that the [electoral] system is motivated by discriminatory pur-

foreseeable disparate impact is an element of the familiar *Arlington Heights* inquiry into circumstantial evidence of discriminatory intent,[98] a state's willingness to adopt a particular voting practice in spite of knowledge that it may disproportionately disenfranchise minority voters—coupled with an unwillingness to adopt ameliorative amendments that might soften the law's impact—indicates a lack of responsiveness (Senate Factor 8) that may rightfully raise suspicions about motivations.[99]

Thus, although intent is not a required element of liability under Section 2, "[i]n practice . . . this 'results test,' as applied in Section 2 cases, requires consideration of factors very similar to those used to establish discriminatory intent based on circumstantial evidence."[100] Further, as previously noted, a link to unconstitutional discrimination is generally viewed as a prerequisite to Congress's exercise of its enforcement authority under the Fourteenth Amendment.[101] The Senate Factors could therefore be helpful insofar as some have suggested that the constitutionality of Section 2's results test—whether as a general matter, in the vote denial context specifically, or in some subset of vote denial cases, such as ID laws—"is hardly a forgone conclusion," and may be considered by the Supreme Court in the future.[102]

But, by itself, this explanation is a bit unsatisfying: If the Senate Factors are nothing more than proxies for intentional discrimination, a framework built around those factors would seem to require too much from plaintiffs litigating under a nominal-effects standard. Moreover, it would not explain why a particular discriminatory *result* should it-

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poses. . . . [and] evidence that a voting device was intended to discriminate is circumstantial evidence that the device has a discriminatory result.").

98. *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977). Under the *Arlington Heights* framework, a court determines "whether invidious discriminatory purpose was a motivating factor" based on "(1) discriminatory impact, (2) historical background, (3) sequence of events leading up to the decision, (4) procedural or substantive deviations from the normal decisionmaking process, and (5) contemporaneous viewpoints expressed by the decisionmakers." Texas v. United States, 887 F. Supp. 2d 133, 152 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013).

99. *See* Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1265 (N.D. Miss. 1987) (finding a "significant lack of responsiveness on the part of elected officials" with respect to the satellite registration at issue in the case); Conn. Citizen Action Grp. v. Pugliese, No. N. 84-431, 1984 U.S. Dist. LEXIS 24869, *12 (D. Conn. Sept. 27, 1984) (order granting preliminary injunction) (finding widespread "unresponsiveness" in changing voter registration procedures that were the subject of the lawsuit).

100. Shelby Cnty. v. Holder, 679 F.3d 848, 868 (D.C. Cir. 2012), *rev'd on other grounds*, 133 S. Ct. 2612 (2013).

101. *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

102. Nelson, *supra* note 78, at 635; *see also id.* at 635 n.276 (describing academic debate over the constitutionality of Section 2).

self be deemed suspect. Put another way, if we imagine a situation in which two states impose the same strict voter ID law, and both laws impose equally severe burdens on the right to vote and have identical racially disparate impacts, why would the presence of one or more of the Senate Factors in one state make a difference? Why should a strict voter ID law in a place like Texas, with its long history of voting-related discrimination, be improper, but not in another state without such a history? While a long-standing pattern of discrimination might be suggestive of discriminatory intent, it does not explain why a law should be deemed unlawful based on a particular *effect*.

This leads to a second reason why some of the Senate Factors could matter in the vote denial context: where they are present, the factors function as headwinds that prevent minority voters from participating equally in the political process, which in some sense magnifies the disparate burdens of an exclusionary voting law.[103] To take a few examples, a history of official discrimination in voting (Senate Factors 1 and 3); racially polarized voting (Senate Factor 2); discrimination in areas such as education, housing, and employment (Senate Factor 5); the use of racial appeals in political campaigns (Senate Factor 6); a lack of minority candidate success (Senate Factor 7); and a lack of responsiveness to the needs of the minority community by elected officials (Senate Factor 8) all could be viewed as indicia that minority voters have been marginalized from the political process in certain cases.

For example, racially polarized voting enhances the risk of racial discrimination in part because it "allows those elected to ignore [minority] interests without fear of political consequences . . . ."[104] Where elected officials are not responsive to the interests and needs of minority communities, that fact in itself demonstrates a degree of political powerlessness. Similarly, where minorities experience significant levels of discrimination in areas such as employment, the resulting socioeconomic inequalities create a drag on minority political participation.[105] Racial appeals can only be effective in contexts where a

103. *Id.* at 597 (noting that the Senate Factors "underscore the impact of the vote denial on the ability of minority voters to elect candidates of their choice by establishing the context in which the vote denial operates").

104. Rogers v. Lodge, 458 U.S. 613, 623 (1982).

105. *See, e.g.*, Spirit Lake Tribe v. Benson Cnty., No. 2:10-cv-00095, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010) (order granting in part and denying in part motion for preliminary injunction) (internal quotation marks omitted) ("Native American citizens in Benson County continue to bear the effects of this past discrimination, reflected in their markedly lower socioeconomic status compared to the white population. These factors hinder Native Americans' present-day ability to participate effec-

segment of the electorate subscribes to racial fears that can be played upon for electoral advantage. And, the Supreme Court has observed that an absence of minority candidate success is relevant because it may illustrate that "members of a minority group have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'"[106]

In this sense, a framework for liability built around one or more of the Senate Factors could also bolster the constitutionality of Section 2, by limiting liability only to claims where a challenged law has a particularly burdensome racial effect, rather than simply a disparate impact. Recall that the Senate Factors serve a claim-limiting function in the vote dilution context. The factors prevent Section 2 from commanding racial proportionality in the districting context, by requiring plaintiffs to show not only that an existing electoral arrangement prohibits them from being able to elect their preferred candidates, but that their opportunity to participate in the political process has itself been constrained in some sense. In other words, in a redistricting case, evidence of the Senate Factors can show that minority voters' inability to elect their preferred candidates is not merely a function of losing elections, but rather that the competition was not equally open to all in the first place.[107]

Evidence of one or more of the Senate Factors could serve an analogous function in the vote denial context, weeding out some claims and narrowing the scope of Section 2 liability. More precisely, evidence of one or more Senate Factors could prevent Section 2's results standard from morphing into a general prohibition on any election law that happens to have a racially disparate result, which is how some have caricatured it.[108] Rather, Section 2 would prohibit only those laws that disproportionately burden minority voters where there is a preexisting backdrop of inequality in the political process. The disparate result is truly "discriminatory," then, in the sense that it enhances and exacerbates existing patterns of inequality.

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tively in the political process."); United States v. Berks Cnty., 277 F. Supp. 2d 570, 581 (E.D. Pa. 2003) ("Hispanics in Reading suffer from significant socioeconomic inequality, which is ordinarily linked to lower literacy rates, unequal educational opportunities, and depressed participation in the political process.").

106. Johnson v. De Grandy, 512 U.S. 997, 1000 (1994) (quoting 42 U.S.C. § 1973 (2012)).

107. *See supra* text accompanying notes 56–60.

108. *See* Roger Clegg & Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, HERITAGE FOUND. (Mar. 17, 2014), http://www.heritage.org/research/reports/2014/03/disparate-impact-and-section-2-of-the-voting-rights-act.

This leads to a third reason why the Senate Factors could be relevant in the vote denial context: they solve the causation problem from cases like *Salt River* and *Ortiz*. Assuming that I am correct in reading these cases as suggesting something of a "race causation" requirement, some of the Senate Factors may help address the concerns raised in the cases. For example, if the plaintiffs in *Salt River*—whose challenge to a real property requirement for voting was rejected because it was based solely on statistical racial disparities in property ownership—had also alleged that racial disparities in real property ownership were, at least to some degree, the product of racial discrimination in areas such as health, employment, and education (i.e., Senate Factor 5), then that could have explained how the disparate impact of a real property voting qualification is *caused* by race. In such a scenario, the disparate impact of the property requirement would not be a mere statistical happenstance, but would be intimately connected to racial discrimination. This is essentially how a district court proceeded in recently striking down Wisconsin's voter ID law, rejecting the Senate Factors as a requirement of a *prima facie* case for liability, but finding that evidence of Senate Factor 5 could resolve the causation conundrum.[109]

To be clear, I am not suggesting that the Senate Factors or causation should be understood as *requirements* in Section 2 cases. Rather, I simply note that, to the extent that some courts have suggested that some form of a causal nexus between race and the disparate impact of a challenged vote denial practice is relevant to Section 2 liability, evidence of Senate Factor 5 may offer a solution. Plaintiffs should of course be mindful of permitting an intent requirement to creep into what is an express "results" standard. But the model that I have sketched out connecting Senate Factor 5 to a causation requirement does not embrace intentional discrimination—whether by the state or some other societal actor—as a requirement in Section 2 cases. Discrimination in areas such as housing and employment—which can have substantial effects on the socio-economic status of people of color, with resulting downstream effects on their ability to overcome a particular barrier to the ballot—can take numerous forms, including

109. *See* Frank v. Walker, Nos. 11-CV-01128, 12-CV-00185, 2014 WL 1775432, at *24, *31–32 (E.D. Wis. Apr. 29, 2014) ("The reason Blacks and Latinos are disproportionately likely to live in poverty, and therefore to lack a qualifying ID, is because they have suffered from, and continue to suffer from, the effects of discrimination. . . . I conclude that Act 23's disproportionate impact results from the interaction of the photo ID requirement with the effects of past and present discrimination and is not merely a product of chance. Act 23 therefore produces a discriminatory result.").

intentional discrimination, unconscious bias,[110] or institutional discrimination. To the extent that any form of such discrimination can help explain the causal connection between a challenged law and its disparate impact, that can only be helpful to plaintiffs litigating Section 2 vote denial claims.

CONCLUSION

There are significant practical and substantive differences between Sections 2 and 5 that will complicate the task for voting rights litigators in the era of the new vote denial. The lack of substantial case law providing guidance in litigating Section 2 vote denial cases will be a particular challenge. If we assume, however, that courts hearing Section 2 vote denial claims in the future will not deviate dramatically from what courts have done in the past, then we have a few guideposts. Much of the same types of evidence utilized in Section 2 vote dilution cases may be relevant in vote denial cases, where such evidence can explain why the disparate impact of a challenged law is not the product of statistical chance, but rather is the result of a larger racialized context. While a causal nexus should not be understood as a strict requirement in Section 2 cases, evidence that minority voters have suffered discrimination in the political process within a particular jurisdiction, or in areas that are external to politics but which nevertheless constrain minority voters' ability to participate in the political process, may be an important component of successful Section 2 vote denial litigation.

110. *See* Nelson, *supra* note 78, at 597–98 ("The second core value that the Senate factors reveal is recognition of the complexity of racial discrimination, in all its forms, including implicit bias.").