NOTE

Vote Denial and Defense: A Strategic Enforcement Proposal for Section 2 of the Voting Rights Act

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In the years since the Supreme Court in Shelby County v. Holder *held unconstitutional the formula used to enforce the core mechanism for preventing discrimination in elections, several states have enacted laws or policies that make it harder for people to vote. Often, these laws more heavily burden minority voters as a result of social or historical conditions of discrimination that are both internal and external to the political process. Section 2 of the Voting Rights Act is the primary remaining remedy for these denials or abridgments of the right to vote, but proponents of restrictive voting laws are increasingly making explicit arguments against the constitutionality of that provision. At the same time, the Supreme Court has in recent years expressed significant doubt about the propriety of disparate impact statutes in general and section 2 in particular. An invalidated or curtailed section 2 would be an enormous setback in the fight against voter suppression, and election law advocates should actively manage this constitutional risk. This Note recognizes the potential constitutional hazards for section 2 and recommends a set of eight litigation considerations to strategically confront laws that disenfranchise minority voters. These considerations will help advocates target the most harmful and least justified burdens on voting while directing advocates away from cases that could provide a vehicle for challenging the constitutionality of section 2.*

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INTRODUCTION

The 1965 Voting Rights Act (VRA) transformed voting in America. President Lyndon B. Johnson signed the Act into law on the heels of violent clashes over racial disenfranchisement in the Jim Crow South and provided forceful remedies to guarantee the right to vote.[1] Section 5 was the heart of the Act, requiring especially problematic jurisdictions covered by the VRA to "preclear" electoral changes with the federal government before they took effect.[2] Section 4

1. *See* ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 13–15 (2015) (describing pre-VRA history); MARTIN LUTHER KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 35 (Beacon Press 2010) (1967) ("When the 1965 Voting Rights Law was signed, it was proclaimed as the dawn of freedom . . . .").

2. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10304(c) (2012)). The prohibition of "retrogression" was the legal standard enforced by section 5. *See, e.g.*, Beer v. United States, 425 U.S. 130, 141 (1976). If a new law worsened voting access for minorities compared to the status quo, it would be rejected under federal preclearance review. *See, e.g.*, *id.* at 151–52 & n.10. Section 5 has become effectively nullified after the Supreme Court ruled that the VRA's section 4(b) coverage formula is unconstitutional in *Shelby County v. Holder*, 570 U.S. 529, 530

contained a coverage formula identifying the jurisdictions that were subject to section 5 requirements based on the jurisdiction's history of voting discrimination.[3] Section 3(c) set forth a process for "bailing in" new jurisdictions under federal review to stop the spread of intentional voting discrimination.[4] Section 2—the core remaining provision of the Act—offered a nationwide prohibition of laws that deny or abridge minority voting participation at any stage of the electoral process, mirroring the Fifteenth Amendment and providing a private right of enforcement.[5] In 1966, the Warren Court, in an eight-to-one decision, upheld the VRA against constitutional challenge, finding the Act necessary to reverse decades of the states' "unremitting and ingenious defiance of the Constitution."[6]

The passage of the VRA was a watershed moment for American democracy, and for almost sixty years the Act has effectuated the Constitution's commitment to equal voting rights.[7] Section 2 litigation and section 5 preclearance objections have blocked or deterred many jurisdictions from enacting discriminatory laws ranging from abusive voter-qualification requirements, to redistricting plans, to closed or moved polling places.[8] By all accounts, the VRA has been an effective tool to confront voter suppression: minority voter turnout has increased dramatically in many of the previously lowest performing states since 1965, helping minority groups become a force in election outcomes.[9]

(2013). *See, e.g.*, BERMAN, *supra* note 1, at 280 ("Roberts's opinion turned Section 5 into a zombie, a body with no life in it.").

3. Pub. L. No. 89-110, § 4(b), 79 Stat. 437, 438 (codified as amended at 52 U.S.C. § 10303(b) (2012)), *ruled unconstitutional in Shelby County*, 570 U.S. at 557.

4. Pub. L. No. 89-110, § 3(c), 79 Stat. 437, 437-38 (codified as amended at 52 U.S.C. § 10302(c) (2012)). Section 3(c) provides a process for federal courts to put electoral jurisdictions under section 5 federal preclearance requirements after finding the jurisdiction operated its voting laws with discriminatory intent. *See* Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2016 (2010). However, since 1975, the provision has only been used "sparingly" to "bail-in two states, six counties, and one city." *Id.* at 2010. Even in recent cases where federal courts have invalidated election laws for discriminatory intent, the section 3(c) mechanism has not been used. *See, e.g.*, N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 240–41 (4th Cir. 2016) (enjoining the challenged provisions of North Carolina's omnibus election law, but declining to "bail-in" the state under federal supervision).

5. Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a) (2012)). See *infra* Part I for a detailed discussion of section 2.

6. South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

7. *See* ALLAN J. LICHTMAN, THE EMBATTLED VOTE IN AMERICA: FROM THE FOUNDING TO THE PRESENT 79–80, 92 (2018) (detailing the Founders' failure to provide an affirmative right to vote and how the Supreme Court compounded the problem by limiting the application of the Reconstruction Amendments); *id.* at 176–78 (discussing the positive effects of the VRA).

8. *See* U.S. COMM'N ON C.R., AN ASSESSMENT OF MINORITY VOTING RIGHTS ACCESS IN THE UNITED STATES 22–23 (2018), www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf [https://perma.cc/J5K9-JZGN] [hereinafter USCCR REPORT]; *see also generally* Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, *in* VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 47 (Ana Henderson ed., 2007) (studying the deterrent effect of section 5); USCCR REPORT, *supra*, at 37–41 (detailing the mechanics of section 5 before *Shelby County*).

9. *See* LICHTMAN, *supra* note 7, at 176–78 (showing the rise in minority voter representation between 1965 and 2000); USCCR REPORT, *supra* note 8, at 53 (showing increases in electoral participation by minority voters between 1965 and 2004); *see also* Meg Kinnard, *House Democrats Train 2020 Focus on Minority, Young*

Now, however, the VRA is in a vulnerable state and its enfranchisement gains are potentially at risk. As if scripted with tragic and callous irony, the success of the Act has become a core contributor to its imperilment.[10] In its 2013 *Shelby County v. Holder* decision, the Supreme Court gutted the VRA's core enforcement mechanism in section 5 and returned to a deferential vision of local election administration, despite lessons learned from many states' long histories of excluding minority voters from the political process.[11] The Court relied primarily on a rarely invoked federalism doctrine of "equal [state] sovereignty" to strike down the recently reauthorized coverage formula used to enforce section 5,[12] but the Court also shed a skeptical light on Congress's and advocates' use of historical evidence to demonstrate how the entrenched discrimination and disadvantages visited upon minority voters justifies the robust, prophylactic remedies available in the VRA.[13]

In doing so, the *Shelby County* decision expressed a wooden and overly simplistic view of how voter suppression operates today and scrapped the very

Voters, ASSOCIATED PRESS (June 21, 2019), https://apnews.com/089c793c29d0468080f41ddef52cb3d9 (quoting Democratic Congressional Campaign Committee Chairwoman Cheri Bustos for notion that "where our strength comes from is people of color, who are the foundation of the Democratic Party").

10. *See* Shelby County v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) (warning of a future increase in voter suppression laws and likening the majority's opinion to "throwing away your umbrella in a rainstorm because you are not getting wet"); *see also* USCCR REPORT, *supra* note 8, at 277 ("The right to vote is the bedrock of American democracy. It is, however, a right that has proven fragile and in need of both Constitutional and robust statutory protections. . . . Voter access issues, discrimination, and barriers to equal access for voters with disabilities and for voters with limited-English proficiency continue today.").

11. *See* 570 U.S. at 544, 549–53 (holding unconstitutional the section 4(b) coverage formula enforcing section 5 for violating the "tradition of equal sovereignty" between states); Nicholas O. Stephanopoulos, *The South After* Shelby County, 2013 SUP. CT. REV. 55, 56 (noting that the formula was deemed "both obsolete . . . and irrational because covered areas no longer perform worse than their noncovered peers" (footnote omitted)); *see also* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 45 (rev. ed. 2000) ("Early in the [antebellum] period, there was an almost matter-of-fact quality to decisions to bar African Americans [from voting], who were widely believed to be inferior and lacking in potential republican virtues."); LICHTMAN, *supra* note 7, at 36 (quoting 1860 presidential candidate Stephen A. Douglas as saying that "this government . . . was made by white men, for the benefit of white men and their posterity forever" (alteration in original)).

12. *See Shelby County*, 570 U.S. at 556. For a critique of the Supreme Court's application of the equal sovereignty doctrine in *Shelby County*, see generally Austin Graham, *Unstable Footing:* Shelby County*'s Misapplication of the Equal Footing Doctrine*, 23 WM. & MARY BILL RTS. J. 301 (2014) and Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016).

13. *See Shelby County*, 570 U.S. at 553 (criticizing Congress for its apparent "focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs"). Although the Court clarified that the opinion "issue[d] no holding on § 5 itself, only on the coverage formula" and that "Congress may draft another formula based on current conditions," the opinion expressed serious doubt about Congress's ability to do so. *Id.* at 557. Chief Justice Roberts explained that, to justify such a departure from traditional notions of federalism and equal sovereignty, the new formula must show convincing evidence of exceptional and contemporary discriminatory conditions. *See id.* at 555–57. Justice Thomas wanted the Court to go even further, asserting that no coverage formula could make section 5 constitutional. *See id.* at 558 (Thomas, J., concurring) ("However one aggregates the data compiled by Congress, it cannot justify the considerable burdens created by § 5.").

framework that had for decades prevented jurisdictions from excluding voters.[14] Immediately after the decision, the rest of 2013 marked an inflection point for states enacting new restrictions on voting eligibility.[15] These new so-called "vote denial"[16] laws—designed to address the specter of unsubstantiated voter fraud by adding hurdles to registering or casting a ballot—are increasing nationwide and often disproportionately burden minority voters.

With the negation of section 5, only one core VRA provision remains to block the rise of harmful vote denial laws and forestall a backslide to essentially unchecked discrimination in elections: more costly, more burdensome, and more reactive litigation under section 2.[17] But in the wake of *Shelby County*, proponents of voting restrictions have also been emboldened to tempt a growingly conservative Supreme Court to confine even that provision,[18] which would fatally

14. *See id.* at 593 (Ginsburg, J., dissenting) (observing that "the evolution of voting discrimination into more subtle second-generation barriers is powerful evidence that a remedy as effective as preclearance remains vital to protect minority voting rights and prevent backsliding"); *see also* BERMAN, *supra* note 1, at 280 ("Roberts's opinion turned Section 5 into a zombie, a body with no life in it."); Danielle Lang & J. Gerald Hebert, *A Post-*Shelby *Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE L.J. F. 779, 781 n.9 (2018) (criticizing the Court's limited view of discrimination in *Shelby County*); USCCR REPORT, *supra* note 8, at 57–60 (summarizing the impact of *Shelby County* on VRA enforcement by the U.S. Department of Justice).

15. *See* Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1577–78 (2019) ("Since 2010 . . . *twenty-three* states have implemented new franchise restrictions. Thirteen have required identification for voting; eleven have limited voter registration; seven have reduced the timespan available for early voting; and three have delayed the restoration of voting rights for people with criminal convictions. These measures amount to the most systematic retrenchment of the right to vote since the civil rights era. In geographic coverage, indeed, they surpass the franchise restrictions of Jim Crow, since they are in effect nationwide, not confined to the south." (footnotes omitted)); USCCR REPORT, *supra* note 8, 60–82 (detailing how North Carolina and Texas immediately acted in the wake of *Shelby County* to erect discriminatory barriers to voting).

16. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691–92 (2006) (coining the term the "new vote denial" for election laws that abridge participation in elections).

17. *See* Dale E. Ho, *Voting Rights Litigation After* Shelby County*: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 680 (2014) ("Section 2 litigation will often proceed more slowly and will be more costly than Section 5 preclearance, significantly limiting Section 2's effectiveness."); *id.* at 685 ("[T]he 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."); Lang & Hebert, *supra* note 14, at 781 ("By gutting preclearance, the *Shelby* Court nullified the VRA's ex ante protections and left minority voters to fend for themselves through affirmative litigation [under section 2]."); USCCR REPORT, *supra* note 8, at 30–31 (discussing differences between sections 2 and 5, and deficiencies of post-enactment litigation as the only remedy in voting-rights cases).

18. *See* Jess Bravin, *Conservative-Dominated Supreme Court Fulfills Nixon-Era Dream*, WALL ST. J. (Oct. 9, 2018, 11:19 AM), https://www.wsj.com/articles/conservative-dominated-supreme-court-fulfills-nixon-era-dream-1539077401; Oliver Roeder & Amelia Thomson-DeVeaux, *How Brett Kavanaugh Would Change the Supreme Court*, FIVETHIRTYEIGHT (July 9, 2018, 9:34 PM), https://fivethirtyeight.com/features/how-brett-kavanaugh-would-change-the-supreme-court/ [https://perma.cc/D87R-JRFN] (anticipating that according to one empirical measure of judicial ideology, Brett Kavanaugh's confirmation means that Chief Justice Roberts will replace Justice Kennedy as the ideological "median" on the Court); *see also* Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL'Y 125, 140–

damage the VRA and authorize the increased exclusion of minority groups from the political process.

Advocates have a role to play to abate this threat. They should remain guided by the principle that even one disenfranchised voter is too many and continue to fight against the new franchise restrictions that distort our democracy.[19] But aggressive section 2 litigation could backfire by providing opportunities for opponents looking to take up a case that challenges the statute's constitutional firmness. Section 2 cases percolating in the lower courts have already raised constitutional issues, and the current Supreme Court seems likely to weigh in.[20] These recent lower court cases, however, also illustrate certain considerations for how advocates can strategically choose to challenge laws that deny equal voting access without exposing the statute to constitutional risk. In other words, trends in recent section 2 litigation provide key guideposts for ways in which advocates can petition courts to enforce the VRA against disenfranchising laws while maintaining that section 2 of the Act stands on firm constitutional ground.

In Part I, this Note provides an overview of the text, history, and purpose of the section 2 vote denial results test (the "results test"). Part I also reviews recent developments in cases applying the results test to the increasing number of vote denial laws that states have enacted nationwide since *Shelby County*. Part II summarizes the two main constitutional challenges to section 2 and briefly rebuts these theories. Finally, Part III analyzes the outcomes and reasoning from recent vote denial cases to recommend eight strategic litigation considerations that can help advocates pick the right section 2 battles.

These recommended strategic litigation factors can be categorized under both parts of the prevailing two-part section 2 vote denial results test, which analyzes

42 (2010) (arguing that the political ideologies of Supreme Court justices, and more importantly, their alleged proclivity for ruling based on "personal policy preferences," are likely to play a consequential role in determining the VRA's constitutionality).

19. *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 117 (1980) (arguing that "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about, and denial of the vote seems the quintessential stoppage"); Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATLANTIC (July 17, 2018), https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355 (describing the distortive effects of voter suppression on election outcomes); KEYSSAR, *supra* note 11, at 7 ("[I]f the legitimacy of a government depended on the consent of the governed (one of the key rhetorical claims of the revolution), then limitations on suffrage were intrinsically problematic, since voting was the primary instrument through which a populace could express or withhold consent.").

20. For a discussion of the likelihood of the Supreme Court deciding a constitutional challenge to section 2, see Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 380–82 (2012); Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since* Shelby County, 127 YALE L.J. F. 799, 824 (2018); Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L. L. REV. 93, 127–28 (2018); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 635 (2013); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 489 (2015); Fuentes-Rohwer, *supra* note 18, at 142–55.

whether an election law: (a) causes a disparate impact on minority voters that (b) is related to social and historical conditions of race discrimination in the jurisdiction. To prove the first part of the results test, advocates should focus on: (1) the significance of the burden on minority voters, both in terms of statistical disparity and aggregate burden, when compared to white voters; (2) the existence of multiple franchise restrictions exacting cumulative harm on minority voters; (3) the presence of depressed minority turnout figures, either by raw numbers or by rate of change; and (4) other indicators showing the challenged law's practical burden on a voter ultimately casting a ballot and the extent to which the state has mitigated the hindrance. To demonstrate conditions of discrimination for part two of the results test, advocates should emphasize: (5) historical or current racial disparities outside of voting in the context of the jurisdiction's overall race demographics; (6) evidence of prior or current discrimination within the political process; (7) the tenuousness of the state's justification and any political objectives driving a vote denial law; and finally, (8) indicia of a jurisdiction's discriminatory purpose while operating under conditions of racially polarized voting, even if such evidence is insufficient to prove a section 2 discriminatory intent claim. Considering these factors may help strategically enforce section 2 while safeguarding this critical bulwark against voter suppression.

I. VOTE DENIAL AND THE IMPORTANCE OF THE SECTION 2 RESULTS TEST

Section 2 is the primary remaining voting-rights enforcement mechanism under the VRA. The text of the statute broadly proscribes any "voting qualification or prerequisite to voting or standard, practice or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color."[21] In 1982, Congress explicitly amended the provision to restore its expansive scope, displacing a then-recent Supreme Court decision to reaffirm

21. Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a) (2012)). Section 2 of the current VRA states in full:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

that section 2 promulgates a results-oriented standard.[22] Accordingly, a voting practice or procedure violates section 2's results test if, under the totality of circumstances, the law disproportionately burdens minority voters more than non-minority voters.[23] But a "bare statistical" disparity is insufficient to make this showing.[24] Instead, the Senate Report accompanying the 1982 amendment enumerates a list of non-exhaustive, circumstantial factors (the Senate Factors) that indicate when additional hardships for minority voters are likely to be without a legitimate justification.[25] The Senate Factors primarily prompt an inquiry into the

22. *See* City of Mobile v. Bolden, 446 U.S. 55, 74 (1980) (plurality opinion) (ruling that section 2 requires a showing of discriminatory intent); S. REP. NO. 97-417, at 2 (1982), *as reprinted in* 1982 U.S. C.C.A.N. 177, 179 ("[T]he revised statute restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*."); *see also* Veasey v. Abbott, 830 F.3d 216, 304 (5th Cir. 2016) (en banc) ("Congress fashioned this [revised section 2] language to overturn a then-recent Supreme Court decision limiting voting rights violations to cases of intentional state-sponsored discrimination. In so doing, Congress was focused largely, though not exclusively, on legislative districting practices whose effects often undermined minority representation. Clearly, the formula for a Section 2 violation requires less than intent, but far more than a mere racially disparate impact." (citation omitted)).

23. *See* 52 U.S.C. § 10301(a); Ho, *supra* note 17, at 679–80 (2014) (providing an overview of the section 2 analysis).

24. *See, e.g.*, Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997) (rejecting a section 2 claim that had relied on statistical evidence regarding land ownership because "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry"); Ortiz v. Phila. Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 314–15 (3d Cir. 1994) (rejecting a section 2 vote denial results test claim against a voter-purge law that had a disparate statistical impact, but did not sufficiently demonstrate "both elements of a Section 2 cause of action").

25. The Senate Factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
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 unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

   Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

   whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

   whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

jurisdiction's history of discrimination in voting or other areas (such as education or employment) that may encumber political participation for minority groups.[26] In sum, section 2 plaintiffs challenging any election law or practice need not prove that lawmakers were motivated by discriminatory intent, but rather must show the discriminatory effects or results of the challenged law or practice.[27]

Most section 2 precedents address "vote dilution" challenges, in which a jurisdiction's redistricting or use of at-large elections dilutes the strength of a collective minority group's voting power.[28] But the considerations at the center of vote dilution jurisprudence are essentially irrelevant to vote denial, and as a result, the test for applying section 2 to the recent upswing of vote denial laws—such as voter ID requirements—is still forming.[29] Scholars have suggested various alternative analyses to apply section 2 to vote denial while keeping it in line with constitutional principles,[30] but most circuit courts have recently coalesced around

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S. REP. NO. 97-417, at 28–29, *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07 (footnotes omitted). Although the senate only enumerated seven factors, this Note will refer to the final two sentences beginning with "whether" as Factor Eight and Factor Nine, respectively.

26. *See* Tokaji, *supra* note 20, at 444 (describing the Senate Factors).

27. *See Veasey*, 830 F.3d at 277 (Higginson, J., concurring) ("[I]t is undisputed that, in response to a judicial ruling that Section 2 plaintiffs had to prove discriminatory intent, Congress revised the statute 'to make clear that a violation could be proved by showing discriminatory effect alone.'" (quoting Thornburg v. Gingles, 478 U.S. 30, 35 (1986))); Chisom v. Roemer, 501 U.S. 380, 404 (1991) ("[A] violation of § 2 could be established by proof of discriminatory results alone."); S. REP. NO. 97-417, at 28–29 (reaffirming the effects standard).

28. *See* Stephanopoulos, *supra* note 15, at 1575–76. As jurisdictions became more elusive in their efforts to limit minority voting, states created "second generation" barriers that dilute minority voters' electoral influence. *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). The paradigmatic vote dilution case is *Thornburg v. Gingles*, which applied section 2 to North Carolina's state legislative redistricting plan. 478 U.S. 30 (1986). In an opinion by Justice Brennan, the *Gingles* Court established a tripartite threshold test for section 2 vote dilution claims. Minority plaintiffs alleging a violation must establish that they are: (1) "sufficiently large and geographically compact"; (2) "politically cohesive"; and (3) often denied an equal opportunity to elect candidates of their choice because of racial polarization. *Id*. at 50–51. After proving the "preconditions" for vote dilution claims, the Court then considers the totality of the circumstances using the nine Senate Factors. *See id*. at 50, 80.

29. *See* Ho, *supra* note 17, at 698 (noting that between 1982 and 2005, there were only eighteen reported successful section 2 cases concerning vote denial practices). Because voter-participation and redistricting claims differ in both the character of the injury and the nature of the remedy sought, the section 2 results tests applied to denials and dilution of the right to vote should also be different. *See* Tokaji, *supra* note 16, at 718–23.

30. These constitutional principles concern the scope of Congress's enforcement power under the Reconstruction Amendments and a preference for race neutrality under the Equal Protection Clause. *See infra* Part II. For scholars supporting some variation of the prevailing two-part vote denial results test, see, for example, Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 767–68 (2016); Ho, *supra* note 20, at 821–22; Nelson, *supra* note 20, at 597. For scholars recommending different tests to enforce section 2, see, for example, Michael J. Pitts, *Rethinking Section 2 Vote Denial*, 46 FLA. ST. U. L. REV. 1, 38–39 (2019) (suggesting a balancing test similar to the Fourteenth Amendment standard); Elmendorf, *supra* note 20, at 384 (describing a quasi-intent test, which requires "plaintiffs to prove to a significant likelihood that the electoral inequality is traceable to race-biased decisionmaking"); Lang & Hebert, *supra* note 14, at 78–82 (advocating for an intent-based strategy to enforce equal voting rights and strengthen section 2 results claims); Morgan,

one test: that an election measure violates section 2 if it (1) causes a disparate impact on minority voters (2) through the law's interaction with conditions of social or historical race discrimination.[31] Circuit courts remain somewhat split on the proof that is required to satisfy this test, but the basic scaffolding of the two-part framework has remained consistent and is a logical outgrowth of the text of section 2.[32]

Such a test is also in line with the VRA's, and specifically section 2's, original and enduring purpose: to prevent states from erecting both subtle and overt discriminatory barriers that deny or abridge minority voting rights.[33] The 1982 Senate Report explained how the section 2 results standard would achieve that objective and characterized the provision as "the major statutory prohibition of all voting rights discrimination . . . [at] any phase of the electoral process."[34] And as Congress observed during a reauthorization of the VRA in 2006, "[d]iscrimination today is more subtle than the visible methods used in 1965," which

supra note 20, at 158–60 (suggesting a type of burden-shifting framework); Stephanopoulos, *supra* note 15, at 1595–1625 (suggesting a type of burden-shifting framework); Tokaji, *supra* note 20, at 475–80 (same).

31. *See, e.g.*, *Veasey*, 830 F.3d at 244–45 (endorsing the two-part test); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014) (same); Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014) (same); *see also* Stephanopoulos, *supra* note 15, at 1578–79 (summarizing the two-part test).

32. *See* Ho, *supra* note 20, at 805–09 (discussing application of the two-part test in section 2 cases beginning in 2014). Divergences in how courts apply section 2 to vote denial laws are discussed in greater detail in Part III, but it is worth noting here that courts are somewhat divided on the requisite causation showing, nature of discriminatory conditions, scope of the injury, value of the Senate Factors, importance of the state's justification, significance of turnout, and the appropriate remedy. *See* Stephanopoulos, *supra* note 15, at 1582–89.

33. *See* South Carolina v. Katzenbach, 383 U.S. 301, 328, 337 (1996) ("After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims. . . . [It] has marshalled an array of potent weapons against the evil, with authority in the Attorney General to employ them effectively. . . . [M]illions of non-white Americans will now be able to participate for the first time on an equal basis . . . ."); *see also* Holder v. Hall, 512 U.S. 874, 945 (1994) (Thomas, J., concurring) (concluding the section 2 results test applies "only to state enactments that regulate citizens' access to the ballot or the processes for counting a ballot"); Stephanopoulos, *supra* note 15, at 1575 ("When the VRA was first enacted in 1965—after the beatings of protesters in Selma, Alabama outraged the nation and after a southern filibuster was broken in the Senate—the statute was highly focused on vote denial. Vote denial, through poll taxes, literacy tests, and other discriminatory practices, is what motivated the marchers on the Edmund Pettus Bridge and their fellow activists around the country." (footnotes omitted)); Tokaji, *supra* note 20, at 442 ("[T]he text and legislative history leave no doubt that § 2's 'results' language applies to both vote denial and vote dilution claims.").

34. S. REP. NO. 97-417, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207; *see also Bills to Amend the Voting Rights Act of 1965: Hearing on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong. 1432 (1982) (statement of Prof. Archibald Cox, Chairman, Common Cause) (outlining the Supreme Court's VRA precedent vesting Congress with broad discretion, under the Reconstruction Amendments, "to outlaw all voting arrangements that result in denial or abridgement of the right to vote even though not all such arrangements are unconstitutional, because this is a means of preventing their use as engines of purposive and therefore unconstitutional racial discrimination").

requires a more incisive and flexible analysis to protect minority voting rights.[35] The section 2 results test strikes the balance of being an effective tool to invalidate even the most subtle or inventive discriminatory devices[36] without having courts interfere with all regulations of the state's election scheme.[37]

More fundamentally, a section 2 test that strikes down voting laws with racially disparate effects should be preferred to an intent-based standard. Focusing on unjustified disparate impacts in election laws can "smoke out" prejudicial intent without the smoking-gun evidence rarely available in modern discrimination cases.[38] Indeed, intent-based tests have inherent practical barriers to their effectiveness because there are substantial obstacles to ascertaining and aggregating the intent of the legislative body that enacted an election law.[39] Judges, moreover, may face interpersonal or professional backlash from finding discriminatory intent from circumstantial factors.[40] Therefore, an intent test could contradictorily

35. H.R. REP. NO. 109-478, at 6 (2006), *as reprinted in* 2006 U.S.C.C.A.N. 618, 620; *see also* Karlan, *supra* note 30, at 772 (noting that the VRA's "expansive definition of voting . . . reaches '*all* action necessary to make a vote effective'") (quoting 52 U.S.C. § 10310(c)(1) (2012)).

36. *See Katzenbach*, 383 U.S. at 314 (finding that the new VRA would be effective because "[e]ven when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity").

37. *See* Ho, *supra* note 20, at 820–22 (explaining that the section 2 vote denial results test limits liability by requiring proof of the Senate Factors and linking disparate voting burdens to patterns of discrimination).

38. *See* Veasey v. Abbott, 830 F.3d 216, 235–36 (5th Cir. 2016) (en banc) ("In this day and age we rarely have legislators announcing an intent to discriminate based upon race, whether in public speeches or private correspondence. To require direct evidence of intent would essentially give legislatures free rein to racially discriminate so long as they do not overtly state discrimination as their purpose and so long as they proffer a seemingly neutral reason for their actions." (footnote omitted)); *see also* Lang & Hebert, *supra* note 14, at 785–86 (describing effects test as a proxy for "smoking out" discriminatory intent); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1376 (2010) (same); Stephanopoulos, *supra* note 15, at 1605 (same).

39. Regarding older laws, an intent test is "hopelessly ineffective" because many jurisdictions do not maintain legislative histories and "those who enacted ancient voting requirements could not be subpoenaed from their graves." United States v. Blaine County, 363 F.3d 897, 908 (9th Cir. 2004). "Present-day legislators" are also often "protected from testifying about their motives by legislative immunity." *Id*. Even if the intent of an individual legislator can be determined, the issue is compounded when intent must be proved as to the enacting governing body as a whole. *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 546 (1999) ("The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor . . . ."); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16–18 (1997) (recognizing the impossibility of determining the single, motivating intent of a legislature and arguing against an intentionalist approach to statutory interpretation). Without clear public statements of motivation, advocates often cannot prove an intent claim without relying most heavily on the law's substantial disparate impact, which is typically insufficient on its own to make a prima facie case. *See, e.g.*, N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 231 (4th Cir. 2016) (noting that in vote denial intent claims "[s]howing disproportionate impact . . . suffices to establish [only] one of the circumstances evidencing discriminatory intent" (emphasis omitted)).

40. After all, a discriminatory intent finding ultimately puts judges in the challenging position of having to label their fellow local public servants as racists without direct proof. *See* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 735 (1998) (noting that federal judges "often live in the same milieu as other public officials and far away from the plaintiffs who bring racial vote dilution lawsuits. If they are compelled to

foster the same problematic racial divisiveness the Supreme Court labors to avoid,[41] and the vote denial results test best serves the important Reconstruction Amendment goals of removing discrimination from the electoral process.[42]

The section 2 results remedy is also urgently needed during a time of rising voter suppression. A 2018 U.S. Commission on Civil Rights report on voting rights paints a damning picture of the increases in election law restrictions, summarizing that:

> In states across the country, voting procedures that wrongly prevent some citizens from voting have been enacted and have a disparate impact on voters of color and poor citizens, including but not limited to: restrictive voter ID laws, voter [registration] roll purges, proof of citizenship measures, challenges to voter eligibility, and polling places moves or closings.[43]

These laws have made voting more burdensome in recent years, and they are often justified by a claim of widespread voter fraud that is not based in empirical reality.[44] The negative effects from rising voting restrictions fall disproportionately on minority, poor, elderly, and disabled voters,[45] during a time of severe economic inequality in America.[46] As one scholar remarked, the new vote denial laws "amount to the most systematic retrenchment of the right to vote since the

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call their acquaintances evil in order to do justice, then they may find themselves tempted to shade their judgment in even remotely close cases").

41. *See* S. REP. NO. 97-417, at 36 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 214 (finding that "the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," and could exacerbate purposeful discrimination); *see also* Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 685–86 (2015) (observing that the Roberts Court focuses on ensuring "interventions designed to heal social division should be implemented in ways that do not aggravate social division" (footnote omitted)).

42. *See* CONG. GLOBE, 39th Cong., 2d Sess. 252 (1867) (statement of Rep. Thaddeus Stevens) ("Have not loyal blacks quite as good a right to choose rulers and make laws as rebel whites?"); USCCR REPORT, *supra* note 8, at 15–16 (describing the Reconstruction Amendments).

43. USCCR REPORT, *supra* note 8, at 13.

44. For a description of studies debunking the existence of large-scale voter fraud, see, for example, RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 41–75 (2012); LICHTMAN, *supra* note 7, at 189–93; USCCR REPORT, *supra* note 8, at 96–111. For a discussion of the way in which allegations of voter fraud have become the "new Southern strategy," see LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD 89–90 (2010).

45. *See, e.g.*, Daniel J. Hopkins et al., *Voting but for the Law: Evidence from Virginia on Photo Identification Requirements*, 14 J. EMPIRICAL LEGAL STUD. 79, 83–85 (2017) (aggregating studies to show that almost all voter-ID laws currently in place have racial disparities); Sari Horwitz, *Getting a Photo ID so You Can Vote Is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), https://www.washingtonpost.com/politics/courts_law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html?noredirect=on&utm_term=.0458986c4c2e; Ina Jaffe, *For Older Voters, Getting the Right ID Can Be Especially Tough*, NPR (Sept. 7, 2018, 5:01 AM), https://www.npr.org/2018/09/07/644648955/for-older-voters-getting-the-right-id-can-be-especially-tough [https://perma.cc/3Y96-L6ZE].

46. *See generally* Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), Rep. of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America, at 4, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018) (documenting the results of a U.N. human rights visit to the U.S., which "has the highest rate of income inequality among Western countries"

civil rights era. . . . [I]ndeed, they surpass the franchise restrictions of Jim Crow, since they are in effect nationwide, not confined to the South."[47]

And yet, proponents of restrictive voting laws have claimed that the section 2 vote denial results test is unconstitutional based on arguments raised during the *Shelby County* litigation and borrowed from other areas of the Roberts Court's equal protection jurisprudence.[48] As those arguments become increasingly frequent, explicit, and (perhaps) appealing to the Supreme Court, advocates should see the risk to section 2 as more than just an idle threat and should make strategic litigation choices to protect the statute. Given the rise and breadth of vote denial laws and decline of meaningful federal oversight over state election management, formulating a legal strategy to retain the section 2 vote denial remedy is essential to upholding the promise of the VRA.

II. CONSTITUTIONAL CONCERNS ABOUT SECTION 2

Although no federal court decision to date has called into doubt the constitutionality of section 2, the current Supreme Court may welcome new efforts to eliminate or limit the application of the results test to vote denial claims. First, the Court has expressly and repeatedly left open the constitutional status of section 2's results test,[49] and over the last two decades, multiple current Justices have expressed serious concerns about the VRA in general and section 2 in

(citing *WIID – World Income Inequality Database*, UNU-WIDER, www.wider.unu.edu/project/wiid-world-income-inequality-database (last visited Oct. 17, 2019))).

47. Stephanopoulos, *supra* note 15, at 1578.

48. Opponents of section 2 results test suits who have raised constitutionality concerns primarily argue that the statute exceeds Congress's enforcement power under the Reconstruction Amendments or that it violates the Equal Protection Clause. *See, e.g.*, Petition for a Writ of Certiorari at 28–36, Abbott v. Veasey, 137 S. Ct. 612 (2017) (No. 16-393) (mem.) (denying certiorari); Supplemental En Banc Brief for Appellants at 44–50, Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (No. 14-41127) (en banc); Reply Brief for Appellants at 27–31, Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015) (No. 14-41127); Brief of Senators Thom Tillis, Lindsey Graham, Ted Cruz, Mike Lee, and the Judicial Educ. Project as Amici Curiae in Support of Defendants-Appellees and Affirmance at 21–22, N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (No. 16-1468(L)); Brief for Appellants at 48–49, Cooper v. Harris, 137 S. Ct. 1455 (2017) (No. 15-1262); Brief for Appellees at 33–35, Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788 (2017) (No. 15-680); Appellant Brief at 26–41, Alabama v. Ala. State Conference of the NAACP, No. 2:16-cv-00731-WKW-CSC (11th Cir. Nov. 13, 2017); *see also* Thomas v. Bryant, 938 F.3d 134, 185 (5th Cir.) (Willett, J., dissenting) (finding that a race-conscious section 2 remedy in a vote dilution case would "run headlong into the Fourteenth Amendment"), *reh'g en banc granted*, 939 F.3d 629 (5th Cir. 2019).

49. *See, e.g.*, Johnson v. De Grandy, 512 U.S. 997, 1028–29 (1994) (Kennedy, J., concurring in part and concurring in the judgment) ("It is important to emphasize that the precedents to which I refer, like today's decision, only construe [section 2], and do not purport to assess its constitutional implications."); Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) ("Nothing in today's decision addresses the question whether § 2 . . . is consistent with the requirements of the United States Constitution." (citation omitted)). *But see* Shelby County v. Holder, 570 U.S. 529, 537 (2013) (noting that "Section 2 is permanent, applies nationwide, and is not at issue in this case"); Bush v. Vera, 517 U.S. 952, 990–91 (1996) (O'Connor, J., concurring) (citing cases upholding section 2's results test); Holder v. Hall, 512 U.S. 874, 965 (1994) (Stevens, J., writing separately) (claiming that reinterpreting section 2 to limit its scope "would require overruling a sizable number of this Court's precedents"); Miss. Republican Exec. Comm. v. Brooks, 469 U.S. 1002, 1002–03 (1984) (Stevens, J., concurring) (summary affirmance of lower court case upholding section 2's constitutionality).

particular.[50] Second, under the tailoring rule established in *City of Boerne v. Flores*, opponents of the VRA have long argued that section 2 is neither temporally nor geographically "congruent and proportional" to the harm of unconstitutional voting discrimination.[51] Third, the Court's equal protection jurisprudence has tended to be suspicious of race-conscious governmental actions, even when viewed by some as beneficial.[52] As a result, the Roberts Court has heavily scrutinized and typically disfavored disparate impact statutes, particularly in the Fair Housing Act and Title VII contexts.[53] In sum, opponents claim that section 2 is

50. *See, e.g.*, Abbott v. Perez, 138 S. Ct. 2305, 2314–15 (2018) (increasing the burden of proving a discriminatory intent claim in a section 2 redistricting case); *id.* at 2335 (Thomas, J., concurring) (rearticulating a narrow view of section 2, which Justice Gorsuch joined); *Shelby County*, 570 U.S. at 557 (Thomas, J., concurring) (questioning the validity of section 5 of the VRA); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 500–03 (2006) (Roberts, C.J., concurring in part, concurring in the judgment, and dissenting in part) (discussing the purported racial divisiveness of VRA enforcement); Lopez v. Monterey County, 525 U.S. 266, 293–94 (1999) (Thomas, J., dissenting) (detailing the perceived federalism costs of section 5 of the VRA); *Hall*, 512 U.S. at 893–94 (Thomas, J., concurring) (advancing a circumscribed view of section 2); *see also Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 5*, at 1:41:26–1:41:55, C-SPAN (Sept. 5, 2018), https://www.c-span.org/video/?449705-15/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-5&playEvent&start=5914 (showing video recording of Justice Kavanaugh hesitating "to pre-commit" on the constitutionality of section 2 in response to a line of questioning from Senator Kamala Harris).

51. 521 U.S. 507, 520 (1997) (holding that enforcement statutes must be "congruen[t] and proportional[]" to a record or threat of constitutional violations); *see also Shelby County*, 570 U.S. at 553 (ruling that disrupting traditional federalism and equal-sovereignty principles must be done "on a basis that makes sense in light of current conditions" and that "[Congress] cannot rely simply on the past"); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) ("[T]he Act imposes current burdens and must be justified by current needs."); Fuentes-Rohwer, *supra* note 18, at 137 ("[I]t is often noted that the [*City of Boerne*] Court offered the Voting Rights Act as an exemplary statute. The Court underscored often how RFRA was different in degree and kind from the VRA. . . . [But] [s]ection 2 remained conspicuously absent from the discussion." (footnote omitted)); Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 452–53 (2015) (noting that the *Shelby County* "holding reflected long-standing concerns that Congress had not built a sufficient record of intentional racial discrimination in voting to justify the continued use of this particular remedy (both preclearance and selective coverage) under not just *City of Boerne*'s congruence and proportionality analysis but under any standard of review").

52. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (plurality opinion) (rejecting a voluntary school-desegregation program and demanding colorblindness in efforts to promote racial inclusion because "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race"); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 225–27 (1995) (holding that equal protection strict scrutiny analysis applies to federal laws that discriminate based on race even when those laws have "benign" motives).

53. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2524 (2015) (upholding but curtailing an FHA disparate impact provision); Ricci v. DeStefano, 557 U.S. 557, 593 (2009) (upholding but curtailing a Title VII disparate impact provision); *id.* at 595 (Scalia, J., concurring) (warning of a coming "war between disparate impact and equal protection").

The Court's disfavored view of disparate impact liability is not exclusive to these statutes. *See, e.g.*, Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1787 n.4 (2019) (Thomas, J., concurring) (deriding disparate impact liability as relying on a "simplistic and often faulty assumption that some one particular factor is the key or dominant factor behind differences in outcomes and that one should expect an even or random distribution of outcomes . . . in the absence of such complicating causes as genes or discrimination" (internal quotation marks and alterations omitted)); Alexander v. Sandoval, 532 U.S. 275, 280–81 (2001) (permitting only intent claims (not disparate impact claims) under Title VI of the Civil Rights Act of 1964); *see also* Richard A. Primus, *Equal Protection and*

unconstitutional because it is untethered from its constitutional foundation and that it violates the Equal Protection Clause by requiring excessive consideration of race in electoral decisionmaking.[54]

The two main arguments that section 2 is unconstitutional have substantial defects and the Court should reject them. The scope of this Note does not include a full explanation and rebuttal of the challenges, but they can be briefly addressed to assuage some concerns about section 2.

The modern vote denial results test should pass muster under the *City of Boerne* "congruence and proportionality" requirement. First, the scope of Congress's authority under the Fourteenth and Fifteenth Amendments combined is broader than its authority under the Fourteenth alone, providing lawmakers with more latitude to affix voting remedies than in other antidiscrimination areas.[55] Second, although section 2 has no sunset provision, the test itself contains a "durational calibration" to the harm it seeks to prevent.[56] If inequalities improve and facially neutral voting requirements no longer cause a substantial disparate impact on minority voters by interacting with conditions of discrimination, section 2 challenges will no longer be successful and the statute will become obsolete.[57] Third, section 2 is also sufficiently geographically tailored to the harm of voting discrimination because modern voter suppression is not regionally confined; vote denial laws have spread to areas of the country without long histories of disenfranchisement, necessitating the adaptable and nationwide remedy that section 2 provides.[58]

Disparate Impact: Round Three, 117 HARV. L. REV. 494, 585 (2003) ("The rise of individualist and colorblind values in the generation since [*Washington v.*] *Davis* now makes it necessary to consider . . . the affirmative tension between equal protection and disparate impact statutes."); Siegel, *supra* note 41, at 687–89 (summarizing the tensions in the Roberts Court's disparate impact jurisprudence).

54. For proponents of vote denial laws making some variation of these arguments, see, for example, J. Christian Adams, *Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not*, 31 TOURO L. REV. 297, 317–18 (2015); Noel H. Johnson, *Resurrecting Retrogression: Will Section 2 of the Voting Rights Act Revive Preclearance Nationwide?*, 12 DUKE J. CONST. L. & PUB. POL'Y 1, 11–14 (2017); Roger Clegg, *The Future of the Voting Rights Act After* Bartlett *and* NAMUDNO, *in* CATO SUPREME COURT REVIEW 2008–2009, at 35, 49–50 (Ilya Shapiro et al. eds., 2009); ROGER CLEGG & HANS A. VON SPAKOVSKY, THE HERITAGE FOUND., LEGAL MEMORANDUM NO. 119, "DISPARATE IMPACT" AND SECTION 2 OF THE VOTING RIGHTS ACT 4 (2014), http://thf_media.s3.amazonaws.com/2014/pdf/LM119.pdf [https://perma.cc/8NWY-6ANP].

55. *See, e.g.*, Fuentes-Rohwer, *supra* note 18, at 134; Karlan, *supra* note 40, at 738; Evan Tsen Lee, *The Trouble with* City of Boerne*, and Why It Matters for the Fifteenth Amendment as Well*, 90 DENV. U. L. REV. 483, 502–03 (2012); Morgan, *supra* note 20, at 164–65; Nelson, *supra* note 20, at 637.

56. Karlan, *supra* note 40, at 733 (arguing that section 2 "contains a kind of durational calibration that makes the enforcement congruent with the injury").

57. *See id.* at 741 ("Election practices are vulnerable to section 2 only if a jurisdiction's politics is characterized by racial polarization. As the lingering effects of racial discrimination abate, . . . their ability and need to bring claims under section 2 will subside . . . ."); Nelson, *supra* note 20, at 637 (noting that the section 2 remedy "is in effect only temporary" and that "[c]onditions external to the process of voting that presumably can be corrected provide the rationale for the remedy, and the remedy is no longer appropriate once those conditions cease to create a disparate impact").

58. *See generally* USCCR REPORT, *supra* note 8 (overall detailing why section 2's flexible, results-oriented test is necessary to combat expansive voter suppression); *see also* S. REP. NO. 97-417, at 42–43

Section 2, as applied to vote denial, similarly does not offend the Equal Protection Clause. First, unlike in the FHA or Title VII, section 2's totality analysis and consideration of the Senate Factors means that the provision cannot be easily mischaracterized as a bare disparate impact test.[59] The searching analysis of conditions of discrimination using the Senate Factors serves a "liability-limiting function," which is perhaps even truer in the vote denial context than in the vote dilution context.[60] Second, no problematic zero-sum game exists that would make invalidating discriminatory voting participation laws an injury to another racial group. Instead, eliminating laws with disparate burdens on minorities would simply make voting easier for everyone in the electorate and would impose no cognizable harm on white voters.[61] Third, vote denial claims do not call for race-based assumptions that could aggravate racial divisions because the results test does not rely on predictions or stereotypes of voting patterns by racial groups.[62]

(1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 221 (concluding that "even if there were some over-inclusion of jurisdictions [section 2] would be constitutionally permissible"). Moreover, it was precisely the unequal treatment of states that led to the effective negation of section 5 in *Shelby County*. 570 U.S. at 556. For the Supreme Court to now hold that section 2's results test is unconstitutional because it *does not* distinguish between states would be a highly incongruous outcome. *See* Jeffrey M. Schmitt, *In Defense of* Shelby County*'s Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 213 (2016) (finding that the "equal sovereignty principle simply ensures that when Congress limits the sovereign power of some of the states in ways that do not apply to others, it has a good reason to do so").

59. *See* Nelson, *supra* note 20, at 610–12; *see also* Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1970 (2018) (summarizing that "section 2 rejects reliance on '[a]n inflexible rule' and requires instead 'a searching practical evaluation of the 'past and present' reality, and on a 'functional view' of the political process" (alteration in original) (first quoting Johnson v. De Grandy, 512 U.S. 997, 1018 (1994); and then quoting Thornburg v. Gingles, 478 U.S. 30, 45 (1986))).

60. Ho, *supra* note 20, at 823; *see also id.* at 804 (emphasizing the role of the Senate Factors and arguing that requiring plaintiffs to demonstrate how conditions shown by the Factors function "as headwinds that prevent minority voters from participating equally in the political process" has the effect of "limit[ing] liability only to claims where a challenged law has a particularly burdensome racial effect" (citing Ho, *supra* note 17, at 703)); 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, 660 (2006) (finding that in many of the sixty-eight vote dilution section 2 lawsuits studied in which the *Gingles* preconditions were satisfied, "courts engaged in only a perfunctory review of the Senate Factors," and only eleven decisions ruled against plaintiffs at this step).

61. *See* Nelson, *supra* note 20, at 611 (arguing that invalidating discriminatory voting burdens "will not visit negative consequences on any racial group. Unlike in the employment context, . . . the right to vote can be extended to countless individuals without denying others access to that right"); Stephanopoulos, *supra* note 15, at 1595–1600, 1608 (drawing distinctions between section 2 and other types of disparate-impact statutes on a zero-sum basis); *see also* Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 36 (1976) ("The voting test suspension remedies have been relatively uncontroversial because they do not frustrate the legitimate expectations of third parties or prefer the intended beneficiaries to others similarly situated . . . ."); Primus, *supra* note 38, at 1381 (noting that VRA remedies typically do not create visible victims).

62. *See* Morgan, *supra* note 20, at 109, 116; *see also* Fuentes-Rohwer, *supra* note 18, at 149–51 (discussing historical conflict between the Court's colorblind mentality and purpose to protect "discrete and insular minorities" in election law context); Siegel, *supra* note 41, at 685–86 (observing that the Roberts Court focuses on ensuring "interventions designed to heal social division should be implemented in ways that do not aggravate social division").

Regardless, the reality that opponents of section 2 are making increasingly forceful claims against the constitutionality of the section 2 results test cannot be ignored.[63] A conservative majority of the Supreme Court could adopt any one of these arguments to severely damage minority voting rights. As one advocate warned, it "behooves supporters of section 2 to think of ways to restrict its reach—to prevent it from imposing liability in almost all circumstances where policies produce disparate impacts."[64] The ensuing strategic considerations for section 2 litigation would be a positive step toward insulating the results test from constitutional scrutiny and maintaining the best remaining VRA protection of an equal franchise.

III. STRATEGIC CONSIDERATIONS FOR SECTION 2 VOTE DENIAL LITIGATION

Since *Shelby County*, mostly private plaintiffs have brought section 2 results test claims against a range of new vote denial laws.[65] More recent cases have included challenges to restrictive voter-ID requirements,[66] laws adding voting registration hurdles,[67] laws cutting back on early and absentee voting,[68] laws changing balloting procedures,[69] and a variety of other restrictions on how,

63. *See supra* notes 20, 54.

64. Stephanopoulos, *supra* note 15, at 1594.

65. *See* Ho, *supra* note 20, at 805–09 (analyzing recent section 2 cases); Tokaji, *supra* note 20, at 455–64 (same); *see also* USCCR REPORT, *supra* note 8, at 275 (finding that "DOJ enforcement actions . . . have generally declined during the time period . . . since the *Shelby County* decision.").

66. *See, e.g.*, Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016) (upholding Virginia's voter-ID law); N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (striking down North Carolina's photo-ID law); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc) (striking down Texas's strict photo-ID law); Frank v. Walker, 768 F.3d 744 (7th Cir.), *reh'g denied* 773 F.3d 783 (7th Cir. 2014) (upholding Wisconsin's photo-ID law); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014) (rejecting the voter-ID law in an earlier phase of the *McCrory* litigation); Gonzalez v. Arizona, 624 F.3d 1162 (9th Cir. 2010) (upholding Arizona's voter-ID requirement), *modified on reh'g*, 677 F.3d 383 (9th Cir. 2012) (en banc); Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253 (N.D. Ala. 2018) (upholding Alabama's photo-ID law); *see also* Brakebill v. Jaeger, 905 F.3d 553 (8th Cir. 2018) (staying the district court's order enjoining the state from enforcing its voter-ID requirement but not addressing merits of Fourteenth Amendment and section 2 challenges to North Dakota's photo-ID law).

67. *See, e.g.*, One Wis. Inst. v. Thomsen, 351 F. Supp. 3d 1160 (W.D. Wis. 2019) (enforcing injunction against reenacted limits on in-person absentee voting and added restrictions to voter-ID law); One Wis. Inst. v. Thomsen, 198 F. Supp. 3d 896 (W.D. Wis. 2016) (addressing a section 2 challenge to the range of registration and early-voting changes in Wisconsin); Gonzalez v. Arizona, No. CV-06-1268-PHX-ROS, 2008 WL 11395512 (D. Ariz. Aug. 20, 2008) (rejecting section 2 challenge to Arizona's proof-of-citizenship requirement), *aff'd in part, rev'd in part*, 677 F.3d 383 (en banc) (invalidating Arizona's proof-of-citizenship requirement under the National Voter Registration Act); *see also* Complaint for Injunctive and Declaratory Relief at 41–43, Ga. Coal. for the People's Agenda, Inc. v. Kemp, 347 F. Supp. 3d 1251 (N.D. Ga. 2018) (challenging Georgia's "exact match" requirement for voting-registration applicants).

68. *See, e.g.*, Ohio Democratic Party v. Husted, 834 F.3d 620 (6th Cir. 2016) (permitting restrictions on early and alternative voting in Ohio); Ohio State Conference of the NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014) (invalidating other cutbacks to early voting); *McCrory*, 831 F.3d 204 (permanently enjoining North Carolina's elimination of multiple early and alternative voting options).

69. *See, e.g.*, Mich. State A. Philip Randolph Inst. v. Johnson, 749 F. App'x 342 (6th Cir. 2018) (permitting Michigan's elimination of straight-ticket voting); Ne. Ohio Coal. for the Homeless v.

where, and when people can vote.[70] Any of these types of laws or practices can violate section 2's vote denial results test if it imposes a disparate impact on minority voters through its interaction with past or current conditions of discrimination. But recent section 2 challenges to vote denial laws have seen mixed results, providing some signposts to help guide the risk-averse enforcement of section 2. Lessons from the outcomes and reasoning from vote denial opinions since *Shelby County* can be distilled into eight strategic litigation considerations, with four falling under each of the two prongs of the section 2 vote denial results test. Under the disparate impact prong of the test, advocates should consider:

(1) the significance of the statistical disparity *and* the aggregate burden on minority voters compared to white voters;

(2) the existence of multiple franchise restrictions operating together to impose cumulative harm on minority voters;

(3) evidence of depressed minority-voting turnout totals or rate of change; and

(4) the practical burden on a voter ultimately casting a ballot and the extent to which the jurisdiction has mitigated that burden.

Under the second prong of the test, which addresses social and historical conditions of race discrimination in the relevant jurisdiction, advocates should focus on:

(5) showing how conditions of discrimination outside the voting context hinder access to the political process for a large group of minority voters under Senate Factor Five;

Husted, 837 F.3d 612 (6th Cir. 2016), *reh'g denied*, No. 16-3603 (Oct. 6, 2016) (rejecting a section 2 challenge to multiple voting restrictions, including a law demanding perfect accuracy of information on absentee and provisional ballots); *see also* Luna v. Cegavske, No. 2:17-CV-2666-JCM-(GWF), 2017 WL 5615445 (D. Nev. Nov. 21, 2017) (assessing a section 2 challenge to a recall election in Nevada that was voluntarily dismissed).

70. *See, e.g.*, Democratic Nat'l Comm. v. Reagan, 904 F.3d 686 (9th Cir. 2018) (upholding limitations on early-ballot collecting by third parties and assigned precinct in-person voting requirements in Arizona), *reh'g en banc granted*, 911 F.3d 942 (9th Cir. 2019) (mem.); Sw. Voter Registration Educ. Project v. Shelley, 278 F. Supp. 2d 1131 (C.D. Cal.), *aff'd*, 344 F.3d 914 (9th Cir. 2003) (en banc) (rejecting challenge to error rates in California's voting machines); Navajo Nation Human Rights Comm'n v. San Juan County, 281 F. Supp. 3d 1136, 1165 (D. Utah 2017) (rejecting the defendant's motion for summary judgment and permitting a section 2 challenge to a polling place closure on the Navajo Reservation); Bear v. County of Jackson, No. 5:14-CV-5059-KES, 2015 WL 1969760 (D.S.D. May 1, 2015) (denying the defendant's motion to dismiss a section 2 challenge to closed polling places on the Oglala Sioux Tribe reservation); Brooks v. Gant, No. Civ. 12-5003-KES, 2012 WL 4482984 (D.S.D. Sept. 27, 2012) (same); Spirit Lake Tribe v. Benson County, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010) (granting a preliminary injunction in a section 2 challenge to closed polling places on the Spirit Lake Tribe reservation); United States v. Berks County, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (holding for plaintiff voters in a challenge to discriminatory treatment at the polls); *see also* McLemore v. Hosemann, No. 3:19-CV-383-DPJ-FKB, 2019 WL 5684512, at *1 (S.D. Miss. Nov. 1, 2019) (denying preliminary injunction in a constitutional and section 2 suit challenging Mississippi's Jim Crow-era requirement that candidates for statewide office must win both the popular vote and a plurality of votes in state House districts).

(6) evidence of discrimination within the political process under Senate Factors One, Three, Six, and Seven;

(7) the tenuousness of the state justification for the discriminatory voting law under Senate Factor Nine, particularly concerning any political motivation behind the law; and

(8) indicia of a jurisdiction's discriminatory purpose in conditions of racial polarization under Senate Factor Two, even if the evidence is insufficient to make a section 2 intent claim.

Each consideration is individually analyzed below for its value at the corresponding prong of the two-part vote denial results test. As advocates more readily apply section 2 to challenge vote denial laws at the same time that their opponents increasingly argue that the statute is unconstitutional, advocates may weigh these considerations to strategically retain the results test as a vital remedy in the fight against voter suppression.

A. ACTUAL BURDEN ON VOTERS

Most courts have treated the first prong of the vote denial results test as a straightforward disparate impact analysis, examining how and to what degree an election law burdens minority voters compared to the burden on white voters. But not all statistical disparities between voting groups are significant enough to satisfy this prong, and advocates should be cognizant of narrow disparate impacts that some courts do not consider actually unequal or problematic. These proposed factors concern strategy, not principle, and although it is a just and normatively attractive position to say that "even one disenfranchised voter . . . is too many,"[71] several courts deciding section 2 vote denial cases thus far have disagreed.[72] After all, "[d]isparate impacts are ubiquitous . . . so if they were all actionable, many institutions might be paralyzed by litigation and more severe discrepancies could be overshadowed by relatively trivial ones."[73]

Some section 2 advocates have proposed various cutoffs for when the disparate burden on minority voters is significant enough. Professor Nicholas Stephanopoulos argues for a "four-fifths rule" to analyze the magnitude of a racial disparity, measuring the ratio between minority and nonminority voters impacted by the voting

71. *League of Women Voters of N.C.*, 769 F.3d at 244; *see also id.* ("[W]hat matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that 'any' minority voter is being denied equal electoral opportunities.").

72. *See, e.g.*, Lee v. Va. State Bd. of Elections, 843 F.3d 592, 597, 607–08 (4th Cir. 2016); Frank v. Walker, 768 F.3d 744, 752 n.3, 755 (7th Cir. 2014); Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253, 1274 (N.D. Ala. 2018).

73. Stephanopoulos, *supra* note 15, at 1612; *see also McCrory*, 831 F.3d at 231 n.8 ("When plaintiffs contend that a law has a discriminatory *result* under § 2, they need prove *only* impact. In that context, of course plaintiffs must make a greater showing of disproportionate impact. Otherwise, plaintiffs could prevail in any and every case in which they proved any impact.").

law.[74] Professor Stephanopoulos' test, derived from EEOC guidelines on employment discrimination, suggests that the disparate impact is significant in situations where only four or fewer voters belonging to racial minority groups are able to comply with a restriction and vote per every five white voters.[75] Professor Jamelia Morgan provides an alternate approach, analyzing both the percentage of total affected registered voters and percentage of minorities that previously used an eliminated voting practice or standard.[76] This Note does not recommend a bright line for when racially disparate burdens are significant enough, but it instead encourages advocates to weigh the below considerations for bringing cases that emphasize the tangible, and often prohibitive, hardships disproportionately visited upon minority voters. Advocates should be guided by considerations of: (1) the size of the disparate impact and aggregate burden on minority voters as compared to white voters; (2) simultaneous changes to many election laws and how new restrictions combine to multiply the harm on minority groups; (3) evidence of depressed minority turnout as sufficient, but not necessary, to prove a section 2 violation; and (4) the practical barriers to the voters actually casting a ballot and the extent to which the jurisdiction has worked to mitigate the harm on minority groups.

1. Size of Disparate Impact and the Aggregate Burden on Minority Voters

Election laws resulting in large statistical disparities and aggregate burdens on minority voters should be sufficient to show a clear need for a section 2 remedy, thereby insulating the results test from constitutional risk. Consider the Texas ID litigation in *Veasey v. Abbott*, where the en banc Fifth Circuit ruled that the state's strict voter-ID law violated section 2 for its discriminatory effect on minority voting rights.[77] The Fifth Circuit noted that the district court found that overall,

74. Stephanopoulos, *supra* note 15, at 1611–13. Under the four-fifths test, first, the rates at which minority and nonminority voters are able to comply with a voting requirement (like an ID law) are computed, then the lower rate is divided by the higher rate. *Id.* at 1613. Finally, the statistical significance of the difference between the rates is calculated. *Id.* If "the rates' ratio is below four-fifths and the rates' difference is statistically significant," then the disparate impact is significant. *Id.*

75. *See id.* at 1611–13 (citing 29 C.F.R. § 1607.4(D) (2018)).

76. Morgan, *supra* note 20, at 158–59. Professor Morgan contends that the burden of an election law will be considered significant if "(a) approximately 5% of [all] registered voters in a district" are adversely affected, "or (b) that more than 50% of registered minority voters disproportionately use the standard, practice, or procedure that the jurisdiction aims to alter or eliminate." *See id.* (footnote omitted).

Professor Elmendorf has advanced a similar model for voting participation burdens under the equal protection test:

> [T]he courts would ask whether the requirements cause the number or distribution of participating voters to deteriorate by more than a given amount (*x*%). If so, the requirements would be deemed presumptively impermissible, and would face strict scrutiny. If not, the requirements would be deemed presumptively permissible, and reviewed very leniently.

Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 675 (2008).

77. Veasey v. Abbott, 830 F.3d 216, 265 (5th Cir. 2016) (en banc) (invalidating a voter-ID law for discriminatory effect, but remanding for the lower court to reevaluate the plaintiff's intent claim).

approximately 608,470 registered voters in Texas, representing approximately 4.5% of all registered voters, lacked a qualifying voter ID.[78] Of that total, "Hispanic registered voters and Black registered voters were respectively 195% and 305% more likely than their Anglo peers to lack [a qualifying] ID."[79] Even Texas's own expert statistician found that "4% of eligible White voters lacked [a qualifying] ID, compared to 5.3% of eligible Black voters and 6.9% of eligible Hispanic voters."[80] These numbers demonstrated a massive overall burden on Texas voters that fell heavily on minority groups.[81] Such a high and disproportionate burden cuts in favor of bringing section 2 litigation.

Compare the Texas ID case to a Wisconsin ID case, *Frank v. Walker*, in which the Seventh Circuit rejected a section 2 challenge to a comparable photo-ID requirement.[82] Similar to *Veasey* in terms of the magnitude of the challenged voting law's impact, the Seventh Circuit found that "300,000 registered voters in Wisconsin lack[ed] a photo ID that the state [would] accept for voting . . . [that was] approximately 9% of the state's 3,395,688 registered voters."[83] Additionally, the ID law appeared to impose stark racial disparities, given that "[i]n 2012, 9.5% of white voters, 16.2% of Black voters, and 24.8% of Hispanic voters lacked a matching ID."[84] On their face, these numbers demonstrated a large overall burden on Wisconsin voters with substantial racial disparities, and should weigh heavily toward litigation. But unlike the Fifth Circuit, the Seventh Circuit was not convinced; it rejected the plaintiffs' claims on prong one of the vote denial results test, characterizing the ID law as merely an "inconvenience" on minority and nonminority voters alike.[85]

Although the Seventh Circuit's conclusion that the ID law's burden rose only to the level of an "inconvenience" is a misapplication of the vote denial results

78. *Id.* at 250.

79. *Id.*

80. *Id.* at 251.

81. Consider also North Carolina's elimination of same-day registration for early voters and Ohio's cutbacks to early voting during the so-called "Golden Week"—a "five-day period" in which "voters could register and vote on the same day." Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 531 (6th Cir. 2014). Although the North Carolina change affected only a relatively small total number of voters, it presented a large disparate impact: "[I]n 2012, 13.4% of African American voters who voted early used same-day registration, as compared to 7.2% of white voters; in the 2010 midterm, the figures were 10.2% and 5.4%, respectively." League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 233 (4th Cir. 2014). Eliminating the measure was highly burdensome, and the racial disparity was later probative for finding a discriminatory intent behind the entire set of election regulations. *See* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 231 (4th Cir. 2016).

In Ohio, although the disparate impact was slight, the overall burden on voters was significant, given that the number of voters using Golden Week "ranged from 26,230 in 2010 to 89,224 in 2012." *Ohio State Conference of the NAACP*, 768 F.3d at 542. In both scenarios, the election changes violated section 2's results test.

82. *See* 768 F.3d 744, 755 (7th Cir. 2014).

83. *Id.* at 746.

84. Frank v. Walker, 17 F. Supp. 3d 837, 889 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

85. *Frank*, 768 F.3d at 748 (citing Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 198 (2008)).

test—as Judge Posner suggested[86]—it also represents a misuse of racial data that could cause problems for section 2 cases going forward. A closer analysis provides a simple explanation for the discrepancy between the Seventh Circuit's holding and the holding in *Veasey*: a vast majority of the voters injured by Wisconsin's ID law were white. Looking to the plaintiffs' expert's data, "among the citizen adult population in Milwaukee County, 24.5% is African American (164,341), 7.6% is Hispanic (50,738) and 63.8% is White, non-Hispanic (427,421)."[87] Of that sample, 13.2% of eligible black voters, 14.9% of Latino voters, and 7.3% of white voters lacked accepted ID.[88] In terms of total raw numbers, then, an estimated 21,693 black voters and 7,560 Latino voters in Milwaukee lacked the requisite ID to vote, which put together is still less than the approximately 31,202 white voters potentially injured by the law.[89]

The same result holds for statewide figures. By the 2016 general election, Wisconsin had a citizen voting-age population of 4,313,304 and total race demographics were 82.1% non-Hispanic white, 6.3% black, and 6.5% Latino.[90] The Seventh Circuit found that in 2014, 2.4% of white voters, 4.5% of black voters, and 5.9% of Latino voters statewide did not "currently possess either qualifying photo IDs or the documents that would permit Wisconsin to issue them."[91] Assuming the continued accuracy of these percentages during the 2016 election cycle, an estimated 84,989 total non-Hispanic white voters would have been affected by the ID law, whereas 28,770 combined minority voters would have been disenfranchised statewide.[92] The upshot is that despite the presence of a large statistical racial disparity, the overwhelming majority of voters injured by Wisconsin's new ID law were white. Although this is not and should not be an aspect of the section 2 results test analysis, it may help to explain the Seventh Circuit's incongruous ruling in *Frank v. Walker*. It also provides a cautionary example for practitioners. When a challenged law can be misinterpreted as burdening white voters as much as or more than minority voters, advocates should highlight the other considerations described below to emphasize the section 2 harm exists beyond a statistical difference.

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86. *See* Frank v. Walker, 773 F.3d 783, 786–87, 792 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc) (arguing that the Seventh Circuit's panel opinion inappropriately discounted the burden of the ID law on all voters, and particularly minority voters).

87. Rates of Possession of Accepted Photo Identification, Among Different Subgroups in the Eligible Voter Population, Milwaukee Cy., Wis.: Expert Report Submitted on Behalf of Plaintiffs at 8, Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014), ECF No. 62-10.

88. *Id.* at 18.

89. *Id.* at 37 tbl.8.

90. *See* U.S. CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES: 2012–2016 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES (2016), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk [https://perma.cc/TW7D-CUJ6].

91. Frank v. Walker, 768 F.3d 744, 752 (7th Cir. 2014).

92. These numbers are merely estimates for the purposes of making this example, assuming both that 2014 figures were similar to 2016 and that total race demographic percentages are roughly representative of the voting-eligible population for each demographic group.

Recently enacted ID laws in Virginia and Alabama also illustrate instances in which disparate and aggregate burdens may appear too nominal for advocates to establish part one of the vote denial results test. In *Lee v. Virginia State Board of Elections*, the Fourth Circuit upheld Virginia's ID law against a section 2 challenge.[93] To measure the requirement's overall burden, the court decided that the number of provisional ballots cast during two election cycles was a useful proxy, finding that only "773 provisional ballots were cast by voters without valid identification" in 2014, and that in 2015, "408 provisional ballots were cast by voters with no acceptable form of identification."[94] As to disparate impact, black voters were portrayed as only slightly more likely to lack acceptable ID, considering that "96.8% of Caucasians and 94.6% of African Americans had appropriate IDs."[95] Similarly, in *Greater Birmingham Ministries v. Merrill*, an Alabama district court found that the state's voter-ID law affected only 2.4%, 2.3%, and 1.4% of black, Latino, and white registered voters, respectively.[96] The court concluded that compliant ID ownership was overall prevalent in Alabama, and that the racial discrepancy was "miniscule."[97] In both cases, the courts framed the overall burden of the voter-ID laws and their disparate impacts as being relatively small, and rejected the plaintiffs' section 2 claims under the first prong of the results test.[98]

For this first consideration, the lesson may be that when proving prong one of the section 2 test, advocates must target and frame their cases like *Veasey*, demonstrating how both statistical disparities and aggregate burdens on minorities are substantial compared to white voters. Advocates in cases like *Frank*, where the total population of injured voters was predominantly white, or *Lee* and *Merrill*, where the challenged law was determined to have only a slightly more significant aggregate and disparate burden on minority groups, should bolster their prong-one showing with other considerations to avoid taking a case that could make the results test appear constitutionally suspect.

2. "Panoply" of Voting Restrictions Viewed Cumulatively

Practitioners should also consider how several concurrent election changes may function as a multiplier of the burden on minority voters, particularly when viewed within the electoral scheme as a whole. As the Fourth Circuit observed,

93. 843 F.3d 592, 594 (4th Cir. 2016).
94. *Id*. at 596.
95. *Id*. at 597.
96. 284 F. Supp. 3d 1253, 1269 (N.D. Ala. 2018).
97. *Id*. at 1274.
98. *See Lee*, 843 F.3d at 600–01; *Merrill*, 284 F. Supp. 3d at 1277. Also, consider the unsuccessful section 2 challenges of California's voting-machine errors and Arizona's proof-of-residency requirement, where the Ninth Circuit ruled that the disparate impact was either minor or nonexistent, and the overall burden was low. *See* Sw. Voter Registration Educ. Project v. Shelley, 278 F. Supp. 2d 1131, 1143 (C.D. Cal.) (finding the total burden affected 40,000 out of eight million voters, and that "many if not most of [the state's] votes will be cast by non-minority voters"), *aff'd*, 344 F.3d 914 (9th Cir. 2003); Gonzalez v. Arizona, No. CV-06-1268-PHX-ROS, 2008 WL 11395512, at *23–24 (D. Ariz. Aug. 20, 2008), *aff'd in part, rev'd in part*, 624 F.3d 1162 (9th Cir. 2010) ("[E]ven if everyone prevented from registering by [the proof-of-residency requirement] was allowed to register, the percentage of the electorate that was Latino would only increase by 0.1% . . . .").

"[a] panoply of [election] regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting participation and competition."[99]

Recent vote denial cases from Ohio reveal the influence of this factor. In the first case, which struck down a 2014 election law that curtailed multiple early voting and registration options, the court focused on the cumulative effect of the law's burden.[100] Because Ohio had simultaneously eliminated weekend voting, cancelled a weeklong early-voting period that had previously turned out thousands of minority voters, and reduced the overall number of hours to register and vote, the district court held for the plaintiffs (who represented voters), and found that the sum results of the law were "fewer voting opportunities for African Americans than other groups of voters."[101] The Sixth Circuit also ruled for the plaintiffs on appeal, seemingly influenced by the reality that the cumulative effects of Ohio's changes were particularly burdensome on minority voters.[102]

However, in subsequent decisions in cases challenging additional changes in Ohio election laws, the Sixth Circuit separately upheld the various increased voting burdens and was not concerned by the cumulative effect of these laws.[103] By failing to analyze the changes in concert, one dissent recognized that the majority had "engage[d] in a piecemeal freeze frame approach . . . finding that each new requirement alone in a vacuum does not meet the standard for disparate impact."[104] As these cases illustrate, advocates should prioritize showing courts how multiple election changes work together to fence out minority voters and effectively eliminate opportunities to cast a ballot.[105] Doing so will both strengthen the section 2 claim and insulate it from constitutional risk.

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99. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 242 (4th Cir. 2014) (alteration in original) (quoting Clingman v. Beaver, 544 U.S. 581, 607–08 (2005) (O'Connor, J., concurring in part and concurring in the judgment)).

100. Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 553–54, 556–57 (6th Cir. 2014).

101. Ohio State Conference of the NAACP v. Husted, 43 F. Supp. 3d 808, 851 (S.D. Ohio 2014).

102. *Ohio State Conference of the NAACP*, 768 F.3d at 553–54, 556–57.

103. *See* Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 618 (6th Cir. 2016) (upholding Ohio's curtailment of poll-worker assistance for indigent voters, restrictive ID requirements for absentee and provisional ballots that demand perfect accuracy between ID forms and state voting records, and the reduced time period during which voters could correct ballot mistakes); Ohio Democratic Party v. Husted, 834 F.3d 620, 628 (6th Cir. 2016) (noting that additional cuts to early voting eliminated only "one component of Ohio's progressive voting system" and emphasizing the "many options that remain available to Ohio voters").

104. *Ne. Ohio Coal.*, 837 F.3d at 658 (Keith, J., concurring in part and dissenting in part).

105. *See League of Women Voters*, 769 F.3d at 242 (describing how the "combined effect" of regulations can be "severely restrict[ive]"). However, judicial opinions differ regarding the propriety of creating a remedy to address the cumulative effect of voting restrictions. *Compare* One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 951 (W.D. Wis. 2016) ("A remedy directed at the diffuse cumulative effects of Wisconsin's election regime would invite . . . a rewrite of the state's election laws."), *with* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 234 (4th Cir. 2016) ("[A] court must be mindful of the number, character, and scope of the modifications enacted together in a single challenged law . . . . Only then can a court determine whether a legislature would have enacted that law regardless of its impact on African American voters."). Cumulative effects can also show discriminatory "intent-lite" evidence relevant to this Note's eighth strategic litigation factor. *See infra* Section III.B.4.

3. Depressed Total Minority Turnout or "Rate of Change" Statistics

Evidence that a challenged law has reduced or is likely to reduce turnout by minority groups could also be used to demonstrate a heavy burden under the first prong of the results test and the urgent need for section 2 protection. Importantly, section 2's totality analysis does not include a facial evidentiary requirement and does not prompt challengers to present statistical evidence of turnout reduction. The statutory text explicitly prohibits either "denial or *abridgement*" of the right to vote, such that minority voters have "less opportunity . . . to *participate* in the political process" than white voters.[106] In other words, section 2 forbids laws that burden minority voters who are ultimately able to overcome the hurdle just as much as it prohibits laws that flat-out deny people the ability to vote.[107] Accordingly, advocates must be cautious when using turnout data. Data should not be presented in a manner that would make courts begin to expect this evidence as a component of section 2 results claims, given that some proponents of vote denial laws have long tried to manipulate the results test and inject a reduced-turnout requirement into section 2.[108] But even if evidence of turnout disparities or reduction is not a necessary element for prong one of the results test, it should be sufficient.[109] Stifled turnout, either manifested as a decrease in total minority voters or a reduced rate of change from prior election cycles, is a useful consideration for presenting a strong vote denial claim.

In *North Carolina State Conference of the NAACP v. McCrory*, for example, the Fourth Circuit analyzed the disparate impact imposed by a set of North Carolina laws that included a voter-ID requirement, but the court ultimately enjoined the laws because of the lawmakers' discriminatory intent.[110] Regarding its disparate impact analysis, the Fourth Circuit ruled that the district court erred

106. Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301 (2012)) (emphasis added).

107. *See* Ho, *supra* note 20, at 811 ("'Section 2 also explicitly prohibit[s] *abridgement* of the right to vote,' which includes practices that make voting more *burdensome*, even if not altogether impossible." (quoting Veasey v. Abbott, 830 F.3d 216, 253 (5th Cir. 2016) (en banc))); Karlan, *supra* note 30, at 771–72.

Justice Scalia also recognized how laws that make voting more difficult for minority groups would violate section 2, even if it were possible for voters to still turn out and cast a ballot. *See* Chisom v. Roemer, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("If, for example, a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites, blacks would have less opportunity '*to participate* in the political process' than whites, and § 2 would therefore be violated . . . .").

108. *See, e.g.*, Frank v. Walker, 768 F.3d 744, 751 (7th Cir. 2014) (finding important that the district court "judge did not find that photo ID laws measurably depress turnout in the states that have been using them"); Johnson, *supra* note 54, at 19 (suggesting an increased role for turnout evidence); *cf. McCrory*, 831 F.3d at 232 (explicitly rejecting a turnout evidentiary requirement); *Veasey*, 830 F.3d at 260 (same).

109. *See* Ho, *supra* note 20, at 809–15 ("[A] myopic focus on turnout statistics would transform a potentially relevant piece of evidence into something dispositive. Turnout evidence may in some circumstances be probative of whether a voting restriction burdens voters—but it is not—and cannot be—the sine qua non for that inquiry."); Karlan, *supra* note 30, at 768–77 (describing the cautious use of turnout data); Tokaji, *supra* note 20, at 474–76 (same).

110. 831 F.3d at 215.

by giving outsized attention to the 1.8% increase in aggregate black voter turnout while the challenged laws were in effect.[111] Rather, the court held that the 1.8% increase in minority voter turnout was actually evidence of the discriminatory effect of the laws in that it represented a disturbing "*decrease* in the *rate* of change" of minority participation, because "in the prior four-year period, African American midterm voting had increased by 12.2%."[112]

Similarly, in *Frank v. Walker*, the Wisconsin ID litigation discussed above, Judge Posner dissented from the denial of rehearing en banc, explaining that the panel below had misinterpreted the record regarding turnout.[113] Even Wisconsin's own expert presented evidence that the law *would* suppress total minority turnout, and such evidence should be used to show that the ID requirement violated section 2.[114] Albeit rare, indications that a law will contribute to reduced minority voter turnout totals (as highlighted by Judge Posner in *Frank*), or reduced rate of change (like in *McCrory*), should be a strong consideration in favor of liability. Making this showing will set the results claim on firm constitutional ground by fulfilling even the distorted evidentiary requirement sought by section 2's opponents.

4. Emphasizing Practical Voting Burdens, Considering the Extent of Alternatives and Mitigation, and Avoiding "Preference" Framing

Several courts have denied section 2 challenges by concluding that, even though a voting law causes a disparate impact, it merely eliminates a subjective "preference" or imposes a "disparate inconvenience" on minority voters that is insufficient to satisfy the results test.[115] As a response to this trend, advocates

111. *See id.* at 232–33. Although *McCrory* was a successful section 2 vote denial claim based on discriminatory intent, its discussion of turnout is nonetheless relevant because it is related to the Fourth Circuit's lengthy analysis of the laws' discriminatory effects as a component of the intent finding. *See id.* at 230–34.

112. *Id.* at 232.

113. Frank v. Walker, 773 F.3d 783, 792–93 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

114. Transcript of the Trial Court at 1475–77, Frank v. Walker, No. 11-cv-1128 (E.D. Wis. Nov. 12, 2013). Dale Ho, Director of the Voting Rights Project at the ACLU, also noted the relevance of this expert testimony: "Wisconsin's own expert, who studied Georgia's voter ID law, wrote an academic paper arguing that it 'had the effect of suppressing turnout[.]' He testified at trial that Georgia's ID law likely suppressed about 20,000 votes in 2008, and he agreed that 'as a matter of [his] professional opinion, the Wisconsin voter ID law . . . is likely to suppress voter turnout in the State of Wisconsin.'" Ho, *supra* note 20, at 810 n.68 (citations omitted).

115. *See, e.g.*, Lee v. Va. State Bd. of Elections, 843 F.3d 592, 601 (4th Cir. 2016) ("We conclude that § 2 does not sweep away all election rules that result in a disparity in the convenience of voting."); Frank v. Walker, 768 F.3d 744, 749 (7th Cir. 2014) (finding voter-ID law merely affected a "matter of choice rather than a state-created obstacle"); Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253, 1280 (N.D. Ala. 2018) ("But where, as here, [the state] allows everyone to vote and provides free photo IDs to persons without them . . . [the challenged law] provides every voter an equal opportunity to vote and thus does not violate § 2 . . . ." (quoting *Lee*, 843 F.3d at 600–01)); *see also* Ohio Democratic Party v. Husted, 834 F.3d 620, 630 (6th Cir. 2016) (finding that, on plaintiff's Fourteenth Amendment claim, "[t]he district court placed inordinate weight on its finding that some African-American voters *may prefer* voting on Sundays, or avoiding the mail, or saving on postage, or voting after a nine-to-five work day" so that any burden resulted from a "matter of choice").

should prove how the challenged law imposes a large practical burden on minority voters that can only be overcome through onerous or ineffectual alternatives. As detailed below, advocates can bolster their section 2 claim and insulate the results test from scrutiny by: (1) emphasizing the tangible injury and financial costs borne by minority voters; (2) showing that the jurisdiction lacks meaningful alternatives to avoid or overcome an electoral change (for example, by not offering reasonable impediment exceptions, provisional ballots, or vote-by-mail options); (3) highlighting a jurisdiction's failure to educate voters or carefully implement the law to mitigate abridgments of minority voting rights; and (4) demonstrating that minority groups will have more difficulty adjusting to the elimination of an electoral mechanism because those voters had used it overwhelmingly.

a. Practical Burdens and the Lack of Alternative Voting Opportunities

Section 2 vote denial claims are more insulated from constitutional risk if they challenge laws with practical burdens that are not diminished by exceptions or alternatives. First, the best way to illustrate the practical burden for minority voters is to highlight the relative financial costs that certain voters will likely incur to comply with a voting requirement. Costs are particularly, but not exclusively, pertinent to voter photo-ID litigation.[116] In *Veasey*, for example, the district court credited testimony from one putative minority voter who lived on $321 per month and could not afford the fee to replace her birth certificate as a prerequisite for obtaining compliant voter-ID.[117] She stated: "I had to put the $42.00 where it was doing the most good. It was feeding my family, because we couldn't eat the birth certificate . . . [a]nd we couldn't pay rent with the birth certificate, so, [I] just wrote [voting] off."[118] In contrast, the Virginia ID law upheld in *Lee* imposed much lower costs, and election officials made affirmative efforts to provide free IDs without requiring the burdensome collection of underlying documents.[119] Accordingly, the Fourth Circuit found the burdens on voters to be insubstantial.[120]

116. *See* USCCR REPORT, *supra* note 8, at 92 ("[M]any opponents of voter ID laws equate these laws to the poll taxes of the Jim Crow era. They argue that even if the ID itself is offered free of charge, there are other costs citizens must pay in order to receive these IDs. For instance, expenses for documentation (e.g., birth certificate), travel, and wait times are significant—especially for low-income voters (who are often voters of color)—and they typically range anywhere from $75 to $175. . . . [E]ven after being adjusted for inflation, these figures represent far greater costs than the $1.50 poll tax outlawed by the 24th Amendment in 1964." (footnote omitted)).

117. *See* Veasey v. Perry, 71 F. Supp. 3d 627, 665 (S.D. Tex. 2014).

118. *Id.* (alterations in original); *see also Frank*, 773 F.3d at 792 (Posner, J., dissenting from denial of rehearing en banc) (explaining in detail the heavy burdens of getting photo ID and how the Seventh Circuit panel misapprehended these practical barriers).

119. *See Lee*, 843 F.3d at 603 (finding that the legislature "allowed a broad scope of IDs to qualify; it provided free IDs to those who did not have a qualifying ID; it issued free IDs without any requirement of presenting documentation; and it provided numerous locations throughout the State where free IDs could be obtained"). The *Merrill* district court made a similar finding regarding the financial costs of the Alabama ID law. *See Merrill*, 284 F. Supp. 3d at 1279.

120. *See Lee*, 843 F.3d at 603.

A lack of state effort to reduce costs on eligible minority voters could be influential in framing the burden of a discriminatory law and reinforcing the need to apply section 2.

Second, reasonable impediment exceptions to a law—which permits a voter's noncompliance with a requirement under certain circumstances—can reduce its practical burden.[121] In a later phase of the *Veasey* Texas ID litigation, a different Fifth Circuit panel found that the state legislature's addition of a reasonable impediment provision purportedly cured the discriminatory burden of the original law.[122] The amendment allowed voters without an ID to cast a valid ballot if they could attest under penalty of perjury that their lack of ID was because of one of seven listed grounds.[123] A three-judge panel made similar findings concerning South Carolina's ID law, where a reasonable impediment provision enabled the requirement to pass even the more protective section 5 retrogression test.[124]

But these exception provisions can only mitigate the law's burden if the jurisdiction also has plans for educating officials to guarantee nondiscriminatory administration.[125] Contrast Texas's ID law amendment with North Carolina's similar attempt to save its ID law with a reasonable impediment exception. North Carolina's amendment was inadequate under the Fourth Circuit's disparate impact analysis because it exacted its own burdens on voters by requiring them to go through another confusing multi-step process, allowing for potentially abusive third-party challenges, and threatening severe criminal liability for any errors

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121. Reasonable impediment provisions exempt some voters from an otherwise strict election law by, for example, permitting voters to sign an affidavit explaining their noncompliance and attesting to their eligibility to vote. These exceptions have typically, but not exclusively, been applied to voter photo-ID requirements. *See, e.g.*, Veasey v. Abbott, 888 F.3d 792, 802–03 (5th Cir. 2018) (ruling that Texas's effort to permit a declaration of reasonable impediment to avoid the voter-ID requirement had sufficiently tracked the district court's interim remedy and eliminated the voting burden on plaintiffs in the case); South Carolina v. United States, 898 F. Supp. 2d 30, 32 (D.D.C. 2012) (upholding a voter-ID law against a section 5 retrogression challenge where "voters simply must sign an affidavit at the polling place and list the reason that they have not obtained a photo ID").

122. *See Veasey*, 888 F.3d at 802–04.

123. *See id.* at 802. The qualifying categories in Texas are: "(A) lack of transportation; (B) lack of birth certificate or other documents needed to obtain the identification . . . ; (C) work schedule; (D) lost or stolen identification; (E) disability or illness; (F) family responsibilities; and (G) the identification prescribed by [the approved voter-ID list] has been applied for but not received . . . ." TEX. ELEC. CODE § 63.001 (West 2019).

124. *See South Carolina*, 898 F. Supp. 2d at 32 (rejecting a section 5 challenge to voter-ID law); *see also id.* at 54 (Bates, J., concurring) ("The key ameliorative provisions were added during that legislative process and were shaped by the need for pre-clearance. And the evolving interpretations of these key provisions of [the ID law], particularly the reasonable impediment provision, subsequently presented to this Court were driven by South Carolina officials' efforts to satisfy the requirements of the Voting Rights Act.").

125. *See, e.g.*, Richard L. Hasen, *Softening Voter ID Laws Through Litigation: Is It Enough?*, 2016 WIS. L. REV. FORWARD 100, 114 (observing that "South Carolina's voter information program barely mentions the reasonable impediment exemption in fine print in voter information, and the governor of the state has incorrectly stated that voters must have photographic identification in order to be allowed to vote. Some voters are confused, with confusion beginning with the fact that some voters do not know what the word 'impediment' means and therefore have difficult time taking advantage of the exception" (footnote omitted)).

made on the voter's impediment declaration.[126] In sum, advocates should consider the extent to which a specific reasonable impediment exception mitigates the law's burden, and then advocates should emphasize the potential for future discriminatory applications of the exception or the ancillary burdens it itself imposes.

Third, the ability to easily participate in elections by other means and avoid the effects of a new or changed requirement may also reduce some of the practical burdens of a challenged law. For example, the ability to vote absentee instead of voting in-person and showing ID may ameliorate the tangible burden of a voter-ID law. In *Frank v. Walker*, Judge Posner illustrated this point by distinguishing the ID requirements employed in Indiana and in Wisconsin.[127] Posner observed that "Indiana's statute does not require absentee voters to present photo identification, and permits voters to vote absentee" for a long list of possible reasons.[128] Conversely, in Wisconsin, absentee voters are still "require[d] . . . to submit a photo ID the first time they request an absentee ballot, and [sometimes] in subsequent elections as well."[129] Although both ID laws have taken effect,[130] Judge Posner explained how Wisconsin's law imposes more practical burdens because

126. *See* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 240–41 (4th Cir. 2016) (holding that North Carolina's reasonable impediment exception did not eliminate the burden of the ID law because "it requires voters to take affirmative steps to justify to the state why they failed to comply with a provision that we have declared was enacted with racially discriminatory intent and is unconstitutional"); *id*. at 241 n.14 ("While declaring that a reasonable impediment 'prevent[ed]' her from obtaining an acceptable photo ID, the voter must heed the form's warning that 'fraudulently or falsely completing this form is a Class I felony' under North Carolina law." (alteration in original) (citation omitted)); *see also Veasey*, 888 F.3d at 820 (Graves, J., concurring in part and dissenting in part) (warning that the reasonable impediment exception is inadequate because "in place of [the original ID law's burden, voters] must enter a separate line, fill out a separate declaration and state, under threat of a state jail felony for perjury, which of an exhaustive list of reasons explains *exactly* why they were unable to obtain one of the acceptable forms of photo ID").

127. *See* Frank v. Walker, 773 F.3d 783, 784–87 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc); *see also* Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 188–89 (2008) (affirming Judge Posner's Seventh Circuit opinion that rejected a facial constitutional challenge to Indiana's voter-ID law).

128. *Frank*, 773 F.3d at 785.

129. *Id*. Moreover, consider the many voting changes challenged in Wisconsin in 2016. The district court there found that the new documentary proof-of-residency requirement was neither burdensome nor a violation of section 2 because voters could meet the requirement using a wide range of proof. *See* One Wis. Inst., Inc. v. Thomsen, 198 F. Supp. 3d 896, 954–55 (W.D. Wis. 2016). In contrast, the district court held that Wisconsin's new durational-residency requirement violated section 2 because it imposed greater hardship on minority voters without providing a good alternative, given that recently moved voters would have to travel to their former municipality to vote. *See id*. at 942. Because minorities are "more likely to lack access to transportation and to have less flexible work schedules, traveling to another municipality is not always feasible." *Id*. at 956.

130. *See Crawford*, 553 U.S. at 188–89 (rejecting a facial Fourteenth Amendment challenge to Indiana's photo-ID law); Frank v. Walker, 768 F.3d 744, 755 (7th Cir. 2014) (rejecting Fourteenth Amendment and section 2 challenges to Wisconsin's photo-ID law).

For critical reflections on *Crawford*, see LICHTMAN, *supra* note 7, at 192–93 (noting that Justice Stevens regrets writing the plurality opinion upholding Indiana's ID law to support the state's alleged anti-voter fraud interest); RICHARD A. POSNER, REFLECTIONS ON JUDGING 84–85 (2013) ("I plead guilty to having written the majority opinion (affirmed by the Supreme Court) upholding Indiana's requirement that prospective voters prove their identity with a photo ID—a type of law now widely regarded as a means of voter suppression rather

there are fewer alternative voting options in the overall election scheme for a voter to avoid the challenged law's disparate impact.[131] Such a juxtaposition can illustrate a challenged law's high practical burdens and will help bolster a section 2 claim.

Fourth, the ability to cast provisional ballots without significant post-election requirements may also mitigate the practical burdens of a vote-denial law. In *Lee*, the Fourth Circuit upheld a relatively permissive voter-ID requirement after observing that "[w]hen a voter shows up without identification, he or she is able to cast a provisional ballot, which can be cured by later presenting a photo ID."[132] Additionally, the putative voter "can obtain a free voter ID with which to cure the provisional ballot."[133] During two election cycles using the ID law in Virginia, over half of all provisional ballot voters completed the process and the number of uncounted provisional ballots totaled only a few hundred.[134] A voting rights advocate may rightfully argue that, on principle, this is still too many disenfranchised voters. But section 2 claimants must be strategic and take into account how courts are likely to consider the ways in which a burdened voter may nonetheless effectively use provisional ballots to vote.

Fifth, for voter-ID laws specifically, the range of permissible IDs could also dictate the degree of a law's practical burden. When jurisdictions "pick and choose which types of identification are acceptable," they are effectively "pick [ing] and choos[ing] which voters are favored and which are disfavored," often with significant racial disparities.[135] In Virginia, for example, the state legislature permitted university IDs, which were disproportionately used by black voters and would reduce the discriminatory effect of the ID requirement.[136] But not every legislature will take this correct step. Texas's photo-ID law, which is strict compared to Virginia's or to the state's own previously more accommodating requirement, was especially troublesome concerning its circumscribed list of useable

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than of fraud prevention." (footnote omitted)); Richard W. Trotter, *Vote of Confidence:* Crawford v. Marion County Election Board*, Voter Identification Laws, and the Suppression of a Structural Right*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 515, 520 (2013) (arguing that *Crawford* is "ripe" to be overturned because the decision resulted from unique evidentiary shortcomings); Robert Barnes, *Stevens Says Supreme Court Decision on Voter ID Was Correct, but Maybe Not Right*, WASH. POST (May 15, 2016), https://www.washingtonpost.com/politics/courts_law/stevens-says-supreme-court-decision-on-voter-id-was-correct-but-maybe-not-right/2016/05/15/9683c51c-193f-11e6-9e16-2e5a123aac62_story.html?utm_term=.4389985f4de2 (quoting Justice Stevens's description of his controlling opinion in *Crawford* as a "fairly unfortunate decision").

131. *See Frank*, 773 F.3d at 785–86 (Posner, J., dissenting from denial of rehearing en banc); *see also* Common Cause/Georgia v. Billups, 554 F.3d 1340, 1350 (11th Cir. 2009) (in a Fourteenth Amendment voter-ID case, recognizing that the burden of the law was reduced because "absentee voting . . . is an option for voters who do not have an acceptable form of identification").

132. Lee v. Va. State Bd. of Elections, 843 F.3d 592, 600 (4th Cir. 2016).

133. *Id.*

134. *Id.* at 596.

135. Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 474 (2016).

136. *See Lee*, 843 F.3d at 604 (rejecting a discriminatory intent claim against the Virginia ID law in part because the law "allows the use of photo IDs provided by Virginia's public and private universities, which are, according to plaintiffs' own witnesses, disproportionately possessed by young people and African Americans").

IDs.[137] Although university IDs did not qualify under the state requirement, concealed carry permits did; this inconsistency helped convince the district court that the law was motivated by a racially discriminatory purpose.[138] Limiting the list of acceptable IDs to those that disfavor minority voters can demonstrate a law's high practical burdens for the section 2 results test claim while also providing strong circumstantial evidence of discriminatory intent.[139]

Sixth, scrutinizing the circumstances of the jurisdiction's pre-implementation rollout of an election change can also help advocates emphasize a voting law's practical burden and the need for the adaptable section 2 totality analysis. For example, the *Veasey* court was troubled both by Texas's lack of affirmative efforts to mitigate the burdens imposed by its new law, and the fact that the bill had been rushed through the state legislature as soon as *Shelby County* was decided.[140] And although Texas's IDs were nominally free, "the State devoted little funding or attention to educating voters . . . resulting in many Plaintiffs lacking information about these supposed accommodations until they were informed about them during the course of this lawsuit."[141] Accordingly, the Fifth Circuit found that Texas's first implementation of its ID law was "insufficient" and resulted in voters being erroneously turned away at the polls.[142] Such

137. *See* Texas v. Holder, 888 F. Supp. 2d 113, 115 (D.D.C. 2012) (explaining that prior to the proposed SB 14, in-person voters could cast ballots by presenting a free voter registration card, or by completing an affidavit along with a range of qualifying IDs, including utility bills, expired driver's license, official government mail, any "form of identification containing the person's photograph that establishes the person's identity," or "any other form of identification prescribed by the secretary of state" (quoting TEX. ELECTION CODE § 63.0101 (2012))), *vacated and remanded*, 570 U.S. 928 (2013).

138. *See* Veasey v. Perry, 71 F. Supp. 3d 627, 658 (S.D. Tex. 2014); Derfner & Hebert, *supra* note 135, at 474.

139. *See* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 229, 237–38 (4th Cir. 2016) (finding the North Carolina legislature acted with discriminatory intent because it "completely revised the list of acceptable photo IDs [after *Shelby County*], removing from the list the IDs held disproportionately by African Americans, but retaining those disproportionately held by whites"); *Veasey*, 71 F. Supp. 3d at 702 (finding that Texas's ID law was enacted with a discriminatory purpose in part because "its list of acceptable IDs was the most restrictive of any state and more restrictive than necessary to provide reasonable proof of identity"), *aff'd in part, rev'd in part sub nom.* Veasey v. Abbott, 830 F.3d 216, 272 (5th Cir. 2016) (en banc) (remanding on intent claim to reweigh evidence, including the permissible list of IDs).

140. *See Veasey*, 830 F.3d at 256 (describing the "lackluster educational efforts" of Texas's implementation); *id.* at 258–59 (describing the "procedural maneuvers employed by the Texas Legislature" to hurriedly enact its voter-ID law as "virtually unprecedented"); USCCR REPORT, *supra* note 8, at 60–63 (detailing the timeframe of the voter-ID requirement becoming law in Texas, where "[w]ithin two hours after the Supreme Court issued its decision in the *Shelby County* case, the Texas state Attorney General tweeted that the state would immediately reinstitute its strict photo ID law"). Other courts have expressed similar concerns about voting laws passed through the use of procedural irregularities in North Carolina and Colorado. *See* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 242–43 (4th Cir. 2014) (considering evidence of expedited legislative process vis-à-vis the burden on minority voters and proof of conditions of discrimination); Sanchez v. Colorado, 97 F.3d 1303, 1325 (10th Cir. 1996) (ruling, in a vote-dilution case, that "[i]f [a challenged] procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact").

141. *Veasey*, 830 F.3d at 256.

142. *Id.*

circumstances can demonstrate how a law locks voters out of the political process, even if a new requirement may appear manageable on its face.

Compare *Veasey* to the ID laws upheld in Virginia,[143] Alabama,[144] and Georgia.[145] In these jurisdictions, the government more carefully implemented its new voter-ID requirement to be less burdensome by publicizing the changes and providing some educational programs for voters and election officials. These types of affirmative efforts may indicate to the court that an election law's perceived burden on minority voters will not be too severe, and advocates should also be conscious of this effect.

b. Distinguishing Perceived Subjective Preferences from Voting Necessity

Several courts have also expressed the view that a law's practical burden on minority voters will be insignificant if the voters only subjectively "prefer" certain eliminated franchise opportunities.[146] The dichotomy between the recent section 2 litigation in North Carolina and Ohio demonstrates this preference-framing issue. The Fourth Circuit in *McCrory* recognized that "60.36% and 64.01% of African Americans voted early in 2008 and 2012, respectively, compared to 44.47% and 49.39% of whites[,]" and specifically, "African Americans disproportionately used the first seven days of early voting" that the new law eliminated.[147] The Fourth Circuit ruled that minority voters' disproportionate use of

143. Lee v. Va. State Bd. of Elections, 843 F.3d 592, 596 (4th Cir. 2016) (noting that the Virginia Board of Elections had "launched a state-wide pre-election campaign informing voters of the photo identification requirement," which "included the public posting of some 500,000 posters describing the law and the sending of 86,000 postcards to persons on the active voter list who" lacked compliant ID (internal quotation marks and alterations omitted)).

144. Greater Birmingham Ministries v. Merrill, 284 F. Supp. 3d 1253, 1279 (N.D. Ala. 2018) (finding that Alabama had "sufficiently advertised the need for a photo ID and how to get one, and the law has been used in elections in Alabama since 2014 (so that no person can reasonably claim ignorance of the law's provisions)").

145. In Georgia, the district court found that:

> [E]vidence revealed that the State made exceptional efforts to contact voters who potentially lacked a valid form of Photo ID . . . and to inform those voters of the availability of a Voter ID card, where to obtain additional information, and the possibility of voting absentee without a Photo ID. . . . [T]he State also provided information to voters in general by advertising on [the radio], and by partnering with libraries and nongovernmental organizations. Additionally, the Photo ID requirement has been the subject of many news reports, editorials, and news articles. Under those circumstances, Plaintiffs are hard-pressed to show that voters in Georgia . . . are not aware of the Photo ID requirement.

Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1378–79 (N.D. Ga. 2007) (citation omitted), *vacated in part on other grounds*, 554 F.3d 1340 (11th Cir. 2009).

146. *See, e.g.*, Frank v. Walker, 768 F.3d 744, 749 (7th Cir. 2014) (noting that "for most eligible voters not having a photo ID is a matter of choice rather than a state-created obstacle," and implying that the burden was functionally inconsequential because "people who do not plan to vote also do not go out of their way to get a photo ID that would have no other use to them"); Ortiz v. Phila. Office of City Comm'rs Voter Registration Div., 28 F.3d 306, 315 (3d Cir. 1994) (concluding that minority voters had subjectively decided not to maintain their registration and, therefore, the registration purge's disparate impact was not an actual burden on the right to vote).

147. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 216 (4th Cir. 2016).

early voting was "no mere preference"; rather, "[r]egistration and voting tools may be a simple preference for many white North Carolinians, but for many African Americans, they are a necessity."[148]

Compare this to Ohio's cuts to early voting, where a small overall percentage of the electorate used the eliminated practice and "19.55% of blacks reported voting [by early in-person] absentee ballots in Ohio."[149] The Sixth Circuit concluded that the challenged burdens were minimal, and held that all voters who used the eliminated opportunity, "regardless of race, were just as likely to vote in 2014 without" it.[150] Therefore, the court framed the cutbacks as impacting only "preferences, [and their] 'burden' clearly result[ed] more from a matter of choice rather than a state-created obstacle."[151] Certainly, framing the issue as one of subjective "preference" influenced the court's rejection of the plaintiffs' section 2 results claims.

The difference in framing a voting mechanism as a preference or as a necessity is not easily delineated in many situations. But contrasting section 2 cases opposing polling place closures to those challenging the elimination of straight-party voting on ballots may help illustrate the core difference. Closing polling places often does not merely remove a minority-preferred voting mechanism—it can be determinative of the injured voter's ability to ultimately cast a ballot because there are no realistic alternatives.[152] This is particularly true for closures on Native American reservations, where residents are often found to have few resources to travel to vote in distant towns, and frequently do not have state-recognized addresses for vote-by-mail alternatives.[153]

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148. *Id*. at 233 (internal quotation marks omitted).

149. Analysis of Effects of Senate Bill 238 and Directive 2014-06 on Early In-Person (EIP) Absentee Voting By Blacks and Whites in Ohio of Daniel A. Smith, Ph.D. at 31, Ohio State Conference of the NAACP v. Husted, 43 F. Supp. 3d 808, 830 (S.D. Ohio 2014) (No. 2:14-CV-00404), 2014 WL 6696318.

150. Ohio Democratic Party v. Husted, 834 F.3d 620, 639 (6th Cir. 2016).

151. *Id*. at 630 (internal quotation marks omitted) (quoting *Frank*, 768 F.3d at 749).

152. *See* SCOTT SIMPSON ET AL., THE LEADERSHIP CONFERENCE EDUC. FUND, THE GREAT POLL CLOSURE 4 (2016), http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf [https://perma.cc/JF6S-NCPB] (finding that since *Shelby County*, 868 polling places have been closed in counties previously covered by section 5); Christopher Ingraham, *Thousands of Polling Places Were Closed over the Past Decade. Here's Where*., WASH. POST (Oct. 26, 2018, 5:00 AM), https://www.washingtonpost.com/business/2018/10/26/thousands-polling-places-were-closed-over-past-decade-heres-where/?utm_term=.144f437c030b (analyzing disenfranchising effect of closing polling places in many regions).

153. *See, e.g*., Spirit Lake Tribe v. Benson County, No. 2:10-cv-095, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010) ("The Tribe has provided evidence that the closure of the voting places on the reservation will have a disparate impact on members of the Spirit Lake Tribe because a significant percentage of the population will be unable to get to the voting places in Minnewauken to vote."); Navajo Nation Human Rights Comm'n v. San Juan County, 281 F. Supp. 3d 1136, 1165 (D. Utah 2017) (permitting section 2 claims to proceed to trial on theory that closing polling places in favor of a mail-only voting system disparately burdens Native American voters); Brooks v. Gant, No. CIV. 12-5003-KES, 2012 WL 4482984, at *7 (D.S.D. Sept. 27, 2012) (permitting a section 2 claim to survive a motion to dismiss where the early-voting period on a Native American reservation was shorter than in similar counties, and it required voters missing the window to travel one to three hours to the closest alternative early-voting site); *see also* Brakebill v. Jaeger, 932 F.3d 671, 681–82 (8th Cir. 2019) (Kelly, J., dissenting) (describing the additional cost and transportation barriers faced by Native American voters in North Dakota).

By contrast, in rejecting challenges to Wisconsin's and Michigan's elimination of straight-party voting on the ballot, the courts looked past evidence of racially disparate impacts by ruling that minority groups merely subjectively preferred the straight-party ballot option but did not rely on it.[154] Troublingly for section 2, the Sixth Circuit in the Michigan case appears to go a step further to suggest that these types of electoral changes are *categorically* exempt from section 2 because the "language of [section 2] alone can hardly be read to cover a change in ballot format that applies to all voters, that keeps no one away from the polls, and that prevents no one from registering their vote."[155] Advocates should be particularly careful to avoid claims such as the straight-party voting challenge, which section 2 opponents can easily frame as merely enforcing subjective preferences of minority voters and may be viewed by courts as stretching section 2 beyond its purpose of prohibiting laws that more directly hinder a person's ability to participate in the political process.[156]

* * *

In sum, these four main recommended considerations under the first prong of the results test can help emphasize the degree of an election law's severe and concrete burden on minority groups, and the inability for those voters to adapt to an electoral change to ultimately vote. Showing the above-described circumstances can demonstrate that the jurisdiction is disproportionately preventing minority voters from exercising their fundamental right to vote, and can reaffirm the urgent need for applying section 2's flexible and incisive results test while insulating the provision from constitutional challenge.

B. SENATE FACTORS AND CONDITIONS OF DISCRIMINATION

The four remaining recommended considerations all fall under the second prong of the vote denial results test, which analyzes how conditions of discrimination relate to the challenged election law's disparate impact on minority voters. For this showing, most courts have agreed that plaintiffs must prove at

154. *See* Mich. State A. Philip Randolph Inst. v. Johnson, 749 F. App'x 342, 348 (6th Cir. 2018); One Wis. Inst. v. Thomsen, 198 F. Supp. 3d 896, 957 (W.D. Wis. 2016). In Michigan, a district court found that statewide, only "49.2% of [] voters used the straight-party option in the 2016 general election," whereas in African American communities, "77.7% of voters used the straight-party option." Mich. State A. Philip Randolph Inst. v. Johnson, 326 F. Supp. 3d 532, 548 (E.D. Mich. 2018). But the Sixth Circuit was not persuaded, finding that there was no discriminatory burden on minority voters. *See Johnson*, 749 F. App'x at 354.

155. *Johnson*, 749 F. App'x at 353. The same could be said for the section 2 claim against Nevada's recall process in *Luna v. Cegavske*. The *Luna* plaintiff claimed that the recall process violates section 2 because "minority voters are more likely than their white counterparts to have their votes nullified by recall elections and more likely to be forced to bear the undue burden of having to vote again in a recall election to ensure that their Senators serve full terms." Plaintiffs' Motion for Preliminary Injunction and Memorandum of Points and Authorities at 13, Luna v. Cegavske, No. 2:17-cv-02666-JCM-GWF (D. Nev. Aug. 6, 2018), ECF No. 17, 2017 WL 7058795. But this type of claim can be more easily construed by section 2 opponents as constitutionally problematic, given that it appears more like a subjective preference not to vote again in the recall election, and the claimed burden is more attenuated compared to those traditionally recognized under section 2.

156. For a discussion of section 2's purpose, see *supra* notes 33–37 and accompanying text.

least some of the Senate Factors enumerated during the 1982 amendment to section 2.[157] As several opinions have admonished,[158] not providing this evidence makes section 2 a bare disparate impact test with the potential constitutional problems discussed above.[159] In the totality of the circumstances analysis, no set combination of conditions or factors must be present.[160] But to make a constitutionally surefooted case under the vote denial results test, advocates should prioritize certain key factors that are emphasized in recent section 2 opinions: (1) Senate Factor Five, which analyzes conditions of discrimination external to voting; (2) Senate Factors One, Three, Six, and Seven, which speak directly to overt or subtle discrimination in the electoral process; (3) Senate Factor Nine, which examines the tenuousness of the jurisdiction's policy behind its challenged law and particularly the use of voting restrictions for political gain; and (4) Senate Factor Two, which examines conditions of racially polarized voting that would make politicians acting on even subtle or implicit racially discriminatory purposes more fruitful for the non-minority group in political control. These Senate Factors and related considerations are discussed below and analyzed for their persuasive value in strategically litigating section 2 vote denial claims and avoiding constitutional risk.

1. Factor Five and Racial Demographics of the Electorate

Senate Factor Five is the core inquiry for proving the second prong of the vote denial results test. It involves examining the jurisdiction's historical and current conditions of both governmental and private discrimination in the areas of education, employment, health, and housing.[161] As multiple courts have found, severe

157. *See supra* notes 21–27 and accompanying text (describing the Senate Factors and the 1982 Amendment of section 2); *see also* Ho, *supra* note 20, at 822 (noting that most courts have adopted the Senate Factors for showing prong two of the results test). *But see* Frank v. Walker, 768 F.3d 744, 754 (7th Cir. 2014) (finding the Senate Factors are typically "unhelpful in voter-qualification cases"); 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.").

158. *See, e.g.*, Sw. Voter Registration Educ. Project v. Shelley, 278 F. Supp. 2d 1131, 1142–43 (C.D. Cal.), *aff'd*, 344 F.3d 914 (9th Cir. 2003) (rejecting a section 2 claim that presented scant evidence regarding only one Senate Factor); Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997) (rejecting a section 2 claim using statistical evidence regarding land ownership because "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry"); Ortiz v. Phila. Office of City Comm'rs Voter Registration Div., 28 F.3d 306, 310 (3d Cir. 1994) ("[T]here must be some causal connection between the challenged electoral practice and the alleged discrimination that results in a denial or abridgement of the right to vote.").

159. *See supra* Part II.

160. *See* Ho, *supra* note 17, at 703.

161. *See* Thornburg v. Gingles, 478 U.S. 30, 37 (1986) ("[T]he extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." (quoting S. REP. NO. 97-417, at 29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206)); Veasey v. Abbott, 830 F.3d 216, 278 (5th Cir. 2016) (en banc) (Higginson, J., concurring) (rejecting the claim that only governmental discrimination is analyzed for Factor Five and concluding that "pervasive private discrimination should be considered, because such discrimination can contribute to the inability of [minorities] to assert their political influence and to participate equally in public life" (alteration in

discrimination in areas outside of the voting context can substantially affect how voters exercise their rights and their ability to adjust to changed electoral systems.[162] Indeed, commentators have urged that "if vote denial occurs when none of the other Senate Factors are present, it may still be cognizable on the strength of the fifth Senate Factor—the inequality external to the electoral system that is transmitted into the electoral arena via election laws."[163] But when the goal is to insulate the results test from constitutional scrutiny, putting on evidence of disparate poverty levels and discrimination in areas outside of voting may not be enough. Advocates should bolster their section 2 claims by demonstrating how inequities and conditions of discrimination outside of voting will map onto overall state demographics to impair a large population of minority voters.

For example, litigation in Texas and North Carolina has relied more heavily on evidence of Senate Factor Five because racial disparities in the societal areas covered by this factor are staggering in these states.[164] And given the race demographics in Texas and North Carolina, such inequalities burdened a large portion of the electorate.[165] These conditions likely make evidence under Senate Factor Five sufficient on its own to prove the second prong of the vote denial results test. However, Senate Factor Five evidence alone might not carry the day in a less racially diverse jurisdiction. For example, consider Wisconsin, where socioeconomic disparities are equally high as in Texas and North Carolina,[166] but the total minority population in the state is much lower.[167] Related to the first strategic

original) (quoting United States v. Marengo Cty. Comm'n, 731 F.2d 1546, 1567 n.36 (11th Cir. 1984))); *but see Frank*, 768 F.3d at 753 (ruling that regarding part two of the vote denial results test, "units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination. . . . [Section 2] does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters" (citation omitted)).

162. *See, e.g.*, *Gingles*, 478 U.S. at 47 (emphasizing that 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 black and white voters to elect their preferred representatives" (emphasis added)); *Veasey*, 830 F.3d at 258–59 (examining discrimination in "education, employment, health, . . . housing, and transportation"); N.C. Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 430–38 (M.D.N.C.) (evaluating the same factors as *Veasey*), *rev'd on other grounds*, 831 F.3d 204 (4th Cir. 2016).

163. Nelson, *supra* note 20, at 597; *see also* Ho, *supra* note 20, at 815–19 (detailing courts' analyses of Factor Five).

164. *See Veasey*, 830 F.3d at 258 (noting that "29% of African Americans and 33% of Hispanics in Texas live below the poverty line compared to 12% of Anglos"); *McCrory*, 182 F. Supp. 3d at 430 (noting that in North Carolina, "27% of African Americans and 43% of Hispanics [live] below the poverty line, compared to 12% of whites").

165. *See Quick Facts: Texas*, U.S. CENSUS BUREAU, www.census.gov/quickfacts/tx [https://perma.cc/G54T-BDH8] (last visited Oct. 20, 2019) (noting that in 2018, 42% of the Texas population was non-Hispanic white); *Quick Facts: North Carolina*, U.S. CENSUS BUREAU, www.census.gov/quickfacts/nc [https://perma.cc/9JFL-BPZE] (last visited Oct. 20, 2019) (noting that in 2018, 63.1% of the North Carolina population was non-Hispanic white).

166. *See* Frank v. Walker, 17 F. Supp. 3d 837, 877 n.38 (E.D. Wis.) (finding that the "poverty rate in Wisconsin is 11% for Whites, 38% for Latinos, and 39% for Blacks, and that the Latino–White and Black–White gaps are both greater than the national average"), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

167. *See Quick Facts: Wisconsin*, U.S. CENSUS BUREAU, www.census.gov/quickfacts/wi [https://perma.cc/HH4A-FYW7] (last visited Oct. 20, 2019) (noting that in 2018, 81% of the Wisconsin population was non-Hispanic white).

consideration described above, there are likely a comparatively smaller total number of poor minority voters injured by the voter-ID law in Wisconsin than there are poor minority voters injured by the equivalent law in Texas and North Carolina.[168] This type of demographic evidence could lead a court to discount the degree to which conditions of discrimination are causally related to an election law's burden on minority voters specifically.[169] The Seventh Circuit was certainly persuaded by these circumstances when conducting its analysis of the second prong of the results test in *Frank*, particularly when considering that overall minority turnout rates exceeded white turnout rates in Wisconsin even in light of the challenged law's anticipated disparate burden.[170] Overall, advocates should still be able to meet their prong two burden on Factor Five alone, but in states with a comparatively low proportion of minority voters, advocates should present other factors showing a clear relationship between a law's disparate impact and conditions of discrimination.

2. Other Senate Factors Related to Discrimination

Senate Factors One, Three, Six, and Seven can also buttress the strength of a section 2 results claim, particularly when an advocate can show some combination of the conditions covered by these factors.[171] Factors One and Three together analyze the history of official race discrimination in voting.[172] Evidence of election prejudice can come in several forms, including prior successful constitutional or section 2 litigation against the jurisdiction, recent history of section 5 federal preclearance objections, or the presence of laws facilitating private discrimination against minorities, such as through challenge provisions or poll-watcher intimidation. In the Texas and North Carolina cases, both the Fourth and Fifth

168. *See supra* notes 78–98 and accompanying text (discussing the first recommended strategic consideration).

169. *See* Gonzalez v. Arizona, 624 F.3d 1162, 1193 (9th Cir. 2010), *modified on reh'g*, 677 F.3d 383 (9th Cir. 2012) (en banc) (upholding Arizona's voter-ID law against section 2 vote denial claim because of a perceived lack of causation between disparate impact and conditions of discrimination outside of voting); Stephanopoulos, *supra* note 15, at 1614–16 (discussing problems with making the causation showing); *see also* Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014) (refusing to consider evidence of private discrimination at the second prong of the section 2 test as being causally related to any disparate impact imposed by a voter-ID law at part one).

170. *See Frank*, 768 F.3d at 753–54 ("In 2012 75% of the state's eligible white non-Hispanic registered voters went to the polls; 78.5% of the state's eligible black voters cast ballots. Even if [the ID law] takes 2.1% off this number (the difference between the 97.6% of white voters who already have photo ID or qualifying documents, and the 95.5% of black voters who do), black turnout will remain higher than white turnout.").

171. Factor Two regarding racial polarization is also important but is discussed *infra* notes 204–07 and in the accompanying text.

172. Factor One is "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." S. REP. NO. 97-417, at 28 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206. Factor Three is "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." *Id*. at 29.

Circuits considered the recent, successful section 5 objections against the state, as well as post-*Shelby County* cases that found discrimination in redistricting under either section 2 or the Equal Protection Clause.[173] In Ohio, the district court found contemporary evidence for Senate Factor Three because a recent law permitted poll-watcher groups to disproportionately "target[] areas with higher minority populations," thereby "enhanc[ing] the opportunity for discrimination against minority groups."[174] These circumstances show that minority voters are working from a backdrop of electoral disadvantages, thus supporting the need for a section 2 results test remedy to prevent new vote denial laws from perpetuating such exclusion.

Senate Factor Six speaks to a similar consideration and elicits evidence of "overt or subtle racial appeals" made during political campaigns in the jurisdiction.[175] The NAACP's Janai Nelson emphasizes this factor to highlight the implicit biases that contribute to voting discrimination.[176] According to Nelson, racially inflammatory campaigning can provide incentives for representatives to later intentionally or implicitly disregard the needs of minority voters once they enter office, thereby requiring more urgent application of section 2.[177] Given the rising use of overtly racist language in political campaigns,[178] Factor Six may become more prevalent in vote denial cases and should be used more readily by section 2 advocates.

Senate Factor Seven concerns the number of minority politicians "elected to public office in the" state.[179] The theory is that if sizable minority groups have failed to elect representatives reflecting their own racial or cultural identities, this could be the result of lasting discrimination in the electoral process. Although the *Veasey* court made findings on this factor and considered it in its totality analysis,[180] other courts have determined that Factor Seven is only relevant in vote

173. *See, e.g.*, N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 215–19 (4th Cir. 2016) (noting a history of voting discrimination in North Carolina); Veasey v. Abbott, 830 F.3d 216, 257 (5th Cir. 2016) (en banc) (emphasizing that "[i]n every redistricting cycle since 1970, Texas has been found to have violated the VRA with racially gerrymandered districts" (quoting Veasey v. Perry, 71 F. Supp. 3d 627, 636 & n.23 (S.D. Tex. 2014)).

174. Ohio State Conference of the NAACP v. Husted, 43 F. Supp. 3d 808, 849 (S.D. Ohio 2014); *see also Veasey*, 71 F. Supp. 3d at 636 (outlining continued effect of poll watchers and challenge provisions in Texas, highlighting that in some cases, white poll watchers "demand that minority voters identify themselves, telling them that if they have ever gone to jail, they will go to prison if they vote"); Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. REV. L. & SOC. CHANGE 173, 218–19 (2015) (discussing recent increases in criminal prosecutions of unlawful voter-intimidation).

175. *See* S. REP. NO. 97-417, at 29.

176. *See* Nelson, *supra* note 20, at 624.

177. *See id.* (observing that "evidence of '*subtle* racial appeals' . . . may result from intentional discrimination or implicit bias that fuels discrimination against minority voters' candidates of choice").

178. *See, e.g.*, Alexander Burns & Astead W. Herndon, *Trump and G.O.P. Candidates Escalate Race and Fear as Election Ploys*, N.Y. TIMES (Oct. 22, 2018), https://www.nytimes.com/2018/10/22/us/politics/republicans-race-divisions-elections-caravan.html.

179. *See* S. REP. NO. 97-417, at 29.

180. *See* Veasey v. Abbott, 830 F.3d 216, 261 (5th Cir. 2016) (en banc) ("The district court found that African Americans comprise 13.3% of the population in Texas, but only 1.7% of all Texas elected

dilution claims.[181] Because Factor Seven bears directly on racial electoral progress, it should be a relevant factor under the second prong of the results test. But proponents should also elicit other factors because opponents have long criticized section 2 as a proportional representation mandate, and solely relying on Senate Factor Seven could further fuel their fire.[182]

Together, Senate Factors One, Three, Five, Six, and Seven demonstrate how conditions of discrimination internal or external to the political process may exacerbate the disparate burden of a challenged law or provide courts with another vantage point to see how an election law change will be felt more acutely by minority voters. So long as advocates can prove that a combination of these factors exist and demonstrate how they relate to the disparate burdens of a challenged voting restriction, courts may be more likely to rule that section 2 results liability is warranted and not constitutionally suspect. Moreover, showing conditions of discrimination may also complement evidence that the state policy is unjustified, or perhaps motivated by an illicit purpose, as explained in the following discussion of the two final strategic litigation considerations.

3. Tenuousness of the State Policy

Senate Factor Nine considers the tenuousness of the state's justification for a challenged voting law and should be elevated in importance to help diminish constitutional concerns about section 2.[183] Some courts have treated the tenuousness analysis as a postscript, discussing it in "a brief addendum at the end of an opinion focused on other matters."[184] Despite that, commentators have proposed revising the section 2 results test to scrutinize the state's justifications and bring the VRA more in line with other antidiscrimination statutes.[185] Although tenuousness remains only one factor in the totality test and is not part of a burden-shifting process,[186] advocates should focus more on Senate Factor Nine and work to refute the state's interests. And, unlike the "sliding scale" review used in the vote denial

officials are African American. Similarly, Hispanics comprise 30.3% of the population but hold only 7.1% of all elected positions." (quoting Veasey v. Perry, 71 F. Supp. 3d 627, 638 (S.D. Tex. 2014))).

181. *See, e.g.*, Farrakhan v. Gregoire, 590 F.3d 989, 1005 (9th Cir.) (concluding that evidence of Senate Factors Seven and Eight are irrelevant to vote denial claims), *aff'd in part, rev'd in part*, 623 F.3d 990 (9th Cir. 2010) (en banc).

182. *See, e.g.*, BERMAN, *supra* note 1, at 141.

183. S. REP. NO. 97-417, at 29.

184. Stephanopoulos, *supra* note 15, at 1587 (showing that the North Carolina ID decision stated only that "North Carolina asserts goals of electoral integrity and fraud prevention. But nothing . . . suggests that those are anything other than merely imaginable" (quoting League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 246 (4th Cir. 2014))); Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 557 (6th Cir. 2014) (stating briefly, without significant analysis, that "[u]nder Senate factor nine, it is also relevant that . . . the policy justifications for [the cutback] are 'tenuous.'" (quoting Thornburg v. Gingles, 478 U.S. 30, 37 (1986))).

185. *See, e.g.*, Morgan, *supra* note 20, at 158–60 (suggesting a burden-shifting framework to apply section 2); Stephanopoulos, *supra* note 15, at 1595–1625 (same); Tokaji, *supra* note 20, at 447 (same).

186. *See League of Women Voters*, 769 F.3d at 244 ("Section 2 does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote.").

constitutional standard,[187] the Factor Nine analysis under section 2 should closely examine the state's interest, including whether there is a direct nexus between the law and its purported objective.[188]

In *Veasey*, the Fifth Circuit carefully analyzed and dismissed each of Texas's justifications for its voter-ID law, even after finding errors in the district court's discriminatory intent ruling.[189] Texas's proffered interests were "preventing voter fraud, stopping undocumented immigrants from voting, and bolstering voter confidence."[190] First, despite the state having some history of absentee voting fraud, the court found this justification to be tenuous because the ID law only targeted rarely occurring in-person identification fraud.[191] Second, the court found the state's interest in stopping undocumented voting to be unfounded, given that the ID law "would not prevent noncitizens from voting, since noncitizens can legally obtain a Texas driver's license or concealed handgun license, two forms of" accepted ID.[192] Third, the court found that the state's justification of boosting voter confidence was also tenuous because there was "no credible evidence to support assertions that voter turnout was low due to a lack of confidence in elections, that [the voter-ID law] would increase public confidence in elections, or that increased confidence would boost voter turnout."[193] Therefore, "articulat[ing] . . . a legitimate interest is not a magic incantation a state can utter to avoid a finding of" section 2 liability, and proving tenuousness under Factor Nine bolstered the results test claim, which compelled the Fifth Circuit to strike down Texas's strict ID requirement.[194]

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187. For constitutional claims against vote denial laws, courts will determine the appropriate level of scrutiny applied by weighing "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule," while considering "the extent to which those interests make it necessary to burden the plaintiffs' rights." Burdick v. Takushi, 504 U.S. 428, 434 (1992) (quoting Anderson v. Celebrezze, 460 U.S. 780, 789 (1983)).

188. *See* Karlan, *supra* note 30, at 786 (advocating for narrow tailoring that, unlike the deferential standard used in a Fourteenth Amendment challenge, closely scrutinizes the state's interest behind any voting measure that imposes a disparate impact on minority groups).

189. Veasey v. Abbott, 830 F.3d 216, 262–64 (5th Cir. 2016).

190. *Id.* at 262, 263; Stephanopoulos, *supra* note 15, at 1588 (examining the court's analysis of Texas's interests).

191. *See Veasey*, 830 F.3d at 263; *see also* Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/ (discussing a study that showed at most thirty-one credible allegations of possible in-person voter fraud out of over one billion ballots cast between 2000 and 2014).

192. *Veasey*, 830 F.3d at 263.

193. *Id.* (internal quotation marks and citation omitted). Instead, the majority inferred that the ID law could actually *decrease* confidence and turnout because voters without IDs could become disillusioned with the political process. *See id.*

194. *Id.* at 262; *see also* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 244 (4th Cir. 2014) (finding that the district court should not have "sacrific[ed] voter enfranchisement at the altar of bureaucratic (in)efficiency and (under-)resourcing" because "Section 2 does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens' right to vote").

Moreover, indications that purely partisan motivations drive the state's passage of a discriminatory election law is highly probative and could help reaffirm the results test's essential role in protecting minority voting rights.[195] In fact, Professor Pamela Karlan argues that partisan motivations behind an election law are per se tenuous under Senate Factor Nine and should weigh heavily toward a section 2 violation.[196] Professor Karlan's view finds significant support in vote denial constitutional case law. In *Crawford v. Marion County*, for example, the Supreme Court's controlling opinion observed that if partisan objectives "had provided the only justification for a photo identification requirement, we may also assume that [the law] would suffer the same fate as the poll tax" struck down in *Harper v. Virginia Board of Elections*, a canonical constitutional voting case.[197] Judge Posner endorsed the same proposition, noting that although courts usually hesitate to interfere with "politics as usual," they should more actively use section 2 to strike down election laws skewing to one party's advantage at the expense of a minority group.[198] Disturbingly, some politicians have not been shy about admitting the political objective behind laws that make it harder for minority groups to vote.[199] Therefore, the tenuousness of a state policy—especially as it

195. Indeed, partisan motivation could also prove a discriminatory intent claim. As the Fourth Circuit observed, "[w]hen a legislature dominated by one party has dismantled barriers to African American access to the franchise, even if done to gain votes, 'politics as usual' does not allow a legislature dominated by the other party to re-erect those barriers." N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 226 (4th Cir. 2016). Further, "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose. This is so even absent any evidence of race-based hatred and despite the obvious political dynamics." *Id*. at 222–23.

196. *See* Karlan, *supra* note 30, at 786.

197. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 203 (2008); *see also* Dunn v. Blumstein, 405 U.S. 330, 350 (1972) (discussing the principle that "States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State" (quoting Carrington v. Rash, 380 U.S. 89, 96 (1965))); *Carrington*, 380 U.S. at 94 ("Fencing out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." (internal quotation marks and citation omitted)); Crawford v. Marion Cty. Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic. We should subject this law to strict scrutiny . . . and strike it down as an undue burden on the fundamental right to vote.").

198. *See* Frank v. Walker, 773 F.3d 783, 791 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc) ("There is evidence both that voter-impersonation fraud is extremely rare and that photo ID requirements for voting . . . are likely to discourage voting. This implies that the net effect of such requirements is to impede voting by people easily discouraged from voting, most of whom probably lean Democratic."); *see also* Karlan, *supra* note 30, at 789 ("The Voting Rights Act was intended to disrupt politics as usual in the service of full civic inclusion for long-excluded minority citizens, and the fact that the new restrictions often stem from that usual politics is a reason to strike them down, and not to sustain them.").

199. The examples are many. In 2016, one Wisconsin representative said: "I think Hillary Clinton is about the weakest candidate the Democrats have ever put up. . . . And now we have photo ID, and I think photo ID is going to make a little bit of a difference as well." Aaron Blake, *Republicans Keep Admitting That Voter ID Helps Them Win, for Some Reason*, WASH. POST (Apr. 7, 2016, 12:34 PM), https://www.washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win/ (internal quotation marks omitted).

relates to partisan motivation—should become more important in section 2 litigation and a strong consideration weighing in favor of bringing a 2 results claim that will be constitutionally sound.

4. Discriminatory "Intent-lite"

Although showing discriminatory intent in voting has become increasingly difficult,[200] some practitioners have suggested that presenting evidence of discriminatory purpose is an important strategic move for invalidating burdensome election laws.[201] Even if there is likely insufficient evidence to show the "smoking gun" of a direct illicit motivation or prove the requisite *Arlington Heights* circumstantial factors,[202] "[g]athering and putting forward strong evidence of intentional discrimination also reinforces and bolsters traditional Section 2 results-based claims."[203]

Senate Factor Two concerning conditions of racial polarization can help present this "intent-lite" evidence.[204] The Supreme Court and Congress have both found that racial polarization in voting may indicate a discriminatory purpose behind an election law enacted by the nonminority group in political control.[205]

In 2012, the Republican leader of the Pennsylvania House of Representatives said a new voter ID law would "allow Governor Romney to win the state of Pennsylvania, done." Michael Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/us/some-republicans-acknowledge-leveraging-voter-id-laws-for-political-gain.html.

In North Carolina in 2013, a GOP precinct chairman said that a voter ID law would "kick the Democrats in the butt" and referred disparagingly to "lazy black people [who want] the government to give them everything." Brett LoGiurato, *Here's the Racist 'Daily Show' Interview that Cost a Local GOP Chair His Job*, BUS. INSIDER (Oct. 24, 2013, 5:33 PM), https://www.businessinsider.com/daily-show-interview-don-yelton-racist-resign-2013-10 [https://perma.cc/F6M5-2VTZ]; *see also* Blake, *supra*; Wines, *supra*.

Most recently, President Trump's advisor, Corey Lewandowski, implied that the elimination of same-day registration in New Hampshire would help elect Republicans. *See* Sam Levine, *Corey Lewandowski Says New Voting Restrictions Will Help Trump Win New Hampshire*, HUFFPOST (Aug. 5, 2019, 3:20 PM), https://www.huffpost.com/entry/corey-lewandowski-new-hampshire-voting-law_n_5d4849d2e4b0acb57fd06a4e [https://perma.cc/YBY6-976E].

200. *See* Abbott v. Perez, 138 S. Ct. 2305, 2324 (2018) (holding that in a vote dilution case, "the 'good faith of [the] state legislature must be presumed'" (alteration in original) (quoting Miller v. Johnson, 515 U.S. 900, 915 (1995))).

201. *See, e.g.*, Lang & Hebert, *supra* note 14, at 782 ("Intentional discrimination claims—brought where appropriate and supported by the evidence—force an appraisal of the true motives underlying laws passed behind the 'cloak of ballot integrity.'" (citing Veasey v. Abbott, 830 F.3d 216, 241 (5th Cir. 2016))). For a critique of using an intent standard to enforce section 2, see *supra* notes 38–42 and accompanying text.

202. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68 (1977).

203. Lang & Hebert, *supra* note 14, at 786, 792; *see also* Ho, *supra* note 20, at 823 (claiming the Senate Factors "were designed to be probative of intent without requiring courts to make explicit findings about the motives of defendants").

204. Thornburg v. Gingles, 478 U.S. 30, 37 (1986) ("[T]he extent to which voting in the elections of the state or political subdivision is racially polarized." (citing S. REP. NO. 97-417, at 29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206)); Nelson, *supra* note 20, at 622–23 ("[C]ourts have repeatedly determined that evidence of racially polarized voting reveals a subtext of racial discrimination.").

205. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 623 (1982) (finding that racially polarized voting "bear[s] heavily on the issue of purposeful discrimination"); White v. Regester, 412 U.S. 755, 765

The relevance of racial polarization to voting discrimination is intuitive because "intentional racial discrimination in voting outside of a racially polarized context is highly irrational, because it serves no purpose other than the expression of animus."[206] But in polarized conditions, "efforts to reduce participation by minority voters start to make more 'sense' to incumbents, because they help secure their positions of power" by disenfranchising racial groups least likely to support their re-election.[207]

Evidence of racial polarization has influenced the outcome of recent successful section 2 vote denial cases. In *Veasey*, for example, Texas conceded that 252 out of the state's 254 counties had racially polarized voting.[208] White and Latino support for Republican candidates widely contrasted, with a 30%–40% gap in support, the white-to-black voter gap was even larger, and the differences exceeded disparities explained by other sociodemographic factors.[209] The Fourth Circuit in *McCrory* also recognized equally high rates of racial polarization in North Carolina and determined that this evidence supported the plaintiffs' discriminatory intent claim.[210] And Judge Posner, dissenting from the Seventh Circuit's denial of an en banc rehearing in the Wisconsin ID case, also summarized the perverse incentives behind enacting vote denial laws in racially polarized states, stating that the effect of voter-ID laws, "if felt mainly by persons inclined to favor one party (the Democratic Party, favored by the low-income and minority groups whose members are most likely to have difficulty obtaining a photo ID), can be decisive in close elections."[211]

On the other hand, conditions of low polarization should factor against bringing a vote denial results test claim. In the section 2 suit against Arizona's proof-

(1973) (noting that the Court has "entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups" for potential political gain); H.R. REP. NO. 109-478, at 34 (2006), *as reprinted in* 2006 U.S.C.C.A.N. 618, 638 (noting that "[r]acially polarized voting occurs when voting blocs within the minority and white communities cast ballots along racial lines and is the clearest and strongest evidence" of the continued need for federal oversight of elections). *But see* Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1839 (2018) (arguing that in the redistricting context, race and party are impossible to separate—in regions with high racially polarized voting, an initiative by one party to harm the other may also be construed as intent to harm one race).

206. Ho, *supra* note 20, at 818.

207. *Id.*; *see also* LICHTMAN, *supra* note 7, at 187 ("In our time, it is white Republicans, not white Democrats, who have made voting more difficult, especially for minorities burdened by a history of discrimination and disparities in income, education, housing, health, and access to vehicles and computers. Once again, patterns of racially polarized voting established the political motivations for restricting minority voting.").

208. Veasey v. Abbott, 830 F.3d 216, 258 (5th Cir. 2016).

209. Veasey v. Perry, 71 F. Supp. 3d 627, 637 (S.D. Tex. 2014) ("[R]acial differences were much greater than those among other sociodemographic groups—including differences between those of low and high income, between men and women, between the least and most educated, between the young and the old, and between those living in big cities and small towns.").

210. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 222 (4th Cir. 2016) (noting that high polarization gives elected officials the "incentive for intentional discrimination in the regulation of elections" because suppressing minority voting helps incumbents "entrench themselves").

211. Frank v. Walker, 773 F.3d 783, 793 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

of-citizenship requirement, the district court found that "Latino candidates fared better than the non-Latino candidates in two-thirds of the general elections both before and after" the new requirement, which showed that minority and non-minority groups often voted for the same candidates.[212] Although the court found that "to some degree there continue[d] to be some racially polarized voting in Arizona," the section 2 challenge was unsuccessful and the lack of polarization may have worked against plaintiffs.[213] In all, laws with discriminatory effects under polarized conditions are less likely to be accidental, and courts may more aggressively find results-test violations in these circumstances even if an intent showing cannot be made.[214]

Intent-lite claims may also be shown by evincing that the jurisdiction implemented its election law or regulation to diminish a minority group's recently growing influence over election outcomes.[215] Justice Kennedy alluded to this consideration in a 2006 vote dilution case from Texas,[216] and the Fourth Circuit in *McCrory* held that lawmakers' consideration of rising African-American turnout was relevant to its discriminatory intent finding.[217] If minorities prove to be decisive in an election, and lawmakers soon thereafter enact laws that disproportionately burden the voting power of that group, courts may be more willing to find a nexus between the law's disparate impact and conditions of discrimination, thus justifying the existence (and constitutionality) of the incisive and flexible results test in section 2.[218]

* * *

In sum, the final four strategic litigation considerations falling under prong two of the vote denial results test can bolster the section 2 claim. Proving these Senate Factors and their relationship to the challenged law provides a backdrop of racial discrimination that can explain why the challenged law burdens minority voters

212. Gonzalez v. Arizona, No. CV-06-1268-PHX-ROS, 2008 WL 11395512, at *26 (D. Ariz. Aug. 20, 2008).

213. *Id*. The same can be said for the section 2 challenge to the election recall process in Nevada. The plaintiffs claimed that "in the most recent presidential election, 56% of whites in Nevada voted for Donald Trump, and 55% voted for Republican Senate candidate Joe Heck. In contrast, in 2012, President Obama won the votes of 80% of Nevada's Latinos." Plaintiffs' Motion for Preliminary Injunction and Memorandum of Points and Authorities at 19, Luna v. Cegavske, No. 2:17-cv-02666-JCM-GWF (D. Nev. Aug. 6, 2018), ECF No. 17, 2017 WL 7058795 (internal quotation marks and citation omitted). This data does not show the same degree of severe polarization as in Texas and North Carolina, and should cut against bringing a section 2 results-based lawsuit.

214. *See* Elmendorf, *supra* note 20, at 384; Lang & Hebert, *supra* note 14, at 781–82.

215. *See* Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1055–58 (2013); Nelson, *supra* note 20, at 620–21.

216. *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 440–42 (2006) (observing that Texas diluted the Latino vote just as they "were about to exercise it," and in a manner that bore "the mark of intentional discrimination that could give rise to an equal protection violation").

217. *See* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 215 (4th Cir. 2016).

218. *See, e.g.*, LICHTMAN, *supra* note 7, at 183–86 (finding that disparate impacts in Florida's election laws may have been vital to the 2000 presidential outcome); Maggie Astor, *A Look at Where North Dakota's Voter ID Controversy Stands*, N.Y. TIMES (Oct. 19, 2018), https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration.html (detailing that after Senator Heitkamp won North Dakota by 3,000 votes, many of them Native supporters, "the state legislature began debating a voter ID law within months of [her] victory").

more than white voters. And litigating a section 2 challenge while emphasizing these considerations could show the court how discriminatory burdens are more likely to lack a legitimate justification. Doing so will strengthen the section 2 claim and buttress the perceived need for, and constitutional underpinnings of, a results test that can take a broad view and invalidate laws that further entrench racial discrimination in elections.

CONCLUSION

President Lyndon B. Johnson captured the essence of voting rights while signing the VRA at the Capitol Rotunda in 1965: "This right to vote is the basic right without which all others are meaningless. It gives people, people as individuals, control over their own destinies. . . . [T]he vote is the most powerful instrument ever devised by man for breaking down injustice."[219] But protecting this fundamental right to vote requires vigilance, recalibration, and active strategy by advocates. Indeed, soon after Dr. Martin Luther King Jr. witnessed this crowning achievement for American democracy, in his prescience he warned that "[e]ach step forward accents an ever-present tendency to backlash."[220] The history of enfranchisement is one of expansions and contractions,[221] and the years since the *Shelby County v. Holder* decision have produced an uptick in discriminatory voting laws not seen since the Jim Crow Era.[222] *Shelby County* exposed the VRA as vulnerable. It could also indicate that the current Supreme Court may not find President Johnson's rallying call to affirmatively safeguard an equal right to vote remains as urgent today.

In this environment, the results test of section 2 must not be taken for granted. Advocates should seek to maintain the VRA and avoid the narrowing or elimination of this essential remedy for modern denials and abridgements of the right to vote. By taking into account the above eight recommended considerations, advocates may help courts understand that the vote denial results test is an effective tool for distinguishing between legitimate election regulations and voter suppression. These considerations can assist in doing so by demonstrating: why a law hurts minority voters compared to white voters, how the law imposes burdens on a significant part of the electorate, why such a burden may be felt more acutely by minority voters to transform a purported "inconvenience" into a functional barrier to voting, and how all these adverse results occur on the backdrop of longstanding and enduring race discrimination. Making strategic choices while litigating section 2 cases will help forestall further damage to the VRA and safeguard minority voting rights nationwide from the most perverse and unjustifiable franchise restrictions.

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219. Lyndon B. Johnson, President, United States of Am., Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965), www.presidency.ucsb.edu/documents/remarks-the-capitol-rotunda-the-signing-the-voting-rights-act [https://perma.cc/R789-FJF7] (internal quotation marks omitted).

220. KING, *supra* note 1, at 11.

221. *See generally* KEYSSAR, *supra* note 11 (detailing the history of the right to vote).

222. *See* Stephanopoulos, *supra* note 15, at 1577–78.