# RETHINKING SECTION 2 VOTE DENIAL

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ABSTRACT

*It has now been more than 35 years since passage of the Section 2 results standard, and how that standard applies to vote denial claims (e.g., claims involving voter identification) remains extremely muddled. The Supreme Court has never ruled on a vote denial claim in the context of the Section 2 results standard, and lower courts have struggled to develop a workable framework. Yet it is now more imperative than ever to establish a workable framework because Section 2 vote denial claims have become more prevalent in the wake of the Court's 2013 ruling in* Shelby County v. Holder. *This Article proposes a judicially-administrable framework for applying the Section 2 results standard to claims of vote denial. In short, when applying Section 2 to such claims, a court should balance the government interest in the election law against the harm to minority voters. If the government interest outweighs the harm, the law should be upheld; however, if the harm outweighs the government interest, the law should be struck down. Importantly, when doing so, courts should generally only accept two justifications from the government—increasing the number of ballots cast and increasing the accuracy of elections. On the flip side, when assessing harm to minority voters, courts should almost exclusively focus on actual disfranchisement of minority voters. In developing this framework, this Article discusses the history of the adoption of the Section 2 results standard and demonstrates how the above framework adequately represents the compromise forged by liberals and conservatives in adopting that standard. It also details why the framework represents something better than what currently exists and tackles potential objections to the proposal.*

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## I. INTRODUCTION

In 1982, Congress amended Section 2 of the Voting Rights Act to create a standard allowing plaintiffs to successfully challenge electoral laws that have discriminatory "results."[2] Development of the results standard primarily stemmed from Supreme Court Justice Potter Stewart's lead opinion in *City of Mobile v. Bolden*,[3] which established a stringent doctrine of discriminatory purpose for proving

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2. 52 U.S.C. § 10301 (2012).

3. 446 U.S. 55, 66 (1980).

racial and ethnic[4] (i.e., minority) vote dilution under the Fourteenth Amendment's Equal Protection Clause.[5] Since the creation of the results standard, many successful lawsuits have been filed against electoral structures such as at-large elections that dilute the votes of minority citizens, and these lawsuits helped increase the number of minority-elected officials at every level of government.[6]

But the Section 2 results standard does not just apply to electoral laws that dilute minority votes; it also applies to electoral laws leading to "vote denial."[7] Over the years, the types of electoral laws alleged to lead to Section 2 vote denial include, among other things, voter purges,[8] felon disfranchisement laws,[9] property ownership requirements,[10] and the type of voting equipment employed at the polls (for example, punch card machines).[11] Section 2 has also been applied to what Ohio State's Daniel Tokaji termed the "new vote denial"[12]—including such things as strict (generally photo) voter identification laws[13] and changes to the early voting process.[14]

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4. I employ the phrase "racial and ethnic" as a useful shorthand to describe the groups protected by Section 2 because that phrase was used in one of the earliest Supreme Court decisions involving voting rights for minority groups and because that decision aided in the formulation of the results standard. *See* White v. Regester, 412 U.S. 755, 756 (1973). Technically, Section 2 prohibits discrimination "on account of race or color, or in contravention of the guarantees set forth in [S]ection 10303(f)(2)," with Section 10303(f)(2) covering discrimination against "language minority group[s]." 52 U.S.C. § 10301(a) (2012); 52 U.S.C. § 10303(f)(2) (2012).

5. *Bolden*, 446 U.S. at 66.

6. *See* Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 921 (2008) ("In the end, the amendment of [Section] 2 and its initial interpretation in *Gingles* significantly helped to foster the sea-change in descriptive representation that has occurred over the last several decades.").

7. Michael J. Pitts, *Rescuing Retrogression*, 43 FLA. ST. U. L. REV. 741, 746 (2016) (defining vote dilution and vote denial); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691 (2006) [hereinafter *New Vote Denial I*] (same); *see also* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 416 (2012) ("[T]he Senate Report makes clear that an actionable harm arises when minorities face improper barriers to participation at discrete junctures of the electoral process, irrespective of whether this results in vote dilution.").

8. *See* Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 307 (3d Cir. 1994).

9. *See* Wesley v. Collins, 791 F.2d 1255, 1257 (6th Cir. 1986).

10. *See* Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 588 (9th Cir. 1997).

11. *See* Roberts v. Wamser, 679 F. Supp. 1513, 1515-16 (E.D. Mo. 1987).

12. *New Vote Denial I*, *supra* note 7, at 692; Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 440 (2015) [hereinafter *New Vote Denial II*].

13. *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 225-27 (5th Cir. 2016).

14. Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 529 (6th Cir. 2014). The procedural history of *Husted* is complicated and ultimately the decision was vacated.

Yet the Section 2 results standard has always been an awkward fit in the vote denial context, and courts have struggled with interpreting Section 2 in that realm.[15] The awkward fit stems from the fact that the results standard—while applicable to vote denial claims—arose primarily out of a need for a new standard in vote *dilution* litigation, with the statutory language and legislative history of Section 2 reflecting that almost singular focus.[16] And while numerous court decisions have dealt with the results standard in the vote dilution realm, far fewer adjudications (and not a single United States Supreme Court decision!) have interpreted the results standard in the vote denial context.[17] Thus, Section 2 vote denial claims still pre-

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The district court granted a preliminary injunction against enforcement of certain Ohio voting laws for the 2014 election, and the Sixth Circuit affirmed that preliminary injunction. *Id.* at 529. The Supreme Court then granted a stay of the preliminary injunction. Husted v. Ohio State Conference of NAACP, 135 S. Ct. 42, 42 (2014). Because granting the stay vacated the operation of the preliminary injunction, the Sixth Circuit vacated its opinion. Ohio State Conference of NAACP v. Husted, No. 14-3877, 2014 WL 10384647, at *1 (6th Cir. Oct. 1, 2014). It is likely that the preliminary injunction approved in *Husted* was stayed by the Supreme Court because of its timing—the preliminary injunction was issued close to the election. *New Vote Denial II*, *supra* note 12, at 457 ("[T]he [Supreme Court] decision is probably best understood . . . as reflecting the Court's concern about injunctions issued very close to an election."). Regardless, whether *Husted* is technically "good law" or not really does not matter to the citations to it and discussion of it in this Article. Indeed, another Section 2 decision this Article cites several times has a similar history. In *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 230 (4th Cir. 2014), the appellate court reversed a district court's denial of a preliminary injunction against enforcement of certain North Carolina electoral laws and remanded the case to the district court with instructions to issue a preliminary injunction. The Supreme Court then stayed the Fourth Circuit's mandate. North Carolina v. League of Women Voters of N.C., 135 S. Ct. 6, 6 (2014). Again, though, the Supreme Court's move likely was about timing, and whether *League of Women Voters* is technically good law does not really matter to the citations to it and discussion of it in this Article. Indeed, ultimately *League of Women Voters* resulted in a declaration that North Carolina's package of electoral laws was adopted with a discriminatory purpose. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 219 (4th Cir. 2016). Although, even the substantive validity of the Fourth Circuit's decision remains vague. North Carolina v. N.C. State Conference of the NAACP, 137 S. Ct. 1399, 1400 ("Given the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law, it is important to recall our frequent admonition that '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case.' " (quoting United States v. Carver, 260 U.S. 482, 490 (1923))) (statement respecting the denial of certiorari of Roberts, C.J.). Moreover, there is justification in citing these decisions—even if technically not good law—because federal courts continue to cite these cases favorably. *See, e.g.*, *Veasey*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc); Ohio Democratic Party v. Husted, 834 F.3d 620, 637-38 (6th Cir. 2016); Mich. State A. Philip Randolph Inst. v. Johnson, 209 F. Supp. 3d 935, 942 (E.D. Mich. 2016).

15. *Husted*, 768 F.3d at 554 ("A clear test for Section 2 vote denial claims . . . has yet to emerge.").

16. *See infra* Part I.A.

17. *League of Women Voters of N.C.*, 769 F.3d at 239 ("Section 2's use to date has primarily been in the context of vote-dilution cases."); Frank v. Walker, 768 F.3d 744, 752 (7th Cir. 2014) ("[M]ost case law concerning the application of [Section] 2 concerns claims that racial gerrymandering has been employed to dilute the votes of racial or ethnic groups."); Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section*

sent a thorny problem for the federal courts even though the Section 2 results standard has been operable for more than thirty-five years.[18]

While application of the Section 2 results standard to vote denial claims is an old problem, it has taken on a new salience in recent years. *Bush v. Gore*[19] refocused attention on election administration issues in general. But the Supreme Court's decision in *Shelby County v. Holder*[20] essentially sent Section 5 of the Voting Rights Act into permanent exile and seemingly sparked an increase in Section 2 vote denial litigation.[21] Thus, it seems inevitable that the Supreme Court will one day consider a Section 2 vote denial claim—probably in the near future—and when it does, the Court will essentially be writing on a blank slate.[22]

This Article proposes adopting the following basic framework for determining whether the Section 2 results standard has been violated in the vote denial context[23]: Balance the government interest in the electoral law against the harm to minority voters—if the government interest outweighs the harm, retain the electoral law; if the harm outweighs the government interest, strike down the electoral law.

While this is the big-picture sketch of the framework, many of the finer details of the proposal are important. For instance, the frame-

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*2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative*, 39 U. MICH. J.L. REFORM 643, 654-57 (2006) (surveying Section 2 cases and demonstrating that the vast majority of cases were related to vote dilution); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 595 (2013) ("[T]he legal contours of vote denial claims remain woefully underdeveloped as compared to vote dilution claims."); Pitts, *supra* note 7, at 750 ("The approach [S]ection 2 takes to election laws that might deny the ability to cast a countable ballot . . . is, to put it mildly, not nearly as well defined [as the doctrine for vote dilution]."); *New Vote Denial II*, *supra* note 12, at 445 ("[T]he Supreme Court has never decided a vote denial case under [section] 2's 'results' language.").

18. Brown v. Detzner, 895 F. Supp. 2d 1236, 1249 (M.D. Fla. 2012) ("[P]resent-day 'vote denial' cases are uncommon, and as such, courts have yet to develop a clear analytical framework for this type of case, unlike the more common vote dilution claim.").

19. *See* 531 U.S. 98, 98 (2000).

20. *See* 570 U.S. 592 (2013).

21. *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), https://www.brennancenter.org/analysis/effects-shelby-county-v-holder.

22. Because the Supreme Court will be writing on a blank slate, there are no foreseeable thorny *stare decisis* issues with the analysis proposed in this Article. For a discussion of potential *stare decisis* problems when interpreting Section 2, see Elmendorf, *supra* note 7, at 448-55.

23. I adhere to the view that it is unnecessary to prove vote dilution for a plaintiff to prevail on a vote denial claim—a view that the majority of lower federal courts have taken. Elmendorf, *supra* note 7, at 408 ("Most courts have held that Section 2 provides a cause of action against participation injuries, whether or not the injury results in the tangible dilution of a minority community's voting strength.").

work would prioritize a couple of government interests—enabling more voters to cast ballots (increased access) and ensuring an accurate result, often through rules that might prevent fraud or mistake. On the other hand, the framework would only recognize the harm of disfranchisement rather than burdens that do not *actually result* in disfranchisement. And on both sides of the ledger, the framework would demand more solid proof of these issues rather than theoretical benefits or harms.

The primary upsides of this approach, roughly in order of importance, are:

- The proposed framework focuses the analysis on the two most critical things we should care about when it comes to electoral laws and their impact on minority voters: (i) how much interest the government has in the electoral law, and (ii) how much harm is being done to minority voters.
- It simplifies the standard from vague, confusing, and muddled tests, such as "causation," that are currently employed by the courts.
- It divorces the Section 2 standard from the idea that Section 2 violations only occur when they are traceable to historic and societal discrimination.

The framework stems from several principles that need to be accounted for when considering vote denial claims under the Section 2 results standard. First, Section 2 vote denial needs structure because it essentially does not have any. Second, while Section 2 needs more structure, the structure will never (and should never) lead to clear, predictable outcomes. Section 2 is a statute born out of vote dilution litigation, vague statutory language, and compromise—it will never be mathematically precise. Third, because Section 2 resulted from a compromise between liberals and conservatives, any structure provided to Section 2 can neither be so easy that plaintiffs who prove disparate impact virtually always win, nor so difficult that plaintiffs are essentially forced to prove purposeful discrimination to succeed.[24]

My purpose in presenting this framework also is born from a view that Section 2 vote denial jurisprudence should be simplified in a way that serves to reflect what matters most in conducting elections: High overall participation with accurate results while simultaneously en-

24. Any Section 2 vote denial standard must make room to allow governments to do the following things that appear to be core values in our democracy: (i) disfranchise *incarcerated* felons, and (ii) retain age, citizenship, and residency requirements for voters. And this makes sense because there is no evidence that Section 2 was intended to displace these core eligibility requirements. Thus, the proposal in this Article would not apply in these contexts.

suring that racial and ethnic minority groups do not suffer unjustifiable harms in the process of achieving such a system. Thus, the framework will, for instance, divorce Section 2 analysis from historic discrimination and instead focus on current consequences. On the other hand, the framework also will not simply readily accept any government justifications for an electoral law and will value access slightly more than accuracy and integrity. In the end, the framework should give both liberals and conservatives some things to love and some things to hate—and that is how a statute born out of compromise should operate.

With those things in mind, it is clear that this Article is attempting to reverse-engineer a standard for Section 2. But that is really all anyone can do. The statutory language and legislative history provide no clarity when it comes to applying Section 2 in the vote denial context. We should be honest about that and embrace UC-Davis's Chris Elmendorf's view of Section 2 as a statute that gives federal judges license to create a common law of racially-fair elections.

This Article will proceed as follows. Part II discusses the creation of the Section 2 results standard and the problem the lower federal courts have in developing an administrable doctrine in the vote denial realm. Part III details a proposal to balance government interests against the harm to minority voters, explains why the proposal presents a useful approach to Section 2 vote denial, and tackles potential objections to the proposal.

## II. SECTION 2 VOTE DENIAL: WHERE WE HAVE BEEN AND WHERE WE STAND

The history behind adoption and initial Supreme Court application of Section 2's results standard is fairly well known, but it is worthwhile to traverse the highlights to make a couple of points relevant to this Article's thesis. First, the adoption of the Section 2 results standard and its initial application by the Supreme Court in the seminal case of *Thorburg v. Gingles*[25] revolved almost entirely around vote dilution litigation. Second, the Section 2 results standard contains vague language that was a political compromise between liberals and conservatives.

After touring the basics surrounding adoption of the results standard, this Article canvasses the Section 2 vote denial jurisprudence developed by the lower federal courts. What is clear is that the courts have struggled to develop a coherent doctrine to separate voting laws that have a disparate impact and violate Section 2 from vot-

25. 478 U.S. 30 (1985).

ing laws that have a disparate impact and do *not* violate Section 2. In drawing this line, courts have generally focused on requiring that a plaintiff demonstrate causation in order to succeed on a vote denial claim. However, determining what constitutes causation is somewhat of a mystery.

### *A. A Brief History of Amended Section 2*

Section 2, after its original passage within the Voting Rights Act of 1965, did not play a major role.[26] Instead, enforcement of the Voting Rights Act in the late-1960s primarily focused on other provisions aimed specifically at guaranteeing the right to register to vote and the right to cast a ballot free from discrimination.[27] And in the 1970s—when voting rights litigation turned to so-called "second generation" claims of vote dilution—the Equal Protection Clause of the Fourteenth Amendment or Section 5 of the Act, rather than Section 2, provided the primary vehicles for litigating such claims.[28]

Section 2 began its rise to prominence in 1980 when Justice Potter Stewart issued his lead opinion in *City of Mobile v. Bolden*.[29] That opinion held four important things in relation to Section 2 and its future:

> 1) That Section 2 added nothing to a voting rights claim beyond what the Fifteenth Amendment already served to prevent;[30]

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26. Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1352-53 (1983) (describing Section 2 as "a little-used provision" and noting that Section 2 "had never been successfully used as the basis for litigation").

27. *See* Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, *in* MINORITY VOTE DILUTION 145, 149-50 (Chandler Davidson ed., 1984); *New Vote Denial I*, *supra* note 7, at 702 ("The VRA's immediate success was largely attributable to Section 4, the centerpiece of the 1965 Act, which temporarily suspended literacy tests. The deployment of federal examiners under Sections 6 through 8 of the VRA was also critical in helping to register eligible black voters." (footnotes omitted)).

28. *See* Beer v. United States, 425 U.S. 130, 130 (1976) (involving vote dilution under Section 5); White v. Regester, 412 U.S. 755, 755 (1973) (involving vote dilution under the constitution); Whitcomb v. Chavis, 403 U.S. 124, 127 (1971) (involving vote dilution under the constitution); Bolden v. City of Mobile, 571 F.2d 238, 242 n.3 (5th Cir. 1978) ("[T]his court knows of no successful dilution claim expressly founded on [Section 2].").

29. 446 U.S. 55 (1980).

30. *Id.* at 61 ("In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim."). As originally adopted in 1965, Section 2 read as follows: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437. The Fifteenth Amendment reads, in relevant part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or

> 2) That the Fifteenth Amendment contained a discriminatory-purpose standard;[31]
>
> 3) That the Fifteenth Amendment only applied to claims of vote denial and did not apply to claims of vote dilution;[32] and
>
> 4) That the Fourteenth Amendment embodied a stringent discriminatory-purpose standard for vote dilution claims.[33]

In combination, these four holdings rendered Section 2 ineffective for vote dilution litigation, ineffective as a separate standard (from the Fifteenth Amendment) for vote denial litigation, and, as will be discussed momentarily, made vote dilution claims more difficult for plaintiffs to prove.

*Bolden* sparked a great uproar due to its negative impact on a plaintiff's ability to win a vote dilution claim.[34] *Bolden*'s critics thought Justice Stewart's opinion created a situation where minority plaintiffs filing vote dilution claims would be unable to secure victory as easily as they had in the past.[35] In part, this was because *Bolden* "appear[ed] to have abandoned . . . [a] totality of circumstances test and to have replaced it with a requirement of specific evidence [of intent]" that amounted to a "requirement of [providing proof of] a smoking gun."[36]

*Bolden*'s critics turned to Congress and an amendment to Section 2 as a means to reverse the harm rendered by the decision to vote dilution plaintiffs. The amendment to Section 2 would create a statutory "results" standard that would obviate the need for plaintiffs to prove a constitutional claim of discriminatory purpose in vote dilu-

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by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

31. *Bolden*, 446 U.S. at 65.

32. *Id.* at 65.

33. *Id.* at 66 (describing the "basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment").

34. Boyd & Markman, *supra* note 26, at 1355 ("The Supreme Court's decision in *Mobile* produced an avalanche of criticism, both in the media and within the civil rights community.").

35. *See* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 621 (4th ed. 2012) (describing the reaction to *Bolden* by voting rights lawyers and civil rights advocates).

36. *Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Const. of the Comm. on the Judiciary*, 97th Cong. 199 (1982) (statement of Sen. Mathias); *see also* Boyd & Markman, *supra* note 26, at 1404 ("Proponents of the results test repeatedly characterized the intent standard as requiring direct evidence of discriminatory purpose or intent, such as overt statements of bigotry or evidence of a 'smoking gun.' " (footnotes omitted) (quoting Memorandum from Ralph Neas, Executive Director, Leadership Conference on Civil Rights, on Amending Section 2 of the Voting Rights Act (Jan. 26, 1982), *reprinted in Senate Hearings*)).

tion litigation. And this "results" standard would enable plaintiffs to win more easily.

But shifting Section 2 from a stringent purpose standard to an easier-to-satisfy results standard was controversial.[37] The focus of contention concerned whether the results standard created a right of proportional representation in vote dilution litigation.[38] Whereas opponents of the results standard thought it created such a right, proponents of the results standard said it did not create a right to proportional representation but refrained from clearly articulating exactly what sort of right the results standard created.[39]

In an attempt to resolve the controversy and provide additional guidance regarding interpretation of the results standard, Senator Bob Dole proposed additional statutory language that described the results standard in greater detail.[40] But the adoption of Senator Dole's language did little to end the ambiguity.[41] As the leading commentators on the history of the adoption of the Section 2 results standard have noted, "[t]he Dole proposal effectively supplied a political resolution to misgivings about section 2. It did not, however, put to rest the considerable confusion over what the compromise ultimately was intended to mean."[42]

Despite the controversy, Congress adopted—and President Ronald Reagan signed into law—a discriminatory results standard for Section 2.[43] This results standard would be violated when:

> [B]ased 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 mem-

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37. *See* Boyd & Markman, *supra* note 26, at 1396-1401.

38. *Id.* at 1390-94, 1397-1403; *see also id.* at 1397-98 ("[T]he critical issue in the entire debate was whether the results test would lead to a political regime in which proportional representation of racial and ethnic groups became the standard on which voting rights violations would be predicated." (footnote omitted)).

39. *See id.* at 1399-1400.

40. *Id.* at 1414-15.

41. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 7-8 (2008) (describing how "there has been considerable disagreement about the precise meaning of [the results] standard").

42. Boyd & Markman, *supra* note 26, at 1416.

43. 52 U.S.C. § 10301 (2012). The full text of Section 2's subsection (a), which contains the results standard, reads as follows:

> (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).

52 U.S.C. § 10301(a) (2012).

> bers 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.[44]

Importantly, though, this vague statute represented a deal forged by liberals and conservatives. While the Democratic Party controlled the House, Republicans controlled the Senate. And Republican Ronald Reagan was President. As Justice Sandra Day O'Connor noted in the Supreme Court's first Section 2 results standard decision, the statute amounts to "compromise legislation."[45]

So the basic story thus far is that in 1982 Section 2 was amended to create a statutory results standard for vote dilution litigation that was intended to make it easier for plaintiffs to succeed than the constitutional discriminatory-purpose standard created a couple years earlier by Justice Stewart's *Bolden* opinion. However, lawmakers did not want the results standard to create a right to proportional representation. Beyond that, though, Congress provided little definitive guidance about enforcement of the results standard. In essence, Congress enacted the results standard and then punted it to the federal courts to make some sense out of it.

Four years after adoption of the results standard, the Supreme Court weighed in by creating a two-step doctrinal framework for vote dilution claims in *Thornburg v. Gingles*.[46] To succeed on a claim, the first step requires a plaintiff to prove that:

> i) The minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district";
>
> ii) The minority group "is politically cohesive"; and
>
> iii) "[T]he white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate."[47]

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44. 52 U.S.C. § 10301(b).

45. Thornburg v. Gingles, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in judgment).

46. 478 U.S. 30, 50-51, 79 (1986); Patino v. City of Pasadena, 230 F. Supp. 3d. 667, 675 (S.D. Tex. 2017) ("In *Gingles*, the Supreme Court established a two-step analysis for vote-dilution claims.").

47. *Gingles*, 478 U.S. at 50-51 (footnote omitted) (citation omitted); *see also id.* at 48-49 ("Stated succinctly, a bloc voting majority must *usually* be able to defeat candi-

These three elements of a plaintiff's Section 2 vote dilution claim have subsequently become colloquially known as the "*Gingles* preconditions."[48]

The second step involves an overall assessment of the "totality of the circumstances."[49] A court assesses the totality of circumstances with reference to a number of factors listed as relevant in the Senate Report that accompanied creation of the results standard in 1982.[50] These so-called "Senate factors" are:

> i) "[T]he history of voting-related discrimination in the State or political subdivision";
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> ii) "[T]he extent to which voting in the elections of the State or political subdivision is racially polarized";
>
> iii) "[T]he extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting";
>
> iv) "[T]he exclusion of members of the minority group from candidate slating processes";
>
> v) "[T]he extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process";
>
> vi) "[T]he use of overt or subtle racial appeals in political campaigns"; and
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> vii) "[T]he extent to which members of the minority group have been elected to public office in the jurisdiction."[51]

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dates supported by a politically cohesive, geographically insular minority group." (citation omitted)).

48. Voinovich v. Quilter, 507 U.S. 146, 158 (1993); *cf.* Johnson v. De Grandy, 512 U.S. 997, 1006 (1994) (describing the "three threshold conditions for a dilution challenge").

49. Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1115 (3d Cir. 1993) ("[E]ven after a court has determined that the plaintiffs proved each of the *Gingles* factors, it must go on to consider whether the totality of circumstances . . . establishes that the particular voting scheme diminishes the minority group's opportunity fully to participate in the political process.").

50. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1500 (2008) ("Once the preconditions are satisfied, a court is still required to engage in a multifactor balancing inquiry (focusing on the factors identified in the 1982 Senate Report) before determining whether vote dilution exists. In other words, [Section] 2 doctrine is formally structured as a two-stage inquiry . . . ." (footnote omitted)).

51. *Gingles*, 478 U.S. at 44-45.

In addition, two other factors "may have probative value"[52]:

> viii) "[E]lected officials are unresponsive to the particularized needs of the members of the minority group"; and
>
> ix) "[T]he policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous."[53]

But these Senate factors are not necessarily the exclusive factors to consider in evaluating the totality of the circumstances in vote dilution claims. After all, when one engages in a totality of circumstances analysis, pretty much anything goes. Moreover, in *Johnson v. De Grandy*, the Supreme Court explicitly mandated consideration of at least one other factor—"proportionality"—in the totality of circumstances analysis for vote dilution claims.[54]

At this point, though, it is crucial to emphasize that this entire discussion—from the decision in *City of Mobile* to the congressional debate over amending Section 2 that created a results standard to the Supreme Court's interpretation of the results standard in *Gingles*—revolves entirely around vote *dilution* litigation. None of this discussion has any direct implications for vote *denial* litigation.[55]

The problem, then, is to develop a framework for adjudicating vote denial claims under the Section 2 results standard in light of the almost nonexistent guidance Congress provided in this realm and in light of the notion that Section 2 represents vague compromise legislation between liberals and conservatives.[56] As will be highlighted, lower federal courts have struggled to develop a *Gingles*'-type, or even any type of, coherent framework for vote denial claims.

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52. *Id.* at 45.

53. *Id.*

54. Johnson v. De Grandy, 512 U.S. 997, 1000 (1994) (holding that "proportionality . . . is a relevant fact in the totality of circumstances").

55. *See New Vote Denial II*, *supra* note 12, at 443 ("Congress was primarily focused on vote dilution rather than vote denial at the time it considered and adopted the 1982 amendment to [Section] 2.").

56. No one questions whether the Section 2 results standard applies to vote denial. S. REP. NO. 97-417, at 30, 30 n.119 (noting that Section 2 prohibits "all voting rights discrimination" and mentioning discriminatory absentee balloting and purge procedures as violations of Section 2); *New Vote Denial II*, *supra* note 12, at 442 ("[T]he text and legislative history leave no doubt that [Section] 2's 'results' language applies to both vote denial and vote dilution claims."). Even Supreme Court Justice Clarence Thomas, arguably the Court's most conservative member, concedes that Section 2's results standard applies to vote denial claims. Holder v. Hall, 512 U.S. 874, 914-45 (Thomas, J., concurring) (arguing that Section 2 *only* applies to "enactments that regulate citizens' access to the ballot or the processes for counting a ballot").

### *B. The Primary Problem with the Vote Denial Precedents: A Focus on the Elusive Notion of Causation*

Since 1982, the lower federal courts have tried to develop a framework for adjudicating Section 2 vote denial claims. But the framework is highly unsatisfactory in that, in essence, the decisions amount to a court declaring some electoral law to violate or not violate Section 2 without a clear understanding of exactly why the court has reached that conclusion. The main culprit here—at least from the standpoint of the judicial doctrine that has developed[57]—is the notion of "causation" initially created by the lower courts in the 1980s and 1990s. This has continued to be perpetuated by the most recent decisions of the federal courts in hot-button areas such as voter identification and reduced early voting hours.

In applying the Section 2 results standard to vote denial claims, the lower courts have generally started with a fairly unassailable and unobjectionable premise: The standard should not be employed to strike down every electoral law that disparately impacts minority voters. Thus, lower federal courts often, quite rightfully, make pronouncements along the lines of "a showing of disproportionate racial impact alone does not establish a *per se* violation [of Section 2]."[58] And this makes perfect sense. A fair review of the statutory language and legislative history of amended Section 2 makes it difficult to take the position that every electoral law having a disparate impact on

57. The main culprit is a Congress that provided little guidance on the meaning of the Section 2 results standard generally and, particularly, in the vote denial realm.

58. Wesley v. Collins, 791 F.2d 1255, 1260 (6th Cir. 1986); *see also* Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014) ("[Section 2] does not condemn a voting practice just because it has a disparate effect on minorities."); Gonzalez v. Arizona, 677 F.3d 383, 405 (9th Cir. 2012) (en banc), *aff'd on other grounds*, Arizona v. Inter Tribal Council of Ariz., Inc., 133 S.Ct. 2247 (2013) (noting that a Section 2 claim "based purely on a showing of some relevant statistical disparity between minorities and whites . . . will be rejected") (quoting Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997)); *Smith*, 109 F.3d at 595 ("[A] bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the [Section] 2 'results' inquiry."); Brown v. Detzner, 895 F. Supp. 2d 1236, 1249 (M.D. Fla. 2012) (noting that a plaintiff needs to "demonstrate something more than disproportionate impact to establish a Section 2 violation"). In recent years, several federal courts have described the need to prove a disparate impact as the first step to proving a Section 2 violation in the vote denial context. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014) ("First, the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. (quoting Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 553 (6th Cir. 2014)) (internal quotation marks omitted)); Veasey v. Abbott, 830 F.3d 216, 244 (5th Cir. 2016); *Husted*, 768 F.3d at 554. While some of these cases may not technically be good law, see *supra* note 14, they merely restate what lower courts appear to have always required.

minority voters creates a statutory violation.[59] Congress does not appear to have intended such an extreme result, and it does not appear that any commentator has adopted such an extreme position. Remember, the Section 2 results standard was a compromise between liberals and conservatives where vote denial was barely a consideration, so it would be surprising to interpret the statute as outlawing all electoral practices that have any sort of disparate impact.

Because Section 2 vote denial claims are rarely brought without some proof of disparate impact on minority voters,[60] the key question in such litigation often becomes what more, aside from a disparate impact on minority voters, is necessary to prove a Section 2 violation?[61] The answer to that question from the lower courts appears to be that plaintiffs need to prove "causation."[62] But it is not clear exactly what this causation requirement entails. As Ohio State's Dan Tokaji has written: "There is a general consensus that some showing of

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59. One could contend that this intent is implied from the statutory language of Section 2 which notes 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(b). An interpretation of Section 2 that outlawed any electoral practice with a disproportionate impact would seemingly be the vote denial equivalent of enforcing proportional representation.

60. For a few outlier examples of instances where plaintiffs have been unable to provide adequate proof of disparate impact, see Northeast Ohio Coalition for the Homeless v. Husted, 837 F.3d 612, 627-29 (6th Cir. 2016) (finding plaintiffs failed to prove disparate impact related to Ohio laws governing absentee and provisional ballots); Ohio Democratic Party v. Husted, 834 F.3d 620, 639-40 (6th Cir. 2016) (finding plaintiffs failed to provide statistical evidence of disparate impact); Gonzalez v. Arizona, 677 F.3d 383, 406-07 (9th Cir. 2012) (en banc) (finding plaintiffs failed to prove disparate impact of voter identification law on Latino voters); Stewart v. Blackwell, 356 F. Supp. 2d 791, 795, 798, 807-08 (N.D. Ohio 2004) (appearing to find no proof of disparate impact in Ohio's use of punch card ballots). The decision in *Stewart* was ultimately vacated by the Sixth Circuit. Stewart v. Blackwell, 473 F.3d 692, 694 (6th Cir. 2007).

61. *See New Vote Denial II, supra* note 12, at 448 (noting the courts' "general agreement that 'something more' than a mere disparate impact should be required to prevail, but disagreement over what that something more should be" (footnote omitted) (quoting Nicholas O. Stephanopolous, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 108)).

62. *See, e.g.*, *Gonzalez*, 677 F.3d at 405 (noting that "proof of 'causal connection between the challenged voting practice and a prohibited discriminatory result' is crucial") (quoting *Smith*, 109 F.3d at 595); *Smith*, 109 F.3d at 595 (Section 2 plaintiffs need to demonstrate a "*causal* connection between the challenged voting practice and [a] prohibited discriminatory result") (emphasis added) (quoting Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 312 (3d Cir. 1994)); *Ortiz*, 28 F.3d at 310 n.4 (to prevail on a Section 2 claim a plaintiff "must demonstrate and establish by evidence that the particular [electoral] practice *causes* the alleged discrimination") (emphasis added); Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 60 ("Under Section 2, plaintiffs typically need to demonstrate not only that a statistical disparity exists between minorities and whites, but also that a franchise restriction interacts with social and historical conditions to *cause* the disparity." (emphasis added)).

causation is required for plaintiffs to prevail on a [section] 2 claim. There are differences among courts, however, in what they think causation means."[63]

After reading the cases in this realm, it seems like causation serves as an all-purpose label that lower federal courts place on their ultimate conclusion as to whether a particular electoral law violates Section 2. In other words, if a court desires to find that an electoral law does not violate Section 2, it will conclude that plaintiffs have not proved causation; on the other hand, if a court wants to find that an electoral law violates Section 2, it will conclude that plaintiffs have proved causation. Put plainly, decisions on causation seem akin to the old standard for proving obscenity—courts know it when they see it.

For instance, consider a couple of appellate court cases where causation was not found. In these cases—one involving felon disfranchisement and the other involving registered voters being purged for not voting—causation was not found, at least in part, because of the legitimate government interests in disfranchising felons and purging voters to prevent fraud, respectively.[64] Both of those cases also downplayed historical discrimination and lower socioeconomic status (the combination of which this Article sometimes refers to as "societal discrimination") for minority voters in their causation analyses.[65] In-

63. *New Vote Denial II*, *supra* note 12, at 451. We can say with some certainty that one thing the "causation" requirement is not is a requirement that merely mandates a showing of "but for" causation. In other words, Section 2's causation requirement does not simply entail demonstrating that the alleged vote denial would disappear through elimination of the challenged electoral law. If that were the case, the causation requirement would be relatively simple to understand and implement.

64. In *Wesley v. Collins*, the Sixth Circuit recognized that Tennessee had a legitimate and compelling rationale for felon disfranchisement because such disfranchisement is authorized by the Fourteenth Amendment and because it made sense to "decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases." 791 F.2d 1255, 1261-62 (6th Cir. 1986). In *Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division*, the Third Circuit noted that purge statutes were a legitimate tool to prevent fraud, especially in light of evidence of voter fraud in Philadelphia. 28 F.3d at 314, 316-17. It also noted that citizens were purged for not voting without regard for their minority status. *Id.*

65. In *Wesley*, the Sixth Circuit noted that while Tennessee had a history of discrimination whose effects continued to the present day, such past discrimination could not "in the manner of original sin, condemn action that is not in itself unlawful." *Wesley*, 791 F.2d at 1261 (quoting City of Mobile v. Bolden, 446 U.S. 55, 74 (1980)) (internal quotation marks omitted). In *Ortiz*, in finding a lack of causation, the Third Circuit majority rejected the position of the dissent which "argue[d] at great length that societal conditions—discrimination in housing, education, wages, etc.—constitute a totality of the circumstances with which the practice (the purge law) interacts to create inequality (discrimination)." *Ortiz*, 28 F.3d at 315. The Third Circuit majority responded:

stead, both decisions placed the blame for vote denial on those impacted by the electoral practices at issue either because they had committed a crime (in the case of felon disfranchisement)[66] or because they had failed to vote (in the case of the purge for not voting).[67]

In contrast, other appellate court decisions appear to find causation primarily based on the type of evidence rejected in the cases mentioned in the previous paragraph. For instance, one decision involving a challenge to the reduction of early voting days and hours found causation from historic and current socioeconomic inequalities—[68] a position apparently rejected in previous cases mentioned above that downplayed those factors.[69] Another case involved a challenge to the elimination of same-day registration and a change in state law that prevented votes cast at the wrong precinct from being tabulated.[70] In that instance, the appellate court found causation by relying primarily on the history of voting-related discrimination, socioeconomic disparities between white and minority voters, and the "tenuousness of the reasons given for the restrictions."[71] Again, such reliance on societal discrimination cuts against other court decisions related to causation.

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> [T]he individuals to whom the purge law applies apparently have surmounted and overcome the societal disadvantages which [the dissent] emphasizes, and have registered to vote at least once, if not more often. Had they continued to do so, the purge law could not have affected them, inasmuch as the purge law operates against only those who have registered to vote at least once, but then do not vote or register again.

*Id.* at 315-16 (footnote omitted).

66. *Wesley*, 791 F.2d at 1262 ("[O]nly the commission of a preascertained, proscribed act warrants the state of Tennessee to foreclose a certain individual from the voting process . . . . [Felons are disenfranchised] *because of* their conscious decision to commit a criminal act for which they assume the risks of detention and punishment." (emphasis added)).

67. *Ortiz*, 28 F.3d at 315-16 (noting that if the purged voters "had . . . continued to [vote], the purge law could not have affected them, inasmuch as the purge law operates against only those who have registered to vote at least once, but then do not vote or register again."). UC-Davis' Chris Elmendorf refers to this mode of analysis as the "voter fault" defense. Elmendorf, *supra* note 7, at 408-09.

68. Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 556 (6th Cir. 2014) (finding causation in large part because "African Americans in Ohio tend to be of lower-socioeconomic status because of 'stark and persistent racial inequalities . . . [in] work, housing, education and health,' inequalities that stem from 'both historical and contemporary discriminatory practices.' ") (citation omitted) (internal quotation marks omitted).

69. *Supra* note 62 and accompanying text.

70. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 229-30 (4th Cir. 2014). Again, while technically the decision was vacated, it does help demonstrate that courts are all over the map with their causation analysis.

71. *Id.* at 245-46.

In my opinion, causation, as it has thus far been applied by lower federal courts, does not provide much help as a guiding principle.[72] Take the very real-world instance of a state law requiring a voter to provide government-issued photo identification as a condition for casting a countable ballot. On the one hand, a court could look at evidence of societal discrimination and find that requiring voters to produce photo identification amounts to proof of causation that renders the law invalid under Section 2. Indeed, at least one appellate court basically did just that.[73] On the other hand, a court could say that if those who desire to vote do not take the time to secure adequate photo identification, then it is their own fault for not voting, and no cau-

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72. Dan Tokaji seems to view some recent decisions as providing more structure to the Section 2 inquiry. *See New Vote Denial II*, *supra* note 12, at 463 ("Lower courts have struggled to come up with a workable framework for adjudicating [Section] 2 claims . . . [but t]here has been significant progress in the most recent set of decisions."). I disagree. A few recent, influential appellate court decisions have described the Section 2 vote denial standard as follows:

> • First, "the challenged 'standard, practice, or procedure' must impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.' "
>
> • Second, that burden "must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class."

*League of Women Voters of N.C.*, 769 F.3d at 240 (quoting Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 553 (6th Cir. 2014)); *see also* Veasey v. Abbott, 830 F.3d 216, 244 (5th Cir. 2016); *Ohio State Conference of NAACP*, 768 F.3d at 554. Of course, as mentioned above, a couple of these decisions are technically not good law. *See supra* note 14. But much more importantly and substantively, these two prongs are not viewed much differently, if at all, from what previous courts were doing. The first prong essentially requires proof of a disparate impact on minority voters. *See supra* note 55. The second prong is the causation requirement. Indeed, the second prong uses the word "caused." Moreover, the court that created this two-pronged test admitted that the second factor is "causation." *See, e.g.*, *Ohio State Conference of NAACP*, 768 F.3d at 554 n.9 ("In the few cases considering vote denial claims, this second factor has often been expressed as a 'causation' requirement, or through statements that a plaintiff cannot establish a Section 2 violation merely by showing a disproportionate impact or burden."). While the court has created a two-step test and this has the *appearance* of more structure, the second step appears to be the same old vague causation analysis with the word "[s]econd" in front of it. Moreover, a later opinion from the Sixth Circuit contains a muddled, confusing discussion of the two-step analysis that appears to rely heavily on what might be viewed as the "traditional" notion of causation. *See* Ohio Democratic Party v. Husted, 834 F.3d 620, 637-39 (6th Cir. 2016) ("[A] Section 2 violation [occurs] only if [an electoral law] is shown to causally contribute, as it interacts with social and historical conditions that have produced discrimination, to a disparate impact on African Americans' opportunity to participate in the political process.").

73. *See Veasey*, 830 F.3d at 257-64 (upholding district court finding of a Section 2 violation based on analysis involving poverty caused by racial discrimination). *Veasey* involved discussion of several Senate factors in its analysis. That discussion covers about seven full pages in the Federal Reporter with about four of the seven pages analyzing the history of discrimination and the effect of past discrimination. *See id.*

sation exists. And, not surprisingly given the malleability of causation analysis, another appellate court basically took that approach.[74]

Indeed, one can take many electoral requirements that may have a disproportionate impact on minority voters and frame the causation inquiry so it comes out either way. For example, take the elimination of early voting hours. On the one hand, you could use a causation analysis that focuses on societal discrimination and find that a reduction in early voting hours causes disfranchisement. On the other hand, you could use a causation analysis that focuses on the fault of the voters and finds no causation because it is the voters' fault for not using whatever early voting hours remain or for not using election-day voting hours.[75] To take another example, assume racial disparities in the error rates of voting equipment.[76] On the one hand, you

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74. *See* Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014) (finding that it is not a violation of Section 2 when the government "extends to every citizen an equal opportunity to get a photo ID" and minority voters "are less likely to *use* that opportunity"). In discussing these last two cases, they are painted with a broad brush. In both instances, the courts do not rely on any single reason for their Section 2 decisions, and this Article is trying to glean what factors seem to be doing the most work. Thus, the analysis here could be subject to criticism that it is not considering the totality of either opinion. But that is just the point—these cases deal with very similar issues, very similar facts, very similar analysis, and end up going in the opposite direction, ultimately leading to the conclusion that no real structure exists for Section 2 vote denial claims. In many ways, what the courts have been doing in Section 2 vote denial claims mimics Chris Elmendorf's description of vote dilution jurisprudence under *White v. Regester*, 412 U.S. 755, 766 (1973):

> But the dictate of *White* is only this: (1) duly note that vote dilution claims require "evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question," (2) make findings regarding the presence or absence of any number of factors related to present and past discrimination against minorities, minority political participation, minority representation, and the nuts and bolts of the electoral system at issue, and (3) conclude with an unexplained normative judgment about whether the findings, viewed in totality, warrant a federal court order replacing the challenged electoral arrangements with something more to the plaintiffs' liking. . . .
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> . . . .
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> Thus . . . state electoral practices shall be reformed on the basis of the individual judge's unstated sentiments and beliefs about racial fairness. District judges could be reversed, of course, but only by appellate judges making similarly unexplained normative calls.

Elmendorf, *supra* note 7, at 412-13 (footnotes omitted) (quoting *White*, 412 U.S. at 766).

75. *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2183 (2015) (recognizing the availability of a voter-fault argument in the context of the reduction of early voting hours).

76. Not an inconceivable assumption. *See* Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1743 (2005) (discussing voting equipment that has a disproportionate impact on minority voters).

could say that societal discrimination causes some voters not to cast a countable ballot. On the other hand, you could blame the voters for not paying appropriate attention to correctly using the machine to ensure they cast a countable ballot. A court's view of causation will be contingent on whatever focus the judge making the decision wishes to emphasize.[77]

Perhaps because of the elusive nature of the causation analysis, a few courts have tried to bring more order to the vote denial analysis in recent years by emphasizing the importance of some of the Senate factors from *Gingles*—essentially elevating some Senate factors to a higher status than other Senate factors.[78] The Ninth Circuit noted that the factors relevant to a plaintiff's claim challenging a voter identification law were:

> [T]he history of official state discrimination against the minority with respect to voting, the extent to which voting in the state is racially polarized, and "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."[79]

And the Sixth Circuit held that Senate factors one (history of official discrimination in voting), three (enhancing devices), five (effects of discrimination in education, employment, and health that hinders political participation), and nine (whether the policy underlying the election rule is tenuous) are *particularly* relevant to vote denial claims.[80]

But trying to emphasize a few of the Senate factors likely will not help the analysis much either.[81] For starters, these courts do not even

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77. Professor Tokaji appears to take the view that lower courts' consideration of the importance of social and historical conditions to finding a Section 2 vote denial violation is something apart from the causation inquiry. *New Vote Denial II*, *supra* note 12, at 454-55. The reading of the cases here is that everything is intertwined. But the difference between Professor Tokaji's reading and the reading here may not matter because there is agreement that little clarity exists in how the courts arrive at decisions in the realm of Section 2 vote denial.

78. At least one district court has explicitly rejected use of the Senate factors in a Section 2 vote denial analysis. *See* Brown v. Detzner, 895 F. Supp. 2d 1236, 1245 n.13 (M.D. Fla. 2012) (noting the Senate factors were of "limited usefulness" for vote denial claims). This decision, though, is an outlier. Moreover, the district court replaced the Senate factors with an open-ended "totality of the circumstances" inquiry. *Id.* Thus, eliminating use of the Senate factors did not appear to add much clarity to the situation.

79. Gonzalez v. Arizona, 677 F.3d 383, 405-06 (9th Cir. 2012) (en banc) (quoting Thornburg v. Gingles, 478 U.S. 30, 44 (1986)).

80. Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 555 (6th Cir. 2014).

81. In describing the disarray of Section 2 vote denial decisions, the University of Chicago's Nick Stephanopoulos writes:

entirely agree on what the most important Senate factors are. In addition, to the extent these courts have agreed on what is most important, the most important factors are a history of discrimination and the effects of discrimination as witnessed through lower socioeconomic status. But a history of discrimination and lower socioeconomic status seem likely to be found everywhere with a significant minority population—whether it be North Carolina, Texas, Florida, Wisconsin, or Ohio.[82] So if the focus falls on those Senate factors, there would seem to be almost no limiting principle on Section 2. Just prove a disparate impact, a history of discrimination, and a lower socioeconomic status (that is, societal discrimination), and the plaintiff wins.

But societal discrimination plus disparate impact probably cannot be the test because it trends too far to the liberal view of voting rights. For instance, it is hard to think that conservatives who adopted Section 2 in 1982 (President Reagan) thought they were embracing a formula where societal discrimination plus disparate impact would equal a finding of vote denial under the results test. Moreover, the reality is that it is hard to believe the current conservative Supreme Court would endorse a standard where societal discrimination plus disparate impact equals a Section 2 violation.[83]

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> Some courts require proof of proximate causation, that is, proof that the franchise restriction at issue is directly responsible for the disparity between minorities and whites. If some other factor is significantly implicated—for example, lack of minority interest in the election, poverty unrelated to discrimination, a different electoral regulation not contested in the litigation—then a Section 2 claim cannot succeed. Other courts focus on the interaction between the franchise restriction and social or historical patterns of discrimination. They grant relief only when the restriction's disproportionate impact occurs because of such an interaction, for example, if discrimination is responsible for minorities' lesser education, which in turn makes them more likely to misuse complicated voting machines. And still other courts demand not just a statistical disparity but also the satisfaction of relevant factors from the 1982 Senate report. Responsiveness to minority concerns, a legacy of discrimination, and socioeconomic differences are the factors these courts most often have examined.

Stephanopoulos, *supra* note 62, at 108-09 (footnotes omitted). While I might characterize it slightly differently—because I think that all three of these methods fall within the "causation" doctrine—there is not much of a gulf between the discord Professor Stephanopoulos sees in the doctrine and the views expressed here.

82. *See id.* at 110 ("[T]he usual reason why a restriction disproportionately affects minorities is that they are poorer or less educated, and the usual reason why they are poorer or less educated is a history of discrimination. It thus will be straightforward in many cases to show that a restriction's interaction with discriminatory conditions gives rise to the disparate impact.").

83. Moreover, a less conservative Supreme Court might not even endorse such an analysis. To borrow from the vote dilution context, a focus on finding vote denial violations based primarily on societal discrimination might run into what could be termed the "*De Grandy* problem." *See* Johnson v. De Grandy, 512 U.S. 997, 1000 (1994). When vote dilu-

But let us return to the main point: Section 2 vote denial doctrine is, to put it kindly, vague. And there is widespread agreement among commentators that current Section 2 vote denial doctrine is underdeveloped and muddled.[84] Less charitably, it is a mess. And, at the end of the day, the most important point here for this thesis is just that—Section 2 vote denial doctrine needs a better structure; but it also needs a structure faithful to the compromise forged in 1982.[85]

## III. A BETTER WAY: FOCUS SOLELY ON JUSTIFICATIONS AND HARMS

When it comes to Section 2 vote denial litigation, the doctrine is a mess. Because the doctrine is a mess, it should be simplified to focus on what is most important in relation to conducting fair elections: Whether the benefit of the electoral regulation at issue outweighs the harm to minority voters. Within this basic framework, though, courts should embrace several more principles. First, courts should give top priority to certain types of harms and certain types of benefits. When it comes to harms, courts should prioritize the raw number of minority voters disfranchised by the law over evidence of disproportionate

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tion litigation began, plaintiffs would challenge at-large or multi-member election systems where virtually no minority candidates had ever been elected. Proving a violation in such a place basically involved demonstrating the *Gingles* preconditions plus societal discrimination—which was not particularly difficult in most places with at-large elections and no minority elected officials. But then the context became tougher when the challenges moved to single-member districts that provided some, but not the maximum possible, descriptive representation for minority voters. The lower court in *De Grandy* embraced what had become the traditional analysis—*Gingles* preconditions plus societal discrimination equals Section 2 vote dilution violation. But the Supreme Court overwhelmingly balked at that sort of analysis, making it harder for plaintiffs to win vote dilution challenges in the context of single-member districting that already provided some descriptive representation to minority voters. *See id.* at 1009. The only members of the Supreme Court to dissent in *De Grandy* were Justices Thomas and Scalia, whose dissent was premised on their view that Section 2 does not apply to vote dilution claims at all. *See id.* at 1031-32 (Thomas, J., dissenting). And, at the end of the day, a vote denial analysis focusing solely on disparate impact plus societal discrimination could well suffer a similar fate.

84. *See, e.g.*, Elmendorf & Spencer, *supra* note 75, at 2183 (describing Section 2 vote-denial case law as "inchoate"); Nelson, *supra* note 17, at 595; Stephanopoulos, *supra* note 62, at 107-08 ("In order to determine how the VRA applies to vote-denial claims, it thus is necessary to turn to the case law of the lower courts—which itself is both sparse and somewhat muddled."); *New Vote Denial I*, *supra* note 7, at 692; *New Vote Denial II*, *supra* note 12, at 446, 448.

85. Additional evidence that the Section 2 results doctrine is unsatisfactory might be seen in a recent Fourth Circuit decision involving a package of laws adopted by North Carolina. *See* N.C. State Conference of NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016). The litigation involved claims under Section 2 and the Equal Protection Clause—the latter of which requires a showing of discriminatory intent. *See id.* at 214. The trial court rejected the claims on all counts. *Id.* at 219. The Fourth Circuit, however, reversed the trial court on its discriminatory-intent analysis. *See id.* This is odd given that one would think that reversing the trial court on its discriminatory-results analysis would be easier than on its discriminatory-purpose analysis. After all, the former should be easier for plaintiffs to prove than the latter.

impact. When it comes to benefits, courts should give far greater credence to electoral regulations that expand the electorate and that ensure an accurate count—which may quite often involve the prevention of fraud—almost to the exclusion of any other government interest. Second, when it comes to the benefits and harms of an electoral law, courts should be relatively stringent in their demands for proof of benefits and harms from *both sets of litigants*. Courts should not allow the government to get away with hortatory statements of the benefits of an election law and not allow plaintiffs to get away with weak, theoretical proof of disfranchisement of minority voters.[86]

The proposed test would be superior to the current mishmash framework for several reasons. The cost-benefit test outlined above would be more administrable, focused on factors that should be of utmost concern in analyzing racial fairness in elections, be faithful to the compromise forged between liberals and conservatives in the adoption of the Section 2 results standard, and perhaps represent a more honest reflection of what courts may be doing *sub silentio* anyway. Of course, the proposal has potential flaws that will also be explored.

### *A. The Basic Framework*

The basic premise of the proposed framework is that a court should employ a cost-benefit analysis when it comes to assessing whether an electoral law results in vote denial under Section 2. The benefit of the electoral law will be measured by the government justifications for the law, and the harm of the law will be measured by the cost it has on participation by minority voters. If the harm outweighs the benefit, the electoral law will violate Section 2. But a couple of additional, important layers should be noted to the cost-benefit analysis. First, certain benefits and certain costs should be prioritized almost to the exclusion of all others. Second, courts should be strict in requiring proof from both sides in demonstrating the benefits and costs of an election law.

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86. Other commentators—including Janai Nelson, Steve Pershing, Daniel Tokaji, and Christopher Elmendorf—have made proposals for Section 2. In some instances, this Article concurs with and utilizes their insights. In some instances, it departs from their views. This Article points out some of the differences between my position and those commentators in the footnotes for purposes of keeping the main text relatively clean. The first commentator is Chris Elmendorf. Elmendorf has provided a well-reasoned and extremely detailed account for Section 2. *See* Elmendorf, *supra* note 7, at 377-78. His work, though, focuses primarily on vote dilution litigation. Elmendorf also joins with Doug Spencer to suggest a burden-shifting framework for Section 2. *See* Elmendorf & Spencer, *supra* note 75, at 2183-85. But they admit that "[c]rafting disparate-impact presumptions for vote denial cases is difficult" and that their ideas are "ventured tentatively." *Id.* at 2183.

*Prioritizing Benefits*. The possible benefits of an electoral law are potentially unlimited. An electoral law might be justified because it leads to a more informed electorate,[87] makes elections competitive, reduces voter confusion, ensures an accurate result, enhances fair processes, or levels the playing field between incumbents and challengers. Indeed, the potential benefits of an electoral law are only limited by the creativity of the imagination of government officials who adopt electoral laws and the lawyers who defend those laws against Section 2 challenges.

Because of the seemingly unlimited number of potential benefits, courts should prioritize the two most important interests in conducting elections: 1) voter access to the ballot, and 2) ensuring an accurate count—which may often involve regulations aimed at preventing fraud. All other justifications for electoral laws should mostly be given short shrift within the context of balancing benefits of a regulation with harm to minority voters in the context of Section 2 vote denial.

The most important government interest occurs when an electoral law increases the number of eligible voters casting ballots. An electoral law bringing more voters into the system should be viewed in a highly favorable manner under Section 2 even if it has a disparate impact. With due respect to those who think fewer citizens should vote, that too much voter participation in a democratic society can be dangerous, and who harken back to the Weimar Republic for evidence that high voter turnout is not invariably a positive,[88] for the most part a healthy democracy is one where more, rather than less, people vote. If more individuals take part in elections, the electorate will likely be more representative of the entire population.[89] And if more people vote, more people will feel better about themselves in terms of their civic participation.[90] Thus, an electoral law increasing

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87. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 631 (1969) (describing a potential government interest in limiting the franchise to those who are directly interested in an election because they will more likely acquire the information they need to cast an informed vote).

88. *See, e.g.*, JASON BRENNAN, THE ETHICS OF VOTING 68-73 (2011); H. B. Mayo, *A Note on the Alleged Duty to Vote*, 21 J. POL. 319, 321 n.4 (citing the Weimar Republic as evidence of the dangers of high voter turnout); Selwyn Duke, *Why Most Voters Shouldn't Vote*, AM. THINKER (Mar.4, 2008), http://www.americanthinker.com/articles/2008/03/why_most_voters_shouldnt_vote.html [https://perma.cc/YVK5-XVS4]; Gary Gutting, *Should Everybody Vote?*, N.Y. TIMES (Apr. 25, 2016), https://www.nytimes.com/2016/04/25/opinion/should-everybody-vote.html [https://perma.cc/2EWS-NMSU].

89. Michael J. Pitts, *Opt-Out Voting*, 39 HOFSTRA L. REV. 897, 917 (2011); *see* Gutting, *supra* note 88.

90. *See* Gutting, *supra* note 88 ("I may want [to vote] to express my solidarity with everyone who favors my candidates, to support the democratic process in general, to set an example that will encourage others to vote, or even just to feel the personal satisfaction of having voted.").

voter participation should be given the most credence in a Section 2 analysis.

The other important government interest is ensuring an accurate count which may often come in the form of regulations intended to prevent fraud. Democracy requires not only that an election be broadly accessible but that an election accurately reflect the will of the electorate. If the wrong winner is declared, particularly because of fraud, then an election is not legitimate. Thus, regulations that ensure accuracy in elections should be given great weight in balancing the benefits of a law with the harm to minority voters.

While an electoral regulation might be justified apart from increased access and accuracy—such as by cost-savings or ensuring the orderly conduct of elections—these justifications should be given very little respect except in outlier circumstances. Access and accuracy are of paramount importance when it comes to elections. Everything else should fall deep into the background because access and accuracy are the only areas that might possibly justify the harm of disparate vote denial on minority voters. If an electoral law only creates a more informed electorate but leads to disparate disfranchisement of minority voters, then that should be unacceptable. To reiterate that point because it is important, I am absolutely not saying that there are no other possible government interests out there or that governments should not be able to implement electoral laws for other reasons. What I am saying is that if the government has an electoral law that *harms minority voters*, the government should basically be limited to two justifications to support the law—access and accuracy.[91]

*Prioritizing Harms.* The plaintiff in a Section 2 vote denial case will need to prove the electoral law harms minority voters. Undoubtedly, this will be done by using evidence that the challenged electoral law has a disparate impact on minority voters. Section 2 requires a plaintiff to demonstrate that a minority group has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[92] The need to demonstrate "less opportunity" would seem to require a plaintiff to present evidence of disparate impact, and it appears that courts already universally require such proof.[93]

But the requirement of evidence of disparate impact should not end the inquiry into the harm. The harm of an electoral law with a

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91. Arguably, four areas should be carved out where the government could engage in vote denial involving traditional qualifications of citizenship, age, *incarcerated* felons, and eligibility to vote in special purpose districts. *See supra* note 24.

92. 52 U.S.C. § 10301(b) (2012).

93. *See id.*; *see supra* note 58.

disparate impact can be assessed in different ways. For instance, consider a city with a 20 percent minority population. Assume an electoral law results in twenty-two lost votes for minority voters and seventy-eight lost votes for nonminority voters. There are several different ways to characterize the harm:

- One could focus on the total number of minority votes lost: 22.
- One could focus on comparing the total number of minority votes lost with the total number of nonminority votes lost: 22 versus 78.
- One could focus on the disparity between the number of minority votes lost and nonminority votes lost relative to their percentage of the population: 2.[94]
- One could focus on the disparity between the percentage of minority votes lost and the percentage of minority voters in the total population: 2 percentage points.

In assessing the harm, courts should prioritize the raw number of minority votes lost because of both the potential impact on outcomes and the overall individual harm. The raw number of voters disfranchised should be foremost in the analysis because the more actual votes lost, the more likely it is that those votes might make a difference to the outcome of the election. If 50,000 minority votes are lost then that is likely to make more of a difference in an election than if 1,000 minority votes are lost.[95] In addition, the more actual votes lost, the greater the amount of individual harm to minority voters regardless of whether outcomes are impacted. The primary value of an *individual* voting is, in essence, the intangible "good feeling" it brings to the voter. Voting empowers people and, among other things, allows them to affirm their role in society—and that is important.[96] So the greater the absolute number of minority voters denied the individual right to express themselves through the process of casting a countable ballot in an election, the more reason to strike down an electoral law.[97]

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94. Obviously, no disparate impact exists if twenty minority votes are lost and eighty non-minority votes are lost.

95. Of course, if it is 1,000 votes lost in a 2,000 total vote election, that could make a difference. Thus, the framework would allow for plaintiffs to demonstrate the number of lost votes was high in relation to the specific jurisdiction. In other words, plaintiffs would have a better chance of success with a local law that disfranchised 1,000 persons in a town than a state law that disfranchised 1,000 persons in a state.

96. *See* Gutting, *supra* note 88.

97. In proving harm, the framework mandates a showing of a disproportionate impact and seeks proof that minority persons will not actually cast a ballot. On this score, two objections might be raised. The first is that Section 2 applies to "abridgment" of the right to vote, as well as denial of the right to vote, so that outright denial should not be a require-

But that is not to say relative rates of disfranchisement have no role to play whatsoever—it is just that relative disparities should play a secondary role to absolute numbers. To take an example, let us posit a situation where there are a million citizens with 20 percent of them being minority voters. And let us posit an electoral law that disfranchises 1,000 minority voters and 1,000 nonminority voters. The law has a disproportionate disfranchising impact as 50 percent of the disfranchised voters are minority as opposed to minority voters being just 20 percent of the overall voters. But the loss of votes is unlikely to have an impact on the outcome in such a large electorate,[98] and while there are harms to individual voters' dignity, they are not as high in the aggregate as a loss of 50,000 votes. (Of course, a relatively low disfranchising impact could be enough to support a successful Section 2 claim if the government has little interest in the regulation.) The main point here is that the analysis should value the total votes denied more than the amount of the disparity, not that the analysis should ignore disparate impact entirely.

*Evidentiary Demands on Both Sides.* Governments will assert the benefits of electoral laws. Plaintiffs will counter with the harms. Both sides will have the incentive to inflate the benefits and harms. However, courts should be very demanding of both sides in insisting on tangible proof of benefits and harms.

When it comes to the government interest, courts should be demanding in requiring proof that the electoral law actually accom-

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ment. Rather, laws that inconvenience voting should be enough to win a Section 2 claim. 52 U.S.C. § 10301(a) (2012). The second is that demonstrating vote denial will mandate a showing that a particular electoral law causes a lower *overall* turnout for minority voters. With regard to the distinction between "abridgment" and "denial," it is unclear whether much of a distinction truly exists. If an electoral law "abridges" the right to vote and leads to actual vote denial, then we should be concerned about it from the standpoint of Section 2. But if an electoral law "abridges" the right to vote but does not lead to actual vote denial, why should we care about it? The focus should be on actual harm. In my view, the term "abridgment" captures laws that might indirectly deny voting rights, such as at-large elections or discriminatory redistricting plans—which are the bread and butter Section 2 claims. Abridgment should not be used as a term that signifies the need to provide less evidence of actual vote denial. To use a concrete example, if the government imposes a photo identification law that places a burden on a person to get a photo identification, but that person gets the identification and votes, the framework here would not capture this scenario as a cognizable wrong for Section 2 vote denial purposes.

As for demonstrating lower overall turnout, the requirement of showing disparate impact might not be much different from demonstrating a reduction in turnout. For example, if a certain type of voting machine disparately rejects votes from a minority group then, presumably, minority turnout (in terms of actual votes counted) is lower. Or, if a post-election survey of nonvoters shows that minority registrants disproportionately did not vote because they lacked the required identification then, presumably, minority turnout has been reduced.

98. Assuming complete racial polarization in voting, the loss of 1,000 votes on either side should not swing the election, as each side would lose an equal number of votes.

plishes the government interest. For instance, if a government asserts accuracy through the prevention of illegitimate votes (whether the votes are intentionally fraudulent or just accidentally incorrect) as its interest, courts should be fairly strict in seeking proof that the electoral law actually does prevent illegitimate votes. If the proof is not strong, courts should deeply discount the government benefit, perhaps to the point of irrelevancy. To take what is likely the paradigmatic example in the current context of vote denial, a photo identification law should actually lead to fewer instances of fraud rather than allowing for the government to assert that the opportunity for fraud exists due to fraudulent names on the voter rolls.[99]

As the above example suggests, courts should also be particularly demanding in requiring proof when the government asserts that an electoral law will lead to a benefit in some indirect way. One way an electoral law could lead to more voters casting ballots is through a direct impact. An example of a law that might have a direct impact on increasing the number of votes cast would be a switch to a vote-by-mail system rather than a system where voters generally have to present themselves at a polling place.[100] In contrast, more voters could cast ballots because of less direct effects of an electoral law, such as voters casting more ballots because the electoral law gives them more confidence in the system. For example, if a state switched from electronic machines with no voter-verified paper trail to a system with such a paper trail, it might cause more individuals to vote because they would have more confidence that their vote counted.[101]

In general, courts should heavily discount claims of indirect impact. [102] When, say, the assertion is that the number of voters will in-

99. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 192-94 (2008).

100. Elizabeth Bergman, *Voting Only By Mail Can Decrease Turnout. Or Increase It. Wait, What?*, WASH. POST (Dec. 21, 2015), https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/21/voting-only-by-mail-can-decrease-or-increase-turnout-wait-what/?noredirect=on&utm_term=.4d7c22e9e013 [https://perma.cc/4TDJ-96CL].

101. *See* Alec Foote Mitchell, *Paper Trails and Audits Can Boost Confidence in Elections*, BIPARTISAN POL'Y CTR. (Aug. 12, 2015), https://bipartisanpolicy.org/blog/paper-trails-and-audits-can-boost-confidence-in-elections/ [https://perma.cc/8W8F-7M64].

102. This goes for any governmental assertion where the claimed impact is a tangential, rather than a direct, impact on access or fraud. For instance, an electoral law might be justified because it increases the efficiency of checking in voters and, therefore, has the potential to lead to shorter lines. This is all well and good, but a court should not accept "shorter lines" as a justification and leave it at that. Instead, a court should demand some proof that (1) the regulation actually does shorten the line in more than a trivial manner, and (2) that the amount of time the line will be shortened will actually lead to more people casting ballots. It is an open question whether long lines are much of a deterrence to voting. The people who wait the longest would appear to be the people who are most passionate about making their votes count (early voters and voters who arrive on election day when the polls open). *See* Charles Stewart III, *Waiting to Vote in 2012 4, 21-22* (MIT Political Sci. Dept., Working Paper No. 2013-6, 2013), https://poseidon01.ssrn.com/delivery.php?

crease because of an increase in voter confidence in the electoral system, courts should demand strong proof that the electoral regulation leads to increased confidence which, in turn, leads to increased votes.[103] Put simply, courts should not take claims of indirect benefits—such as increased voter confidence leading to greater participation—at face value.

But courts should be just as demanding from plaintiffs in requiring proof of harm and should not simply accept assertions of disparate impact and disfranchisement. A plaintiff should be required to generate evidence that a particular electoral law does, indeed, have a disparate impact. And a plaintiff should demonstrate that an electoral law does not just provide an *opportunity* for disfranchisement, but that it actually does translate into lost votes. (In the same way, a government interest should not be accepted because of a theoretical "opportunity" for fraud without showing that actual fraud exists.)[104] To take a paradigmatic example from the voter identification context, courts should not just accept plaintiffs' showing that some registered voters do not have an acceptable identification. Instead, they should demand a showing that registered voters without adequate identification would participate absent the identification requirement.

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ID=541021002118115127089097083018089089109025032011016032119084100076096101025065095106001060102005041111018116102070094081124120042034007076000096071091092125004003064064019111101118118097105122006087064084090114016003021095084005103014004080003087116&EXT=pdf (documenting that those who voted early waited the longest).

103. Indeed, in many instances, increases and decreases in confidence in elections may merely reflect partisan bias. For example, one argument for strict voter identification laws is that they increase public confidence in elections. *See Crawford*, 553 U.S. at 197. But what appears to happen is that strict voter identification laws increase Republicans' confidence in elections and decrease Democrats' confidence in elections. *See* Shaun Bowler & Todd Donovan, *A Partisan Model of Election Reform: Voter Identification Laws and Confidence in State Elections*, 16 ST. POL. & POL'Y Q. 340, 351 (2016) (reporting results from a study that "suggest that if voter identification laws had any positive effects on voter confidence, they were limited to Republicans, and any potential positive effects among Republicans may have been offset by depressed confidence among Democrats"). In addition, confidence in elections may largely be tied to whether the candidate you voted for wins. Michael W. Sances & Charles Stewart III, *Voter Fraud Is More Believable When Your Candidate Loses*, U.S. POL. & POL'Y (Feb. 11, 2016), http://blogs.lse.ac.uk/usappblog/2016/02/11/voter-fraud-is-more-believable-when-your-candidate-loses/ [https://perma.cc/CKK6-SMUT] (reporting research suggesting "voters' confidence is indeed driven by who wins—if my candidate wins the election, I trust the process more").

104. I would not restrict litigants to only presenting proof of the government interest or the harm to minority voters from elections within the jurisdiction. For instance, assume a government wants to defend a law mandating strict proof of citizenship and evidence exists that noncitizen voting is a problem elsewhere. My analysis would allow the government to use that evidence in support of its law. Similarly, assume a plaintiff wants to demonstrate the harm of the loss of early voting opportunities with evidence from other places without early voting. The analysis here would allow a plaintiff to use that evidence in support of his or her claim. That said, evidence from within the jurisdiction will be much stronger and should be given much more credence by a court.

### *B. The Benefits of the Proposal*

The proposal here is a standard for Section 2 vote denial claims that balances the benefit of the law against the harm to minority voters with a focus on access and accuracy on the benefits side and a focus on the raw number of minority voters impacted on the cost side. The proposal also seeks to tighten the burden on both the government and the plaintiffs in proving the benefits and costs of an electoral regulation. Each side should have to provide firm proof of its assertions related to the benefits and costs of an electoral law rather than hortatory statements and theory.

Such a standard would be a vast improvement over the current situation in relation to Section 2 vote denial jurisprudence for several reasons. First, the proposal presents a clear, judicially-administrable framework for analysis. Second, the proposal focuses the framework on the factors we should care about the most in relation to election administration and minority voters: An accurate election that attempts to maximize participation while not disparately and substantially disfranchising minority voters. Third, the proposal represents a fairly balanced compromise between liberal and conservative positions that reflects the actual compromise forged when the results standard was adopted. Fourth, and far less significantly, it may be a more jurisprudentially-honest standard because it may essentially reflect what some courts are *sub silentio* doing in this realm.

*An Administrable Standard Primarily Focused on What Is Most Important to Democracy*. The proposal provides a clear and easily understandable structure to the Section 2 results analysis. Current Section 2 vote denial jurisprudence remains terribly unstructured with many courts using the multi-layered Senate factors as the touchstone of the analysis—at least when it comes to causation. The proposed test totally abandons the Senate factors as a mechanism for evaluating Section 2 vote denial claims and ditches the "I-know-it-when-I-see-it" causation inquiry.[105] Thus, the proposal provides a clearer structure for evaluating vote denial claims than what currently exists.

But beyond providing a more judicially-administrable framework, the proposal also focuses on what is most important in election administration: (1) maximizing the number of people who cast ballots, and (2) ensuring that elections accurately reflect the will of the electorate. The best election is generally an election where a lot of people participate and where fraud or mistake does not taint the results.

105. As Christopher Elmendorf has noted, "though the permissibility of particular participation barriers might be resolved by working through the [Senate] factors and winding up with an unexplained judgment call, that would be odd." Elmendorf, s*upra* note 7, at 416.

Everything else related to the conduct of an election should be a secondary consideration.[106]

On the other side of the equation, the proposal reflects what we should care most about when it comes to minority voting rights in the vote denial context: The raw number of minority voters who will be disfranchised by a regulation that has a disproportionate impact. Disparate impact is important, but disparate impact that does not affect a substantial number of minority voters or does not cause many more minority votes to be lost than nonminority votes should not be of primary concern. And disparate impacts that do not lead to lost votes should be of virtually no concern.

While the proposal provides a clearer structure for the Section 2 results standard, more structure does not mean the outcome of any particular claim will never be dependent on the particular judge who hears the claim. At the end of the day, the proposal comes down to a balancing test, and a balancing test can always be manipulated by a judge. For instance, when it comes to, say, the strength of the proof offered on the question of the harm to minority voters, one judge might find an expert witness *not* credible whereas another judge might find that same witness credible. When it comes to litigation in front of a judge, the human aspect of judging will always be a wildcard, regardless of the doctrine developed.[107]

It would be asking far too much for a Section 2 results doctrine that cannot possibly be judicially manipulated. When it comes to case-by-case decisionmaking, the federal judiciary could not adopt a clear doctrinal rule for adjudication of Section 2 vote denial cases without coming down hard on one side or the other of the contentious debate over its creation. In other words, any clear rule that might emerge would either err far too much on the side of striking down electoral laws or far too much on the side of upholding them. For instance, if Section 2 was interpreted to bar any electoral law that has a disparate impact in a jurisdiction where societal discrimination exists, the interpretation would not be faithful to the balance Congress struck in adopting the results standard—that would be erring too far on the side of liberals. On the other hand, a Section 2 standard that, in essence, demands proof of discriminatory intent would take things

106. Again, and it is repeated for emphasis—I am not saying that the government does not have any other interest in the conduct of elections outside of maximum participation and accuracy. What is being said is that these two factors are the compelling interests that could serve to outweigh the harm of a law to minority voters.

107. And even if a doctrine provides an absolutely clear rule, that doctrine likely is adopted because the absolutely clear rule accords with that particular judge's predilections for how the world should operate.

too far in the opposite direction in favor of conservatives.[108] Congress passed a law that asked the federal judiciary to strike a balance between opposing ideas, and that balance must be abided by.

So the goal is not to create a test that absolutely cannot be manipulated by the judiciary— that is a fool's errand. Instead, the goal is to create a test that focuses the judiciary (and the litigants as well) on what really matters when it comes to structuring democracy. When it comes to any electoral law, the utmost concern should be the overall costs and benefits of the law. And when it comes to the Section 2 results standard, the concern should focus on the overall costs and benefits of the law with particular attention to the costs of the law in relation to minority voters. Put simply, an electoral law might be allowed to cause some harm to minority voters if it *is* worth it in the grand scheme of things. Conversely, an electoral law should not be allowed to perpetrate harm to minority voters if it *is not* worth it in the grand scheme of things.

But currently, instead of focusing on the important aspects of a given electoral law—the justification for its use and its harm to minority voters—the doctrinal standard focuses on an undefined notion of "causation." This is demonstrated by a set of evidentiary guideposts that were not even developed for vote denial litigation in the first place. Arguably, if judicial manipulation is to persist (and it will), we should not dress it up in undefined legal jargon; instead, we should be clear and honest about what should matter and then argue about the existence (or lack thereof) of the things that do matter.

*Adhering to the Original Liberal-Conservative Compromise.* The proposal remains faithful to the balance struck by conservatives and liberals in enacting Section 2. Recall that in adopting the Section 2 results standard, liberals were seeking to free plaintiffs from having to prove a difficult test of discriminatory purpose. On the other hand, conservatives were opposed to enacting a test of proportional representation. The vague, open-ended language adopted by Congress reflected a compromise that punted the issue to the judiciary.

A cost-benefit standard remains faithful to liberal prerogatives because it does not require proof of a discriminatory purpose. A cost-benefit standard does not require knowing what was in the hearts and minds of government officials when they adopted the legislation.

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108. In *Veasey v. Abbott*, the State of Texas argued for—and the Fifth Circuit rejected—a test that similarly would have led to litigation outcomes favorable to state and local governments. 830 F.3d 216, 247 (5th Cir. 2016) ("As the State would have it, so long as the State can articulate a legitimate justification for its election law and some voters are able to meet the requirements, there is no Section 2 violation. This argument effectively nullifies the protections of the Voting Rights Act by giving states a free pass to enact needlessly burdensome laws with impermissible racially discriminatory impacts.").

A cost-benefit standard looks at objective factors (like the harm to minority voters and the benefits to the government) and *only* objective factors when determining whether an electoral law violates the Section 2 results standard in the vote denial context. Proof of discriminatory purpose is wholly unnecessary and irrelevant.

A cost-benefit standard remains faithful to conservative prerogatives because it does not enforce proportional representation. In the context of vote denial, proportional representation is, essentially, striking down an electoral law merely because it has a disparate impact. Disparate impact will be a part of the inquiry, but it will not be the sole aspect of the inquiry. The government will be able to put forth evidence of the benefits of its choice in response to proof of disparate impact. A cost-benefit approach does not violate the conservative side of the results standard compromise.

A cost-benefit analysis in relation to Section 2 vote denial might also be attractive to conservative and liberal judges alike. In essence, a cost-benefit standard boils down to a test of efficiency in the conduct of elections while taking into consideration the particular interest of minority voter participation. The former consideration of efficiency may well be something that a coalition of liberal and conservative justices can agree on.[109] The consideration of minority voter participation is what the statute requires the judiciary to focus on; minority participation is what the Voting Rights Act was intended to foster.

*Jurisprudential Honesty*. Finally, an assessment of costs and benefits may closely mirror what is actually occurring in many of the Section 2 vote denial cases. In one of the earliest academic articles discussing the Section 2 results standard in the vote denial context, voting rights litigator Steve Pershing canvassed the case law and came to the conclusion that "what seems to be at work [in the decisions] is the court's assessment of the justification for the government's policy."[110] Taking the line of thinking one step further, Profes-

109. Notably, in *Crawford*, discussed *infra*, a majority of liberal and conservative judges agreed on a balancing framework, although they differed as to how it should be applied in a specific case. *See generally* Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

110. Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 LOY. L.A. L. REV. 1171, 1193 (2001). Pershing's article mainly focused on a hypothetical Section 2 challenge to internet voting, using Arizona's 2000 Democratic Presidential primary as the jumping-off point. *See id.* at 1172-74 (describing Arizona's use of internet voting and discussing the "[S]ection 2 access question presented on these facts"). After canvassing judicial opinions in the Section 2 vote denial context and finding that the government's justification was an important aspect of the decisions, Pershing offered the following "modest proposal" for application of Section 2 in the vote denial context: "The more severe the racial disparity of voting access that results from a challenged practice, the more tenuous the justification should be seen to be, even if that justification is asserted to have nothing to do with race." *Id.* at 1199.

sor Tokaji admits to the possibility that the current "causation" framework is "a sort of under-the-table balancing of the government's interest in the challenged practice against its vote-denying impact."[111] If such a balancing is what is really going on, then the proposal brings the doctrine closer to the actual practice.

### *C. Potential Objections to the Proposal*

There will likely be many objections to a proposal to use a cost-benefit analysis that primarily focuses on the harm of disfranchisement and government benefits related to access and accuracy. And objections will likely also arise due to the standard's more stringent requirement of actual proof of costs and benefits on both sides of the litigation equation. Indeed, objections will probably come from all quarters. Conservatives will not like the limitations on government justifications. Liberals will not like the focus on raw numbers of minority voters disfranchised. Conservatives will not like putting a more stringent burden for the government to produce proof that its electoral law actually operates in a beneficial way. Liberals will not like putting a more stringent burden on plaintiffs to demonstrate disfranchising impact. If both liberals and conservatives objected to the proposal, this would be a positive rather than a negative because the Section 2 results standard represents a compromise—where both sides should be dissatisfied with whatever standard operates.

It is impossible to anticipate all the objections to the proposal, but here are a few major potential objections. First, there may be "legalistic" objections—objections that the proposal is somehow unfaithful to statutory text, legislative history, or precedent. Second, there may be an objection that the proposal too closely tracks current Equal Protection jurisprudence. Third, there may be a practical problem when it comes to proof of the cost and benefits in this realm. The remainder of this discussion deals with those possible objections in turn.

*Legalistic Objections.* Many of the objections to the proposal seem likely to come from a "legalistic" angle and would probably come from both conservatives and liberals. Conservatives may criticize the above standard for failure to adhere to some notion of what the plain language of the statute indicates—that the statute does not expressly speak in terms of costs and benefits. Liberals may criticize the above standard for failure to follow language from Justice Brennan's opinion in *Gingles*.[112] But these legalistic objections should not serve as a

111. *New Vote Denial I*, *supra* note 7, at 722.

112. *See infra* note 118.

barrier because Section 2 is, essentially, a common law statute, and the Supreme Court has broad authority to develop the law in this area as it sees fit.

The analysis starts from the following premise: Many of the traditional tools of legal analysis—statutory language, legislative history, and precedent—are not helpful in determining the standard for Section 2 vote denial claims. In the development of the results standard and the initial Supreme Court precedent, there was an almost singular focus on vote *dilution* claims rather than vote *denial* claims. What this means is that virtually any arguments relying on plain language, legislative history, and precedent are trying to fit a round peg in a square hole. To be sure, one can cherry-pick bits and pieces in this realm to come to a liberal conclusion or a conservative conclusion, but we should be realistic—legalistic claims in this realm are generally inconclusive unless one is already predisposed to one particular side or the other.

Yet there are some big-picture principles emanating from adoption of the results standard that cannot reasonably be disputed by either liberals or conservatives. First, the creation of the results standard focused almost exclusively on vote dilution, and those who passed the statute gave little, if any, thought to its application in the vote denial context. Second, despite the standard's narrow focus on vote dilution, there is no question that the Section 2 results standard applies in instances of vote denial. Section 2 has always applied to vote denial claims, and there is no indication that creation of the results test intended to pull the plug on Section 2's application to vote denial. Third, adoption of the results standard was a compromise forged between liberals and conservatives that did not give much guidance at all to the judiciary in either the vote denial or vote dilution context beyond some very broad strokes—no *Mobile*-style discriminatory purpose and no proportional representation.

This Article is firmly in the camp with UC-Davis's Chris Elmendorf who has posited that passage of the Section 2 results standard was essentially an invitation to the judiciary to develop a common law of racially fair elections.[113] I would add to Professor Elmendorf's assertion the idea that such common law cannot sway too far in one direction or the other—too far in favor of the liberal side (plaintiffs) or too far in favor of the conservative side (the government). But Professor Elmendorf basically has it right: Section 2 leaves wide berth for the Supreme Court to craft a standard as it sees fit in this realm. (And if Congress disagrees with the Supreme Court's interpretation, it can always amend the statute.)

113. Elmendorf, *supra* note 7, at 383.

Much of the discussion above dispenses with those who would want to marry the results standard to some sort of plain-language notion (a legal methodology generally associated with conservatives).[114] For instance, the proposal does not specifically address the fact that the statutory language says that a violation can be proven by the "totality of circumstances."[115] Indeed, the proposal leaves this language—and all of the statutory language—by the wayside. But if there is to be more structure to Section 2 vote denial jurisprudence, then it cannot be married to a boundless "totality of circumstances" analysis.[116]

But there will just as likely be vehement legalistic opposition to the proposal from the liberal side of the spectrum because the proposal runs counter to a judicial opinion written by a liberal lion, Justice Brennan. The proposal divorces the Section 2 results analysis from "societal discrimination"—a history of discrimination against minority voters manifested in a lower socioeconomic status for minority voters.[117] This goes against the grain of the seminal Section 2 re-

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114. The height of foolishness of plain-language analysis in the realm of Section 2 remains Justice Thomas's opinion in *Holder v. Hall*, where he argues that Section 2 does not apply to vote dilution claims. 512 U.S. 874, 875 (1994). One must completely ignore the context surrounding the adoption of the 1982 amendment to Section 2 to achieve this result.

115. 52 U.S.C. § 10301(b) (2012).

116. *See id.* A left-of-center colleague criticized the proposal for recognizing government interests and for failing to place enough emphasis on disparate impact by focusing on the language "have less opportunity than other members of the electorate . . . to elect representatives of their choice." *Id.* Again, though, that basic language was cribbed from a Supreme Court opinion involving vote dilution. *See* White v. Regester, 412 U.S. 755, 766 (1973) (describing the plaintiff's burden in a constitutional vote dilution case as producing evidence to demonstrate "that its members had less opportunity than did other residents . . . to participate in the political processes and to elect legislators of their choice"). Not to mention that this language is so vague as to be virtually useless, except if you side with a liberal view that any disparate impact is less opportunity and, therefore, all laws that have a disparate impact violate Section 2.

117. In this respect, the proposal differs from Professor Janai Nelson who wrote an article that focused on what types of vote denial should be considered, in the words of Section 2, to be "on account of race." Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 585-86 (2013) (internal quotation marks omitted). In that article, Professor Nelson identified two "core values" of Section 2: "(1) racial context matters and (2) implicit bias counts" that allow for "deeper inquiry" into the "causal context of disparate vote denial." *Id.* at 586 (internal quotation marks omitted). In essence, Professor Nelson wants the Section 2 inquiry to focus on two things. First, courts should "examine the historical racial context of discrimination in which contemporary race-neutral laws operate to determine whether persistent racial inequality interacts with these laws to cause disparate vote denial." *Id.* Second, that evidence of implicit bias helps inform whether disparate vote denial in violation of Section 2 exists. *See id.* Obviously, I disagree with Professor Nelson as to her first point. However, I agree with her second point that evidence of implicit bias should be considered in assessing Section 2 claims. Implicit bias is real and does exist. And, to the extent that implicit bias exists and is traceable to disfranchisement

sults precedent—Justice Brennan's *Gingles* opinion—which contains what seems to have become the hallmark principle for finding a Section 2 violation: "The essence of a [Section] 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." [118] Indeed, lower courts often harken back to this statement in their discussions of Section 2 vote denial.[119]

But it is not clear at all to me why Section 2 vote denial claims should remain a prisoner to Justice Brennan's sentiment. For starters, it is a single sentence in a 50-page opinion. Moreover, the statement appears in a case involving vote dilution, not vote denial. In addition, it is not as if this statement was pulled from the statutory language, from the legislative history, or from a prior Supreme Court opinion dealing with minority voting rights—*no citation follows the sentence*. Finally, as noted previously, Section 2 is a common law statute and, thus, there is no need to be forever loyal to a single sentence in a 50-page opinion more than three decades in the rear-view mirror.

History and socioeconomic status should be immaterial when it comes to the current disfranchisement of minority voters. If minority voters are being disfranchised now, society should not care about how much or how substantial or how impactful a history of discrimination has been. Nor should it care about why or whether minority voters have a lower socioeconomic status. The thing that should matter is whether a significant number of minority voters are being disproportionately disenfranchised without adequate government justification. The focus should be on present outcomes, not on whether those outcomes can be traced in some way to social and historical discrimination.[120]

Here is a hypothetical example of why the Court should move away from Justice Brennan's single sentence in *Gingles* as the touchstone for the Section 2 vote denial analysis. Assume a wealthy, well-educated minority group of eligible voters arrived in a town one year

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(that is, can be shown to actually cause lost votes by minority voters), it should be considered as part of assessing the harm of an electoral law under the Section 2 results standard.

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

119. *See New Vote Denial II*, *supra* note 12, at 454 ("[Lower courts] tend to emphasize *Gingles*' statement that the 'essence' of a [Section] 2 claim is that the challenged practice 'interacts with social and historical conditions' to cause an inequality in voting opportunities." (quoting *Gingles*, 478 U.S. at 47)); *see, e.g.*, Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612, 626 (6th Cir. 2016).

120. However, it is likely that many, if not all, current outcomes were created at least in part by historical discrimination.

ago, and the town subsequently enacts an ordinance disfranchising a substantial and disproportionate number of those people in town elections. Also assume that the ordinance does not serve to increase the electorate as a whole or increase accuracy, and there is no history of discrimination or strong evidence of societal discrimination. Yet, under these circumstances, the right result should be to find a violation of the Section 2 results standard because a substantial group of voters are being disfranchised for no good reason.[121]

And here is another problem with societal discrimination as the pivot point for analysis under Section 2: What about electoral laws that expand the franchise for all people but disproportionately expand the franchise for nonminority voters? Should such laws be struck down in any place that has societal discrimination? If not, why not? And if the answer is "no" because of the overall benefits of the laws, then the proposed framework does a much better job of honestly analyzing the situation than a framework which revolves around societal discrimination.[122]

This is not to say that we should ignore the role that historical discrimination has played in the development of American democracy. And this is not to say that we should ignore the role historical discrimination plays in current outcomes for minority voters. And further, this is not to say that the history surrounding the passage of the Voting Rights Act of 1965 should not play a role in our understanding of the Voting Rights Act.

But historical discrimination should only be used to justify passage of the statute itself. The reason we have the Voting Rights Act is because we had a crisis related to minority voting rights.[123] We still have problems—though not as outrageous[124]—related to minority voting rights. And as long as the United States is a pluralistic nation, it

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121. Granted, the hypothetical presented is probably unrealistic. If a town passes a law with a substantial impact on a newly established minority group, it seems likely one would be able to generate evidence of other instances of animus against the group (for example, hate crimes, ethnic tensions in the school system, etc.) that could be classified as a "recent history" of discrimination.

122. Courts should not engage in a less-restrictive-alternative-type analysis when adjudicating Section 2 vote denial claims. For example, assume a law passed in a state with 20 percent minority voters will lead to 90,000 new nonminority voters and 10,000 new minority voters. However, tweaking that law would lead to 85,000 new nonminority voters and 15,000 new minority voters. In such an instance, judges should not enjoin the law passed and replace it with a different law. Such a move strikes too close to the line of judges becoming an electoral law legislature rather than acting in a judicial role.

123. *See generally* GARY MAY, BENDING TOWARD JUSTICE (2013).

124. With due respect to those who take an opposing view, I do not think that such recent enactments, such as reducing early voting opportunities or photo identification requirements, come anywhere near what was happening in Selma, Alabama and elsewhere in 1965.

will likely continue to have problems related to minority voting rights. That is more than enough reason to ingrain Section 2 of the Voting Rights Act into the democratic landscape for a long time. But while history and societal discrimination can and should be used as a macro-level justification for Section 2, courts should eschew a micro-level analysis using societal discrimination as a touchstone for case-by-case decisionmaking.[125]

*Equal Protection Overlapping Objection*. Another potential objection is that a cost-benefit analysis in relation to the Section 2 results test might not be much, if at all, different from the Equal Protection framework developed in the *Anderson-Burdick-Crawford* line of Supreme Court jurisprudence.[126] A detailed account of this line of jurisprudence is not necessary for development of this idea. For present purposes, it is sufficient to note that the *Anderson-Burdick-Crawford* line of jurisprudence involves balancing injury to the electorate against governmental interests.[127] And when it comes to injuries that minority groups might assert under this balancing test, a Section 2 results standard that tracks this balancing provides nothing different.

Perhaps the framework provides nothing different for minority voters than what an *Anderson-Burdick-Crawford* balancing analysis

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125. Perhaps a benefit of retaining some requirement of an intersection of the challenged practice with social and historical conditions is the fact that it might eliminate Section 2 challenges brought on behalf of white voters. *See New Vote Denial II*, *supra* note 12, at 479-80 (noting that "it will generally be more difficult for white voters to show the interaction with social and historical conditions"). But why care whether white voters can bring a claim under Section 2? If a government did not have a legitimate reason for systematically and disparately denying the franchise to a significant number of white voters, then Section 2 should rectify that situation. The dignity of white voters in such a situation does not need to be diminished because of a lack of historic discrimination. That being said, such claims will very likely be virtually nonexistent.

126. *See generally* Anderson v. Celebrezze, 460 U.S. 780 (1983); Burdick v. Takushi, 504 U.S. 428 (1992); Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

127. As the Court has most recently described the standard in *Crawford*:

> [A] court evaluating a constitutional challenge to an election regulation [should] weigh the asserted injury to the right to vote against the "precise interests put forward by the State as justifications for the burden imposed by its rule" . . . .
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> . . . [We have never identified] any litmus test for measuring the severity of a burden that a state law imposes on a political party, an individual voter, or a discrete class of voters. However slight that burden may appear . . . it must be justified by relevant and legitimate state interests "sufficiently weighty to justify the limitation."

*Crawford*, 553 U.S. at 190-91 (quoting *Burdick*, 504 U.S. at 434; Norman v. Reed, 502 U.S. 279, 288-89 (1992)).

would provide,[128] but, even if that is the case, that lack of differentiation is not a problem. There is nothing that says Section 2 results and *Anderson-Burdick-Crawford* balancing *must* be different (*at least in the context of applying the balancing to a specific racial or ethnic minority group*).[129] Remember, Congress can easily be said to have passed Section 2 as a license to create a common law of racially fair elections.[130] It is not a problem if the common law of Section 2 develops a similar (or the same) test as the *Anderson-Burdick-Crawford* balancing. The results standard adopted in 1982 was an effort to reverse a requirement that plaintiffs meet a stringent standard of discriminatory purpose.[131] The *Anderson-Burdick-Crawford* balancing test does not contain a stringent purpose standard and, indeed, contains no purpose requirement at all. In addition, the *Anderson-Burdick-Crawford* balancing test was an innovation that came *after* passage of the results standard, so one cannot argue that those who adopted the results standard were trying to abandon it. Moreover, the Section 2 results standard was enacted primarily for its impact on vote dilution litigation. Finally, to the extent that the proposal here closely tracks *Anderson-Burdick-Crawford* balancing, this presents a useful counter-argument to those who might assert that Section 2 is unconstitutional.

*Practical Objection*. The biggest barrier to the proposal is a practical one. The proposal calls upon courts to be stricter on both plaintiffs and defendants with the requirement of proof. But both sides may have trouble generating firm evidence of benefits and harms.[132]

The government may have trouble generating evidence that an electoral law leads to an increase in voters or an increase in accuracy. It can often be difficult to determine whether a given electoral law actually causes more votes to be cast. It can also be difficult to prove that a given electoral law actually increases accuracy by decreasing the amount of fraud that occurs. And, on both sides, it can be difficult to figure out the *amount* of the increase in votes and accuracy.

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128. I think the proposal is different in that it puts primary emphasis on certain types of benefits and harms when it comes to government interests and a certain type of harm when it comes to minority voters. But for purposes of this discussion, this Article proceeds from the vantage point that it is the same basic test and defends the proposal on those grounds.

129. *Anderson-Burdick-Crawford* balancing is certainly different than the proposed Section 2 standard because the *Anderson-Burdick-Crawford* balancing does not require proof of racial or ethnic harm (that is, any group of voters can bring such a claim).

130. Elmendorf, *supra* note 7, at 383.

131. *Supra* Part I.A.

132. It is doubtful that requesting more concrete proof would lead to much higher litigation expenses. Presumably, both sides would need to hire experts to present proof. But experts are already a part of existing Section 2 vote denial litigation.

On the other hand, plaintiffs may have difficulty demonstrating disparate impact and disfranchisement. Plaintiffs may not have readily available data on voters by race and ethnicity.[133] Even if they do, they may not be able to trace a given electoral law to disfranchisement of minority voters. This may be particularly problematic for challenges to a newly enacted law prior to implementation of the law (though, in truth, the government may have trouble justifying a law that has not been implemented as well).

Frankly, the problems of proof are a positive rather than a negative of the proposal. If there are truly government benefits to be had, the government should be able to prove that. If there is truly disfranchisement of minority voters, the plaintiffs should be able to prove that as well. If a side cannot generate the actual data to prove a claim, *then maybe that claim is not worthy*. There have often been calls for election administration to take a more data-driven approach.[134] Why not compel electoral law litigation to take a more data-driven approach as well?

It is tiring how both sides make vast claims with very modest proof to back up those claims. Again, take voter identification litigation as a prime example. Republicans and conservatives claim that voter impersonation justifies the strict photo identification laws without much proof any such fraud exists.[135] Or they justify photo identification laws based on the *opportunity* for fraud because of bloated voter registration rolls or voter registration fraud.[136] On the other hand, Democrats and liberals make vast claims of disfranchisement, mostly citing data on how many registered voters do not have a qualifying identification without tying that into people actually not turning out to vote *because of* the photo identification law.[137]

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133. One of the problems of proof in Section 2 cases is that not all states gather data on registered voters by race and ethnicity. A federal statute should be enacted to require states to gather such data.

134. *See generally* HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT (2009).

135. JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD, 1, 4 (2007), https://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf ("It is more likely that an individual will be struck by lightning than that he will impersonate another voter at the polls.").

136. *Supra* note 97 and accompanying text.

137. *See* Michael J. Pitts, *Photo ID, Provisional Balloting, and Indiana's 2012 Primary Election*, 47 U. RICH. L. REV. 939, 944-45 (2013) (discussing data used by opponents of photo ID); *see also* Tom Kertscher, *Were 300,000 Wisconsin Voters Turned Away From the Polls in the 2016 Presidential Election?*, POLITIFACT WIS. (Dec. 7, 2016, 5:00 AM), http://www.politifact.com/wisconsin/statements/2016/dec/07/tweets/were-300000-wisconsin-voters-turned-away-polls-201/ [https://perma.cc/5HB6-PRDR]. To date, the best evidence available demonstrates that almost no voter impersonation fraud occurs and that there is some amount of disparate disfranchisement of minority voters but that the claims of actual

Let us put both sides to the test and be equally skeptical of claims of benefits and harms—in all contexts.

That said, the proposal would not necessarily require the government to prove that a specific law actually increased turnout among all voters or minority plaintiffs to prove that a specific law actually decreased turnout among minority voters. It may be very difficult to credibly determine whether a given electoral law either increases or decreases turnout. Instead, both sides should be allowed to present witnesses to justify their claims. For instance, if the government wanted to argue that access was increased, it could present witnesses to testify as to how a given electoral law enabled voter participation. On the other hand, if a plaintiff wanted to argue that disfranchisement occurs, a plaintiff could provide actual persons as witnesses who were disfranchised. Of course, though, in each instance both sides are going to have to provide more than one witness if they are going to make claims of a substantial impact one way or the other.

In addition, as a general matter, both sides would not necessarily be required to prove their claims with evidence from the jurisdiction in question. While evidence from the jurisdiction in question will be the most compelling, evidence of what has occurred in other jurisdictions could be used to support a claim. For instance, if the claim is that the adoption of vote centers in one state will increase the number of people who vote, evidence that the adoption of vote centers in another state has increased the number of people who vote should be considered.[138]

At the end of the day, no framework for Section 2 can ever be perfect. A Section 2 results standard is always going to have to walk the line created by the liberal-conservative coalition required for passage. For the reasons discussed above, a cost-benefit analysis focused on the most important aspects of democracy would be the best way to proceed despite any potential objections to such an approach.

## IV. CONCLUSION

The Section 2 results standard has now been operational for more than thirty-five years. However, there still is no clear structure for adjudicating claims of vote denial using the results standard. At

disfranchisement tend to be overblown. In the face of such evidence, though, the proposed framework would likely invalidate the vast majority of strict photo identification laws.

138. Of course, evidence of the impact of an electoral law from outside the jurisdiction involved in the litigation may well be discounted if there are material differences between the jurisdiction where the evidence was collected and the jurisdiction involved in the litigation.

some point, the Supreme Court will step into the mix. When the Court steps in, it should craft a standard that remains faithful to the liberal-conservative compromise that allowed for the creation of the results standard in the first place. It should also create a standard that focuses on the most important aspects of participation: An accurate election system that maximizes participation. The framework offered in this Article provides both.