Applying Section 2 to the New Vote Denial

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TABLE OF CONTENTS

INTRODUCTION

Over the last several years, many states have enacted laws that make it more difficult for some people to vote.[1] Strict voter identification laws have received the most attention, but this is just one type of voting practice that

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[1] One study found twenty-two states have enacted new restrictions on voting. Wendy R. Weiser & Erik Opsal, *The State of Voting in 2014*, BRENNAN CTR. FOR JUSTICE (June 17, 2014), http://www.brennancenter.org/analysis/state-voting-2014, *archived at* http://perma.cc/QF72-GKKH. The changes have not all been in one direction. The same report notes that another sixteen states have passed laws making voting easier since 2012.

threatens to impede electoral participation by eligible citizens, including racial and ethnic minorities. Other recent state laws limit early and absentee voting, prohibit the counting of provisional ballots cast in the wrong precinct, and restrict voter registration opportunities.[2] In an article published in 2006, I labeled such barriers to participation the "new vote denial," comparing them to practices that were used to disenfranchise African Americans until enactment of the Voting Rights Act of 1965 ("VRA").[3]

Much has happened since then. Voting rights lawyers have brought cases under the Fourteenth Amendment to stop or limit the effects of state laws restricting voting. Although the Supreme Court rejected a facial equal protection challenge to Indiana's voter identification law in *Crawford v. Marion County Elections Board*,[4] there have been some noteworthy successes in the lower courts. The Sixth Circuit, for example, invalidated Ohio's restrictions on early voting and provisional voting under the Fourteenth Amendment.[5] These cases follow *Crawford* in applying a balancing test to equal protection claims, weighing the "character and magnitude" of the burden on voting against the precise interests put forward by the state.

Another important development was the Supreme Court's decision in *Shelby County v. Holder*,[6] which effectively ended preclearance under § 5 of the VRA.[7] Although preclearance was of limited use in stopping vote denial,[8] *Shelby County* shifted the focus to § 2 of the VRA. Lawsuits in Ohio,[9] North Carolina,[10] Wisconsin,[11] and Texas[12] challenged voting restrictions under both § 2 and the Constitution. Some but not all lower courts have granted relief and, most recently, the Supreme Court intervened in three of

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[2] Some of these restrictions may actually have a greater negative impact on participation than voter ID. *See* Daniel P. Tokaji, *Responding to* Shelby County*: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 89–95 (2013).

[3] Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006). To be sure, the recent restrictions are nearly as severe as those that occurred after the end of Reconstruction, when African Americans were systematically denied the vote throughout the South. *See generally* J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 1880–1910 (1974). The Voting Rights Act is codified at 42 U.S.C. §§ 1973 to 1973bb-1 (2012).

[4] 553 U.S. 181, 204 (2008).

[5] Obama for Am. v. Husted, 697 F.3d 423, 436 (6th Cir. 2012); Ne. Ohio Coalition for the Homeless v. Husted, 696 F.3d 580, 598 (6th Cir. 2012).

[6] 133 S. Ct. 2612 (2013).

[7] *See id.* at 2627–2631 (holding the § 4 coverage formula unconstitutional).

[8] Tokaji, *supra* note 2, at 77–83.

[9] Ohio State Conference of the NAACP v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio), *aff'd*, 768 F.3d 524 (6th Cir.), *stay granted*, 135 S. Ct. 42 (2014).

[10] N.C. State Conference of the NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C.), *rev'd in part*, League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir.), *stay granted*, 135 S. Ct. 6 (2014).

[11] Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis.), *stay granted*, 766 F.3d 755 (7th Cir.), *rev'd*, 768 F.3d 744 (7th Cir.), *stay vacated*, 135 S. Ct. 7 (2014).

[12] Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258 (S.D. Tex.), *stay granted*, 769 F.3d 890 (5th Cir.), *vacatur denied*, 135 S. Ct. 9 (2014).

those challenges. It is quite possible that the Court will soon address the merits of the § 2 claims in one or more of these cases.

This Article proposes a test for adjudicating § 2 vote denial claims that builds upon my previous article on the subject, the work of other scholars, and intervening decisions by the Supreme Court and lower courts. Three federal courts have agreed on a test to govern these claims in recent decisions from North Carolina, Ohio, and Texas. This judicial test, which resembles the one I advocated in 2006, represents a significant improvement over previous lower court analyses. Some refinement of the judicial test is necessary, however, to take account of the state interests in a challenged practice and to address constitutional concerns.

This Article advocates a three-part test focusing on the disparate impact of a challenged burden on voting, its connection to social and historical conditions (including but not limited to intentional discrimination), and the state's asserted interests. At the first step, racial minorities would have the burden to demonstrate that the challenged practice has a disparate impact on minority voters. In a case challenging a voter ID law, plaintiffs could meet this initial burden by showing that racial minorities are less likely to possess qualifying identification than white voters. In the case of a law eliminating weekend early voting, it could be met by showing that racial minorities are more likely to use the voting opportunities that the state has eliminated. Second, plaintiffs would have the burden of demonstrating that the disparate impact is traceable to the challenged practice's interaction with social and historical conditions, including but not limited to intentional discrimination attributable to the state.[13] Among the factors that courts should consider at this stage are intentional discrimination by public or private actors, racially polarized voting (in the limited sense that racial minorities are more likely to favor candidates of one party and whites are more likely to favor candidates of the other party), and the extent to which the state has attempted to mitigate the disparate impact of the challenged practice.

To this point, my proposed test is similar to the one articulated in recent lower court decisions under § 2. My concern with these decisions is that they do not expressly provide a place in their analytic structure for state interests that may justify restrictions on voting. I therefore propose a third step in the analysis: once plaintiffs have satisfied their initial burden, courts should balance the harm to minority voters against the state's proffered interests. At this stage, the burden would lie with the state to show by clear and convincing evidence that the challenged practice's benefits outweigh its harms to voters. While fraud prevention and cost savings may be considered, partisan motivations should not be allowed to justify voting bur-

[13] This draws on the Supreme Court's characterization of the "essence" of a § 2 claim in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that the challenged voting rule or practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters." *Id.* at 47.

dens given the correlation between race and party.[14] Because my refined test draws on the constitutional standard for vote denial cases articulated by the Supreme Court, it should easily survive any constitutional challenge.

Part I of this Article provides background on § 2, focusing on the legal uncertainty that still exists regarding the precise standard that should apply in vote denial claims. Part II discusses lower court decisions on vote denial claims under § 2. Informed by cases challenging vote denial under both § 2 and the Constitution, Part III presents a refined standard for vote denial claims under § 2, one that addresses practical problems that have emerged in lower court decisions. Part IV concludes, considering the efficacy of this test in stopping the new vote denial.

I. An Uncertain Legal Standard

Two different kinds of claims are cognizable under § 2: vote denial and vote dilution. The type that is the subject of this article — vote denial — concerns impediments to voting and the counting of votes. Vote denial cases thus implicate the value of *participation*: specifically, being able to register, vote, and have one's vote counted.[15] Historically, vote denial included literacy tests, poll taxes, and registration barriers, all of which were notoriously common in the South prior to enactment of the VRA in 1965.[16] More recent vote denial claims concern voter ID, limits on early and absentee voting, voter registration restrictions, and the rejection of provisional ballots. Vote dilution, on the other hand, refers to practices that diminish a group's political influence, thus implicating the value of *representation*: a group's members being able to aggregate their votes to elect candidates of their choice.[17] The most common examples of practices that may dilute minority votes are at-large elections, multimember districts, and gerrymandered districts.

There have been many more vote dilution claims than vote denial claims under § 2.[18] That said, the text and legislative history leave no doubt that § 2's "results" language applies to both vote denial and vote dilution claims. Section I.A discusses the text and legislative history of the 1982 amendments to § 2, which added the "results" language. Section I.B con-

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[14] *See* Richard L. Hasen, *Race or Party? How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 Harv. L. Rev. F. 58, 62 (2014).

[15] *See* Pamela S. Karlan, *All Over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 Sup. Ct. Rev. 245, 249 (1993) (identifying participation as one component of the right to vote).

[16] Tokaji, *supra* note 3, at 691.

[17] *See* Karlan, *supra* note 15, at 249 (identifying aggregation as a component of the right to vote distinct from participation); Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, *in* Voting Rights and Redistricting in the United States 121, 122–23 (Mark E. Rush ed., 1998).

[18] Tokaji, *supra* note 3, at 708–09 & n.141 (citing Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643 (2006)).

siders the relevance of *Thornburg v. Gingles*[19] — the first and still the most important § 2 decision — to vote denial. Section I.C summarizes scholarly commentary on how § 2 should apply to vote denial claims.

A. Text and Legislative History

Section 2 provides in pertinent part:

> 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 . . . .[20]

The "results" language was adopted in 1982. Before then, § 2 tracked the wording of the Fifteenth Amendment, prohibiting only those voting practices[21] that "deny or abridge the right of any citizen of the United States to vote on account of race or color."[22] In this respect, the original § 2 differed from § 5 of the VRA, which has always proscribed practices with a racially discriminatory "purpose" *or* the "effect."[23] In *City of Mobile v. Bolden*,[24] a plurality of the Supreme Court understood the Constitution (and therefore § 2) to reach only *intentional* race discrimination, making it more difficult to prevail on vote dilution claims.[25] By adding the "results" language to § 2 in 1982, Congress meant to overrule *Bolden*.[26]

Congress was primarily focused on vote dilution rather than vote denial at the time it considered and adopted the 1982 amendment to § 2.[27] The main objection to the results test was that it would be understood as mandat-

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[19] 478 U.S. 30 (1986).

[20] 42 U.S.C. § 1973(a) (2012).

[21] Throughout this Article, I use the term "voting practices" to encompass all the items identified in § 2 (qualifications, prerequisites, standards, practices, and procedures).

[22] Voting Rights Act of 1965, Pub. L. 89-110, § 2, 79 Stat. 437, 437 (1965); *see also* U.S. CONST. amend. XV, § 1.

[23] More specifically, § 5 prohibits voting practices with a retrogressive effect — that is, ones that make a protected group worse off than they were before. *See* Beer v. United States, 425 U.S. 130, 141 (1976). The Court interpreted the purpose prong similarly, understanding it to prohibit only practices adopted with a retrogressive purpose. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 341 (2000) (*Bossier II*). The 2006 amendments reversed *Bossier II*, expanding § 5 to prohibit voting practices adopted with a discriminatory purpose, not just those with a retrogressive purpose. *See* Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81 (2006) (codified as amended at 42 U.S.C. § 1973c(b)–(d) (2012)).

[24] 446 U.S. 55 (1980).

[25] Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 205 (2005).

[26] *See* Tokaji, *supra* note 3, at 704–08.

[27] For a detailed history of the 1982 amendments to the VRA, see Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983).

ing proportional representation in vote dilution cases.[28] Senator Hatch questioned what "core value" the "results" language served, if not proportional representation.[29] In response to these concerns, Senator Bob Dole proposed a compromise that was ultimately embraced by the Reagan Administration and became part of § 2.[30] The Dole compromise added the following subsection § 2(b):

> A violation of [§ 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [§ 2] 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.[31]

The text of the amended VRA did not spell out the factors that should be considered under the "totality of circumstances" language. The Senate Judiciary Committee Report ("Senate Report"), however, listed nine factors derived from prior vote dilution cases[32] that might be used to prove a violation. The listed factors include a history of prior voting discrimination, discrimination in other areas like education that hinders political participation, racial polarization, and whether the government interest asserted in support of the voting practice is "tenuous."[33] According to the Senate Report, there should be no requirement that any particular number of factors be proven.[34] Nor are these factors meant to be either comprehensive or exclusive.[35] Mirroring the language of subsection (b), the Report said that the "ultimate test" is "whether, in the particular situation, the practice operated to deny the minority plaintiff[s] an equal opportunity to participate and to elect candidates of their choice."[36]

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[28] S. REP. NO. 97-417, at 96 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 269 (arguing that, despite the disclaimer, the amended § 2 would entail a mandate for proportional representation).

[29] *Id.*; *see also* Tokaji, *supra* note 3, at 707 (discussing Senator Hatch's comments).

[30] Boyd & Markman, *supra* note 27, at 1414–20, 1425.

[31] 42 U.S.C. § 1973(b) (2012).

[32] Most important were White v. Regester, 412 U.S. 755 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc). *See* S. REP. NO. 97-417, *supra* note 28, at 21–23 (citing both cases).

[33] S. REP. NO. 97-417, *supra* note 28, at 29.

[34] *Id.*

[35] *See id.*

[36] *Id.* at 30.

The Senate Report expressly stated that § 2 prohibits "all voting rights discrimination," including practices that "result in the denial of equal access to any phase of the electoral process for minority group members."[37] Thus, § 2's "results" language applies to vote denial claims as well as vote dilution claims. To the extent the text of the statute leaves any doubt — and it does not — the Senate Report dispels it.

B. The Gingles *Framework*

While the Supreme Court has never decided a vote denial case under § 2's "results" language, there is a settled test for vote dilution claims. *Thornburg v. Gingles*,[38] decided in 1986, remains the leading case. *Gingles* articulated the legal framework for vote dilution claims that applies to this day. Although its framework applies only to vote dilution claims, the Court's decision sheds light on what a good test for vote denial should look like.

The challenge the Court faced in *Gingles* was to devise a workable test for vote dilution claims, while avoiding the twin pitfalls of requiring intentional discrimination on the one hand and of mandating proportional representation on the other. The Senate Report envisioned a "flexible, fact-intensive test,"[39] but a framework to guide the judicial inquiry into vote dilution was lacking.

After summarizing the legislative history of the 1982 amendments, Justice Brennan's majority opinion[40] distilled this core principle: "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[41] The Court proceeded to establish a threshold test for vote dilution claims, consisting of three "preconditions" that plaintiffs must satisfy: (1) the minority group must be sufficiently "large and geographically compact to constitute a majority in a single-member district"; (2) the group must be "politically cohesive"; and (3) there must be racial bloc voting by whites, so as to defeat minority candidates.[42] These preconditions are necessary but not sufficient for plaintiffs to prevail.[43]

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[37] *Id.* In addition, the Senate Report refers to vote denial cases as well as vote dilution cases. Christopher Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Claw Statutes*, 160 U. PENN. L. REV. 377, 416 (2012). This further supports the proposition that the results test applies to both types of § 2 claims.

[38] 478 U.S. 30 (1986).

[39] *Id.* at 46.

[40] Portions of Justice Brennan's opinion were joined only by a plurality, but all the portions discussed here represent a majority of the Court.

[41] *Gingles*, 478 U.S. at 47.

[42] *Id.* at 50–51.

[43] *Gingles* involved multimember districts. Subsequent Supreme Court decisions confirmed that the same test applies to other minority vote dilution claims. *See, e.g.*, League of

Even if plaintiffs satisfy the three *Gingles* preconditions, they must still show that, based on the "totality of circumstances," minority voters were deprived of an opportunity to participate in the political process and elect their representatives of choice.[44] Stressing the fact-intensive character of this inquiry, the *Gingles* majority emphasized that this test demands an "intensely local appraisal" of the challenged practices;[45] accordingly, lower court findings should only be reversed if clearly erroneous.[46] Because the three-judge district court was "composed of local judges who are well acquainted with the political realities of the State," the Court deferred to their findings regarding minority voters' opportunity to elect representatives of their choice.

Although the *Gingles* preconditions apply only to vote dilution claims, the Court's opinion sheds some light on the analytic framework that should govern vote denial claims. First, it leaves no doubt that the results test applies to all forms of voting discrimination, not just vote dilution. Second, the Court defines the "essence" of a § 2 claim: that the challenged voting practice "interacts with social and historical conditions" to diminish the voting strength of racial minorities. Third, the *Gingles* preconditions — which have demonstrated remarkable endurance over almost three decades, despite changes in the Court's composition — demonstrate the value of providing a structured framework for lower courts to apply.[47] Fourth, *Gingles* stressed that substantial deference should be afforded to lower courts, given the context-sensitive character the "totality of circumstances" inquiry. This inquiry depends on a fact-specific appraisal of local conditions, to which lower courts (especially district courts) are much better suited than the Supreme Court, whether the claim involves vote dilution or vote denial.

C. Three Proposed Tests

The text and legislative history of § 2 provide limited guidance on how it should apply to vote denial claims. While *Gingles* offers some assistance, it does not supply a framework for adjudicating such claims either. It is therefore unsurprising that lower courts have not agreed, at least until recently, as discussed below in Part II, on what § 2 requires plaintiffs to prove in vote denial cases. Before discussing those cases, however, it is helpful to

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United Latin Am. Citizens v. Perry, 548 U.S. 399, 425 (2006); Johnson v. De Grandy, 512 U.S. 997, 1006 (1994).

[44] *Gingles*, 478 U.S. at 77. *See also Johnson*, 512 U.S. at 1011 (confirming that, if the *Gingles* preconditions are satisfied, "courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes").

[45] 478 U.S. at 78 (quoting White v. Regester, 412 U.S. 755, 769 (1973)).

[46] *Id.* at 78–79.

[47] *See* Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 HASTINGS L.J. 923, 972 (2011) (observing that *Gingles* "streamlined the evidentiary requirements" for a § 2 claim).

review the academic literature on how § 2 should apply to vote denial claims.

Commentators have advanced three different types of tests for § 2 vote denial claims. The first is *burden-shifting*. I suggested one form of such a test in my 2006 article.[48] Drawing on the employment discrimination cases under Title VII and juror discrimination tests under the Equal Protection Clause, I suggested that § 2 plaintiffs have the initial burden of showing both that the challenged practice results in the disproportionate denial of minority votes, and that the disparate impact is traceable to the challenged practice's interaction with social and historical conditions.[49] If plaintiffs meet that burden, then the state would be required to justify the challenged practice by showing that it is narrowly tailored to serve a compelling state interest.

The second type of § 2 test might be characterized as *quasi-intent*. Professor Chris Elmendorf, the leading proponent of this approach, worries that a test too close to pure disparate impact would raise serious constitutional concerns.[50] Accordingly, he suggests that plaintiffs be required to prove "to a significant likelihood that the electoral inequality is traceable to race-biased decisionmaking."[51] This is something less than what would be required for a race discrimination claim under the Fourteenth or Fifteenth Amendment. In addition, the bias could be on the part of either traditional public actors (like legislators or election officials) or by voters, who he claims are performing a "public function" and therefore may be considered state actors.[52] Professor Elmendorf would have this quasi-intent standard apply to both vote dilution and vote denial claims.[53]

The third type of § 2 test may best be characterized as *contextual*. Professor Janai Nelson has written the leading article advancing this type of analysis, drawing two core values from § 2: (1) that racial context matters; and (2) that implicit bias counts.[54] Drawing on these values, she suggests that evidence of either explicit or implicit racial bias is germane to vote denial claims, while emphasizing that plaintiffs should not be required to prove intentional discrimination (or a reasonable likelihood thereof) to prevail. Instead, she would rely heavily on the Senate factors, suggesting that courts look carefully at the "historical racial context . . . to determine whether persistent racial inequality interacts with [the challenged] laws to cause disparate vote denial."[55]

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[48] *See* Tokaji, *supra* note 3, at 723.

[49] *Id.* at 724.

[50] *See* Elmendorf, *supra* note 37, at 399–403.

[51] *Id.* at 384 (emphasis omitted).

[52] *Id.* at 385, 430–36.

[53] *Id.* at 417.

[54] Janai Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 586 (2013).

[55] *Id.* For other examples of a contextual approach, see Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1, 43–44 (2006);

II. VOTE DENIAL IN THE LOWER COURTS

Historically, § 2 vote denial claims have been few and far between. There were many more vote dilution claims than vote denial claims under § 2 during the three decades following the adoption of the "results" language in 1982.[56]

Section 2 vote denial claims have become more prominent since the *Shelby County* decision, which effectively ended § 5 preclearance. That decision caused voting rights plaintiffs, including the U.S. Department of Justice, to turn to § 2 to stop practices believed to have a disparate impact on minority voters. Until recently, there was no consensus (and much confusion) over how § 2 should apply to this class of claims.[57] There was general agreement that "something more" than a mere disparate impact should be required to prevail,[58] but disagreement over what that something more should be.[59] A few courts have used proximate causation[60] or intentional discrimination.[61] Most courts, however, take a contextual approach that draws on the Senate factors, focusing especially on social and historical inequalities that interact with the challenged practice to result in the disproportionate denial of minority votes.[62]

The discussion below examines the major questions in § 2 vote denial cases decided by lower courts. Section II.A discusses cases involving the express disenfranchisement of certain groups of voters, such as felons. Section II.B summarizes the pre-2014 decisions involving burdens on voting, focusing on the two main issues over which lower courts have struggled: (1) the requirement of causation, including its relationship to discriminatory intent; and (2) the social-historical conditions that must be shown to prevail on a § 2 claim. Section II.C addresses 2014 decisions in cases from Ohio,

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and Kathleen M. Stoughton, Note, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292, 319–27 (2013). A variant on this approach suggests a balancing of the burden on voting against the state's interest, within the context of the flexible approach suggested by the Senate Report. *See* 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, 1201 (2001). The test I suggest *infra* Part III borrows this idea.

[56] *See supra* note 18 and accompanying text.

[57] *See* Nicholas O. Stephanopolous, *The South After* Shelby County, 2013 SUP. CT. REV. 55, 108 (characterizing the decisional law on § 2 vote denial as "somewhat muddled").

[58] *Id.* (quoting Brown v. Detzner, 895 F. Supp. 2d 1236, 1249 (M.D. Fla. 2012)) (citing Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997); Wesley v. Collins, 791 F.2d 1255, 1260–61 (6th Cir. 1986)).

[59] *See, e.g.*, *Salt River*, 109 F.3d at 595.

[60] *See, e.g.*, *id.*; Ortiz v. City of Phila., 28 F.3d 306, 321 (3d Cir. 1994); *Wesley*, 791 F.2d at 1261–62. *Ortiz* is discussed *infra* section II.B.1.

[61] *See, e.g.*, Farrakhan v. Gregoire, 623 F.3d 990, 993–94 (9th Cir. 2010) (en banc); Brown v. Detzner, 895 F. Supp. 2d 1236, 1245–49 (M.D. Fla. 2012) (requiring proof of intentional discrimination by public actors or racial bias by private actors to prevail on a § 2 denial claim). *Detzner* is discussed *infra* section II.B.2.

[62] *See, e.g.*, Stewart v. Blackwell, 444 F.3d 843, 851 (6th Cir. 2006), *vacated by* 473 F.3d 692 (6th Cir. 2007) (en banc). I was co-counsel for plaintiffs in *Stewart*.

North Carolina, Wisconsin, and Texas which suggest that a general (though not unanimous) consensus on the § 2 vote denial test may be emerging.

A. Express Disenfranchisement

This category of cases involves laws that expressly exclude some people from voting. Although most of the cases in this category involve felon disenfranchisement, I start with an oft-cited case involving a property qualification — the decision that has probably sowed more confusion than any other § 2 vote denial case.

In *Smith v. Salt River Project Agricultural Improvement & Power District*,[63] the Ninth Circuit upheld a "one acre, one vote" rule for voting in elections of a special purpose district.[64] Only 40% of African American heads-of-household owned land, compared with 60% of white non-Hispanic heads-of-household.[65] The Ninth Circuit distilled from previous § 2 cases the principles that "a bare statistical showing of disproportionate *impact* on a racial minority" is insufficient, and that there must be a "causal connection" between the challenged practice and the discriminatory result.[66] Neither of these propositions is controversial (although as discussed below, there is considerable confusion about the precise meaning of both impact and causation). Rather, the problem with the plaintiffs' claim was that they had "stipulated to the nonexistence of virtually every circumstance" that might establish a violation under § 2's "totality of circumstances" standard,[67] including not only the absence of any intentional race discrimination, but also any racial issues addressed by the district or any practices that "have the effect of enhancing opportunity for racial discrimination in voting behavior."[68] The plaintiffs thus failed to prove that "African American *landowners* (voters) are discriminated against."[69] The court also found good reasons for the district's landowner-based qualification, given the greater stake that landowners had in its operations and the fact that landowners assumed the risk of its capital investment.[70]

Viewed in this light, *Salt River* is a much less difficult case — and much less informative on the standard for § 2 vote denial claims — than most have presumed.[71] The Ninth Circuit expressly stated that there was "no claim that the District's voting system discriminates against *non-landowners* (non-voters), who may disproportionately be African Americans."[72] This

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[63] 109 F.3d 586 (9th Cir. 1997).
[64] *See id.* at 588.
[65] *Id.* at 589.
[66] *Id.* at 595.
[67] *Id.*
[68] *Id.* at 595–96.
[69] *Id.* at 596.
[70] *Id.*
[71] I am among those who have read the case too broadly. *See* Tokaji, *supra* note 3, at 716.
[72] *Salt River*, 109 F.3d at 596.

point is especially significant. The court understood the plaintiffs to be making a claim only on behalf of African Americans who owned land and therefore were able to vote, not on behalf of the 60 percent of African Americans who did not own land and therefore were not able to vote. For this reason, *Salt River* is really a vote dilution case, even though a footnote in the opinion calls it a vote denial case.[73] At most, the decision supports the basic propositions that (1) a bare statistical showing of disparate impact is insufficient to establish a § 2 violation; and (2) the government's interests in the challenged restriction should be part of the "totality of circumstances" analysis. Something more than mere disparate impact must be shown, but *Salt River* offers scant guidance on what that something more must be.

The felon disenfranchisement cases are somewhat more illuminating, but the special constitutional status of this qualification limits their relevance to other voting restrictions. Six federal appellate courts have now considered claims that disqualifying voters due to past convictions violates § 2, and all courts have rejected these claims.[74] These decisions, however, place great weight on the Fourteenth Amendment's language allowing felony-based disqualifications.

The Ninth Circuit's en banc decision in *Farrakhan v. Gregoire*[75] is illustrative. A panel of that court had previously held that Washington's felon disenfranchisement law could be challenged under § 2,[76] but the en banc court set a higher bar. The en banc court observed that these laws have an "affirmative sanction" in the Fourteenth Amendment,[77] which expressly excludes disenfranchisement for "participation in rebellion, *or other crime*" from the reduction in representation to which states are otherwise subject if they deny or abridge voting rights.[78] The court went on to hold that plaintiffs challenging such laws must at least show either "that the criminal justice system is infected by *intentional* discrimination or that the felon disenfranchisement law was enacted with such intent."[79] In other words, some proof of intentional discrimination, either internal or external to the voting process, is necessary to challenge felon disenfranchisement under § 2.

Farrakhan and the other appellate decisions rejecting § 2 claims against felon disenfranchisement rest largely on the special constitutional status of

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[73] *See id.* at 596 n.8.

[74] *See, e.g.*, Farrakhan v. Gregoire, 623 F.3d 990, 994 (9th Cir. 2010) (en banc); Simmons v. Galvin, 575 F.3d 24, 41 (1st Cir. 2009); Hayden v. Pataki, 449 F.3d 305, 323 (2d Cir. 2006) (en banc); Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc); Howard v. Gilmore, 205 F.3d 1333, 1333 (4th Cir. 2000) (per curiam) (unpublished opinion); Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986).

[75] 623 F.3d 990 (9th Cir. 2010) (en banc).

[76] *See* Farrakhan v. Gregoire, 338 F.3d 1009 (9th Cir. 2003). For a discussion of this decision and the attempt to rehear it en banc, see Tokaji, *supra* note 3, at 716–18.

[77] *See Farrakhan*, 623 F.3d at 993 (citing Richardson v. Ramirez, 418 U.S. 24, 54 (1974)).

[78] U.S. CONST. amend. XIV, § 2 (emphasis added).

[79] *Farrakhan*, 623 F.3d at 993.

this qualification.[80] Whether or not one agrees with their reasoning, these cases are of limited utility in determining the test that should apply to burdens on voting, to which I now turn.

B. Burdens on Voting

Section 2 plaintiffs have challenged — with little success, until recently — a variety of election administration practices on the ground that they disproportionately burden racial minorities. The challenged practices include voter ID laws, voter registration practices, the use of substandard voting equipment, and restrictions on early voting. This section analyzes the two most important issues to have emerged in the pre-2014 cases: (1) the meaning of *causation*, including the question whether it requires a showing of racially discriminatory *intent*; and (2) the significance of *social and historical conditions* in the "totality of circumstances" analysis. The next section analyzes four recent decisions suggesting that a consensus on the appropriate test may be emerging.

1. Causation and Intent

There is a general consensus that some showing of causation is required for plaintiffs to prevail on a § 2 claim. There are differences among courts, however, in what they think causation means. Some courts understand causation simply to require that plaintiffs show that the challenged practice has a disparate impact on minority voters. Other courts understand causation to be a more onerous requirement, something akin to discriminatory intent.

The simple view of causation is that the challenged practice must be a *but-for* cause of a disproportionate burden on minority voters. Even in this modest form, the causation requirement can be difficult to satisfy, and some § 2 vote denial claims have foundered for failure to show but-for causation. For example, in *Common Cause/Georgia v. Billups*,[81] the court concluded that the plaintiffs had failed to show a substantial likelihood of success in their § 2 challenge to Georgia's voter ID law.[82] The plaintiffs had produced evidence of racial disparities in wealth and access to vehicles, but not of racial disparities in the possession of driver's licenses or other forms of photo ID.[83] Similarly, in *Gonzalez v. Arizona*,[84] the Ninth Circuit rejected a § 2 challenge to Arizona's voter ID law, based primarily on the failure to

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[80] There is scholarly debate over this understanding of the Fourteenth Amendment. *See* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEORGETOWN L.J. 259, 272 (2004) (arguing that the Fifteenth Amendment repealed any implicit sanction for felon disenfranchisement in the Fourteenth Amendment).

[81] 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

[82] *Id.* at 1375.

[83] *Id.* at 1374–75.

[84] 677 F.3d 383 (9th Cir. 2012) (en banc).

prove but-for causation.[85] The district court had found that plaintiffs had not shown that the challenged practice had a disparate impact on Latino voters, and the Ninth Circuit upheld this finding.[86]

Other courts have applied a stricter requirement, one that more closely resembles proximate causation or discriminatory intent. An example is *Ortiz v. City of Philadelphia*,[87] which upheld a law purging registered voters for not voting,[88] stating that "Section 2 plaintiffs must show a causal connection between the challenged voting practice and the prohibited discriminatory result."[89] While this sounds like but-for causation, the evidence showed that African American and Latino voters were purged from the rolls at higher rates than white voters; thus, they appear to have shown a causal connection between the challenged purge and registration disparities.[90]

Elsewhere, *Ortiz* frames the causation requirement more stringently, saying that it demands "a causal connection between *asserted indicia of discrimination* and the challenged electoral procedure at issue."[91] Although it is not entirely clear what *Ortiz* meant by "indicia of discrimination," it might be understood as requiring a causal link between intentional (or quasi-intentional) discrimination and the challenged practice.[92] To the extent *Ortiz*

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[85] *See id.* at 406–07.

[86] *Id.*

[87] 28 F.3d 306 (3d Cir. 1994).

[88] *Id.* at 318. For critical analyses of *Ortiz*'s causation requirement, see Saphire & Moke, *supra* note 55, at 47–55; and John A. Earnhardt, Jr., Note, *Challenging Episodic Practices Under Section 2 of the Voting Rights Act: A Critical Analysis of* Ortiz v. City of Philadelphia Office of the City Commissioners Voting Registration Division, 52 WASH. & LEE L. REV. 1065, 1095–1100 (1995).

[89] *Ortiz*, 28 F.3d at 312.

[90] *See id.* at 313 (quoting Ortiz v. City of Phila., 824 F. Supp. 514, 539 (E.D. Pa. 1993)).

[91] *Id.* at 310 (emphasis added). The Third Circuit cited decisions from three other circuits for this proposition: Wesley v. Collins, 791 F.2d 1255, 1261–62 (6th Cir. 1986) (rejecting § 2 challenge to felon disenfranchisement law on the ground that the individual's decision to commit a crime was the true cause of their being denied a vote); Irby v. Virginia Bd. of Elections, 889 F.2d 1352, 1358–59 (4th Cir. 1989) (rejecting § 2 challenge to appointment of school board members on the ground that plaintiffs failed to show causal link between appointment system and underrepresentation of African Americans on the board); and Salas v. Sw. Texas Jr. Coll. Dist., 964 F.2d 1542, 1556 (5th Cir. 1992) (rejecting Latino voters' challenge to at-large system, on the ground that low turnout was the real cause of their underrepresentation in the district).

[92] *See Ortiz*, 28 F.3d at 317 (faulting the dissenting judge for failing to "bridge the gap between the societal disadvantages which it catalogues at great length, and the purpose and effect of Philadelphia's non-voting purge act"). Another apparent example of a stricter causation requirement is the Ninth Circuit's decision in *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 920 (9th Cir. 2003) (en banc) (denying a preliminary injunction against California's use of punch-card voting systems in the gubernatorial recall election). I served as co-counsel to the plaintiffs in that case. The court characterized the plaintiff's burden as showing "a causal connection between the challenged voting practice and [a] prohibited discriminatory result." *Id.* at 918 (alteration in original) (quoting Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997)). It acknowledged that the plaintiffs had shown a "possibility of success" on their § 2 claim, but did not squarely rule on the merits. *See id.* at 919. Instead, the court said that the "the degree and significance of the [racial] disparity" was disputed and, on that basis, concluded that the district court was within its discretion to deny a preliminary injunction. *Id.* at 918–20.

requires intentional discrimination, that requirement conflicts with the language of § 2.[93]

Another case that blurs the line between causation and intentional discrimination is *Brown v. Detzner*.[94] There, the district court held that § 2 plaintiffs must show either:

> (1) [D]iscriminatory intent on the part of legislators or other officials responsible for creating or maintaining the challenged system; or (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme.[95]

The court thus required intentional discrimination, either by public officials or private actors in the form of "racial bias in the community." The court drew this requirement from Eleventh Circuit cases involving vote dilution, not vote denial. While acknowledging the distinction between vote dilution and vote denial cases, *Brown* did not consider whether the same requirement should apply to the latter category.[96] Even if one agrees that intentional (or quasi-intentional) discrimination should be required for vote dilution, there are good reasons for applying a more lenient standard to vote denial claims, as I explain in Part III.

Another causation question concerns the evidence of disparate impact that must be presented in a vote denial claim. Are plaintiffs obligated to demonstrate that the challenged practice actually causes a drop in minority *turnout*, relative to other voters?[97] Or is it sufficient to demonstrate that the practice causes a disproportionate *burden* on minority voters — for example, by imposing a requirement that minorities are less likely to satisfy (e.g., voter ID) or by eliminating an opportunity that they are more likely to use

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[93] As discussed *supra* Part I, the 1982 amendments eliminated the requirement that plaintiffs prove discriminatory intent, replacing it with a "results" test. Consistent with this language, most courts have not required plaintiffs to show intentional discrimination. *See, e.g.*, Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 550 (6th Cir. 2014); League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014); Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014) (discussed *infra* section II.C.3); Burton v. City of Belle Glade, 178 F.3d 1175, 1198 (11th Cir. 1999). *Husted* is discussed *infra* section II.C.1 and *Walker* is discussed *infra* section II.C.3.

[94] 895 F. Supp. 2d 1236 (M.D. Fla. 2012).

[95] *Id.* at 1244 (quoting Nipper v. Smith, 39 F.3d 1494, 1524 (11th Cir. 1994)).

[96] For a case in which intentional discrimination against racial minorities was found, see United States v. Berks Cnty., 277 F. Supp. 2d 570, 581 (E.D. Pa. 2003) (finding hostility toward Latino voters in the implementation of voter ID requirement).

[97] While not explicitly deciding this question, the Third Circuit's decision in *Ortiz* may be read as suggesting that plaintiffs must prove that the challenged practice negatively affected minority turnout. There, the plaintiffs had shown that minorities were disproportionately purged from voter registration rolls but not that purges caused turnout disparities. *See Ortiz*, 28 F.3d at 314 (noting that, while minorities had turned out at lower rates than white voters in some elections, "the purge statute did not cause the statistical disparities").

(e.g., Sunday early voting)? This question came to the fore in the 2014 cases, which are discussed below in section II.C.

2. Social and Historical Conditions

Lower courts typically devote substantial attention to the "totality of circumstances," including the Senate factors, in § 2 vote denial cases. They tend to emphasize *Gingles*' statement that the "essence" of a § 2 claim is that the challenged practice "interacts with social and historical conditions" to cause an inequality in voting opportunities.[98] This is an inherently murky standard and, unsurprisingly, courts applying it have reached divergent conclusions.

An example is *Stewart v. Blackwell*,[99] in which the Sixth Circuit allowed a § 2 challenge to punch card voting equipment to proceed.[100] The decision is illuminating, even though the panel's decision was later vacated and superseded because the case had become moot.[101] After finding the requisite disparate impact on minority voters, the panel said that the "next inquiry" is to scrutinize the evidence under the "totality of circumstances" standard, quoting *Gingles* for the proposition that this part of the inquiry demanded "an intensely local appraisal of the design and impact" of the challenged practice.[102] *Stewart* thus suggests that plaintiffs must first make a threshold showing of causation — specifically, that the challenged practice has a disparate impact on racial minorities. If plaintiffs make that showing, then the court should look to the totality of circumstances to determine whether the requisite interaction with social and historical inequalities exists.[103]

Other decisions make the Committee Report factors the focal point of the inquiry into social and historical circumstances. The Ninth Circuit's en banc decision in *Gonzalez* is an example. As noted above, *Gonzalez* rejected a § 2 challenge to Arizona's voter ID law, which foundered on plaintiffs' failure to show causation — and more precisely, their failure to show that the law had a disparate impact on minority voters. The Ninth Circuit underlined the need for a "searching practical evaluation of past and present reality,"[104] as well as the "intensely fact-based and localized" nature of this

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[98] Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

[99] 444 F.3d 843 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (en banc).

[100] *Id.* at 877–878. The case also challenged optical-scan voting equipment that did not allow voters to check for errors before casting their ballots. *Id.* at 846.

[101] *See* 473 F.3d at 694.

[102] *Stewart*, 444 F.3d at 878 (quoting *Gingles*, 478 U.S. at 78).

[103] For a previous challenge to voting equipment applying the Senate factors to find a § 2 violation, see Roberts v. Wamser, 679 F. Supp. 1513 (E.D. Mo. 1987), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989).

[104] Gonzalez v. Arizona, 677 F.3d 383, 406 (9th Cir. 2012) (en banc) (quoting *Gingles*, 478 U.S. at 45) (internal quotation marks omitted).

inquiry.[105] This suggests an inquiry similar to that prescribed in *Stewart*: first, an analysis of whether the challenged voting practice has a disparate impact on racial minorities; next, an examination of whether, under the totality of circumstances, the challenged practice interacts with social and historical conditions to diminish minorities' opportunities to participate in the political process,[106] with an emphasis on the Senate factors.[107]

Less clear from these cases is what, exactly, the Senate factors are supposed to show. Is it enough to demonstrate underlying inequalities (in socioeconomic status, for example) that correlate with race? Or are these "soft purpose" factors designed to get at intentional discrimination on the part of either public or private actors?

C. Recent Decisions

A quartet of cases decided in 2014 applies § 2 to voter ID and other practices alleged to impose a disproportionate burden on racial minorities. In cases arising in Ohio, North Carolina, Wisconsin, and Texas, lower courts reached divergent conclusions on whether the challenged practices violated § 2. This in itself is not surprising, given the contextual and evidence-dependent nature of the "totality of circumstances" inquiry. More surprising is that the Supreme Court intervened in three of the four cases, creating even more uncertainty over what § 2 requires. That said, a close reading of the lower court decisions reveals substantial agreement among the lower courts (with the exception of the Seventh Circuit) on the standard that should govern vote denial claims.[108]

1. Ohio

Plaintiffs in *Ohio State Conference of the NAACP v. Husted*[109] challenged restrictions on same-day registration and in-person early voting that Ohio imposed in 2014. Before then, Ohio had a week-long window starting thirty-five days before Election Day, commonly referred to as "Golden Week," during which individuals could simultaneously register and vote. Ohio's Republican-controlled state legislature eliminated this window in

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[105] *Id.* (quoting Smith v. Salt River Project Agric. Improvement and Power Dist., 109 F.3d 586, 591 (9th Cir. 1997)).

[106] *Id.* at 407.

[107] For another example of the application of the Senate factors in a vote denial case, one in which a § 2 violation was found, see Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1263-68 (N.D. Miss. 1987) (holding that state's dual registration system violated § 2).

[108] While all of the cases challenged voting restrictions under both the Constitution and § 2, my focus here is exclusively on the latter.

[109] 43 F. Supp. 3d 808 (S.D. Ohio), *aff'd*, 768 F.3d 524 (6th Cir.), *stay granted*, 135 S. Ct. 42 (2014).

2014.[110] The state eliminated weekend voting as well, except during the last weekend before Election Day.[111]

The district court preliminarily enjoined Ohio's voting restrictions and the Sixth Circuit affirmed, but the Supreme Court stayed the district court's injunction, allowing the voting restrictions to take effect.[112] The district court made specific findings on most of the Senate factors, including a finding that the state's justifications for the change (fraud prevention and cost savings) were tenuous.[113] The Sixth Circuit affirmed, emphasizing the statistical evidence that African Americans were heavier users than whites of the voting opportunities that Ohio eliminated, and citing the Senate factors.[114]

The Sixth Circuit rejected the state's argument that consideration of the impact of Ohio's changes amounted to the improper importation of § 5's retrogression analysis into § 2, by considering the prior voting rules the "benchmark" against which Ohio's new law should be measured.[115] According to the Sixth Circuit, § 2 is best understood as requiring two elements to prove vote denial: (1) that the challenged practice imposes a "discriminatory burden" on a protected class; and (2) that the burden is "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class."[116] For purposes of the first element, the § 2 benchmark is not past practice (as under § 5), but rather how racial minorities fare "*compared to other groups of voters.*"[117]

The Sixth Circuit also rejected the state's argument that Ohio's current rules should be compared to those of other states, citing *Gingles*' emphasis on an "intensely *local* appraisal of the design and impact of the contested electoral mechanism."[118] Finally, the Sixth Circuit found Ohio's stated reasons for its restrictions to be weak. The state's argument that same-day registration opened the door to fraud was particularly jaw-dropping, given that — even with Golden Week — it still had thirty days to verify the eligibility of voters using this period.[119] The cost savings argument was more plausible, but the state failed to show that there were significant costs associated with the voting opportunities that Ohio eliminated.

Five days after the Sixth Circuit issued its opinion, and just one day before same-day registration and early voting in Ohio were to begin, the

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[110] *Id.* at 812.

[111] *Id.* Ohio actually eliminated weekend voting throughout the early voting period, but a court order in another case reinstated early voting during the last weekend before Election Day. *See* Obama for Am. v. Husted, 888 F. Supp. 3d 897, 910–11 (S.D. Ohio 2012).

[112] *Husted*, 135 S. Ct. at 42.

[113] *Husted*, 43 F. Supp. 3d at 847–51.

[114] *Husted*, 768 F.3d at 553–54, 556–57.

[115] *Id.* at 551–52.

[116] *Id.* at 554 (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).

[117] *Id.* at 556.

[118] *Id.* at 559 (quoting *Gingles*, 478 U.S. at 79).

[119] *Id.* at 547.

Supreme Court stayed the district court's injunction by a 5-4 vote.[120] Given that the district court's order applied only to the 2014 election, the Court's stay effectively terminated the injunction, causing the Sixth Circuit panel to vacate its opinion.[121] The Supreme Court provided no explanation of its decision, so ascertaining the reasons for the stay requires speculation. With that caveat, the decision is probably best understood (particularly in connection with the three other cases discussed below) as reflecting the Court's concern about injunctions issued very close to an election.[122] Although the district court's injunction was issued two months before Election Day and twenty-six days before the date it ordered same-day registration and early voting to begin, this may have been too late for a majority of the Justices.[123]

2. *North Carolina*

North Carolina's voting restrictions were more sweeping than those of any other state that changed its voting rules after *Shelby County*.[124] In 2013, the state's Republican-controlled legislature adopted an omnibus bill that eliminated same-day registration, reduced the early voting period, prohibited the counting of provisional ballots cast outside the voter's precinct, eliminated the preregistration of sixteen- and seventeen-year-old voters, and increased the availability of challenges to voter eligibility.[125] The law also imposed a voter ID requirement, although that portion is not scheduled to take effect until 2016.[126]

The district court denied the plaintiffs' request for a preliminary injunction as to all of North Carolina's voting restrictions.[127] It reached the merits of the plaintiffs' § 2 claim on just two of the challenged practices — the elimination of same-day registration and the rejection of provisional ballots

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[120] Husted v. Ohio State Conference of NAACP, 135 S. Ct. 42, 42 (2014). Justices Ginsburg, Breyer, Sotomayor, and Kagan would have denied the stay. *Id.*

[121] Ohio State Conference of N.A.A.C.P. v. Husted, No. 14–3877 (6th Cir. 2014) (order)

[122] For a discussion of these issues, see Richard Hasen, *Reining in the* Purcell *Principle*, FLA. ST. L. REV. (forthcoming 2015).

[123] *See, e.g.*, Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006) (per curiam) (vacating the Ninth Circuit's injunction against Arizona's voter ID procedures and noting that the Ninth Circuit's decision failed to provide the necessary explanation of its decision and would lead to more voter confusion going into the impending election). I have criticized the Court's stay as itself being disruptive and unjustified, given that it was issued the day before voting was to begin. *See* Daniel P. Tokaji, *An Ominous Supreme Court Decision*, ELECTION LAW @ MORITZ (Sept. 30, 2014, 2:00 PM), http://moritzlaw.osu.edu/election-law/article/?article=12939, *archived at* http://perma.cc/8MAX-Y9S8.

[124] In fact, North Carolina appears to be the only state formerly covered by § 5 to have adopted a new voter ID law since the decision was issued.

[125] *See* N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 336–37 (M.D.N.C. 2014).

[126] *Id.*

[127] *Id.* at 344–80. The court also rejected the defendants' motion for a judgment on the pleadings on the ground that the plaintiffs' claims were at least plausible. *Id.* at 334.

cast in the wrong precinct.[128] On the first issue, the evidence showed that African Americans used same-day registration more than whites. The district court found that evidence insufficient, however, because voting-age African Americans in the state were registered at a higher rate than whites,[129] and thus have "an equal opportunity to easily register to vote."[130] On the second issue, the court likewise found that the plaintiffs had not "shown an inequality of opportunity under the totality of circumstances."[131] It noted that any effect would be minimal because so few black voters (3,348 in 2012) cast provisional ballots that were rejected on this ground.[132] On both issues, the district court sought to avoid equating § 2's "results" standard with § 5's retrogression inquiry.[133]

The Fourth Circuit reversed the district court's denial of a preliminary injunction on the issues of same-day registration and out-of-precinct provisional ballots.[134] Its decision framed the ultimate question in a manner similar to the district court, asking whether the challenged practice interacts with social and historical conditions to deny racial minorities equal voting opportunities.[135] From there, however, the opinions diverge sharply. Unlike the district court, the Fourth Circuit concluded that past practices are germane to a § 2 claim: "Neither the Supreme Court nor this Court has ever held that, in determining whether an abridgement has occurred, courts are categorically barred from considering past practices, as the district court here suggested."[136] It also held that the district court erred by considering each of the practices separately but not considering their cumulative impact.[137] Finally, it held that the district court was wrong to conclude that a practice must be "discriminatory on a nationwide basis" to violate § 2, which requires an "intensely local appraisal" of a particular law's effects.[138]

The Fourth Circuit's opinion endorses the Sixth Circuit's two-part test for § 2 vote denial claims: (1) whether the challenged practice imposes a "discriminatory burden" on a protected class;[139] and (2) whether the burden is "caused by or linked to 'social and historical conditions' that have or cur-

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[128] The court denied a preliminary injunction on the other issues for failure to show irreparable injury. *Id.* at 344–80.

[129] The court found that African American registration was 95.3%, some 7.5% above that of white registration. *Id.* at 350.

[130] *Id.*

[131] *Id.* at 366.

[132] *Id.*

[133] *Id.* at 367.

[134] League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014). On the other claims, the Fourth Circuit agreed with the district court that plaintiffs had failed to show irreparable harm and therefore affirmed the denial of a preliminary injunction without reaching the merits. *Id.* at 236–37.

[135] *Id.* at 240.

[136] *Id.* at 241.

[137] *Id.* at 242.

[138] *Id.* at 243 (quoting Thornburg v. Gingles, 478 U.S. 30, 78 (1986)).

[139] *Id.* at 240 (quoting Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014)).

rently produce discrimination against members of the protected class."[140] Applying this test, the Fourth Circuit found that the plaintiffs had met the first element, because African Americans disproportionately used same-day registration and were more likely to cast out-of-precinct provisional ballots.[141] The relatively small number of such ballots was, in the Fourth Circuit's view, irrelevant.[142] The Fourth Circuit proceeded to conclude that the impact of these changes was "caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class."[143] In this portion of its analysis, the Fourth Circuit relied heavily on the Senate factors, particularly the history of voting discrimination in North Carolina.[144] Finding the district court to have been wrong on the merits and that the balance of equities favored the plaintiffs, the Fourth Circuit vacated and remanded with instructions to issue a preliminary injunction on the same-day registration and out-of-precinct provisional ballot issues.[145]

One week later, the Supreme Court stayed the Fourth Circuit's mandate.[146] As in Ohio, the Court did not explain its reasons for granting a stay. Justice Ginsburg, joined by Justice Sotomayor, dissented.[147] Observing that North Carolina's omnibus voting law was passed immediately after *Shelby County* — and would surely have been denied preclearance under § 5, were it still in effect — she would not have displaced the Fourth Circuit's "record-based reasoned judgment."[148] On the other hand, there is a somewhat stronger argument that the Fourth Circuit's order would cause disruption, given that it was issued just over a month before Election Day (rather than two months beforehand, as in Ohio). Accordingly, the Supreme Court's action tells us little if anything about its views on the § 2 issue.

3. Wisconsin

The plaintiffs in *Frank v. Walker*[149] challenged Wisconsin's voter ID law, which requires voters to present one of nine forms of photo ID in order to have their votes counted.[150] The district court enjoined Wisconsin's law on the ground that it violated both the Fourteenth Amendment and § 2.[151]

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[140] *Id.* (quoting *Gingles*, 478 U.S. at 47).
[141] *Id.* at 246.
[142] *Id.* at 244.
[143] *Id.* at 245 (quoting *Husted*, 768 F.3d at 554).
[144] *Id.* at 245–47.
[145] *Id.* at 248–49.
[146] North Carolina v. League of Women Voters of N.C., 135 S. Ct. 6, 6 (2014) (mem.).
[147] *See id.* (Ginsburg, J. dissenting).
[148] *Id.*
[149] 17 F. Supp. 3d 837 (E.D. Wis. 2014).
[150] *Id.* at 842–43.
[151] *Id.* at 863, 879.

The Seventh Circuit reversed,[152] but the Supreme Court stopped the ID requirement from taking effect in 2014.[153]

Although the district court did not expressly adopt a two-part test like that of the Fourth and Sixth Circuits, its analysis was functionally similar. Like the Fourth and Sixth Circuits, the district court required plaintiffs to show both that the practice had a disparate impact on minorities and that the impact resulted from the interaction of the practice with social and historical conditions.[154] The court found that a disproportionate number of the over 300,000 registered voters who lack ID are African Americans or Latinos[155] and that minority voters are less likely to have the documents necessary to obtain qualifying ID.[156] Like previous courts, the district court recognized that a bare statistical showing of disparate impact is not enough; plaintiffs must also show that this impact "results from the interaction of the voting practice with the effects of past or present discrimination."[157] The court found such an interaction arising from past discrimination in housing and employment, which resulted in disproportionate rates of poverty for racial minorities.[158] It then found the state's fraud prevention and voter confidence interests "tenuous," given the lack of evidence supporting them.[159]

The Seventh Circuit stayed[160] and later reversed the injunction in an opinion by Judge Easterbrook,[161] which held that Wisconsin's ID law did not violate either § 2 or the Fourteenth Amendment.[162] The opinion elided most of the district court's factual findings without expressly saying they were clearly erroneous, focusing instead on what the district court did *not* find: specifically, that "substantial numbers of persons eligible to vote have tried to get photo ID but have been unable to do so."[163] Although the district court had found that voter ID laws do not in fact promote public confidence, the court treated it as a "legislative fact" that they do,[164] rejecting contrary empirical research by two highly regarded scholars in the *Harvard Law Review* on the surprising ground that that publication is not "refereed."[165] Judge Easterbrook cited U.S. Census data showing that a slightly higher percentage of African Americans than non-Hispanic whites are registered to

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[152] Frank v. Walker, 768 F.3d 744, 755 (7th Cir. 2014).
[153] Frank v. Walker, 135 S. Ct. 7, 7 (2014) (mem.).
[154] *Frank*, 17 F. Supp. 3d at 877.
[155] *Id.* at 854, 870.
[156] *Id.* at 870–71.
[157] *Id.* at 877 (citing Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).
[158] *Id.*
[159] *Id.* at 879.
[160] Frank v. Walker, 766 F.3d 755, 756 (7th Cir. 2014).
[161] Frank v. Walker, 768 F.3d 744, 745 (7th Cir. 2014).
[162] *Id.* at 755.
[163] *Id.* at 746.
[164] *Id.* at 750 (citing, e.g., Armour v. City of Indianapolis, 132 S. Ct. 2073, 2080 (2012)).
[165] *Id.* at 751 (citing Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 Harv. L. Rev. 1737 (2008)).

vote in the state (81% to 79.6%).[166] While acknowledging that the percentage of Latinos registered was much lower (46.8%), Judge Easterbrook said that this might be due to "errors in the data."[167]

On the § 2 claim, the Seventh Circuit said that the plaintiffs "[did] not show a 'denial' of anything . . . unless Wisconsin makes it *needlessly* hard to get photo ID."[168] Because every citizen has "an equal opportunity to get a photo ID," Wisconsin's ID requirement did not violate anyone's voting rights.[169] What, then, would be required to establish a § 2 violation? The Seventh Circuit's opinion in *Frank* was not precise on this point. It expressed skepticism of the second part of the test adopted by the Fourth and Sixth Circuits (requiring that the burden be "linked to 'social and historical conditions' that have or currently produce discrimination") on the ground that discrimination "*by the defendants*" is not required.[170] Even if this test had been applied in *Frank*, however, Judge Easterbrook concluded that it was not satisfied since "in Wisconsin everyone has the same opportunity to get a qualifying photo ID."[171] As Rick Hasen has noted, this recalls Anatole France's sardonic reminder that the law in its "majestic equality" prohibits both the rich and poor from sleeping under bridges.[172]

The Seventh Circuit denied en banc review on an equally divided vote.[173] Judge Posner, the author of the Seventh Circuit opinion in *Crawford*, which upheld Indiana's ID law against a constitutional challenge, wrote a scathing dissent.[174] Judge Posner's dissent highlighted the differences between the Wisconsin and Indiana statutes, as well as the evidentiary records in the two cases, citing the "practical obstacles" that Wisconsinites face in getting ID if they need it.[175] His dissent also noted the weaknesses in the state's evidence on its asserted justifications, especially voter fraud.[176] While not expressly addressing the § 2 standard, Judge Posner concluded: "The law should be invalidated; at the very least, with the court split evenly in so important a case and the panel opinion so riven with weaknesses, the case should be reheard en banc."[177]

Three days after Judge Easterbrook's opinion was issued, with less than one month remaining before Election Day, the Supreme Court vacated the

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[166] *Id.* at 753.
[167] *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.* at 755 (emphasis added).
[171] *Id.*
[172] Rick Hasen, *A Quick Reaction to the 7th Circuit Wisconsin Voter ID Decision: Horrendous*, ELECTION LAW BLOG (Oct. 6, 2014, 2:45 PM), http://electionlawblog.org/?p=66413, *archived at* http://perma.cc/AF5P-3QR9 (paraphrasing ANATOLE FRANCE, THE RED LILY 75 (Boni & Liveright ed. 1917) (1894)).
[173] Frank v. Walker, 773 F.3d 783, 783 (7th Cir. 2014) (5-5 vote).
[174] *See id.* (Posner, J., dissenting).
[175] *Id.* at 786.
[176] *Id.* at 788–89.
[177] *Id.* at 797.

Seventh Circuit's stay,[178] effectively stopping implementation of Wisconsin's ID requirement in the 2014 election. As in the orders in the Ohio and North Carolina cases, the Court did not explain its reasoning, leaving scholars and practitioners to speculate on whether the Court's action indicates its view of the merits, its concern over the practical effects of requiring ID so close to an election, or both.[179] That said, the disruption caused by the Seventh Circuit's decision to allow Wisconsin's law to be implemented so close to Election Day was surely a factor. It is therefore perilous to read much into the Court's views of the merits of the § 2 or constitutional claim.

4. Texas

Veasey v. Perry[180] challenged Texas' photo ID law, which required voters to display one of four forms of photo ID.[181] After a bench trial, the district court enjoined this law on multiple grounds, including violations of § 2 and the Constitution,[182] but the Fifth Circuit stayed the injunction[183] and the Supreme Court declined to intervene.[184]

The district court's lengthy opinion began with a detailed discussion of Texas' long history of race discrimination in voting and an analysis of the state's voter ID law, adopted in 2012.[185] On the § 2 claim, the district court adopted the same two-part framework as the Fourth and Sixth Circuits, looking to whether the challenged practice has a disparate impact on minorities and whether that impact is caused by or linked to social and historical conditions that produce discrimination against the protected class.[186] After finding that Texas' law would have a significant disparate impact on Latinos and African Americans, the court turned to social and historical conditions, focusing on the Senate factors.[187] The court found evidence that seven of the nine Senate factors were satisfied, including the last one: a "tenuous" justification for the voting restriction, given the rarity of voter impersonation fraud and noncitizen voting.[188] The court went on to conclude that the Texas law

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[178] Frank v. Walker, 135 S. Ct. 7, 7 (2014) (mem.).

[179] Justice Alito, joined by Justices Scalia and Thomas, wrote a brief dissent, acknowledging a "colorable basis for the Court's decision due to the proximity of the upcoming election," while saying that a stay should be vacated only if the courts of appeals "clearly and 'demonstrably' erred in its application of 'accepted standards.'" *Id.* at 7–8 (Alito, J., dissenting) (quoting Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott, 134 S. Ct. 506, 506, (2013) (Scalia, J., concurring in denial of application to vacate stay) (quoting Western Airlines, Inc. v. Teamsters, 480 U.S. 1301, 1305 (1987))).

[180] Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258 (S.D. Tex. Oct. 9, 2014).

[181] *See id.* at *1, *8.

[182] *Id.* at *56.

[183] Veasey v. Perry, 769 F.3d. 890, 892 (5th Cir. 2014).

[184] Perry v. Veasey, 135 S. Ct. 9, 9 (mem.) (2014).

[185] *Veasey*, 2014 WL 5090258, at *1–21.

[186] *Id.* at *49.

[187] *Id.* at *50.

[188] *Id.* at *50–52.

had a discriminatory purpose as well as a discriminatory result, in violation of the Fourteenth and Fifteenth Amendments.[189]

The district court issued its order striking down the law and enjoining its implementation just nine days before early voting in the 2014 general election was to begin. Citing the imminent election and the risk of voter confusion, the Fifth Circuit stayed the injunction against Texas' law.[190] The Fifth Circuit concluded that the need for orderly elections counseled against changing the rules so close to the start of an election, notwithstanding some difficult questions on the merits.[191] The Supreme Court declined to vacate the Fifth Circuit's stay, over the dissent of Justice Ginsburg (which was joined by Justices Sotomayor and Kagan).[192]

Justice Ginsburg's opinion suggests that she, and the two Justices who joined her, are likely to be sympathetic to vote denial claims, at least ones that are buttressed with strong contextual evidence of purposeful race discrimination, as in Texas. That said, the Court's decision not to issue a stay in Texas reveals little if anything about its view on the merits. The Fifth Circuit is probably right in its understanding of the Court's actions in Ohio, North Carolina, and Wisconsin: namely, that they are based mainly on the perceived harms associated with court orders close to an election, rather than the Court's view on the merits of the constitutional or § 2 claims.

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Lower courts have struggled to come up with a workable framework for adjudicating § 2 claims in the relatively few cases alleging vote denial over the years. Three issues have been especially problematic: what causation means, whether intent must be proven, and what role social and historical conditions play in the analysis. There has been significant progress in the most recent set of decisions. The Fourth Circuit, Sixth Circuit, and a federal district court in Texas adopted the same test, requiring plaintiffs to show that the challenged practice imposes a "discriminatory burden" on a protected

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[189] *Id.* at *52–56. The court also concluded that Texas' law imposed an unjustified burden on voting in violation of the First and Fourteenth Amendments, *id.* at *41–48, and amounted to an impermissible poll tax in violation of the Fourteenth and Twenty-Fourth Amendments, *id.* at *56–58.

[190] Veasey v. Perry, 769 F.3d. 890, 893 (5th Cir. 2014).

[191] *Id.* at 895; *see also id.* at 897 (Costa, J., concurring in the judgment) (agreeing that "the only constant principle that can be discerned from the Supreme Court's recent decisions in this area is that its concern about confusion resulting from court changes to election laws close in time to the election should carry the day in the stay analysis").

[192] Perry v. Veasey, 135 S. Ct. 9, 9 (2014) (mem.). Justice Ginsburg found fault with the Fifth Circuit's failure to accord deference to the district court's "reasoned, record-based judgment." *Id.* at 10 (Ginsburg, J., dissenting). Responding to the concern that late-breaking court orders may be disruptive, Justice Ginsburg wrote: "The greatest threat to public confidence in elections in this case is the prospect of enforcing a purposefully discriminatory law, one that likely imposes an unconstitutional poll tax and risks denying the right to vote to hundreds of thousands of eligible voters." *Id.* at 12.

class, that is "caused by or linked to 'social and historical conditions'" producing racial discrimination. Part III assesses and refines this test, in consideration of the issues that have emerged in § 2 vote denial cases and scholarly commentary.

III. An Improved Test for Vote Denial

Given the whirlwind of activity surrounding voting rules, we are likely to see more § 2 vote denial claims in the lower courts, and the U.S. Supreme Court may weigh in on the subject soon.[193] If it does, the Court will have to reckon with the two-part test (for which I use the shorthand "the judicial test") articulated by the Sixth Circuit in *Ohio Conference of the NAACP* and followed by two other federal courts. Part III.A assesses the judicial test in light of scholarly recommendations. Part III.B steps back to consider the two constitutional rights that § 2 is best understood as enforcing — a crucial question, given the possibility that too broad an interpretation could result in the statute being deemed unconstitutional. Part III.C suggests a refined test for vote dilution, building on judicial decisions and the work of other scholars.[194]

A. Assessing Proposed Tests

The judicial test requires that two elements be satisfied for a plaintiff's § 2 vote denial claim to succeed: (1) "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';[195] and (2) "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.[196] This test resembles the first two steps of the one I suggested in 2006, which would have required that plaintiffs show:

> (1) [T]hat the challenged practice results in the disproportionate denial of minority votes (i.e., that it has a disparate impact on minority voters); and

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[193] Shortly before this Article went to press, the Supreme Court denied the petition for certiorari in the Wisconsin voter ID case. Frank v. Walker, No. 14-803, 2015 WL 131119 (U.S. Mar 23, 2015). It remains possible that Court will decide the Ohio, North Carolina, or Texas cases on the merits.

[194] In this discussion, I bracket § 2 challenges to felon disenfranchisement laws that, for reasons discussed in section II.A, raise distinct constitutional concerns.

[195] Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014) (quoting 42 U.S.C. § 1973(a)–(b) (2012)).

[196] *Id.* (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).

> (2) [T]hat this disparate impact is traceable to the challenged practice's interaction with social and historical conditions.[197]

To this point, the courts' test and mine are quite similar. Both first consider whether the challenged practice imposes a disproportionate burden on minority voters, and next whether that burden is traceable to "social and historical conditions" (a term taken from *Gingles*' characterization of the "essence" of a § 2 claim).[198]

The critical difference between the courts' test and the one I proposed is what comes after these two steps. In the judicial test: nothing. The two elements are the sum and substance of its inquiry. By contrast, my 2006 article argued that state and local defendants should be given an opportunity to demonstrate that the need for the challenged practice justified its burdens on racial minorities.[199] I therefore suggested that, once plaintiffs satisfy the two elements, the burden shifts to defendants to demonstrate that the restrictions on voting are narrowly tailored to serve a compelling state interest — the equivalent of strict scrutiny in constitutional cases.[200] As set forth in section III.D below, my views on the state's burden have evolved somewhat in light of subsequent cases and commentary. But I continue to believe that it is important to provide government defendants with an opportunity to justify their practices.

One could argue that the second prong of the courts' test does this, since one of the Senate factors (considered as part of the totality of circumstances) is whether the state's interest is "tenuous[ ]." That, however, is insufficient. The *weight* of the state's interest, including how strong it is and how much evidence supports it, should matter, and is an important consideration, even though it is not expressly mentioned. The state's interest is a part of the test for *constitutional* vote denial claims,[201] and should therefore be taken into consideration.

Constitutional avoidance is an essential consideration in any § 2 test. In a line of cases beginning with *City of Boerne v. Flores*,[202] the Supreme Court has struck down some federal civil rights statutes on the ground that they are not "congruent and proportional" to the constitutional injury they purport to enforce.[203] Under this standard, courts are supposed to "identify with some precision the scope of the constitutional right at issue," then determine whether Congress identified a pattern of constitutional violations,

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[197] Tokaji, *supra* note 3, at 724. Although my statement of the test did not expressly mention a connection to past or ongoing discrimination, the discussion of the Senate factors that preceded this statement and the examples that followed did refer to discrimination. *See id.* at 724–25. I also specified that, in keeping with the Senate Report, the discrimination need not be either intentional or official to be considered in the second step. *Id.* at 724.

[198] *See Gingles*, 478 U.S. at 47.

[199] Tokaji, *supra* note 3, at 725.

[200] *Id.* at 726.

[201] *See infra* section III.B.

[202] 521 U.S. 507 (1997).

[203] *Id.* at 520.

and finally assess whether its remedy is congruent and proportional to the injury.[204] There is disagreement over whether a more deferential standard should apply to the Voting Rights Act.[205] Justice Ginsburg's dissent in *Shelby County* argued for the standard set forth in *McCulloch v. Maryland*, under which "all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[206] The *Shelby County* majority did not specify the standard it was applying, but the Court's references to the "irrationality" of the VRA's coverage formula suggest that it was assuming (if not holding) that a more deferential standard applied.[207]

Uncertain as the scope of Congress' enforcement power may be, it is essential that the test for § 2 vote denial claims fall within it. Professor Christopher Elmendorf helpfully suggests that § 2 be thought of as a delegation of authority to courts, authorizing them to develop a common law of racially fair elections.[208] He sagely counsels an interpretation that avoids constitutional difficulties, noting that § 2 is a "ripe target for a conservative Supreme Court."[209] Largely for this reason, Professor Elmendorf recommends that § 2 plaintiffs be required to show a "significant likelihood" of intentional discrimination.[210] That intentional discrimination could include racial bias by traditional state actors or by voters in making discriminatory voting choices.[211]

While Professor Elmendorf's proposed test has some advantages, it sets too high a bar, risking just what Congress sought to avoid when it enacted the 1982 amendments: that voting rights plaintiffs be required to prove intentional discrimination. It is hard to imagine many real-world courts finding a "significant likelihood" of intentional discrimination but *not* finding a constitutional violation. In other words, his § 2 test would do very little work beyond what the Constitution already does.[212] Professor Elmendorf's

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[204] Bd. of Trustees v. Garrett, 531 U.S. 356, 357 (2001).

[205] *See, e.g.*, Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 204 (2009) (specifying the dispute among the parties, with plaintiff arguing that "congruence and proportionality" was the standard, while the government argued that the legislation need only be a "rational means to effectuate the constitutional prohibition").

[206] Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2637 (2013) (Ginsburg, J., dissenting) (quoting McCulloch v. Maryland, 4 Wheat. 316, 421 (1819)).

[207] *See id.* at 2629–31.

[208] Elmendorf, *supra* note 37, at 383.

[209] *Id.* at 382. *See also id.* at 447 (urging a "structured judicial inquiry"). Professor Elmendorf offers an updated view of the constitutional issues surrounding § 2 in a forthcoming article with Douglas Spencer. Christopher M. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the VRA After* Shelby County, 115 COLUM. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414652, *archived at* http://perma.cc/8ES2-CQPN.

[210] *See* Elmendorf, *supra* note 37, at 384, 428.

[211] *See id.* at 430–36.

[212] In another sense, Professor Elmendorf's test may be too easy to satisfy. He would allow biased voting by individuals to count as evidence of a § 2 violation. *See id.* at 428–36. It is unclear that the Supreme Court would agree that discriminatory voting choices count as state action that justifies a congressional remedy. Such private acts of discrimination, moreo-

"significant likelihood" test might still be worth adopting, if the prohibition on intentional race discrimination in voting were the only constitutional right that § 2 enforces. But it is not, as set forth below in sections III.B and III.C.

Before exploring these constitutional questions, I consider the other leading scholarly assessment of § 2's application to vote denial claims. Professor Nelson persuasively argues that "racial context matters" in § 2 cases,[213] and helpfully urges that the § 2 standard not be too complex, lest it be too difficult for courts to apply.[214] Professor Nelson's recommended test would require minority plaintiffs to establish (1) "vote denial or other infringement on the right to vote," and (2) "that the denial or burden is on account of race."[215] The first requirement is similar to what I have recommended and three lower courts have adopted. The second requirement is subtly different. Professor Nelson is very clear that evidence of purposeful discrimination is not required to satisfy it.[216] In this sense, her test is less stringent than Professor Elmendorf's, and more similar to mine. But I fear that her test may set the bar too low for the current Court.

Professor Nelson argues that her test satisfies the congruence and proportionality standard because "Congress has determined that discrimination may not infect voting or limit it on account of race, *even if such discrimination is not purposeful.*"[217] But under *Boerne* and its progeny, Congress does not get to define the constitutional right, a prerogative that belongs to the Court.[218] The Court generally requires proof of discriminatory intent in race discrimination cases. Unless § 2 enforces some other constitutional right, in addition to the prohibition on intentional race discrimination, the Court is likely to conclude that this test extends § 2 beyond the scope of Congress' Fourteenth and Fifteenth Amendment powers.

Professor Elmendorf's and Professor Nelson's tests thus reveal a Goldilocks problem, analogous to that which courts in vote dilution cases faced before *Gingles*. One test is too hard to satisfy (because it is too close to intentional discrimination), the other is too easy (because it is too close to pure disparate impact). These scholarly commentaries on § 2 vote denial claims are nevertheless illuminating. Cumulatively, they clarify that a good vote denial test should: (1) be faithful to § 2's text and congressional intent; (2) provide an administrable doctrinal structure; (3) not be too complex or amorphous; (4) make room for the state to offer justifications for its voting restrictions; and (5) fall within the boundaries of Congress' enforcement

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ver, are of scant help to voters in vote denial cases, where discriminatory voting choices by individuals are at best tangential.

[213] *See* Nelson, *supra* note 54, at 586.

[214] *See id.* at 585. I take her point that my 2006 test is subject to this objection.

[215] *Id.* at 633.

[216] *See id.* at 637.

[217] *Id.* (emphasis added).

[218] *See* City of Boerne v. Flores, 521 U.S. 507, 529 (1997).

powers. In considering the last criterion, it is essential to "identify with some precision the scope of the constitutional right at issue."[219]

B. Enforcing Two Constitutional Rights

To the extent they address the issue, lower courts appear to assume that the only right § 2 enforces is the Fourteenth and Fifteenth Amendments' prohibition on race discrimination. That assumption is wrong; § 2 should also be understood as enforcing the constitutional right to electoral participation or, as Professor Richard Pildes has called it, "the right to vote as such."[220] Determination of the test that should apply to § 2 vote denial claims depends in no small part on what rights the statute enforces.

The first and more commonly recognized right enforced by § 2 is the Fourteenth and Fifteenth Amendment right to be free from intentional race discrimination.[221] *City of Mobile v. Bolden*[222] established that this standard applies to constitutional claims of minority vote dilution.[223] Intentional discrimination may be *internal* to the electoral process,[224] i.e., a restriction on voter registration drives that is adopted with the intent of making it more difficult for Latinos to register and vote. Alternatively, intentional discrimination may be *external* to the electoral process,[225] e.g., de jure segregation of public schools that leaves African Americans with inferior educational opportunities and makes it more difficult for them to vote. The more attenuated the connection between the challenged practice and intentional discrimination by the state, the weaker the claim that § 2 may constitutionally be applied.[226]

The second constitutional right is broader than the first, in that it is not limited to race discrimination. The Supreme Court has long recognized that some burdens on voting, including poll taxes and disparities in vote counting, violate equal protection even if they are not racially discriminatory. The

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[219] Bd. of Trustees v. Garrett, 531 U.S. 356, 365 (2001).

[220] Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. 741, 760 (2006) (urging protection for right to vote as such instead of antidiscrimination model); *see also* Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95, 104–07 (2013).

[221] *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that Fourteenth Amendment claims of race discrimination require a showing of discriminatory intent). I use the terms purpose and intent interchangeably here.

[222] 446 U.S. 55 (1980).

[223] *See id.* at 67–70.

[224] *See* Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 729 (1998).

[225] *See id.* at 728–29.

[226] Professor Daniel Ortiz has discussed how the line between intent- and impact-based standards is not clear and that the proof courts require depends on the context in which the alleged discrimination takes place. *See* Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1122–23 (1989) (noting, for example, the "lighter burden on the individual" and "heavier burden on the state" in jury selection cases, as opposed to employment and housing discrimination cases).

right to vote as such (or the right to equal participation, as I have called it)[227] derives from the fundamental rights strand of equal protection doctrine.[228] Three cases are especially germane to this constitutional right. The first is *Harper v. Virginia*,[229] in which the Court struck down a $1.50 poll tax based upon the burden it imposed on poor voters and explicitly *not* based on its alleged race discriminatory character.[230] The second is *Bush v. Gore*,[231] which invalidated disparities in Florida's judicially-supervised recount process on the ground that this process violated the principle of "equal treatment" for similarly situated voters.[232] The third is *Crawford v. Marion County Elections Board*,[233] in which a majority of Justices upheld Indiana's photo ID law against a facial challenge.[234]

Although there was no majority opinion in *Crawford*, that decision is the most revealing because it defines the constitutional standard applicable to burdens on electoral participation. A majority of Justices agreed on the legal standard applicable to vote denial claims under the Equal Protection Clause.[235] Justice Stevens' opinion (joined by Chief Justice Roberts and Justice Kennedy)[236] applied a "balancing approach" derived from *Anderson v. Celebrezze*[237] and *Burdick v. Takushi*[238] to uphold Indiana's voter ID law against a facial challenge.[239] Under these cases a court must weigh the "character and magnitude" of the burden on voting,[240] "however slight [it] may appear,"[241] against the "precise interests put forward by the State as justifications for the burden."[242] If the burden on voting is "severe," then strict scrutiny applies, and the law must be narrowly tailored to a compelling interest.[243] Lesser burdens on voting require a less weighty interest, but are

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[227] Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 350, 368–74 (2006).

[228] Anderson v. Celebrezze, 460 U.S. 780, 786–87 n.7 (1983).

[229] 383 U.S. 663 (1966).

[230] *See id.* at 666 n.3.

[231] 531 U.S. 98 (2000).

[232] *Id.* at 107.

[233] 553 U.S. 181 (2008).

[234] *Id.* at 188–89.

[235] *Id.* at 210–11 (Souter, J., dissenting).

[236] Justice Stevens' opinion is controlling because it articulates the "narrowest grounds" for the Court's ruling among those who agreed with the result. *See* Marks v. United States, 430 U.S. 188, 193 (1977). The concurring opinion of Justice Scalia (joined by Justices Thomas and Alito) agreed that the standard articulated in *Burdick* applies, but saw this standard as a "two-track approach," under which strict scrutiny applies to severe burdens while a deferential standard applies to lesser burdens. *See Crawford*, 553 U.S. at 204–05 (Scalia, J., concurring).

[237] 460 U.S. 780 (1983).

[238] 504 U.S. 428 (1992).

[239] *Crawford*, 553 U.S. at 190 (lead opinion of Stevens, J.) (quoting Anderson v. Celebrezze, 460 U.S. 780 (1983) and Burdick v. Takushi, 504 U.S. 428 (1992)). For criticism of this test as too indeterminate, see Edward B. Foley, *Voting Rules and Constitutional Law*, 81 G.W. L. REV. 1836, 1838 (2013).

[240] *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

[241] *Crawford*, 553 U.S. at 191.

[242] *Id.* at 190 (quoting *Burdick*, 504 U.S. at 434).

[243] *Id.* at 190 (citing Norman v. Reed, 502 U.S. 279, 288–89 (1992)).

not exempt from constitutional scrutiny. This balancing test applies even to "reasonable, nondiscriminatory restrictions,"[244] which may be justified by the state's "important regulatory interests."[245]

Justice Souter's *Crawford* dissent (joined by Justice Ginsburg) applied the same balancing test as Justice Stevens, but reached a different conclusion. Like Justice Stevens, Justice Souter embraced the *Anderson-Burdick* "balancing standard" requiring that the "character and magnitude" of the burden on voting be weighed against the burdens on voters.[246] The difference between the opinions is not the standard they articulated, but their application of that standard to the facts. Justice Souter found the burdens on voting heavier (particularly with respect to poor people) and the state's justifications less weighty than did Justice Stevens. Justice Breyer's solitary dissent likewise balances the burdens on voting against the benefits of the law.[247] Thus, six Justices in *Crawford* agreed that a balancing standard should govern equal protection challenges to burdens on electoral participation.

Since *Crawford*, lower courts have applied the *Anderson-Burdick-Crawford* balancing standard to a variety of alleged burdens on electoral participation, upholding some while striking down others.[248] That includes the 2014 decisions discussed in section II.C, all of which involve equal protection claims as well as § 2 claims. The details of the constitutional analyses in these decisions are not especially important for present purposes. What is critical is that a majority of Supreme Court Justices has articulated an equal protection standard, which has since been applied by the lower courts.

The constitutional right explicated in this line of cases provides an alternative basis for upholding § 2's application to vote denial claims. It has long been recognized that the VRA vindicates the right to vote as such, and not just the prohibition against intentional race discrimination. For example, in upholding voting protections for people educated in Puerto Rico, *Katzenbach v. Morgan*[249] identified the Fourteenth Amendment's protection of access to the ballot as a constitutional rationale distinct from the prohibition on invidious discrimination, citing the Court's longstanding recognition that the

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[244] *Id.* (quoting *Burdick*, 504 U.S. at 434).

[245] *Burdick*, 504 U.S. at 434.

[246] *Crawford*, 553 U.S. at 209–11 (Souter, J., dissenting).

[247] *See id.* at 237–41 (Breyer, J., dissenting).

[248] *See, e.g.*, Obama for Am. v. Husted, 697 F.3d 423 (6th Cir. 2012) (affirming preliminary injunction against Ohio rule allowing military and overseas voters, but not other voters, access to in-person early voting during last three days before Election Day); Ne. Ohio Coalition for the Homeless v. Husted, 696 F.3d 580 (6th Cir. 2012) (affirming preliminary injunction against Ohio rule requiring rejection of out-of-precinct provisional ballots cast at correct polling place due to poll worker error); Service Employees Int'l Union Local 1 v. Husted, 698 F.3d 341 (6th Cir. 2012) (staying preliminary injunction against Ohio rule requiring rejection of out-of-precinct provisional ballots cast at incorrect polling place).

[249] 384 U.S. 641 (1966).

right to vote is fundamental because it is "preservative of all other rights."[250] At the time of the 1982 amendments, the Senate Report noted that § 2 protects rights under the Fourteenth Amendment as well as the Fifteenth.[251] Even if it had not been invoked by Congress, the fundamental right to vote may serve as a constitutional justification for § 2's application to vote denial, for the "question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."[252]

While the right to electoral participation is not exclusively an antidiscrimination norm, it allows consideration of racial disparities arising from voting restrictions. An election law's disparate impact on racial minorities may be considered as a part of the *Anderson-Burdick-Crawford* standard. Recall that this standard requires courts to consider the "character and magnitude" of the burden on voting, with severe restrictions getting strict scrutiny and "reasonable, nondiscriminatory" restrictions getting less searching review. The "character" of the burden on voting thus includes whether or not it discriminates against certain groups of voters. In *Anderson*, the alleged discrimination was against independent candidates and their supporters, but its standard allows for consideration of discrimination, in purpose or effect, upon groups defined by race, ethnicity, language status, age, poverty, and other characteristics. Accordingly, lower courts have considered evidence that the challenged practice has a disparate impact on racial minorities in applying the constitutional balancing standard.[253] Such effects are part of the "character" of the burden that a voting restriction imposes. Constitutional authority for the application of § 2 to vote denial claims thus lies in the constitutional right to vote as such, as well as the prohibition on intentional race discrimination.

While it might seem odd to uphold an antidiscrimination statute on the ground that it enforces a more generally applicable constitutional right, the Supreme Court has done just that. In *United States v. Georgia*,[254] the Court unanimously held that Title II of the Americans with Disabilities Act (ADA) may be applied to actual violations of the Constitution.[255] The plaintiff in *Georgia* was a paraplegic prisoner who alleged conditions — including confinement in a small prison cell where he could not turn his wheelchair or

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[250] *Id.* at 652 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

[251] S. REP. No. 97-417, *supra* note 28, at 9–10, 18–19 (1982).

[252] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct 2566, 2598 (2012) (quoting Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948)).

[253] *See, e.g.*, Ohio Conference of the NAACP v. Husted, 768 F.3d 524, 539 (6th Cir. 2014); Gonzalez v. Arizona, 624 F.3d 1162, 1192–93 (9th Cir. 2010) (en banc) (examining the law in question's disparate impact on Latino registrants and voters); Veasey v. Perry, 29 F. Supp. 3d 896, 914, (S.D. Tex. July 2, 2014) (discussing the disparate impact — along with other factors — of the Texas voter ID law on Hispanic and African American voters); Applewhite v. Commonwealth, No. 330 M.D. 2012, 2012 WL 3332376, at *12 (Pa. Commw. Ct.) (considering the disparate impact of a felon disenfranchisement law on African Americans), *vacated*, 54 A.3d 1 (Pa. 2012).

[254] 546 U.S. 151 (2006).

[255] *Id.* at 160.

reach the toilet — that would violate both the ADA and the Eighth Amendment.[256] Justice Scalia's opinion for the Court acknowledged past disagreements among the Justices over Congress' "prophylactic" enforcement, but said that "no one doubts that § 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions."[257] On this basis, the Court upheld the application of an anti-discrimination statute to conduct that violates a generally applicable constitutional right.

Georgia's analysis applies with equal force to § 2 vote denial claims. Like the right to vote, the Eighth Amendment prohibition on cruel and unusual punishment is generally applicable, in the sense that it is not limited to practices that discriminate against a particular group. All members of the Court nevertheless agreed that Congress has the power to create a private remedy for disability discrimination claims challenging state conduct that would actually violate the Eighth Amendment. So too, the Fourteenth Amendment gives Congress power to remedy race discrimination in voting, at least insofar as the statute reaches conduct that actually violates the constitutional right to vote. § 2's anti-discrimination remedy may therefore be constitutionally applied to actual violations of the constitutional right to vote.

The constitutional power affirmed in *Georgia* is sufficient to uphold § 2's application to many vote denial claims and probably most of them. The recent cases from Ohio, North Carolina, Wisconsin, and Texas involve claims under both § 2 and the Fourteenth Amendment. For the latter claim, these cases rely on the *Anderson-Burdick-Crawford* balancing test.[258] In every single decision that has found a § 2 violation, the court also found a constitutional violation. To the extent that § 2 reaches conduct that violates the Constitution, the statute falls within Congress' enforcement power under *Georgia*. That decision is less helpful, however, when it comes to *vote dilution* claims under § 2. The Court has not applied the *Anderson-Burdick-Crawford* balancing test to such claims. Putting aside "one person, one vote" claims, the Court requires intentional discrimination to establish unconstitutional vote dilution.[259] Accordingly, the *Georgia* decision would

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[256] *Id.* at 154–55.

[257] *Id.* at 158 (quoting Tennessee v. Lane, 541 U.S. 509, 559–60 (2004) (Scalia, J., dissenting)).

[258] *See* Ohio State Conference of the NAACP v. Husted, 43 F. Supp. 3d 808, 841 (S.D. Ohio 2014); N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 362–63 (M.D.N.C.) *aff'd in part, rev'd in part and remanded sub nom.* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224 (4th Cir. 2014); Frank v. Walker, 17 F. Supp. 3d 837, 845-46 (E.D. Wis.) *rev'd*, 768 F.3d 744 (7th Cir. 2014); Veasey v. Perry, No. 13–CV–00913, 2014 WL 5090258, at *37–38 (S. D. Tex. Oct., 9, 2014).

[259] *See* City of Mobile v. Bolden, 446 U.S. 55, 67–68 (1980); Rogers v. Lodge, 458 U.S. 613, 618 (1982).

only authorize § 2's application to claims of qualitative minority vote dilution where intentional discrimination is shown.[260]

That is not to say that § 2 must be *limited* to practices that would actually violate the Constitution. If § 2 were so interpreted, the statute would be of little utility, for it would provide no remedy that is not already available through actions to enforce the Constitution. But to the extent § 2 reaches conduct that does not actually violate the Constitution, there is likely to be more disagreement among the justices on whether it falls within the scope of Congress' enforcement powers. The Justices have not been of one mind regarding the scope of congressional power to enact "prophylactic" remedies, as *Georgia* noted, and it remains uncertain just how far the enforcement power extends.[261] This makes it difficult to say exactly how far § 2 may be understood to reach, beyond actual constitutional violations, without exceeding the scope of that power. That said, applications of § 2 that reach far beyond unconstitutional voting practices are in greater jeopardy than those which go only slightly beyond that line. That is true whether the standard for judging the exercise of Congress' enforcement powers is *Boerne*'s "congruence and proportionality" test, or the more deferential standard that the Court applied in *McCulloch, Katzenbach,* and (possibly) *Shelby County.*

The upshot is that Congress would be well-advised not to venture too far beyond actual violations of the Constitution when enacting statutes that prevent or remedy constitutional violations. So too, courts are well-advised not to stray too far beyond actual constitutional violations when they interpret and apply those statutes. The canon of constitutional avoidance counsels against stretching § 2, given the limits on Congress' enforcement power. A test for § 2 vote denial claims that draws on existing constitutional doctrine, including the *Anderson-Burdick-Crawford* standard, is likely to be judged permissible in its application. With that in mind, I turn back to the test for vote denial claims under § 2.

C. Refining the Judicial Test

I propose a three-part test for § 2 challenges to vote denial claims that allege burdens on voting:

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[260] I use the term "qualitative vote dilution" to refer to claims alleging that the quality of minority representation is diminished by practices like at-large elections, multi-member districts, and redistricting plans. By contrast, "quantitative vote dilution" refers to claims that the equal population required by the one person, one vote rule has been violated. *See* Tokaji, *supra* note 227, at 369.

[261] Calvin Massey, *Two Zones of Prophylaxis: The Scope of the Fourteenth Amendment Enforcement Power*, 76 GEO. WASH. L. REV. 1, 1 (2007) ("Few questions of constitutional law are as uncertain as the scope of congressional power to enforce the substantive provisions of the Fourteenth Amendment."). There is an enormous academic literature on the subject. *See, e.g.*, William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. ST. U. L. REV. 451, 456 (2010); Jack M. Balkin, *The Reconstruction Power*, 85 NYU L. REV. 1801, 1805 (2010) (arguing that the Court has understood Congress' power too narrowly).

(1) Plaintiffs must show that the challenged standard, practice, or procedure causes a disproportionate burden on members of a protected class that an alternative standard, practice, or procedure would avoid.

(2) Plaintiffs must show that the disproportionate burden is traceable to interaction of the challenged standard, practice, or procedure with "social and historical conditions" that have produced or currently produce discrimination against members of the protected class.

(3) If the plaintiffs satisfy (1) and (2), then the defendants must show by clear and convincing evidence that the burden on voting is outweighed by the state interests in the challenged standard, practice, or procedure.

The following discussion explains each of these steps, providing guidelines for their application with examples from the cases discussed in Part II. The first two steps synthesize the judicial test and the one proposed in my 2006 article. The third step does not appear in the judicial test and is different than my previous recommendation that strict scrutiny apply once plaintiffs satisfy the first and second requirements. The main reason for this change is to make it easier for the state or local jurisdiction to justify its challenged practice where the burden on participation is modest. This test satisfies the criteria identified in section III.A: it is faithful to § 2's text and congressional intent; provides an administrable doctrinal structure; it is not too complex or amorphous; it makes room for the state to offer justifications for its voting restrictions; and it falls safely within the boundaries of Congress' enforcement powers.

1. Disproportionate Burden

To establish a § 2 violation arising from alleged vote denial, plaintiffs should first have to show that the challenged practice causes a disproportionate burden on racial minorities that could not be avoided by some alternative standard, practice, or procedure.[262] This prong of the test thus requires a causal link between the challenged practice and a disparate impact on racial minorities. Causation means but-for causation, not some murky conception of proximate causation that would be difficult for courts to understand, let alone to apply consistently.

A difficult question that has emerged in vote denial cases is what kind of impact must be shown. Specifically, are plaintiffs required to show that the challenged practice causes a decrease in *turnout* by one racial group in comparison with others? Alternatively, is it sufficient that the challenged

[262] For purposes of simplicity, I mostly refer to voting "practice(s)" in the discussion that follows, meaning this term to include voting "standard(s)" and "procedure(s)."

law imposes a requirement that racial minorities are less likely to satisfy, or eliminates a voting opportunity that racial minorities are more likely to use?

Recent cases exemplify this problem. Plaintiffs in the Wisconsin and Texas cases introduced evidence that racial minorities are less likely to have qualifying voter ID.[263] But it is at least theoretically possible that more of the African American and Latino voters lacking ID will obtain it before the election, thus avoiding (or at least diminishing) a racial disparity in turnout effects. That is apparently why Judge Easterbrook's opinion for the Seventh Circuit in *Frank v. Walker* found the plaintiffs' evidentiary showing on this prong lacking.[264] Even though racial minorities in Wisconsin were less likely to have qualifying ID, Judge Easterbrook emphasized that they have "an equal opportunity to get a photo ID."[265] A similar problem arose in the Ohio and North Carolina cases, where the plaintiffs introduced evidence that racial minorities are more likely to use the voting opportunities (same-day registration and early voting) that the state had eliminated.[266] But it is at least theoretically possible that minority voters will all find other ways to vote, thus avoiding any racial disparity in the effect on turnout. Thus, the district court in North Carolina honed in on the fact that African Americans had "an equal opportunity to easily register to vote."[267] By contrast, the Fourth Circuit and the Sixth Circuit both found that the first step in their analyses could be satisfied by showing that racial minorities are disproportionate users of the voting opportunities eliminated.[268]

The preferable approach is the one taken by the Fourth and Sixth Circuits and followed by the district court in Texas. It should be sufficient for plaintiffs to show that the challenged practice will eliminate opportunities that racial minorities disproportionately use, or impose a requirement that they disproportionately lack. As a practical matter, it is extremely difficult — sometimes impossible — for plaintiffs to prove that a particular practice will actually cause turnout disparities. That is largely because of the inherent difficulties in isolating the effects of a particular voting practice, especially one that has not yet been implemented, from all the other factors that can affect turnout. Research and litigation since my 2006 article demonstrates the enormous difficulty of ascertaining whether a particular practice has a disparate impact on racial minorities.[269] At that time, I thought that proving the turnout effects of a particular voting practice presented a fairly

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[263] *See Frank*, 17 F. Supp. 3d at 870–71; *Veasey*, 2014 WL 5090258, at *49–50.

[264] *See* Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014).

[265] *Id.*

[266] Ohio State Conference of the NAACP v. Husted, 43 F. Supp. 3d 808, 811-813 (S.D. Ohio); N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 349 (M.D.N.C. 2014).

[267] North Carolina State Conference of NAACP, 997 F. Supp. 2d at 350.

[268] *See* League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 244 (4th Cir. 2014); Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 535 (6th Cir. 2014).

[269] Examples include the Ohio and North Carolina cases discussed *supra* text accompanying notes 10 and 107.

simple question. I was wrong. Existing empirical methods are simply not up to the task of establishing the effect of a particular practice on turnout, let alone on turnout by particular subgroups, with any degree of precision.[270] Accordingly, I frame the first step as requiring plaintiffs to demonstrate a "disproportionate burden," rather than "disproportionate denial," the term I used in 2006.[271]

A more manageable judicial inquiry is whether the challenged practice *either* eliminates an opportunity (e.g., weekend early voting or same-day registration) disproportionately used by one racial group, *or* imposes a requirement (e.g., ID or proof of citizenship) that a racial group is less likely to satisfy. Even this inquiry creates a formidable challenge. It can be difficult to document the racial composition of those who use a voting opportunity or who lack a certain document, given that election and other public records often do not include racial or ethnic data. There is no getting around this problem. But given that § 2 forbids the denial or abridgement of the vote on account of race, it is reasonable that plaintiffs be required to make a threshold showing they are disproportionately *burdened* by the challenged practice, in the sense that it eliminates an opportunity they are more likely to use or imposes a requirement they are less likely to satisfy.

Nor will my proposed "disproportionate burden" prong set the bar too low. In cases where plaintiffs are able to meet it, courts should still consider evidence that the challenged practice does not cause *turnout* disparities at later stages of the inquiry. Step one is only the threshold showing that plaintiffs must satisfy in order to proceed. If this showing is made, the state may then introduce evidence that the challenged practice will not actually cause disparities in turnout. For example, if racial minorities satisfied their step one burden by showing that African Americans and Latinos are less likely to have required ID than whites, the state could introduce evidence that its efforts to provide free ID will diminish or eliminate any disparities in the law's impact on voter turnout. This evidence could come in as part of the totality of circumstances analysis at step two, and as part of the balancing at step three, described below.

An important benefit of my proposed first step is that it avoids unnecessary costs, both to the litigants and to the courts. Section 2 cases can be very expensive for both sides, given the breadth and depth of evidence — including expert testimony — that must be brought to bear on "social and historical conditions" included in the Senate factors. The first step in my proposed inquiry is not easy to meet, but it is a more straightforward inquiry than the second and third steps and involves fewer moving parts. The question,

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[270] *See generally* Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification — Voter Turnout Debate*, 8 ELECTION L. J. 85 (2009) (discussing empirical challenges in measuring impact of voter ID).

[271] Tokaji, *supra* note 3, at 724. I prefer "disproportionate burden" to "discriminatory burden" because the latter might be misconstrued to require that the burden be imposed with discriminatory intent rather than that it have a disparate impact.

again, is simply whether the state has eliminated a voting opportunity that racial minorities disproportionately use or imposed a requirement that racial minorities disproportionately lack. Accordingly, a district court might choose to limit discovery (at least initially) to evidence relevant to the first step, where there is a factual dispute over whether the challenged practice really does have a disproportionate burden on minority voters.

My proposed test also adds an additional element to the first step, not required by the judicial test or the one I suggested in 2006. Plaintiffs would have to show that the disproportionate burden *could be avoided* by some alternative standard, practice, or procedure. This element is included because there may be some racial disparities that are unavoidable no matter what practice is adopted. Take the example of voting technology. It is conceivable that plaintiffs might bring a challenge to one of the existing systems — say, direct record electronic (DRE) machines — based on evidence that Latinos are less likely to cast an effective vote than non-Latinos. Suppose that, in support of this claim, plaintiffs introduced evidence showing a statistically significant disparity in undervote rates (ballots for which no valid vote is cast) in top-of-the-ticket races — for example, 2% undervote rates for Latinos, compared to 1.5% for non-Latinos. Under my test, plaintiffs would still have to show an alternative practice that could avoid this disparity. If there are no alternative voting systems that plaintiffs can show would do better, they would still lose at step one. This requirement is analogous to the first *Gingles* precondition that racial minorities show they are sufficiently large and geographically compact to constitute the majority of a single-member district. The idea is that plaintiffs challenging multimember districts must be able to show, as a threshold matter, that they would do better under a different system — in that case, with a compact, single-member, majority-minority district.

Some courts and commentators have expressed anxiety about a § 2 test that is functionally coterminous with the § 5 test. For example, the district court in the North Carolina case worried that the § 2 analysis would be indistinguishable from the § 5 retrogression analysis if plaintiffs were only required to show that racial minorities were disproportionate users of a particular practice like same-day registration.[272]

My proposed § 2 test is not identical to § 5's retrogressive effect test. For one thing, it requires more than just disparate impact. Plaintiffs would still be required to make an additional showing that the challenged practice *interacts with social and historical conditions* to cause the challenged disparity at step two, and would have to prevail on the balancing test at step three. In addition, plaintiffs have the burden of proof under the first two prongs of my § 2 test, while the state had the burden of proof under § 5. But even if the first step is taken in isolation, it is not the same as retrogression.

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[272] N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 367 (M.D.N.C. 2014).

The central difference is the baseline for comparison. Under § 5's retrogression test, the relevant question is whether racial minorities are in a worse position than they were *before adoption of the challenged practice.* Under the first step of my proposed § 2 test, the relevant question is whether the challenged practice has a disparate impact on racial minorities *relative to other voters* that could be avoided by some other practice.[273]

A hypothetical example will clarify how the first prong of my § 2 test differs from retrogression. Suppose that a state that has experienced fraudulent voting due to mail-in absentee ballots decides to eliminate no-excuse absentee voting by mail, and requires voters present an excuse to vote in this manner. This practice presumably would be retrogressive under § 5, insofar as it makes it more difficult for racial minorities to vote. But if the percentage of whites and minorities using no-excuse absentee voting is the same, then the elimination of no-excuse absentee voting would not violate the first prong of my § 2 test. There is no disproportionate burden on racial minorities (or any other protected group) arising from the loss of the challenged practice.[274]

Retrogressive effect is not sufficient to prevail on a § 2 vote denial claim, or even its first step, because the baseline is different. That said, a jurisdiction's past practices *are* germane to a § 2 vote denial claim. Take a jurisdiction that eliminates same-day registration, as North Carolina and Ohio have recently done. As an evidentiary matter, plaintiffs in one of these jurisdictions will have more information to prove the impact of not having same-day registration, as opposed to plaintiffs in a state that never had this practice in the first place, who will have a much more difficult time making the evidentiary showing required at step one. Where a state goes from a more permissive voting rule to a stricter one, plaintiffs will naturally be in a better position to show that the disparate impact could be avoided by a different practice: namely, by introducing evidence on the effect of the practice in effect beforehand. Nothing in the text of § 2, its legislative history, or its subsequent judicial interpretations prohibits a jurisdiction's past practices

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[273] *See* Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 556–58 (6th Cir. 2014) (noting the same distinction between relevant questions in § 5 retrogression analysis and § 2).

[274] While there are few examples of such a situation, a voting restriction may still violate § 2 without creating a retrogressive effect. For example, in the 1980s, when Mississippi partially dismantled its dual-registration system, which had long required voters to register in two different ways, the state's amendments were precleared under § 5 because they made it easier for most African Americans to register. *See* Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1248–50, 1261–62 (N.D. Miss. 1987); *see also* Nicholas O. Stephanopoulous, *The South After* Shelby County, 2013 Sup. Ct. Rev. 55, 115–16 (2013) (discussing *Allain*). Yet the amendments failed a subsequent § 2 action because the law still required dual registration for smaller-town residents and this disparately affected African Americans "who [were] unable, because of disproportionate lack of transportation . . . to travel to the offices of the county registrar." *Allain*, 674 F. Supp. at 1264. Thus, it was § 2 that actually ended this discriminatory practice, not § 5. *See also* Reno v. Bossier School Bd., 520 U.S. 471, 486 (1997) (suggesting that a law may have "some nonretrogressive, but nevertheless 'discriminatory'" purpose that a lower court can discern in conducting a § 2 or § 5 analysis).

from being considered. To the contrary, both the Senate Report and the Supreme Court have expressly allowed past practices to be considered in § 2 claims.[275]

Another difficult question that has arisen in recent § 2 cases is how broadly or narrowly to define the relevant "standard, practice, or procedure." This is exemplified by the North Carolina district court's rejection of a § 2 challenge to that state's elimination of same-day registration, on the ground that overall registration rates for African Americans were marginally *higher* than those of non-Hispanic whites. The court thus viewed the relevant practice as the *registration system as a whole*, rather than the new rule under which same-day registration was no longer allowed. It is difficult to set precise guidelines on how broadly or narrowly the relevant voting practice should be defined. With that caveat, courts should attend to § 2's language by examining the specific "standard, practice, or procedure" that the state seeks to "impose[ ]" or "appl[y]." Where plaintiffs challenge a newly enacted state law — as in all the 2014 cases described in section II.C — courts should consider the disparate impact of that law's challenged requirements, separately and cumulatively, at the first stage. Delving into how the new law interacts with preexisting social and historical conditions, including the state's election ecosystem,[276] is better left for step two of the analysis. I therefore suggest that the relevant "standard, practice, or procedure" be defined narrowly in challenges to a new statute or administrative rule alleged to impose a disproportionate burden on a protected group.

A final question warrants consideration: can whites as well as racial minorities claim a violation of § 2? I have often referred to "racial minorities" in this Article, because § 2 claims by whites, either of vote denial or vote dilution, have been extraordinarily rare. But there is nothing in § 2 that prohibits a claim from being brought in appropriate circumstances.[277] The leading case is *United States v. Brown*,[278] a case from Noxubee County, Mississippi in which local officials were alleged to have intentionally diminished the voting strength of white voters through various devices, including the manipulation of absentee ballots.[279] The district court found, and the Fifth Circuit affirmed, that plaintiffs had shown *intentional* race discrimination against white voters in that case;[280] thus, it is of little use in ascertaining the appropriate standard that should be applied under § 2's results test. While it will generally be more difficult for white voters to show the interac-

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[275] *See supra* notes 116–117, 138, 197 and accompanying text.

[276] *See generally* STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, WITH NATHAN A. CEMENSKA, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES (2007).

[277] *See generally* Denny Chan, Note, *Section 2 of the Voting Rights Act and White Americans*, 2 U.C. IRVINE L. REV. 453 (2012).

[278] 561 F.3d 420 (5th Cir. 2009).

[279] *Id.* at 425–26.

[280] *Id.* at 433–35, 438.

tion with social and historical conditions required under the second step of the test, and therefore to prevail under the "totality of circumstances" that must be considered under § 2, there is no reason why white plaintiffs could not satisfy the first step by showing that the challenged voting practice has a disparate impact on them.

2. *Interaction with Social and Historical Conditions*

The second prong of my proposed test requires plaintiffs to show that the disproportionate burden is traceable to the challenged practice's interaction with social and historical conditions that have produced or currently produce discrimination against members of the protected class. The framing of this requirement is functionally identical to the judicial test and similar to that of my 2006 article.[281] It draws on *Gingles*' statement that the "essence" of a § 2 claim is that the challenged practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[282]

In applying this element of the judicial test to vote denial claims, lower courts have looked primarily at the Senate factors. While the courts say that the "totality of circumstances" applies to both the first and second element, the particular social and historical conditions in the jurisdiction are most germane at this stage.[283] I generally agree with both the statement of this part of the test in recent lower court decisions and the manner in which they have deployed the Senate factors in applying it.[284] There is, however, an overarching question that deserves greater scrutiny than the courts have given it: what are these "social and historical conditions," including the Senate factors, supposed to demonstrate? Or as Senator Hatch put it during Congress' consideration of the 1982 amendments, what is the "core value" underlying § 2?

In my earlier article, I identified the main core value underlying § 2 as redressing race discrimination.[285] But there is a second core value underly-

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[281] There is a slight difference between my framing and the judicial test, which states that the burden be "*caused by or linked to* 'social and historical conditions' that have [produced] or currently produce discrimination against the protected class." Thornburg v. Gingles, 478 U.S. 30, 47 (1986). I have rephrased only because I find the courts' language inelegant. The test differs slightly from my earlier proposal in that it explicitly mentions "discrimination," although that mentioned by way of example in my 2006 article. *See* Tokaji, *supra* note 3, at 723.

[282] *Gingles*, 478 U.S. at 47.

[283] *See, e.g.*, Ohio Conference of the NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014) ("[W]e see no reason why the Senate factors cannot be considered in assessing the 'totality of the circumstances' in a vote denial claim, particularly with regard to the second element.").

[284] In my 2006 article, *see* Tokaji, *supra* note 3, I underestimated the utility of the Senate factors in vote denial claims. The recent litigation shows that they may provide circumstantial evidence of discriminatory intent. Accordingly, I am persuaded that the Senate factors are useful, at least more so than I thought in 2006, at the second step of the test.

[285] *Id.* at 720. Professor Elmendorf characterizes § 2's core value similarly, as stopping race-biased decisionmaking. Elmendorf, *supra* note 37, at 383–84, 404. Professor Nelson

ing § 2 that is especially germane to vote denial claims: stopping infringements on the right to vote as such.[286] Thus, plaintiffs should not be required to prove intentional discrimination at this or any other stage of the vote denial test. That would contradict the "results" language of § 2, as well as its legislative history.[287] Nor should litigants be required to prove a "significant likelihood" of intentional discrimination, by the state or anyone else.[288] As I argued in section III.A, that would come too close to requiring plaintiffs to prove intentional discrimination, thus defeating the purpose of the "results" language.

That said, I agree with the suggestion of other commentators that the Senate factors are mainly targeted at rooting out racial bias — on the part of traditional state actors and others — that might infect the electoral process. Most of these factors provide circumstantial evidence of discriminatory motivation and were primarily written with vote dilution litigation in mind.[289] While they are relevant to vote denial cases as well, their application will sometimes differ. That is especially true of racial polarization. In vote dilution cases, racial polarization plays an important evidentiary function, by showing that the challenged practice really is diluting racial minorities' voting strength. Absent racial polarization, there is no obvious need for legally mandated districts in which racial minorities can elect their preferred candidate. Racial polarization serves a different function in vote denial cases, and so should be understood differently. In these cases, racial polarization provides circumstantial evidence of discriminatory intent. Take for example a state like Texas, in which Latinos vote overwhelmingly Democratic. There would be a strong incentive for Republican legislators to enact laws with the intent of making it more difficult for Latinos to vote.[290] On the other hand, suppose that Vietnamese voters in Texas are evenly split, half favoring Republican candidates and half favoring Democrats. In these circumstances, there is relatively little incentive for a legislature dominated by Republicans (or Democrats) to make it more difficult for Vietnamese citizens to vote. Thus, racial polarization, in the limited sense that a racial minority group is more likely to favor one party than another, is germane to the vote denial inquiry, because it suggests a motivation for the state to limit a racially defined group's voting opportunities.

While most of the Senate factors provide circumstantial evidence of discriminatory intent, the fifth factor reaches more broadly, in looking to whether racial minorities "bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate

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adds implicit bias to the mix and helpfully explains how the Senate factors may shed light on racially biased decisionmaking. *See* Nelson, *supra* note 54, at 625.

[286] *See supra* section III.A.

[287] Tokaji, *supra* note 3, at 724.

[288] *See* Elmendorf, *supra* note 37, at 404.

[289] Tokaji, *supra* note 3, at 706–08.

[290] *See* Hasen, *supra* note 14.

effectively in the political process."[291] That factor is especially relevant to vote denial claims, because it goes beyond possible discriminatory motivations for the voting practice to address underlying social and historical conditions from which its disparate impact may arise. As I put it in my 2006 article: "[T]he Senate Report did not qualify the type of discrimination a court should consider under this test — for example, a court is not limited to considering 'intentional discrimination' or 'official discrimination' — even though the intent/impact distinction and the public/private distinction were both firmly established components of constitutional law by 1982."[292] The fifth Senate factor is therefore of special importance in vote denial cases, the first among equals.

The Fourth Circuit, Sixth Circuit, and Texas district court opinions illustrate the proper application of this prong of the test. In the North Carolina case, the Fourth Circuit considered not only historical discrimination against African Americans trying to register and vote in the state, but also the significant socioeconomic disparities between racial groups in the state, traceable to the effects of past discrimination.[293] Additionally, it noted the "tenuousness" of the state's justifications for its new barriers on voting, an indication that the stated reasons were pretextual.[294] The Sixth Circuit likewise traced African American voters' need for same-day registration and early voting to historical discrimination in employment and income and to more recent barriers to voting that Ohio has imposed, and in some cases been held liable for, which suppress participation by minorities.[295] While the burden on voters was not as heavy as in some other cases, the state's arguments were especially tenuous, particularly its fraud prevention argument, which bore no plausible relationship to its restrictions.[296] In the challenge to Texas' voter ID law, the district court methodically assessed the evidence of each of the Senate factors, especially the socioeconomic inequalities that caused Latinos and African Americans in the state to possess ID at lower rates.[297] The fact that these court orders were later stayed — likely on equitable grounds — does nothing to diminish the force of their reasoning regarding the interaction between the challenged voting practices and social and historical circumstances within these states.

Those who insist on bright-line rules are not likely to be comfortable with the sort of contextual inquiry that the Senate factors suggest and that the courts have applied in the second step of their inquiry. There are un-

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[291] S. REP. NO. 97-417, *supra* note 28, at 29.

[292] Tokaji, *supra* note 3, at 704–09.

[293] League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 235 (4th Cir. 2014).

[294] *Id.* at 246.

[295] Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 556–557 (6th Cir. 2014).

[296] Daniel P. Tokaji, *Context and Pretext: Why the Courts Were Right to Halt Ohio's Latest Voting Restrictions*, ELECTION LAW BLOG (Sept. 25, 2014, 7:27 PM), http://electionlawblog.org/?p=65886, *archived at* http://perma.cc/L4D2-NP99.

[297] Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258 at *51 (S.D. Tex. Oct. 9, 2014).

doubtedly costs to this sort of test, foremost among them that it lessens the determinacy of the judicial inquiry. Any test that focuses on "social and historical conditions" necessitates the exercise of judgment. And when judges exercise judgment, they will sometimes disagree. This is a problem, but one that we have lived with for some time under the § 2 test for vote dilution — which, after all, demands consideration of the same Senate factors that lower courts have recently applied to vote denial. It is also the sort of inquiry that Congress itself prescribed in 1982 by putting the words "totality of circumstances" in the text of the statute. For better or worse, a bright-line rule is not what Congress gave us when it amended § 2.

In discussing the "totality of circumstances" analysis, *Gingles* stressed that the Senate factors were "neither comprehensive nor exclusive."[298] It is therefore worth considering whether other factors, not mentioned in the Senate Report, might be germane to the second part of the vote denial inquiry as well. Two additional factors warrant consideration as part of the analysis of the question whether the practice interacts with social and historical conditions to deny equal voting opportunities to a racially defined group.

The first additional consideration is the interplay between the challenged practice and the larger system of which it is a part. Steve Huefner, Ned Foley, and I have discussed how each state's election rules and practices may be considered a sort of ecosystem.[299] In one state, for example, in-person early voting may be very important for racial minorities, while another state may not choose to offer it at all.[300] A much higher percentage of racial minorities may have qualifying voter ID in one state than another.[301] The same holds true of registration rules, provisional ballots, and virtually all other elements of a state's system.[302] It follows that the effect of a change in election rules in one state may be very different from the effect of a similar-looking change in a different state. When it comes to changes in election administration rules, context matters a great deal.[303]

For this reason, it is very important that courts consider how the practice fits in (or does not fit in) with the body of election rules and practices in the state. In some cases, this will make the disparate impact on minorities worse than it would at first appear; in other cases, it will mitigate the impact. An example is *Brown v. Detzner*, which upheld Florida's reduction in early

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[298] Thornburg v. Gingles, 478 U.S. 30, 45 (1986) (quoting Senate Report's statement that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other").

[299] *See* STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES (2007), *available at* http://moritzlaw.osu.edu/electionlaw/projects/registration-to-recounts/book.pdf, *archived at* http://perma.cc/G792-ZAF8.

[300] *Id.* at 180.

[301] *Id.* at 16.

[302] *Id.* at 12.

[303] Professor Nelson has rightly emphasized this point in her work on § 2. *See supra* text accompanying notes 54–55.

voting days against a § 2 challenge,[304] even after another court held that this reduction had a retrogressive effect under § 5.[305] While reducing the number of early voting days, the state increased the number of hours available for early voting.[306] The new law also increased the availability of early voting on Sunday, the day on which early voting is most important to African American voters in Florida.[307] Under these circumstances, the district court reasonably concluded that minority voters were not, under the totality of circumstances, denied an equal opportunity to vote.[308] So too, the district court in the North Carolina case appropriately considered the absence of racial disparities in registration as a part of its analysis of the elimination of same-day registration, although the court pointedly failed to consider whether there were racial disparities in *turnout* as part of its analysis. If turnout for the plaintiffs' racial group were consistently higher than that of other voters, that circumstance should weigh against plaintiffs' § 2 claim.

The other unenumerated factor that might be considered at step two is the practices of other states. Given the distinctive characteristics of each state's election ecosystem, evidence of other states' laws and practices may be of limited probative value. The Sixth Circuit's opinion in *Ohio State Conference of the NAACP v. Husted* dismissed entirely evidence of other states' practices, stressing the "intensely localized assessment" that the statute requires.[309] The court was right about the need for such an assessment but wrong, in my view, to dismiss evidence of other states' practices entirely. While the main focus should be on how the challenged practice interacts with social and conditions *within* the state, other states' experience may well shed light on that inquiry. The fact that an ID requirement is unusually strict may be taken into consideration. So too, the fact that a state offers extraordinarily generous opportunities for early voting — in comparison with other states — might be taken into consideration as part of the totality of circumstances, should the state try to reduce that period. Evidence of other states' practices may be of limited probative value, given the particularized local inquiry that § 2 requires, but should not be disregarded entirely.

3. Balancing of Interests

Even if § 2 vote denial plaintiffs satisfy their burden at steps one and two, defendants could still prevail, but only if they demonstrate by clear and convincing evidence that their interests outweigh the burden on voting. The balancing I propose for step three is similar to that which the Supreme Court requires in the *Anderson-Burdick-Crawford* line of constitutional cases and

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[304] 895 F. Supp. 2d 1236, 1249 (M.D. Fla. 2012).
[305] *See* Florida v. United States, 885 F. Supp. 2d 299, 318 (D.D.C. 2012).
[306] *Brown*, 895 F. Supp. 2d at 1250.
[307] *Id.* at 1253.
[308] *Id* at 1256.
[309] 768 F.3d 524, 559 (6th Cir. 2014).

that lower courts have followed in recent years.[310] The main difference is the requirement that the state must establish by clear and convincing evidence that its interests outweigh the burden on voters. This requirement will ensure that the state really does have a legitimate reason, and not just a pretextual one, for adopting a practice that makes it more difficult for racial minorities to vote. This is more than the constitutional test requires — thus ensuring that § 2 will not simply restate the constitutional vote denial test — but close enough to avoid constitutional difficulties.

This interest-balancing prong is the central difference between my proposed test and the judicial test, which does not expressly make room for the state to show that the state interests underlying the challenged practice justify its burden on voters. There are two reasons for including such a component in the test. The first is to ensure that the state's interests supporting the voting practice are given adequate consideration. While the Senate factors allow for consideration of whether the state interest is "tenuous[ ]," they do not otherwise provide for consideration of state interests. The weight of state interests supporting a practice ought to matter, not just whether they are tenuous. And the heavier the burden on voters, the stronger those interests should be.

The second reason for adding a balancing component is to address constitutional concerns that arise where § 2 is applied to cases in which there is scant evidence of intentional discrimination by the state. As discussed in section III.B, § 2 may be justified as enforcing two distinct constitutional rights: first, the prohibition on intentional race discrimination; and second, protection for the right to vote as such. Under my proposed test, plaintiffs would not be required to prove intentional discrimination, or even a likelihood of intentional discrimination. Rather, it is sufficient that they show a disproportionate burden on racial minorities arising from the practice's interaction with social and historical conditions. While discrimination must be shown, it need not be intentional discrimination by state actors that would violate the Constitution. Without more, this test, as applied, is likely to raise the constitutional concerns over these enforcement of these two constitutional rights, especially with the conservative majority on the current Supreme Court.[311]

Accordingly, I propose that the two-step judicial test be augmented with a third step, allowing the challenged practice to be upheld if the state shows, by clear and convincing evidence, that its benefits outweigh the burden on voters. This aspect of my proposed test is more accommodating of

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[310] I am not the first to recommend balancing as a part of the § 2 inquiry. In an article written years before a majority of the Court applied a balancing test in constitutional vote denial cases in *Crawford*, Prof. Steven Pershing suggested such balancing as a part of the totality of circumstances. *See* Pershing, *supra* note 55. Of course, he could not have anticipated the developments in constitutional doctrine that informs my analysis, or the recent lower court decisions articulating a two-part judicial test on which I build here.

[311] *See supra* section III.B.

state interests than the one I previously suggested. My 2006 article would have required that the state justify its practice under *strict scrutiny*.[312] That level of scrutiny would still be appropriate in cases involving a severe voting restriction such as where the burden on individual voters is heavy, where large numbers of people are affected, or where the record provides reason to believe that intentional race discrimination is afoot. An example is the § 2 challenge to Texas' ID law, where the circumstantial evidence of intentional discrimination against racial minorities is very strong. In other cases, the state would not have to satisfy strict scrutiny, though it would have to justify its practice with clear and convincing evidence.

The balancing I suggest draws on the *Anderson-Burdick-Crawford* line of cases discussed in section III.C, which require courts to weigh the burdens on voting against the precise interest put forward by the state. While these constitutional cases do not demand "clear and convincing evidence" from the state, this added requirement is constitutionally justified, given that it only comes into play once § 2 plaintiffs have made the threshold showing required at steps one and two. By this stage of the inquiry, there are good reasons to be suspicious of the state's motives, thus warranting more searching scrutiny of the state interest than the Constitution generally demands. This clear and convincing evidence component of my test is thus an appropriate prophylactic to guard against vote denial practices with a negative impact. It will extend § 2's prohibition beyond that of the Equal Protection Clause when it comes to burdens on voting, but not so far as to put its constitutionality in jeopardy.

To reduce indeterminacy and inconsistent application, some additional guidance on the balancing of interests on both sides is appropriate. I therefore consider how courts should assess both burdens on voting and the state interests supporting the challenged practice.

An important aspect of the burden on voting is whether or not it was adopted with a racially discriminatory purpose. If the evidence is clear, that should generally suffice to find a violation of § 2. The reality is that § 2 will rarely be necessary in that type of case, since the challenged practice would likely violate the Fourteenth and Fifteenth Amendments as well. Where plaintiffs show a "significant likelihood" of intentional discrimination by the state, then a heavy burden lies with the state, akin to strict scrutiny. On the other hand, where evidence of discriminatory intent is weak or absent the balancing will be more complicated. In those cases, three other aspects of the burden on voting are especially important.

The first consideration is the *extent of the racial disparity* arising from the challenged practice. Greater racial disparities should be viewed with greater suspicion than modest ones. For example, consider a state that enacts one statute eliminating same-day registration and another statute that shortens the early voting period. Suppose further that that the evidence

[312] Tokaji, *supra* note 3, at 726.

shows that Latino voters are twice as likely as white voters to use same-day registration, but only slightly more likely than whites to use early voting during the days eliminated. Thus, the elimination of same-day registration has a more substantial disparate impact on Latino voters than the reduction in the early voting period. Accordingly, the state would have a heavier burden in justifying the elimination of same-day registration, all other things being equal.

The second consideration is the *number of voters affected* by the challenged practice. A voting restriction affecting more people imposes a greater burden (all other things being equal) than one which affects fewer people. To take another example, suppose that a state enacts a requirement both that voters show photo ID and that provisional ballots cast in the wrong precinct be rejected. In a § 2 challenge, plaintiffs show that there are 200,000 racial minorities who lack the now required ID, but only 2,000 who cast provisional ballots in the wrong precinct in the last election. All other things being equal, the ID law imposes a greater burden on voters than the provisional voting restriction, so would require a stronger state justification.

The third consideration is the *magnitude of the burden on individual voters*. Unlike the first two, this consideration looks not to how many voters are affected but to how great the burden on each voter is. Suppose that a state reduces its weekend early voting hours from 9:00 AM – 5:00 PM to 11:00 AM – 5:00 PM, while also eliminating half its polling places on Election Day. The evidence shows that 3,000 people use each of these opportunities and that the magnitude of the racial disparity is comparable. But the evidence shows that that some minority voters will be heavily burdened by the latter change: in particular, elderly people who rely on public transportation, and will have to travel more than an hour to get to their polling place, while there is no such evidence with respect to the slight reduction in early voting hours. Thus, there is evidence that the voters affected by the elimination of polling places, though small in number, will be severely affected.

The greater the burden on minority voters in these three respects, the stronger the state's justifications for its challenged practice must be. Where the plaintiffs' evidence regarding the burden is strong, the state will bear a heavier burden in justifying its practice. On the other hand, states should not be allowed off the hook in cases where the burden on minority voters is relatively modest. Take for example the Ohio case, challenging the elimination of same-day registration and the shortening of the early voting period. It is certainly true that voters still had plenty of opportunities to register (until thirty days before the election) and plenty of opportunities for early voting (starting twenty-eight days before the election). Thus, the law's burden on individual voters was more modest than in some other cases. But the state's justifications were especially implausible in Ohio, suggesting that they were pretextual. Specifically, the state argued that it needed to end the weeklong window for same-day registration in order to prevent fraud — an

argument that did not pass the straight-face test, given that election officials still had a month after this window closed to verify voter eligibility.[313]

While the state must justify its voting restrictions with clear and convincing evidence, there are a number of possible justifications that one can imagine a state plausibly advancing in the appropriate cases. They include fraud prevention, promotion of voter confidence, cost reduction, and administrative convenience. Balancing these state interests against the burdens on minority voters will be a difficult inquiry, but it is a familiar one which courts must also perform in equal protection challenges to voting restrictions. Because most § 2 vote denial cases involve constitutional claims as well, the added burden on courts is modest.

Although all of the above interests might justify voting restrictions in the appropriate case, there is one conceivable interest that should be taken off the table: the promotion of partisan interests. As Professor Richard Hasen observes, race and party often coincide, with African Americans, Latinos, and (to a lesser extent) Asian Americans generally leaning Democratic.[314] Given the correlation between race and party, legislators can easily serve *partisan* interests by making it more difficult for a *racial* group to vote. It is therefore wrong to conceive of race and party as mutually exclusive reasons for a voting practice. The overriding concern with voter ID and other barriers to voting is that they make it more difficult for racial minorities to vote, thereby making it easier for Republican candidates to vote. The core problem is that elected officials from one party are suspected of making it more difficult for racial minorities to vote in order to achieve partisan ends, but without leaving a paper trail that would document discriminatory intent.[315] Far from being mutually exclusive, racial motivations for suppressing the vote reinforce, and are practically indistinguishable from, partisan ones where (as is typically the case) the affected racial group tends to favor candidates of one party. In these circumstances, a desire to favor one's

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[313] *See Husted*, 768 F.3d at 546–47.

[314] Hasen, *supra* note 14.

[315] Although most previous claims challenge burdens imposed by Republican legislatures or election officials, it is possible to imagine Democrats doing the same thing, for example, by imposing barriers to voting by Cuban Americans or Vietnamese Americans, both groups that lean Republican (by narrow margins). *See* Jens Manuel Krogstad, *After Decades of GOP Support, Cubans Shifting toward the Democratic Party*, PEW RESEARCH CENTER (June 24, 2014), http://www.pewresearch.org/fact-tank/2014/06/24/after-decades-of-gop-support-cubans-shifting-toward-the-democratic-party, *archived at* http://perma.cc/54VC-ST2N; *New Findings: Asian American Vote in 2012 Varied by Ethnic Group and Geographic Location*, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND (Jan. 17, 2013), http://aaldef.org/press-releases/press-release/new-findings-asian-american-vote-in-2012-varied-widely-by-ethnic-group-and-geographic-location.html, *archived at* http://perma.cc/547F-D88N. It is also possible to imagine Democratic elected officials imposing barriers to voting opportunities used primarily by whites, giving rise to a vote denial claim, although it would likely be more difficult for whites to show the social and historical conditions that *Gingles* called the "essence" of a § 2 claim. In any event, such claims are very rarely brought. *But see* United States v. Brown, 561 F.3d 420 (5th Cir. 2009).

party should not excuse voting practices with a discriminatory effect on a racial group.

CONCLUSION

For years, courts and commentators have struggled to come up with a workable and effective test for vote denial cases under § 2. In recent cases arising from Ohio, North Carolina, and Texas, lower courts have suggested a two-part test that would require plaintiffs to demonstrate a disproportionate burden on racial minorities, and that the burden arises from the challenged practice's interaction with social and historical conditions linked to discrimination. While this is progress, the judicial test does not give adequate consideration to state interests, a shortcoming that is likely to raise constitutional concerns with the conservative majority of the Supreme Court. Accordingly, I propose that a third step be added to the analysis, under which a voting restriction would be upheld if the state demonstrates by clear and convincing evidence that its interests outweigh the burden on voting. My proposed test allows (without requiring) evidence of intentional race discrimination, while also giving the state a chance to offer reasonable, nondiscriminatory justifications for its voting restriction.

How effective will my proposed test be in stopping the new vote denial? Realistically, § 2 cannot stop all laws making it harder to vote. It has proven quite challenging — more difficult than one might suspect — to present empirical proof that any particular practice has a racially disparate impact. Moreover, racial minorities are not the only victims of the new vote denial. Young voters, recent movers, and poor people are likely to be hurt, yet the VRA provides no protection for these groups. Finally, there are reasons to be concerned with what the Supreme Court will do if and when a § 2 vote denial case reaches it. For these reasons, constitutional litigation under the *Anderson-Burdick-Crawford* test will remain a necessary complement to § 2. In addition, advocates should pursue federal voting rights legislation that would preempt more restrictive state laws in federal elections.[316]

Although § 2 litigation is no panacea, it could stop some of the most egregious burdens on minority voting. The prospect of § 2 litigation may be an effective deterrent to state legislatures considering unjustified restrictions. It may therefore serve as a replacement for whatever deterrence was lost with the elimination of § 5 and in one sense better, because § 2 litigation applies nationwide. And importantly, § 2 litigation allows for the involvement of the Department of Justice, with its superior resources and expertise.[317] With the right test, § 2 may serve as an effective shield against at least some forms of the new vote denial.

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[316] *See generally* Tokaji, supra note 2.
[317] *See* 42 U.S.C § 1973j (2012).