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NICHOLAS O. STEPHANOPOULOS

## Disparate Impact, Unified Law

**ABSTRACT.** The last decade has seen the largest wave of franchise restrictions since the dark days of Jim Crow. In response to this array of limits, lower courts have recently converged on a two-part test under section 2 of the Voting Rights Act. This test asks if an electoral practice (1) causes a disparate racial impact (2) through its interaction with social and historical discrimination. Unfortunately, the apparent judicial consensus is only skin-deep. Courts bitterly disagree over basic questions like whether the test applies to specific policies or systems of election administration; whether it is violated by all, or only substantial, disparities; and whether disparities refer to citizens' compliance with a requirement or to their turnout at the polls. The test also sits on thin constitutional ice. It comes close to finding fault whenever a measure produces a disparate impact and so coexists uneasily with Fourteenth Amendment norms about colorblindness and Congress's remedial authority.

The section 2 status quo, then, is untenable. To fix it, this Article proposes to look beyond election law to the statutes that govern disparate impact liability in employment law, housing law, and other areas. Under these statutes, breaches are not determined using the two-part section 2 test. Instead, courts employ a burden-shifting framework that first requires the plaintiff to prove that a particular practice causes a significant racial disparity and then gives the defendant the opportunity to show that the practice is necessary to achieve a substantial interest. This framework, the Article argues, would answer the questions that have vexed courts in section 2 cases. The framework would also bolster section 2's constitutionality by allowing jurisdictions to justify their challenged policies. Accordingly, the solution to section 2's woes would not require any leaps of doctrinal innovation. It would only take the unification of disparate impact law.

**AUTHOR.** Professor of Law and Herbert and Marjorie Fried Research Scholar, University of Chicago Law School. I am grateful to Charles Abernathy, Christopher Elmendorf, Joseph Fishkin, Owen Fiss, Aziz Huq, Vicki Jackson, Janai Nelson, George Rutherglen, Robert Schwemm, Stacy Seicshnaydre, Michael Selmi, and Charles Sullivan for their helpful comments. My thanks also to the workshop participants at Harvard Law School, the University of Chicago Law School, and the Washington and Lee School of Law, where I presented earlier versions of the Article. I am pleased as well to acknowledge the support of the Robert Helman Law and Public Policy Fund.



## ARTICLE CONTENTS

INTRODUCTION	1569
I. VOTE DENIAL DOCTRINE AND ITS DEFECTS	1574
A. The Emerging Judicial Consensus	1575
B. The Academy's Approval	1580
C. Unanswered Questions	1582
1. Specific Practice or Entire System?	1582
2. Does the Size of the Disparity Matter?	1583
3. Ability to Comply or Effect on Turnout?	1584
4. Is Interaction with Discrimination Necessary?	1585
5. Are Minority Preferences a Defense?	1586
6. How Does Tenuousness Work?	1587
7. What Is the Remedy?	1588
D. Looming Concerns	1589
II. UNIFYING DISPARATE IMPACT LAW	1595
A. The Usual Framework	1596
B. Applicability to Voting	1601
1. Legislative Histories	1601
2. Theoretical Accounts	1604
3. Nature of the Activity	1607
C. Answered Questions	1609
1. Specific Practice or Entire System?	1610
2. Does the Size of the Disparity Matter?	1611
3. Ability to Comply or Effect on Turnout?	1613
4. Is Interaction with Discrimination Necessary?	1614
5. Are Minority Preferences a Defense?	1616
6. How Does Tenuousness Work?	1617
7. What Is the Remedy?	1619
D. Resolved Concerns	1621



<b>III. OBJECTIONS AND RESPONSES</b>	1625
A. Text and Precedent	1626
B. Constitutional Convergence	1630
C. Prior Record	1632
<b>IV. APPLICATIONS</b>	1636
A. Photo ID Requirements	1637
B. Early-Voting Cutbacks	1640
C. All-Mail Voting	1643
<b>CONCLUSION</b>	1646

## INTRODUCTION

Say a state passes a law that makes it harder to vote, like a requirement to show photo ID or a cutback to early voting. (This is not a far-fetched scenario; more voting restrictions have been enacted over the last decade than at any point since the end of Jim Crow.<sup>1</sup>) Suppose also that the state's new law has a disparate racial impact: that it affects a higher proportion of minority than nonminority citizens. (This too is a plausible assumption; minority citizens are less affluent, on average, and so more disadvantaged by measures that increase the resources required for voting.<sup>2</sup>)

Courts and commentators agree that, standing alone, this racial disparity does not breach section 2 of the Voting Rights Act (VRA), the key statutory provision banning racial discrimination in voting.<sup>3</sup> In the oft-repeated words of one district court, “a plaintiff must demonstrate something more than disproportionate impact to establish a Section 2 violation.”<sup>4</sup> Or as a prominent VRA litigator has put it, “Section 2 plaintiffs [must] establish . . . that the disparate impact of a challenged vote denial practice is not merely a statistical accident.”<sup>5</sup>

Now imagine that a litigant *does* come up with “something more” than a naked racial disparity—specifically, evidence that the disparity is caused by the law's interaction with historical and ongoing patterns of racial discrimination. In a photo ID case, this evidence might show that minority citizens are poorer than nonminority citizens; that their relative poverty is the product of discrimination; that because they are poorer, they are less likely to own cars; and that because they drive less, they are also less likely to have driver's licenses. In an early-voting case, the causal chain might run from discrimination to worse job

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1. See, e.g., *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (May 10, 2017), <https://www.brennancenter.org/new-voting-restrictions-america> [https://perma.cc/8QE6-8F8N] [hereinafter *New Voting Restrictions*] (counting twenty-four states that have adopted new voting restrictions since the 2010 election).
  2. See, e.g., Daniel J. Hopkins et al., *Voting but for the Law: Evidence from Virginia on Photo Identification Requirements*, 14 J. EMPIRICAL LEGAL STUD. 79, 83 (2017) (surveying eleven studies of photo ID possession, almost all of which found substantial racial disparities).
  3. Section 2 is codified at 52 U.S.C. § 10301 (2018). It is even more important now that the VRA's other pillar, section 5, has been neutered. See *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) (striking down the coverage formula used to determine which jurisdictions would be subject to section 5's preclearance requirement).
  4. *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1249 (M.D. Fla. 2012). I am one of those who have repeated this language. See Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55, 108.
  5. Dale E. Ho, *Voting Rights Litigation After Shelby County: Mechanics and Standards in Section 2 Vote Denial Claims*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 675, 680 (2014).

qualifications to less flexible work conditions to greater difficulty voting on Election Day to heavier reliance on early voting.

Given this kind of record, the emerging judicial consensus is that section 2 is violated. In the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits—though not necessarily in the Supreme Court, which has yet to decide a vote denial case under the VRA—liability ensues if an electoral policy (1) has a disparate racial impact that (2) is attributable to the policy’s interaction with discriminatory conditions.<sup>6</sup> And properly so, according to many scholars. To cite a high-profile pair, Sam Issacharoff lauds the courts’ two-part test as a “breakthrough,”<sup>7</sup> while Pam Karlan extols its capacity “to disrupt politics as usual in the service of full civic inclusion for long-excluded minority citizens.”<sup>8</sup>

But there is a problem with construing section 2 in this fashion. Section 2 is a disparate impact provision—a law that imposes liability on the basis of discriminatory effect, not invidious intent. Section 2, however, is not the only such provision. Rather, disparate impact theories are also recognized by Title VII of the Civil Rights Act, by the Fair Housing Act (FHA), and by several more statutes.<sup>9</sup> In these other areas, a violation is *not* established simply because a policy interacts with discriminatory conditions to produce a disparate impact. Instead, courts follow a well-developed framework under which (1) the plaintiff must prove that a particular practice causes a significant discriminatory effect; (2) the defendant next has the opportunity to show that the practice is necessary to achieve a substantial interest; and (3) the plaintiff may then demonstrate that this interest could be attained in a different, less discriminatory way. The emerging consensus in the vote denial context thus threatens to drive a wedge between section 2 and every other disparate impact provision. It risks turning section 2 into a lonely island in the disparate impact sea.

My aim in this Article, then, is to resist this consensus—to urge consistency rather than variety in disparate impact law and to bring vote denial cases into the familiar disparate impact fold. To state my thesis another way: to date, courts have focused on the *explanations* for racial disparities in voting, especially the extent to which they are intertwined with past and present discrimination. In my view, though, courts should scrutinize the interests that allegedly *justify* these

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6. See Dale E. Ho, *Building an Umbrella in a Rainstorm: The New Vote Denial Litigation Since Shelby County*, 127 YALE L.J.F. 799, 802–09 (2018) (surveying the recent case law).

7. Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299, 317 (2016).

8. Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 789 (2016).

9. See, e.g., 42 U.S.C. § 2000e-2(k) (2018) (codifying the disparate impact cause of action under Title VII); *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (recognizing a disparate impact theory under the Fair Housing Act).

electoral disparities: how compelling they are, the degree to which they are advanced by challenged practices, and whether they could be furthered through other means. That is what courts do in every other disparate impact domain, and I see no good reason for vote denial cases to break the mold.

Beyond simplicity, what is the case for unifying disparate impact law? One set of answers stresses the similarities between voting and employment, housing, and the other fields where disparate impact claims may be raised. As a historical matter, the VRA, Title VII, and the FHA are kindred spirits: crown jewels of the civil rights era, enacted in a single burst of legislative activity, and sharing the mission of ending racial discrimination. It would be entirely consistent with these statutes' common legacy for disparate impact law to implement them in the same way.

Theoretically, too, the standard accounts of disparate impact law apply as squarely to voting as to employment or housing. One model treats an unjustified discriminatory effect as a proxy for the true concept of interest: a racially discriminatory purpose. Another approach deems a needless disparate impact an evil in and of itself: an unwarranted racial stratification in a society aspiring for racial equality. Both perspectives extend naturally to vote denial. When an electoral policy differentially affects minority and nonminority citizens, and for no good reason, the injury can be understood as an illicit motive that is suspected but not proven. The harm can also be seen as the unnecessary disparate impact, which prevents minority citizens from participating equally in the political process.

Substantively as well, voting resembles employment and housing in that it is a valued good to which access is determined by criteria that not everyone can satisfy. When these criteria disproportionately exclude minority members, they produce racial disparities whether they pertain to the franchise, the workplace, or the roof over one's head. It is true that voting (unlike employment and housing) is exclusively regulated by the state. But this only means that it is public rather than private interests that are the potential justifications for disparate impacts. It is also true that voting (again unlike employment and housing) is a nonmarket, nonrivalrous good: one with no price and no limit to who may enjoy it. This too, though, simply takes off the table one common rationale for racial discrepancies: private actors' pursuit of profit.

The next reason to unify disparate impact law is more doctrinal. Not only does the framework used by Title VII and the FHA apply fully to vote denial cases; it also resolves many of the most contentious issues that have arisen in these disputes. To name a few: Must section 2 litigants establish a *large* disparate impact, or will any discriminatory effect do? The former, if Title VII is any guide. Courts enforcing that provision have insisted on a racial disparity that is both statistically significant and substantively meaningful before finding an employer

liable.<sup>10</sup> What *kind* of disparate impact must be shown in section 2 litigation – a difference between minority and nonminority citizens’ abilities to comply with an electoral policy or an eventual gap in voter turnout? Again the former, according to Title VII. In a well-known case, the Supreme Court rejected the “suggestion that disparate impact should be measured only at the bottom line.”<sup>11</sup>

Must the racial disparity caused by a voting rule *also* be linked to social and historical discrimination? No, held the Court in another famous Title VII case (thus undermining one of the pillars of the emerging section 2 consensus).<sup>12</sup> It is enough if the rule causes the disparity; there is no need for discrimination to be part of the causal story too. And what is the right *relief* once an electoral policy has been deemed unlawful – facial invalidation or judicial revision to lessen the disparate impact? Courts have usually tossed out practices in their entirety in Title VII and FHA proceedings. Less often, they have ordered race-conscious remedies in order to undo the damage of the illegal activity.<sup>13</sup> These more aggressive steps may also warrant consideration under section 2.

It is no surprise, of course, that employment and housing doctrine is so helpful here. It has been shaped over several decades by hundreds of appellate decisions, including many by the Supreme Court. In contrast, most courts of appeals have yet to adopt a standard for section 2 vote denial claims, and, as noted earlier, the Supreme Court has *never* grappled with such a challenge. But that is precisely my point. It makes little sense for section 2 to evolve independently from the rest of disparate impact law. It should join the main line of precedent and take advantage of its accumulated wisdom: the answers it has laboriously developed to scores of thorny questions.

Doctrinal solutions are nice. But there is a final, and still more significant, reason to unify disparate impact law. It is to make section 2 less menacing to states’ electoral practices and so more likely to be sustained when (not if) its constitutionality is questioned. At present, it is remarkably easy for a plaintiff to prevail in a vote denial case if she is able to establish a racial disparity caused by a particular policy. Her only other obligation is to show that the disparity stems from the policy’s interaction with past and present discrimination. And almost always, the disparity *does* arise for this reason – because the policy raises the cost

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10. See, e.g., 29 C.F.R. § 1607.4(D) (2018) (requiring “differences in selection rate” that “are significant in both statistical and practical terms”).

11. *Connecticut v. Teal*, 457 U.S. 440, 451 (1982).

12. See *Dothard v. Rawlinson*, 433 U.S. 321, 329–30 (1977) (striking down height and weight employment requirements that disproportionately excluded female applicants).

13. See, e.g., *Local 28 v. EEOC*, 478 U.S. 421, 432 (1986) (upholding a “29% nonwhite membership goal” ordered by a district court for a union found to have violated Title VII).

of voting, and minority citizens who are socioeconomically disadvantaged due to discrimination are less able to afford the higher price.

Under the usual disparate impact framework, however, the plaintiff would still have a long road ahead of her. The jurisdiction would have the opportunity to justify its policy, and if it managed to do so, the plaintiff would have the chance to identify a comparably effective but less discriminatory alternative. These additional elements, moreover, are no mere formalities. Rather, they explain why many Title VII and FHA litigants lose their cases<sup>14</sup>: courts conclude that racial disparities *are* justified and *cannot* be reduced through other means. If the same were true in the vote denial context—and there is no reason to think it would not be—then the unification of disparate impact law would slash the success rate of section 2 plaintiffs.

Paradoxically, this would be good news for advocates of section 2 (a group in which I count myself). The simpler it is to satisfy section 2, the more it seems like a pure disparate impact provision: a law that imposes liability solely because of racial discrepancies. The current Supreme Court is deeply suspicious of such measures, which in its view “place a racial thumb on the scales” and require defendants to “make decisions based on (because of) those racial outcomes.”<sup>15</sup> Conversely, the more closely section 2 hews to the usual doctrinal framework—with its extra prongs that exculpate justified racial differences—the more likely the provision is to be upheld. As the Court recently made clear, when “disparate-impact liability” is “properly limited” so it does not threaten the “displacement of valid governmental policies,” it poses no constitutional problems.<sup>16</sup>

Parts I and II of the Article trace the discussion to this point. Part I first describes the test that the courts of appeals (and most scholars) have endorsed for section 2 vote denial claims. The Part then catalogues the doctrinal questions that remain open about the test, as well as the practical and constitutional concerns that loom over it. Next, Part II is the Article’s normative core. After introducing the disparate impact framework used under Title VII, the FHA, and several other

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14. For important studies documenting the low success rates of Title VII and FHA plaintiffs bringing disparate impact claims, see Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006), on Title VII plaintiffs; and Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims Under the Fair Housing Act*, 63 AM. U. L. REV. 357 (2013), on FHA plaintiffs.

15. *Ricci v. DeStefano*, 557 U.S. 557, 594 (2009) (Scalia, J., concurring). Justice Scalia is no longer on the Court, of course, but his views are, if anything, even more widely accepted by the current Justices.

16. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015).

statutes, the Part argues that this framework is fully transferable to the vote denial context. It then explains how the framework would answer the outstanding questions about section 2 and resolve the concerns lingering over it.

Part III subsequently considers a number of objections to the Article's thesis: that section 2's text and precedent do not permit the use of the usual doctrinal framework, that the framework is redundant because it recapitulates the constitutional inquiry, and that litigants' experience with the framework is so disappointing that it should not be exported anywhere else. There is something to these points, but they do not ultimately carry the day.

Lastly, Part IV applies the usual framework to three controversial electoral policies, each emblematic of a separate sort of section 2 case: photo ID requirements for voting (a new franchise restriction), cutbacks to early voting (a reversal of a prior franchise expansion), and all-mail voting (a new franchise expansion). Despite the differences between these measures, the framework is equally apt for all of them.

## I. VOTE DENIAL DOCTRINE AND ITS DEFECTS

Vote denial—the election-law term of art for practices that prevent otherwise-eligible people from voting<sup>17</sup>—has been around for a very long time. From the moment of the Fifteenth Amendment's ratification, in particular, there have been efforts to stop African Americans from casting ballots and thus from participating in the political process. Vote denial *doctrine* under the VRA, though, is not nearly as deeply rooted as vote denial itself. Indeed, courts have often bemoaned the “paucity of appellate case law evaluating the merits of Section 2 claims in the vote-denial context.”<sup>18</sup> It was not until 2014 that the first court of appeals adopted a standard for these challenges, and seven circuits still have not done so.<sup>19</sup>

In this Part, I summarize the two-part test around which courts have begun to coalesce. The test requires that an electoral policy (1) cause a disparate racial

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17. See DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 47 (6th ed. 2017) (defining racial vote denial as “measures that make it more difficult for minority members to vote or otherwise participate in elections”).

18. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014); see also *Veasey v. Abbott*, 830 F.3d 216, 244 (5th Cir. 2016) (en banc) (“[T]here is little authority on the proper test to determine whether the right to vote has been *denied* or *abridged* on account of race.”); *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014) (“A clear test for Section 2 vote denial claims . . . has yet to emerge.”), *vacated as moot*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

19. See *infra* Section I.A.

impact (2) through the policy's interaction with social and historical discrimination. I also note the legal academy's largely positive response to this approach. Switching from description to critique, I then identify a host of issues that remain unresolved under the test. I further point out several difficulties that can be expected to intensify if the test continues to be used in its current form. This legal uncertainty—one might even call it jeopardy—is the basis for this Article's call to unify disparate impact law.

### A. *The Emerging Judicial Consensus*

When the VRA was first enacted in 1965—after the beatings of protesters in Selma, Alabama outraged the nation and after a southern filibuster was broken in the Senate—the statute was highly focused on vote denial.<sup>20</sup> Vote denial, through poll taxes, literacy tests, and other discriminatory practices, is what motivated the marchers on the Edmund Pettus Bridge and their fellow activists around the country.<sup>21</sup> Vote denial is also what the VRA sought to combat through several of its provisions. Section 3 authorized the deployment of federal observers whenever suits were brought to “enforce the voting guarantees of the fourteenth or fifteenth amendment.”<sup>22</sup> Section 4 suspended literacy tests, moral character requirements, and other similar devices for five years.<sup>23</sup> And section 5 obliged certain southern jurisdictions to obtain federal permission before implementing any new “voting qualification or prerequisite to voting.”<sup>24</sup>

This was “strong medicine,” in the Supreme Court's words.<sup>25</sup> In fact, it was so potent that jurisdictions wishing to suppress the electoral influence of minority citizens mostly switched from vote denial to vote dilution.<sup>26</sup> Vote dilution, another election-law term of art, refers to practices that do not prevent anyone

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20. For a rich treatment of the VRA's enactment, see DAVID ARETHA, *THE CIVIL RIGHTS MOVEMENT: SELMA AND THE VOTING RIGHTS ACT* (2008).

21. *See id.* at 73-76.

22. Section 3 is codified at 52 U.S.C. § 10302 (2018). It originally mentioned only the Fifteenth Amendment. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437, 437.

23. Voting Rights Act of 1965 § 4(a).

24. Section 5 is codified at 52 U.S.C. § 10304 (2018).

25. *Shelby County v. Holder*, 133 S. Ct. 2612, 2618 (2013).

26. *See id.* at 2634 (Ginsburg, J., dissenting) (noting that as minority citizens increasingly registered to vote and voted, “[e]fforts to reduce the impact of minority votes, in contrast to direct attempts to block access to the ballot,” became more common).

from voting but that nevertheless reduce the clout of minority groups by changing how votes are aggregated.<sup>27</sup> Dilutive practices include at-large elections as well as district plans that inefficiently disperse or concentrate minority voters. Between roughly the 1970s and the 2000s, these sorts of policies accounted for the vast majority of voting rights litigation under both the Constitution and the VRA.<sup>28</sup> They were also the measures about which Congress was most concerned when it amended section 2 in 1982 to make clear the provision could be violated even in the absence of discriminatory intent.<sup>29</sup>

But while vote dilution was more salient at the time of section 2's revision, it is plain that the provision applies to vote denial, too.<sup>30</sup> Subsection (a) covers any "voting qualification or prerequisite to voting or standard, practice, or procedure"<sup>31</sup>—language that encompasses both direct and indirect barriers to voting. Subsection (a) also prohibits the "denial or abridgement of the right . . . to vote"<sup>32</sup>—in other words, vote denial or vote dilution. Subsection (b) further explains that section 2 is violated if "the political processes leading to nomination or election . . . are not equally open to participation by [minority] members," "in that [minority] members have less opportunity than other members of the electorate to participate in the political process."<sup>33</sup> Vote denial, of course, operates precisely by impeding such equal participation. And in the authoritative Senate report that accompanied the amended section 2, Congress confirmed that the

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27. See LOWENSTEIN ET AL. *supra* note 17, at 216.

28. See, e.g., Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 11 (2008) (observing that section 2 claims "are dominated by . . . challenges to at-large elections . . . and challenges to reapportionment plans"); Peyton McCrary et al., *The Law of Pre-clearance: Enforcing Section 5*, in THE FUTURE OF THE VOTING RIGHTS ACT 20, 25 (David L. Epstein et al. eds., 2006) (finding the same for section 5). For an empirical examination of the impact of this vote dilution litigation, see Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323 (2016).

29. See generally S. REP. NO. 97-417 (1982) (discussing vote dilution almost exclusively).

30. See, e.g., *Holder v. Hall*, 512 U.S. 874, 891-946 (1994) (Thomas, J., concurring in the judgment) (arguing at length that section 2 applies *only* to vote denial); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 441, 442 (2015) ("[T]he text and legislative history leave no doubt that § 2's 'results' language applies to both vote denial and vote dilution claims.").

31. 52 U.S.C. § 10301(a) (2018).

32. *Id.* (emphasis added).

33. *Id.* § 10301(b).

provision “remains the major statutory prohibition of all voting rights discrimination.”<sup>34</sup> It thus “prohibits practices [that] . . . result in the denial of equal access to any phase of the electoral process for minority group members.”<sup>35</sup>

The few section 2 vote denial cases that were decided in the 1980s, 1990s, and 2000s failed to yield a consensus as to the proper legal standard.<sup>36</sup> Courts agreed that a racial disparity alone was not enough to establish liability. But they diverged as to what else might be required. Some courts demanded proof of proximate causation: proof, that is, that the challenged policy was directly responsible for the disparate impact. If some other variable was significantly implicated, then the policy could not be deemed the key driver.<sup>37</sup> Other courts emphasized the interaction between the policy and social and historical patterns of discrimination. On this view, section 2 was breached only if discrimination worsened the present conditions of minority citizens, and these inferior conditions explained why the policy produced a racial disparity.<sup>38</sup> And still other courts insisted on the satisfaction of relevant factors from the 1982 Senate report.<sup>39</sup> These included a legacy of discrimination, socioeconomic differences between minority and nonminority citizens, and racialized campaigns for office.<sup>40</sup>

There were few section 2 vote denial cases from the 1980s through the 2000s because vote denial itself was not very common in this period. Since 2010,

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34. S. REP. NO. 97-417, at 30.

35. *Id.*

36. For a longer discussion of these cases, see Stephanopoulos, *supra* note 4, at 107-09. They likely failed to produce consensus because of their scarcity; there was simply too little judicial activity.

37. See, e.g., *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997); *Ortiz v. City of Phila. Office of City Comm’rs Voter Registration Div.*, 28 F.3d 306, 310 (3d Cir. 1994) (“[T]here must be some causal connection between the challenged electoral practice and the alleged discrimination . . . .”); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1359 (4th Cir. 1989) (“The evidence cast considerable doubt on the existence of a causal link between the appointive system and Black underrepresentation in Buckingham and Halifax counties.”).

38. See, e.g., *Farrakhan v. Washington*, 338 F.3d 1009, 1018 (9th Cir. 2003) (endorsing “a broad, functionally-focused review of the evidence to determine whether a challenged voting practice interacts with surrounding racial discrimination in a meaningful way”); *Wesley v. Collins*, 791 F.2d 1255, 1260-61 (6th Cir. 1986).

39. S. REP. NO. 97-417, at 28-29 (listing “a variety of factors” relevant to “establish[ing] a violation” of section 2).

40. See, e.g., *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1227 n.26 (11th Cir. 2005); *Roberts v. Wamser*, 679 F. Supp. 1513, 1530 (E.D. Mo. 1987), *rev’d on other grounds*, 883 F.2d 617 (8th Cir. 1989); *Miss. State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1263 (N.D. Miss. 1987) (“[T]he same language and analysis is applicable to this voter registration case and each of the relevant [Senate] factors is addressed separately . . .”).

though, *twenty-three* states have implemented new franchise restrictions.<sup>41</sup> Thirteen have required identification for voting; eleven have limited voter registration; seven have reduced the timespan available for early voting; and three have delayed the restoration of voting rights for people with criminal convictions.<sup>42</sup> These measures amount to the most systematic retrenchment of the right to vote since the civil rights era. In geographic coverage, indeed, they surpass the franchise restrictions of Jim Crow, since they are in effect nationwide, not confined to the South.

This resurgence of vote denial has sparked a sharp rise in section 2 vote denial litigation. Unlike their pre-2010 predecessors, though, courts deciding the recent wave of cases have managed to agree on the applicable legal standard.<sup>43</sup> The Sixth Circuit was the first mover, in a 2014 opinion about Ohio's cutback to early voting.<sup>44</sup> The court "read the text of Section 2 and the limited relevant case law as requiring proof of two elements for a vote denial claim."<sup>45</sup> First, the challenged practice "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.'"<sup>46</sup> Second, "that burden must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class."<sup>47</sup>

The Seventh Circuit followed closely on the Sixth Circuit's heels in a 2014 case involving Wisconsin's photo ID requirement for voting.<sup>48</sup> The court "agree[d] . . . that a Section 2 vote-denial claim consists of two elements,"

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41. See *New Voting Restrictions*, *supra* note 1. The Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), is one reason for this surge in vote denial. After *Shelby County*, formerly covered jurisdictions no longer need to preclear franchise restrictions before implementing them. Another driver is the large number of states in recent years where Republicans have enjoyed full control of the state government. Scholars have found that franchise restrictions are far more likely to be enacted by Republican administrations than by Democratic ones. See, e.g., Keith Gunnar Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 *PERSP. ON POL.* 1088, 1089 (2013).

42. See *New Voting Restrictions*, *supra* note 1.

43. I only discuss appellate decisions here. Sections I.C and I.D address both appellate and trial court decisions. For other scholars noting the emerging judicial consensus, see Ho, *supra* note 6, at 808; Karlan, *supra* note 8, at 767; and Tokaji, *supra* note 30, at 455.

44. See *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 531-32 (6th Cir. 2014), *vacated as moot*, No. 14-3877, 2014 WL 10384647, at \*1 (6th Cir. Oct. 1, 2014).

45. *Id.* at 554.

46. *Id.* (quoting 42 U.S.C. § 1973(a)-(b) (2012), now codified at 52 U.S.C. § 10301(b) (2018)).

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

48. See *Frank v. Walker*, 768 F.3d 744, 746 (7th Cir. 2014).

though it cautioned that the second step “does not distinguish discrimination by the defendants from other persons’ discrimination.”<sup>49</sup> Next in line was the Fourth Circuit, in a 2014 decision regarding a North Carolina law that (among other things) required a photo ID to vote, curbed early voting, and eliminated same-day voter registration.<sup>50</sup> In addition to endorsing the same two-pronged standard, the court emphasized the relevance of the Senate factors (the nonexclusive list of criteria in the 1982 Senate report) at the second stage of the analysis.<sup>51</sup>

Sitting en banc, the Fifth Circuit joined the emerging consensus in a 2016 case about Texas’s photo ID requirement.<sup>52</sup> It too “adopt[ed] the two-part framework” and “conclude[d] that the [Senate] factors should be used to help determine whether there is a sufficient causal link between the disparate burden imposed and social and historical conditions produced by discrimination.”<sup>53</sup> Last to come on board (so far) was the Ninth Circuit, in a 2016 en banc decision addressing an Arizona law that banned almost anyone other than voters themselves from returning their early ballots.<sup>54</sup> Like its peers, the court “agree[d] with this two-part framework, which is consistent with Supreme Court precedent, our own precedent, and with the text of § 2.”<sup>55</sup>

A few points about this test are worth stressing at this juncture. First, it builds on the pre-2010 case law about section 2 vote denial claims<sup>56</sup>—but in a rather odd way. Instead of selecting *one* of the earlier approaches, the test essentially embraces them all. The causation of a racial disparity is thus an important part of the inquiry, but so is a measure’s interaction with social and historical discrimination, and so too are the various Senate factors. Second, while the test does not explicitly refer to a jurisdiction’s justification for a challenged practice, one of the Senate factors does bear on this issue. This factor asks “whether the policy underlying the state or political subdivision’s use of [the practice] is tenuous.”<sup>57</sup> A tenuous policy is tantamount to a weak justification and cuts in favor of liability.

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49. *Id.* at 754-55.

50. See *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 229 (4th Cir. 2014).

51. *Id.* at 240.

52. See *Veasey v. Abbott*, 830 F.3d 216, 225-27 (5th Cir. 2016) (en banc).

53. *Id.* at 244-45.

54. See *Feldman v. Ariz. Sec’y of State’s Office*, 843 F.3d 366, 371-73 (9th Cir. 2016) (en banc).

55. *Id.* at 379.

56. See *supra* notes 36-40 and accompanying text.

57. S. REP. NO. 97-417, at 29 (1982).

Third, of the remaining Senate factors, only a few are relevant to vote denial (as opposed to vote dilution) claims. They are “the extent of any history of official discrimination” with respect to voting, “the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health,” and “whether political campaigns have been characterized by overt or subtle racial appeals.”<sup>58</sup> These factors illuminate the social and historical discrimination with which a measure must interact to produce its disparate impact. Last, and most pertinent here, the emerging consensus about the test’s *form* masks a number of fierce disagreements about its *application*. I turn to these areas of dispute later in this Part.<sup>59</sup> They mean that section 2 vote denial law is much more unsettled than its placid surface suggests.

### B. *The Academy’s Approval*

Before diving into these turbulent waters, though, I note one more zone of relative harmony: the legal academy. Before the courts of appeals began to embrace their two-part test in 2014, several scholars recommended close to the same inquiry. In a 2001 article, Stephen Pershing emphasized both the “causal link that . . . transmits to the voting process the racially disparate effect of some other social inequality” and the “idea that the Senate Report totality factors [should] be applied in every section 2 case.”<sup>60</sup> In a 2006 piece, Paul Moke and Richard Saphire called attention to “the interaction between racial disparities in economics, employment, and education and [the challenged policy] that yields an inability to participate in the franchise.”<sup>61</sup> And in 2013, Janai Nelson argued that courts should “examine the historical racial context of discrimination” in order to “determine whether persistent racial inequality interacts with [disputed] laws to cause disparate vote denial.”<sup>62</sup> All of these commentators should feel vindicated by the emerging judicial consensus, which largely tracks their work.<sup>63</sup>

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58. *Id.* at 28–29. These are the factors that most explicitly address discrimination in all its guises. See also Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 595–97 (2013) (highlighting the Senate factors relating to discrimination).

59. See *infra* Section I.C.

60. Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 LOY. L.A. L. REV. 1171, 1193–94 (2001).

61. Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1, 24 (2006).

62. Nelson, *supra* note 58, at 597.

63. So should Dan Tokaji, who urged in 2006 that “a plaintiff . . . be required to show . . . that this disparate impact is traceable to the challenged practice’s interaction with social and historical conditions,” Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the*

Since courts arrived at their approach, too, the academic reception has been highly positive. Voting rights litigator Dale Ho, who has tried several key VRA cases, has written that “the new two-part test for vote denial liability under Section 2” is “a bulwark against some of the worst attempts at vote denial.”<sup>64</sup> As mentioned earlier,<sup>65</sup> Issacharoff and Karlan have each praised the test, describing it as a “breakthrough”<sup>66</sup> that promotes “full civic inclusion for long-excluded minority citizens.”<sup>67</sup> They have also contended that “whether the policy underlying the challenged practice is ‘tenuous’ [should] play[] a more central role” in the analysis.<sup>68</sup> Dan Tokaji has taken an analogous position, labeling the test’s two prongs “a significant improvement” over prior doctrine, and urging that they be supplemented by a third element that would “balance the harm to minority voters against the state’s proffered interests.”<sup>69</sup>

I share Issacharoff, Karlan, and Tokaji’s view that courts should more carefully scrutinize the justifications for the racial disparities caused by electoral practices. But my perspective otherwise diverges from the academic conventional wisdom.<sup>70</sup> As I explain below,<sup>71</sup> I do not agree that a measure’s interaction with social and historical discrimination should be a distinct legal requirement. Nor do I think the Senate factors deserve the pride of place that has been given to them. Even as to justifications, their evaluation should be a separate part of the inquiry, I believe, not an embellishment of a Senate factor or an open-ended balancing exercise. My stances, I hasten to add, are not simply my personal preferences. Rather, they follow from my commitment to unifying disparate impact law—to treating section 2 as a subfield of a larger legal domain, not as its own secluded fiefdom. Taking this project seriously means rethinking the judicial standard for vote denial claims, not just tinkering at its edges.

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*Voting Rights Act*, 57 S.C. L. REV. 689, 724 (2006), and Dale Ho, who identified this approach as an option in 2014, *see* Ho, *supra* note 5, at 695–96. I flag Tokaji’s and Ho’s more recent work in the next paragraph.

64. Ho, *supra* note 6, at 823.

65. *See supra* notes 7–8 and accompanying text.

66. Issacharoff, *supra* note 7, at 317.

67. Karlan, *supra* note 8, at 789.

68. *Id.* at 768; *see also* Issacharoff, *supra* note 7, at 316 (“[I]n the emerging voting-rights cases, tenuousness becomes the statutory hook for shifting the inquiry onto the state’s justification for the proposed reform of electoral practices.”).

69. Tokaji, *supra* note 30, at 441.

70. I note, though, that several other scholars have observed (but not pursued) the analogy between Title VII and section 2 vote denial claims. *See* Ho, *supra* note 5, at 687; Nelson, *supra* note 58, at 587; Tokaji, *supra* note 63, at 692.

71. *See infra* Part II.

*C. Unanswered Questions*

But *why* unify disparate impact law? *Why* disrupt a status quo that commands general assent from courts and scholars alike? I present the affirmative case for unification (and disruption) in Part II. First, though, in this Section and the next, I highlight the problems with the doctrine as it currently stands. One glaring issue is that, to date, the case law has failed to answer basic questions about the operation of the test for section 2 vote denial claims. These questions have arisen—repeatedly—in recent suits. But in engaging with them, courts have taken sharply different tacks and no resolution seems forthcoming.

Moreover, at least some of the blame for the discord may be attributable to courts' insistence on analyzing section 2 in isolation, without reference to the rest of disparate impact law. As I explain later, under Title VII, the FHA, and other statutes, reasonable answers exist to the questions that have stymied the judiciary under section 2.<sup>72</sup> Yet these solutions have been overlooked by courts deciding vote denial cases. Instead, they have marched alone into the fray, indifferent to the doctrinal progress their peers have made in adjacent areas. Confusion and conflict have been the predictable results.

*1. Specific Practice or Entire System?*

To start, what exactly is a section 2 vote denial plaintiff supposed to challenge—a particular electoral practice or a jurisdiction's integrated system of election administration? Some courts have individually examined a series of measures, making factual findings and reaching legal conclusions as to each discrete policy. A North Carolina district court, for example, "considered each challenged electoral mechanism only separately" when confronted with an omnibus law that regulated voter identification, early voting, same-day voter registration, and several more subjects.<sup>73</sup> The Sixth Circuit did the same in a dispute over Ohio provisions that tightened the identification requirements for absentee ballots, shortened the period for fixing absentee-ballot mistakes, and limited poll-worker assistance for needy voters.<sup>74</sup> As the dissent put it, the court "engage[d]

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72. See *infra* Section II.C.

73. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014) (describing the district court's approach).

74. See *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 618 (6th Cir. 2016).

in a piecemeal freeze frame approach . . . finding that each new requirement alone in a vacuum does not meet the standard for disparate impact.”<sup>75</sup>

Other courts, however, have evaluated the collective result of all the disputed practices. Assessing the same North Carolina omnibus law, for instance, the Fourth Circuit “consider[ed] the sum of those parts and their cumulative effect on minority access to the ballot box.”<sup>76</sup> Together, “the panoply of restrictions results in greater disenfranchisement than any of the law’s provisions individually.”<sup>77</sup> Similarly, in a case about Wisconsin’s photo ID requirement, the Seventh Circuit held that it “must look not at [this requirement] in isolation but to the entire voting and registration system.”<sup>78</sup> Because “blacks do not seem to be disadvantaged by Wisconsin’s electoral system as a whole,” the court upheld the measure.<sup>79</sup>

## 2. *Does the Size of the Disparity Matter?*

Next, whether one policy or many are at issue, does the disparate racial impact have to reach a certain magnitude before section 2 is violated? An Alabama district court said yes in a case involving a photo ID requirement, in which the plaintiffs’ expert estimated that only 1.4%, 2.4%, and 2.3% of white, black, and Hispanic registered voters, respectively, lacked valid documents.<sup>80</sup> The court thought this “discrepancy in photo ID possession rates” was “miniscule,” and thus held that “the law has no discriminatory impact.”<sup>81</sup> A North Carolina district court followed the same logic in analyzing a ban on counting provisional ballots cast in the wrong precinct.<sup>82</sup> About 0.2% of white voters’ ballots and 0.3%

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75. *Id.* at 658 (Keith, J., concurring in part, dissenting in part); *see also, e.g.,* *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 954-57 (W.D. Wis. 2016) (separately analyzing five Wisconsin policies); *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 758-59 (S.D. Ohio 2016) (separately analyzing five Ohio policies), *rev’d*, 834 F.3d 620 (6th Cir. 2016).

76. *League of Women Voters*, 769 F.3d at 242.

77. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 231 (4th Cir. 2016).

78. *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014).

79. *Id.*; *see also, e.g.,* *Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (treating an Ohio cutback to early voting as “one component of Ohio’s progressive voting system” and emphasizing the “many options that remain available to Ohio voters”).

80. *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1269 (N.D. Ala. 2018).

81. *Id.* at 1274, 1277.

82. *See N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 366 (M.D.N.C.), *aff’d in part and rev’d in part*, 769 F.3d 224 (4th Cir. 2014).

of black voters' ballots are cast in an incorrect place—a difference that was “minimal,” in the court’s view, and would “not result in unequal access to the polls.”<sup>83</sup>

Not so, retorted the Fourth Circuit on appeal. “[T]he basic truth [is] that even one disenfranchised voter—let alone several thousand—is too many.”<sup>84</sup> “[W]hat matters for purposes of Section 2 is not how many minority voters are being denied equal electoral opportunities but simply that ‘any’ minority voter is being denied . . .”<sup>85</sup> Justice Scalia also suggested that the scale of a racial disparity is immaterial in a vote denial hypothetical he posed in a vote dilution case. If “a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites . . . § 2 would therefore be violated—even if the number of potential black voters was . . . small.”<sup>86</sup>

### 3. *Ability to Comply or Effect on Turnout?*

Third, how should a racial difference be measured—in terms of minority and nonminority citizens’ abilities to comply with a provision, or based on its ultimate effect on voter turnout? In a case about Texas’s photo ID requirement, the Fifth Circuit “decline[d] to require a showing of lower turnout to prove a Section 2 violation.”<sup>87</sup> The court explained that “[a]n election law may keep some voters from going to the polls,” yet “turnout by different voters might increase for some other reason.”<sup>88</sup> The Fourth Circuit took the same position when African American turnout grew slightly after the North Carolina omnibus law was implemented for one election.<sup>89</sup> According to the court, this rise was “beyond the scope of disproportionate impact analysis” and did not change the reality that “many African American votes went uncounted.”<sup>90</sup>

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83. *Id.* at 367; *see also, e.g.*, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 628 (6th Cir. 2016) (“A law cannot disparately impact minority voters if its impact is insignificant to begin with.”).

84. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014).

85. *Id.*

86. *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting).

87. *Veasey v. Abbott*, 830 F.3d 216, 260 (5th Cir. 2016) (en banc).

88. *Id.*

89. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016).

90. *Id.*; *see also, e.g.*, *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 953 (W.D. Wis. 2016) (“[R]aw turnout statistics reveal very little about the disparate burdens that a state’s election system imposes.”); *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251, at \*51 (S.D. Ohio June 7, 2016) (“Registration and turnout numbers . . . do not tell the entire story of a group’s access to the polls.”), *aff’d in part and rev’d in part*, 837 F.3d 612

In contrast, a dissenting Fifth Circuit judge argued against section 2 liability unless there was “a link between requiring [photo] IDs for voting and diminished turnout.”<sup>91</sup> In the absence of “evidence in the record that anybody was *actually* prevented from voting,” a vote denial claim should fail.<sup>92</sup> Likewise, the Seventh Circuit sustained Wisconsin’s photo ID requirement in part because it was unclear “what happened to voter turnout . . . when [the measure] was enforced.”<sup>93</sup> The court also wanted to know: “Did the requirement of photo ID reduce the number of voters below what otherwise would have been expected?”<sup>94</sup> “Did that effect differ by race or ethnicity?”<sup>95</sup> And “what has happened to voter turnout in the other states . . . that require photo IDs for voting?”<sup>96</sup>

#### 4. *Is Interaction with Discrimination Necessary?*

Fourth, must a policy’s disparate racial impact be linked to its interaction with social and historical discrimination? As discussed above, the emerging judicial consensus insists on such a connection.<sup>97</sup> It also regards the Senate factors as instructive evidence of the discrimination with which a policy must interact.<sup>98</sup> But here too there are skeptical voices. The Seventh Circuit, for example, refused to consider private (as opposed to public) discrimination as well as any socioeconomic differences it may have caused. “[U]nits of government are responsible for their own discrimination but not for rectifying the effects of other persons’ discrimination.”<sup>99</sup> Section 2 thus “does not require states to overcome so-

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(6th Cir. 2016). For scholars also endorsing this position, see Ho, *supra* note 6, at 809-15; Karlan, *supra* note 8, at 768-77; and Tokaji, *supra* note 30, at 474-76.

91. *Veasey*, 830 F.3d at 308 (Jones, J., dissenting).

92. *Id.* at 314.

93. *Frank v. Walker*, 768 F.3d 744, 747 (7th Cir. 2014).

94. *Id.*

95. *Id.*

96. *Id.*; see also, e.g., *Ohio Democratic Party v. Husted*, 834 F.3d 620, 639 (6th Cir. 2016) (upholding Ohio’s cutback to early voting in part because “African Americans’ participation was at least equal to that of white voters”); *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 424 (M.D.N.C.) (“[W]hen courts have found § 2 violations, they have frequently grounded that decision in part on lagging minority turnout and registration rates.”), *rev’d*, 831 F.3d 204 (4th Cir. 2016).

97. See *supra* Section I.A.

98. See *id.*

99. *Frank*, 768 F.3d at 753.

cietal effects of private discrimination that affect the income or wealth of potential voters.”<sup>100</sup>

A Wisconsin district court also deemed the Senate factors inapplicable. It observed that they “play a central role in vote-dilution cases,” where they “assist courts in resolving the tension” between promoting minority representation on the one hand and avoiding a guarantee of proportional representation on the other.<sup>101</sup> However, “[f]actors developed for this purpose are not necessarily relevant to cases, like this one, that do not present that tension.”<sup>102</sup> Interestingly, the court could point to impeccable legal authority matching its conclusion about the Senate factors’ inaptness. The Senate report itself declared that vote denial cases “would not necessarily involve the same factors as the courts have utilized when dealing with” vote dilution.<sup>103</sup>

### 5. *Are Minority Preferences a Defense?*

Fifth, is it exculpatory if a racial disparity can be ascribed to minority citizens’ subjective preferences (and thus not to a practice’s interaction with social and historical discrimination)? The Third Circuit thought so in a case involving a Pennsylvania law that purged registered voters from the rolls if they failed to vote for two years.<sup>104</sup> Minority citizens harmed by the provision, the court reasoned, “have registered to vote at least once, if not more often.”<sup>105</sup> “Had they continued to do so,” instead of choosing not to vote or register, “the purge law could not have affected them.”<sup>106</sup> A North Carolina district court dismissed evidence that minority citizens are more likely than nonminority citizens to use

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100. *Id.*; see also, e.g., *Veasey v. Abbott*, 830 F.3d 216, 306 (5th Cir. 2016) (en banc) (Jones, J., dissenting) (approvingly citing these passages); *Farrakhan v. Washington*, 359 F.3d 1116, 1125 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) (objecting to the view that section 2 liability attaches simply because “a disparate impact in an area external to voting . . . translates into a disparate impact on voting”).

101. *Frank v. Walker*, 17 F. Supp. 3d 837, 869 (E.D. Wis.), *rev’d*, 768 F.3d 744 (7th Cir. 2014).

102. *Id.*

103. S. REP. NO. 97-417, at 30 (1982); see also, e.g., *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 414 (M.D.N.C.) (“These [Senate] factors are drawn from the vote dilution context, where they have more obvious application.”), *rev’d*, 831 F.3d 204 (4th Cir. 2016).

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

105. *Id.* at 315.

106. *Id.*

same-day voter registration on the same basis.<sup>107</sup> “That voters *preferred* to use [same-day registration] . . . does not mean that without [it] voters lack equal opportunity.”<sup>108</sup>

On appeal, the Fourth Circuit again vehemently disagreed. “No mere ‘preference’ led African Americans to disproportionately use early voting, same-day registration, out-of-precinct voting, and preregistration.”<sup>109</sup> “Registration and voting tools may be a simple ‘preference’ for many white North Carolinians, but for many African Americans, they are a necessity.”<sup>110</sup> The Sixth Circuit also found it immaterial that black voters’ greater use of straight-ticket voting in Michigan is due to their “tend[ency] to vote overwhelmingly for Democrats.”<sup>111</sup> While this partisan explanation made it “challenging” to say that the state’s elimination of straight-ticket voting “interacts with” [discriminatory] conditions” to produce a disparate impact, there was still a probable section 2 violation.<sup>112</sup>

#### 6. *How Does Tenuousness Work?*

Sixth, what is the nature of the inquiry into a policy’s tenuousness – the sole Senate factor relating to a jurisdiction’s justification for a practice? For most courts, tenuousness has been an afterthought, a brief addendum at the end of an opinion focused on other matters. Here, for instance, is the bulk of the Fourth Circuit’s analysis of tenuousness in its decision about North Carolina’s omnibus law: “North Carolina asserts goals of electoral integrity and fraud prevention. But nothing . . . suggests that those are anything other than merely imaginable.”<sup>113</sup> Similarly, this is the sum of what the Sixth Circuit had to say about tenuousness in a case about Ohio’s cutback to early voting: “Under Senate factor

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<sup>107</sup>. See *N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 349 (M.D.N.C.), *aff’d in part and rev’d in part sub nom. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014).

<sup>108</sup>. *Id.* at 351.

<sup>109</sup>. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016).

<sup>110</sup>. *Id.*

<sup>111</sup>. *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 668 (6th Cir. 2016).

<sup>112</sup>. *Id.*

<sup>113</sup>. *League of Women Voters of N.C.*, 769 F.3d at 246; *see also id.* at 244 (“Section 2 does not prescribe a balancing test under which the State can pit its desire for administrative ease against its minority citizens’ right to vote.”).

nine, it is also relevant that . . . the policy justifications for [the cutback] are ‘tenuous.’”<sup>114</sup>

Conversely, the Fifth Circuit carefully scrutinized the series of interests that Texas invoked on behalf of its photo ID requirement. These included following the lead of other states with such provisions, preventing voter fraud, stopping undocumented immigrants from voting, and bolstering voter confidence.<sup>115</sup> Even more rigorous was a North Carolina district court’s inspection of the state’s justifications for its omnibus law. This section of the court’s opinion ran to twenty-five pages (albeit out of a total of nearly two hundred) and exhaustively explained why each measure had a valid rationale.<sup>116</sup> For these courts, tenuousness was plainly no postscript; rather, its absence was effectively an element of the cause of action.

### 7. *What Is the Remedy?*

Lastly, what relief should be granted when a policy breaches section 2? Several courts have concluded that “the proper remedy . . . is invalidation”<sup>117</sup> and thus have permanently enjoined practices from being used in the future. A permanent injunction was the fate of, among others, Ohio’s cutback to early voting,<sup>118</sup> North Carolina’s omnibus law,<sup>119</sup> and Michigan’s ban on straight-ticket voting.<sup>120</sup> “[A]n injunction is the only practicable remedy,” elaborated a Wisconsin district court.<sup>121</sup> “[S]urely it would make little sense to allow Blacks and Latinos to vote without” complying with a provision, “while continuing to require white voters” to abide by it.<sup>122</sup>

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114. *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 557 (6th Cir. 2014), *vacated as moot*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *see also, e.g.*, *Frank v. Walker*, 17 F. Supp. 3d 837, 878 (E.D. Wis.) (“There is nothing in the text of Section 2 indicating that the state’s interest is relevant . . .”), *rev’d*, 768 F.3d 744 (7th Cir. 2014).

115. *See Veasey v. Abbott*, 830 F.3d 216, 262–64 (5th Cir. 2016) (en banc).

116. *See N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 440–65 (M.D.N.C.), *rev’d*, 831 F.3d 204 (4th Cir. 2016).

117. *McCrory*, 831 F.3d at 239 (adding that different relief may be appropriate when no discriminatory intent is found).

118. *See Husted*, 768 F.3d at 560–61.

119. *See McCrory*, 831 F.3d at 239–41.

120. *See Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 669 (6th Cir. 2016).

121. *Frank v. Walker*, 17 F. Supp. 3d 837, 879 (E.D. Wis.), *rev’d*, 768 F.3d 744 (7th Cir. 2014).

122. *Id.* Also, notably, a district court recently held that its earlier invalidation of Wisconsin’s cutback to early voting barred the State from trying again to limit the early-voting period. *See One Wis. Inst. v. Thomsen*, No. 15-cv-324-jdp, 2019 WL 254093, at \*2–5 (W.D. Wis. Jan. 17,

No court has ordered such racially differential relief. A number of courts, though, have ruled that measures should be *softened* when they contravene section 2—relaxed for minority and nonminority citizens alike—not struck down in their entirety. In a case about Wisconsin’s photo ID requirement, for example, the Seventh Circuit stated that courts’ “remedial authority is limited to ending the illegal conduct,” which “is not photo ID in the abstract, but how income and education affect the probability of having photo ID.”<sup>123</sup> Therefore, “[t]he injunction should . . . allow[] the state an opportunity to make photo ID more readily available.”<sup>124</sup> Likewise, in another photo ID case, the Fifth Circuit opined that “[s]imply reverting to the system in place before [the law’s] passage would not fully respect [Texas’s] policy choices.”<sup>125</sup> Accordingly, “[t]he remedy must be tailored to rectify only the discriminatory effect on those voters who do not have [photo] ID or are unable to reasonably obtain such identification.”<sup>126</sup>

#### D. Looming Concerns

These unanswered questions, it is fair to say, are no mere tangents. On the contrary, they strike at the heart of the emerging test for section 2 vote denial claims. They mean that fundamental issues about both of the test’s prongs remain unresolved. They mean that courts lack concrete guidance as to matters that recur in almost every case. And, most relevant here, they mean that little deference is due to the judicial consensus in favor of the test. Superficial agreement that is, in fact, a facade for stark division is hardly worth heeding.<sup>127</sup>

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2019). These cases, though, should not be read as forever barring states from adopting certain policies. If circumstances significantly changed, presumably the enjoined measures could lawfully be reenacted.

123. *Frank*, 768 F.3d at 755.

124. *Id.* Since *Frank*, as suggested by this passage, the district court has suggested that “the appropriate remedy” for “those who cannot obtain ID with reasonable effort” is “to allow those voters to present an affidavit in lieu of photo identification.” *Frank v. Walker*, 196 F. Supp. 3d 893, 916 (E.D. Wis. 2016).

125. *Veasey v. Abbott*, 830 F.3d 216, 271 (5th Cir. 2016) (en banc).

126. *Id.*; see also, e.g., *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 963 (W.D. Wis. 2016) (holding that Wisconsin’s photo ID petition process is unlawful but “does not require wholesale invalidation”).

127. Of course, there also exist unanswered questions about many other areas of law. See, e.g., Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 604–27 (2016) (describing outstanding issues in vote dilution doctrine). The questions about vote denial law, though, are unusual in their number, in their significance, and in that they *have* been answered by the broader field of disparate impact law.

Beyond the unanswered questions, there is a practical problem with the courts' two-part test, which then leads to a legal problem. The practical problem is that the test is too easy to satisfy. Many aspects of states' electoral systems cause racial disparities, and almost all of them are suspect under the test. The consequent legal problem is that if the test assigns liability this readily, then it puts section 2 in serious constitutional danger. It widens the gap between violations of the Fourteenth and Fifteenth Amendments (which require a discriminatory purpose<sup>128</sup>) and breaches of section 2 (which take little more than a disparate impact), thus undermining section 2's congruence and proportionality with the Amendments. It also encourages jurisdictions to consider race when administering their elections, thus heightening the tension between section 2 and the Equal Protection Clause.<sup>129</sup>

To see why the test threatens so many practices, start with its first prong. Minority citizens tend to be substantially more affected than nonminority citizens by a host of common regulations of voting. In states with voter registration (which is almost all of them<sup>130</sup>), minority citizens generally register at lower rates.<sup>131</sup> In states that disenfranchise felons (again, almost all of them),<sup>132</sup> minority citizens more frequently lose their right to vote.<sup>133</sup> In the twelve states that

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128. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (Fifteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (Fourteenth Amendment).

129. This legal problem exists no matter how the questions in Section I.C are answered. However those issues are resolved, the courts' two-part test continues to lack the justification defense that is critical for not reaching far beyond racially discriminatory intent and not overly racializing election administration.

130. The only exception is North Dakota. See *North Dakota . . . The Only State Without Voter Registration*, N.D. SECRETARY ST. (Aug. 2017), <https://vip.sos.nd.gov/pdfs/portals/votereg.pdf> [<https://perma.cc/R2TG-9ZAU>].

131. See *Voting and Registration in the Election of November 2016*, U.S. CENSUS BUREAU (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html> [<https://perma.cc/J38V-ARHU>] (reporting 2016 voter registration rates of 72% for white citizens, 69% for black citizens, and 57% for Hispanic citizens).

132. Only in Maine and Vermont can incarcerated felons vote. *Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Dec. 21, 2018), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/8RZ2-KN6A>].

133. See Erin Kelley, *Racism and Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUST. 1 (May 19, 2017), [https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement\\_History.pdf](https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf) [<https://perma.cc/W4DB-RWCD>]. I do not focus on felon disenfranchisement in this Article because courts have mostly concluded that, unlike other electoral practices, it is either wholly beyond the reach of section 2 or unlawful only if linked to racially discriminatory intent. See, e.g., *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc).

do not offer early voting,<sup>134</sup> minority citizens would be more likely to vote before Election Day if this option were available.<sup>135</sup> Across the country, minority citizens are less apt to have driver's licenses, and so less able to take advantage of motor-voter registration.<sup>136</sup> Also nationwide, as a dissenting Fifth Circuit judge has observed, minority citizens are "disproportionately affect[ed]" by "polling locations," "mail-in ballots," "language on absentee ballots," "the number of vote-counting machines a county must have," and even "holding elections on Tuesday."<sup>137</sup> With respect to any of these measures, a racial disparity could be established without much difficulty, and a plaintiff could therefore advance to the test's second prong.

This second element – the attribution of a policy's disparate impact to its interaction with social and historical discrimination – is the one that meaningfully restricts the test's reach according to backers of the emerging consensus. In the words of the Fifth Circuit, it is a "sufficient and familiar way to limit courts' interference . . . to [practices] that truly have a discriminatory impact."<sup>138</sup> Or as Ho has written, "[T]he second prong 'limit[s] liability only to claims where a challenged law has a particularly burdensome racial effect.'"<sup>139</sup>

Yet of all the recent section 2 vote denial decisions, only *one* seems to have found a racial disparity but then concluded that it was not the result of a measure's interaction with discrimination. As mentioned above, a North Carolina district court determined that black citizens are more likely to use same-day voter registration but that this proclivity stems from their idiosyncratic preferences.<sup>140</sup> In every other case, if a court discerned a disparate impact, it also managed to

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134. *Absentee and Early Voting*, NAT'L CONF. ST. LEGISLATURES (Jan. 25, 2019), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/L8A8-BNZS>].

135. *Cf. Brown v. Detzner*, 895 F. Supp. 2d 1236, 1254 (M.D. Fla. 2012) (stating for this reason that "acceptance of Plaintiffs' argument that the eight days of early voting allowed by the Florida legislature violates Section 2 could have far-reaching implications"); *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335–36 (M.D. Fla. 2004) (similar).

136. *See Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016) ("[M]otor-voter registration would be found to be invalid as members of the protected class were less likely to possess a driver's license."); *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014).

137. *Veasey v. Abbott*, 830 F.3d 216, 310 (5th Cir. 2016) (en banc) (Jones, J., dissenting).

138. *Id.* at 247 (majority opinion).

139. Ho, *supra* note 6, at 804 (quoting Ho, *supra* note 5, at 703); *see also, e.g.,* Karlan, *supra* note 8, at 767 (arguing that the second prong, which is a critical part of the totality of the circumstances, prevents the test from "render[ing] virtually every electoral rule vulnerable").

140. *See N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 351 (M.D.N.C.), *aff'd in part and rev'd in part sub nom. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014).

link that impact to past and present discrimination, as illuminated by the Senate factors.<sup>141</sup> In every other case, that is, the probability of the test's second prong being satisfied, conditional on its first prong having been met, was one hundred percent. (And even in the North Carolina litigation, the district court's decision was eventually reversed on appeal, precisely because it *was* interaction with discrimination that, in the Fourth Circuit's view, explained black citizens' penchant for same-day registration.)<sup>142</sup>

The elements' near-perfect correlation should not be surprising. When an electoral policy causes a racial disparity, it almost never does so at random—because a condition for voting just happens to be associated with race. Rather, the causal chain connecting the policy with the disparity almost always includes a role for social and historical discrimination. Discrimination helps explain minority citizens' worse education, higher poverty, and greater residential isolation. These socioeconomic disadvantages, in turn, help explain why minority citizens are less likely to register to vote, to have photo IDs, to vote on Election Day, and so on. To put the point another way: discrimination is generally a reason why minority citizens participate in the political process at lower rates. But precisely because it is generally a reason, requiring it to be shown adds little to requiring proof of a disparate impact alone. The impact's causal mechanism is present about as often as the impact itself.<sup>143</sup>

Now turn from the operation of the courts' test to its validity. From a constitutional perspective, two concerns arise if the test's nominally separate prongs in fact collapse into a single inquiry.<sup>144</sup> First, section 2 may then exceed Congress's

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141. See, e.g., *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 668–69 (6th Cir. 2016); *Veasey*, 830 F.3d at 256–64; *League of Women Voters of N.C.*, 769 F.3d at 245–47; *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 556–57 (6th Cir. 2014), *vacated as moot*, No. 14–3877, 2014 WL 10384647 (6th Cir. 2014); *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 957–60 (W.D. Wis. 2016); *N.E. Ohio Coalition for the Homeless v. Husted*, No. 2:06–CV–896, 2016 WL 3166251, at \*49–53 (S.D. Ohio June 7, 2016), *aff'd in part and rev'd in part*, 837 F.3d 612 (6th Cir. 2016); *Ohio Org. Collaborative v. Husted*, 189 F. Supp. 3d 708, 759–62 (S.D. Ohio), *rev'd*, 834 F.3d 620 (6th Cir. 2016); *Frank v. Walker*, 17 F. Supp. 3d 837, 877–79 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014). This sample size is not enormous (amounting to just eight decisions), but it is still quite suggestive of the second prong's limited independent value.

142. See *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 233 (4th Cir. 2016).

143. For another scholar making this point (albeit in the constitutional context), see Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 558 (1977) (“Laws having a disproportionate racial impact burden blacks *because* of their especially disadvantaged position in American society.”).

144. To be clear, these concerns would only threaten section 2 itself (as opposed to the two-part test enforcing it) if section 2 necessarily required the test to be used. I explain below why neither section 2's text nor the cases construing the provision compels the test's use. See *infra*

enforcement powers under the Reconstruction Amendments.<sup>145</sup> Under these Amendments, according to the Supreme Court, there must be “congruence and proportionality” between Congress’s chosen means and the “injury to be prevented or remedied.”<sup>146</sup> And in the Court’s view, the only harm to be avoided or cured in this area is intentional racial discrimination.<sup>147</sup> The test may thus be noncongruent and disproportionate because it prohibits a broad swath of conduct that is constitutionally innocuous: governmental activity that lacks a discriminatory purpose but produces a disparate impact. As a dissenting former Ninth Circuit judge has argued, the test “destroys section 2’s congruence and proportionality” if it is breached by “nothing but [racial] disparities.”<sup>148</sup>

Second, if that is all it takes to infringe section 2, then jurisdictions may have to take race into account whenever they change (or maintain) their electoral regulations. They may have to analyze each potential (or existing) law’s racial effects, and depending on what they find, they may even have to adopt race-based policies in order to avoid liability. But in a pivotal 2015 case, *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, the Supreme Court warned that if a statute “cause[s] race to be used and considered in a pervasive way,” “serious constitutional questions then could arise” under the Equal Protection Clause.<sup>149</sup> The statute could offend the equal protection principle of

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Section III.A. Thus, if these constitutional arguments were accepted, their implication would be not the invalidation of section 2 but rather judicial insistence that some other standard (presumably more like the usual framework) be deployed instead to determine vote denial liability. Cf. *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (construing section 2 narrowly in the vote dilution context in order to “avoid[] serious constitutional questions”).

- <sup>145</sup>. Under the Elections Clause, on the other hand, there is no reason why Congress could not enact a pure disparate impact provision. See, e.g., *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 8–9 (2013) (discussing Congress’s near-plenary authority under Article I, Section 4 of the Constitution). But the Elections Clause applies only to congressional elections, and thus cannot rescue section 2 with respect to elections at any other level. See U.S. CONST. art. I, § 4, cl. 1.
- <sup>146</sup>. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Strictly speaking, *City of Boerne* dealt only with the Fourteenth Amendment, leaving the Fifteenth Amendment standard undetermined. See also *Nw. Austin Mun. Utility Dist. v. Holder*, 557 U.S. 193, 204 (2009) (declining again to specify the Fifteenth Amendment test).
- <sup>147</sup>. See *supra* note 128 and accompanying text.
- <sup>148</sup>. *Farrakhan v. Washington*, 359 F.3d 1116, 1123 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc). *City of Boerne* itself involved this same combination of essentially a pure effects test and a constitutional provision requiring discriminatory intent. See 521 U.S. at 529–36. So did *Kimel v. Florida Board of Regents*, 528 U.S. 62, 82–91 (2000). There is thus ample precedent for the proposition that naked disparate impact laws are not congruent and proportional responses to constitutional violations based on invidious motives.
- <sup>149</sup>. 135 S. Ct. 2507, 2523 (2015); see also *id.* at 2522 (noting “the serious constitutional questions that might arise . . . if such liability were imposed based solely on a showing of a statistical

colorblindness by, as Justice Scalia put it on a different occasion, “plac[ing] a racial thumb on the scales” and “requiring [jurisdictions] to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.”<sup>150</sup> Echoing these sentiments, a Fifth Circuit dissenter criticized the courts’ test precisely because of the excessive race consciousness it allegedly induces. The test, she claimed, “will force considerations of race on state lawmakers who will endeavor to avoid litigation by eliminating any perceived racial disparity in voting regulations.”<sup>151</sup>

Of course, these constitutional objections are not universally shared. Numerous observers (myself included) think it is perfectly permissible, if not necessarily advisable, for Congress to ban electoral practices solely because of the racial discrepancies they cause.<sup>152</sup> Nevertheless, the Supreme Court’s contrary position is the law of the land. It therefore behooves supporters of section 2 to think of ways to restrict its reach—to prevent it from imposing liability in almost all circumstances where policies produce disparate impacts. The next Part turns to that project, on which the continuing viability of the VRA’s most important remaining provision may hinge.<sup>153</sup>

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disparity”). This concern has also been raised in section 2 vote dilution cases. *See, e.g.,* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 446 (2006) (criticizing approaches that “would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions”).

150. Ricci v. DeStefano, 557 U.S. 557, 594 (2009) (Scalia, J., concurring).

151. Veasey v. Abbott, 830 F.3d 216, 317 (5th Cir. 2016) (en banc) (Jones, J., dissenting).

152. For an example of a court defending section 2’s constitutionality, see *id.* at 253 (majority opinion). For an example of a scholar doing the same, see Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998). The reason why a pure disparate impact provision may be imprudent, even if lawful, is that it prioritizes the avoidance of racial disparities above other legitimate governmental goals. *See infra* Part II.

153. As noted earlier, *see supra* note 3, the VRA’s other key provision, section 5, was effectively nullified in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). *Shelby County* also makes clear that the constitutional threat to section 2 is far from speculative. Indeed, the Court’s decision pointedly referred to section 2’s “permanent, nationwide ban on racial discrimination in voting” without affirming the provision’s validity. *Id.* at 2631. Moreover, while section 5 was repeatedly upheld prior to *Shelby County*, the Court has never found section 2 to be constitutional—not even in a vote dilution case. *See, e.g.,* Bush v. Vera, 517 U.S. 952, 990 (1996) (O’Connor, J., concurring) (noting that the Court has “assum[ed] but never directly address[ed] its constitutionality”); Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (identifying the open “question whether § 2 . . . is consistent with the requirements of the United States Constitution”).

## II. UNIFYING DISPARATE IMPACT LAW

In principle, there are several ways in which section 2's scope could be narrowed.<sup>154</sup> But in practice, only one approach has been used by American anti-discrimination law to cabin disparate impact liability: what I call the *usual disparate impact framework*, or the *usual framework* for short. Under the usual framework (as under the courts' two-part test for section 2 vote denial claims), the plaintiff must prove that a practice causes a racial disparity. But next under the usual framework (unlike under the two-part test), the defendant has the opportunity to show that the practice is necessary to achieve a substantial interest. And then under the usual framework (again unlike under the two-part test), the plaintiff may try to demonstrate that this interest could be attained through different means that yield smaller racial differences.

In this Part, I first present the usual framework, emphasizing its use in every area of disparate impact law other than voting. Next, I contend that the usual framework is fully applicable to the electoral context. Historically, theoretically, and substantively, the usual framework fits voting as well as—perhaps better than—any other field. Lastly, I return to the unanswered questions and looming concerns I previously identified with respect to the emerging section 2 consensus. The usual framework, I maintain, responds effectively to the questions by drawing on decades of judicial experience. It also resolves the concerns by limiting section 2 to unwarranted racial disparities.

It is important to note, too, that my argument is not an all-or-nothing proposition. It is quite possible for vote denial law to adopt *some* of the usual framework while declining to embrace other components. To be sure, complete unification is more doctrinally elegant, and applies to section 2 more of the hard-won lessons of other domains. But partial unification is more doctrinally realistic—given the amount of precedent that has already accumulated—and still brings to section 2 much external wisdom. The perfect thus need not be the enemy of the good here. The weak form of my thesis is a perfectly viable (if not, in my view, equally beneficial) alternative to the strong version.

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<sup>154</sup> See, e.g., Louis Kaplow, *On the Design of Legal Rules: Balancing Versus Structured Decision Procedures*, 132 HARV. L. REV. 992 (2019) (arguing for the balancing of racial disparities against defendants' countervailing interests in place of the usual framework's multistep approach).

### A. The Usual Framework

The concept of disparate impact discrimination first entered American law in the breakthrough 1971 case of *Griggs v. Duke Power Co.*<sup>155</sup> The Supreme Court confronted a pair of hiring requirements – possession of a high-school diploma and a satisfactory score on an aptitude test – that were not adopted with a “racial purpose or invidious intent” but that did “render ineligible a markedly disproportionate number of Negroes.”<sup>156</sup> The Court held that such criteria violate Title VII of the Civil Rights Act unless they are “shown to be related to job performance” or to “business necessity.”<sup>157</sup> The Court explained that “Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.”<sup>158</sup> Title VII thus compels the “removal of artificial, arbitrary, and unnecessary barriers to employment” – an end to policies that “operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”<sup>159</sup>

As these quotes from *Griggs* illustrate, the Court meant from the outset to confine Title VII to racial disparities that could not be justified by employers. This aim was formalized in the Court’s next encounter with the disparate impact theory: the 1975 case of *Albemarle Paper Co. v. Moody*.<sup>160</sup> The Court ruled that “the complaining party or class” must first “ma[k]e out a prima facie case of discrimination” by showing that “the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.”<sup>161</sup> If a prima facie case is established, the “burden” then shifts to the employer to “prov[e] that its tests are ‘job related.’”<sup>162</sup> The employer prevails if

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155. 401 U.S. 424 (1971). In an interesting twist, one of the only precedents on which the Court relied in *Griggs*, see *id.* at 430, was an early vote denial case, *Gaston County v. United States*, 395 U.S. 285 (1969), where the Court struck down a literacy test not because it was enacted with discriminatory intent but, rather, because it extended educational inequality to the voting domain. See 395 U.S. at 297 (“‘Impartial’ administration of the literacy test today would serve only to perpetuate these inequities in a different form.”).

156. *Griggs*, 401 U.S. at 429.

157. *Id.* at 431; see also *id.* at 432 (“[A]ny given requirement must have a manifest relationship to the employment in question.”).

158. *Id.* at 432.

159. *Id.* at 431, 432.

160. 422 U.S. 405 (1975); see also CHARLES A. SULLIVAN ET AL., *FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION* 35 (1980) (observing that *Albemarle* set forth the disparate impact framework “in terms of the process of litigation, with plaintiff’s surrebuttal element a new step in the structure”).

161. *Albemarle*, 422 U.S. at 425.

162. *Id.* (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)).

it demonstrates job relatedness unless “the complaining party [can] show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer’s legitimate interest.”<sup>163</sup>

In the decades following *Albemarle*, the Court repeatedly refined the case’s three-step approach. I discuss some of these doctrinal developments later in this Part.<sup>164</sup> For a period in the late 1980s, the Court also veered closer to reversal than to refinement. In *Wards Cove Packing Co. v. Atonio*, in particular, the Court diluted the justification inquiry to merely “whether a challenged practice serves . . . the legitimate employment goals of the employer.”<sup>165</sup> The Court switched the burden allocation between the parties as well, such that “[t]he burden of persuasion . . . remains with the disparate-impact plaintiff . . . ‘at all times.’”<sup>166</sup>

In the Civil Rights Act of 1991, however, Congress emphatically rejected these aspects of *Wards Cove* and restored the usual framework.<sup>167</sup> Under the Act (as under *Albemarle*), “a complaining party [must] demonstrate[] that a respondent uses a particular employment practice that causes a disparate impact.”<sup>168</sup> If this showing is made, the respondent may try to “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”<sup>169</sup> If this showing is made too, the complaining party may offer an “alternative employment practice” that is similarly job related and consistent with business necessity, but that produces a smaller racial disparity.<sup>170</sup> Congress has never revisited this language, so it remains the operative standard for disparate impact liability under Title VII.

In fact, it remains much more than that. Title VII’s burden-shifting approach has served as the template for how disparate impact liability is determined in every other area (except voting) that recognizes the theory. Consider the Fair

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<sup>163</sup>. *Id.*

<sup>164</sup>. See *infra* Section II.C.

<sup>165</sup>. 490 U.S. 642, 659 (1989). The decision then notes that “[t]he touchstone of this inquiry is a reasoned review of the employer’s justification for his use of the challenged practice.” *Id.*

<sup>166</sup>. *Id.* (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 997 (1988) (plurality opinion)).

<sup>167</sup>. See Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k)(1) (2018). For a helpful piece on the Act’s enactment, written by some of the key players in the drama, see Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043 (1993).

<sup>168</sup>. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

<sup>169</sup>. *Id.*

<sup>170</sup>. *Id.* § 2000e-2(k)(1)(A)(ii).

Housing Act.<sup>171</sup> After decades in which many courts of appeals chose to employ the usual framework,<sup>172</sup> the Department of Housing and Urban Development (HUD) ratified their decisions in a 2013 regulation.<sup>173</sup> Under the HUD rule, “the plaintiff . . . has the burden of proving that the challenged practice caused or predictably will cause a discriminatory effect.”<sup>174</sup> Next, the “defendant has the burden of proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests.”<sup>175</sup> Finally, the “plaintiff may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests . . . could be served by another practice that has a less discriminatory effect.”<sup>176</sup> “[T]his burden-shifting scheme,” HUD pointed out in an accompanying statement, “is consistent with the Title VII discriminatory effects standard codified by Congress in 1991.”<sup>177</sup>

The Supreme Court considered the HUD rule in *Inclusive Communities*, the 2015 case about whether the FHA authorizes disparate impact claims.<sup>178</sup> The Court not only held that the FHA does so; it also endorsed the usual framework (as articulated in the HUD rule) while explicitly linking the FHA to Title VII. “The cases interpreting Title VII . . . provide essential background and instruction,” the Court declared.<sup>179</sup> “These cases . . . teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices . . . that sustain a vibrant and dynamic free-enterprise system.”<sup>180</sup> The Title VII precedents also establish that “before rejecting a business justification—or, in the case of a governmental entity, an analogous

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171. The relevant statutory provisions are codified at 42 U.S.C. §§ 3604(a), 3605(a).

172. See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11460, 11462 (Feb. 15, 2013) [hereinafter *FHA Implementation*] (codified largely at 24 C.F.R. § 100.500 (2018)) (noting that “HUD has always used a three-step burden-shifting approach, as do many federal courts of appeals”).

173. See 24 C.F.R. § 100.500. More recently, HUD has asked for comments as to whether this regulation should be revisited in light of *Inclusive Communities*. See Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, 83 Fed. Reg. 28560 (June 20, 2018).

174. 24 C.F.R. § 100.500(c)(1).

175. *Id.* § 100.500(c)(2).

176. *Id.* § 100.500(c)(3).

177. *FHA Implementation*, *supra* note 172, at 11474.

178. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015); see also *id.* at 2514–15, 2522–23 (citing the HUD rule approvingly).

179. *Id.* at 2518.

180. *Id.*; see also *id.* at 2522 (noting that this justification inquiry “is analogous to the business necessity standard under Title VII”).

public interest—a court must determine that a plaintiff has shown that there is” a less discriminatory alternative.<sup>181</sup> “[T]he Title VII framework may not transfer exactly to the fair-housing context, but the comparison suffices for present purposes.”<sup>182</sup>

Or take Title VI of the Civil Rights Act of 1964, enacted at the same time as Title VII and prohibiting recipients of federal funds from engaging in racial discrimination.<sup>183</sup> Title VI itself bars only intentional discrimination,<sup>184</sup> but agencies implementing the provision “may validly proscribe activities that have a disparate impact on racial groups.”<sup>185</sup> Pursuant to this authority, twenty-six agencies have issued disparate impact regulations.<sup>186</sup> Virtually all of these rules, according to the Department of Justice’s Title VI Legal Manual, have adopted the usual framework:

First, does the adverse effect of the policy or practice disproportionately affect members of a group identified by race[?] . . . If so, can the recipient demonstrate the existence of a substantial legitimate justification for the policy or practice? . . . Finally, is there an alternative that would achieve the same legitimate objective but with less of a discriminatory effect?<sup>187</sup>

These “elements of a Title VI disparate impact claim,” the Manual adds, “are similar to the analysis of cases decided under Title VII” and “under the Fair Housing Act.”<sup>188</sup>

The usual framework is also employed under the Age Discrimination in Employment Act (ADEA).<sup>189</sup> As the Supreme Court has held, “employment criteria” that cause an “adverse impact on older workers as a group” are unlawful

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<sup>181</sup> *Id.* at 2518.

<sup>182</sup> *Id.* at 2523.

<sup>183</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53 (codified at 42 U.S.C. § 2000d (2018)).

<sup>184</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

<sup>185</sup> *Id.* at 281.

<sup>186</sup> See Civil Rights Div., *Title VI Legal Manual*, U.S. DEP’T JUST. § 7, at 3 (2017), <https://www.justice.gov/crt/case-document/file/934826/download> [<https://perma.cc/57RX-48BH>].

<sup>187</sup> *Id.* at 6.

<sup>188</sup> *Id.*; see *id.* at 3 n.2 (“Cases decided under Title VII or the Fair Housing Act may be instructive.”); see also Charles F. Abernathy, *Legal Realism and the Failure of the “Effects” Test for Discrimination*, 94 GEO. L.J. 267, 286 (2006) (noting that, even in the absence of agency guidelines, courts “develop[ed] Title VI’s balancing defense” by “following the Supreme Court’s three-step formulation for Title VII disparate impact cases”).

<sup>189</sup> See 29 U.S.C. § 623(a) (2018).

unless “the adverse impact was attributable to a nonage factor that was ‘reasonable.’”<sup>190</sup> The Equal Credit Opportunity Act (ECOA) uses the usual framework as well.<sup>191</sup> In the words of a statement jointly promulgated by eight federal agencies, “lending discrimination under the ECOA” is established “when a lender applies a practice uniformly to all applicants but the practice has a discriminatory effect . . . and is not justified by business necessity.”<sup>192</sup> The usual framework further extends to the Americans with Disabilities Act (ADA).<sup>193</sup> The statute itself bans employment criteria that “screen out . . . a class of individuals with disabilities” unless the criteria are “job-related” and “consistent with business necessity.”<sup>194</sup> The usual framework even reaches beyond American shores. In a comparative study, Rosemary Hunter and Elaine Shoben write that “since the United States Supreme Court adopted the disparate impact theory of discrimination in *Griggs*, the theory has spread to every major common law jurisdiction and into Western Europe and the international arena.”<sup>195</sup>

In sum, there currently exist two standards for assigning disparate impact liability. There is the usual framework, which governs the fields of employment, housing, age discrimination, lending discrimination, and disability discrimination, as well as the many additional contexts in which private or public entities receive federal funds. And there is the courts’ two-part test for section 2 vote denial claims. This Article’s thesis, again, is that only one disparate impact standard is actually necessary—and that it should be the usual framework that is kept, not the courts’ emerging section 2 test. The rest of this Part defends this position, relying in particular on employment law and housing law: the areas where the disparate impact theory has been most fully developed.

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190. *Smith v. City of Jackson*, 544 U.S. 228, 239, 241 (2005); see also *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 100-02 (2008) (elaborating on the ADEA’s reasonableness defense). Of course, the ADEA’s reference to “reasonable factors other than age,” 29 U.S.C. § 623(f)(1), is not identical to the usual framework’s justification defense. It nevertheless captures the same idea: that employment practices that cause disparate impacts should be upheld when they can be explained by the defendant.

191. See 15 U.S.C. § 1691(a) (2018).

192. Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18266, 18268 (Apr. 15, 1994); see also FHA Implementation, *supra* note 172, at 11474 (noting that HUD’s approach to disparate impact claims under the FHA “is also consistent with the discriminatory effects standard under ECOA, which borrows from Title VII’s burden-shifting framework” (footnote omitted)).

193. See 42 U.S.C. § 12112(b)(6) (2018).

194. *Id.*; see also *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (holding that “disparate-impact claims are cognizable under the ADA”).

195. Rosemary C. Hunter & Elaine W. Shoben, *Disparate Impact Discrimination: American Oddity or Internationally Accepted Concept?*, 19 BERKELEY J. EMP. & LAB. L. 108, 124 (1998).

### B. *Applicability to Voting*

How might we determine if the usual framework is applicable to voting? The text of section 2 could resolve the matter if it, like the Civil Rights Act of 1991, referred explicitly to racial disparities, countervailing interests, and alternative practices.<sup>196</sup> Section 2, though, is silent as to how liability should be imposed in vote denial cases. A Supreme Court decision akin to *Albemarle* for Title VII, or *Inclusive Communities* for the FHA, could also specify the right approach in this domain. But the Court has never evaluated a franchise restriction (or expansion) under section 2.

In the absence of any binding authority, several factors seem relevant to the usual framework's applicability to voting. One is the legislative histories of Title VII, the FHA, and section 2. These provisions' drafting might illuminate how Congress expected them to operate with respect to racial discrepancies—and whether Congress had a single expectation or several. Another consideration is disparate impact theory. There are competing accounts of this body of law, which could converge or point in different directions for employment, housing, and voting. And a third issue is the nature of the activity. Working for pay, finding shelter, and casting a ballot are all vital aspects of membership in American society, which may require one or more legal standards when they give rise to racial gaps.<sup>197</sup>

#### 1. *Legislative Histories*

In my view, each of these factors supports the usual framework's validity for voting. Begin with the legislative histories of Title VII, the FHA, and section 2. These measures were passed within a few years of one another in the 1960s and represent some of that era's greatest statutory achievements. Title VII came first in the Civil Rights Act of 1964, the monumental law that John F. Kennedy's assassination and Lyndon B. Johnson's political genius made possible.<sup>198</sup> Section 2 was next: a pillar of the Voting Rights Act of 1965, the statute that Congress

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<sup>196.</sup> See *infra* Section III.A.

<sup>197.</sup> I note that my argument in this section is primarily descriptive: that voting is sufficiently similar to employment and housing that the usual framework *can* be applied to it. I develop my normative claim—that the usual framework *should* be applied to voting—in the next two Sections. See *infra* Sections II.C, II.D.

<sup>198.</sup> For a colorful series of essays on the Act's passage, see *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* (Robert D. Loevy ed., 1997).

enacted in the wake of the appalling violence in Selma.<sup>199</sup> And last in the trio was the Fair Housing Act, ratified in 1968 after yet another tragedy: the murder of Martin Luther King, Jr. and the spasm of inner-city fury his death unleashed.<sup>200</sup>

Title VII, the FHA, and section 2 were close in spirit as well as in time. Their shared mission was to break down entrenched patterns of racial stratification in the economic and political spheres. Indeed, it was precisely because of their interest in “the consequences of [challenged] practices, not simply the motivation,” as the Supreme Court put it in *Griggs*, that all three provisions were construed to authorize disparate impact claims.<sup>201</sup> The 1963 House report on Title VII thus described in detail the large racial differences in wages and joblessness that then existed.<sup>202</sup> One of Title VII’s goals was to loosen “the economic strait-jacket in which the Negro has been confined” — to raise “the economic standards of the Negro population” by ending “this severe inequality in employment.”<sup>203</sup>

Likewise, in a speech subsequently quoted by the Supreme Court, the FHA’s principal sponsor, Senator Walter Mondale, stated that the law aimed to “replace the ghettos ‘by truly integrated and balanced living patterns.’”<sup>204</sup> His counterpart on the House side, Representative Emanuel Celler, agreed that the FHA meant to “remove the walls of discrimination which enclose minority groups” and to end “the blight of segregated housing and the pale of the ghetto.”<sup>205</sup> The VRA, too, was directed at not just purposeful racial discrimination in voting but

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199. As I discuss below, section 2’s revision in 1982 was substantially more important than its enactment in 1965. See *infra* Section III.A.

200. For a good account of the FHA’s legislative history, see Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969).

201. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

202. H.R. REP. NO. 88-914, pt. 2, at 27 (1963) (additional views of Rep. William M. McCulloch et al.) (noting that “[i]n 1962, nonwhites made up 11 percent of the civilian labor force, but 22 percent of the unemployed,” and that “among Negroes who are employed, their jobs are largely concentrated among the semiskilled and unskilled occupations”).

203. *Id.* at 27-28; see also *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (noting that Title VII was “designed to break down old patterns of racial segregation and hierarchy”); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (“The language of Title VII makes plain the purpose of Congress . . . to eliminate . . . racially stratified job environments to the disadvantage of minority citizens.”).

204. 114 CONG. REC. 2276 (1968) (statement of Sen. Walter F. Mondale) (“[W]e are [no longer] going to live separately in white ghettos and Negro ghettos . . .”); see also *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting Senator Mondale).

205. 114 CONG. REC. 9559, 9563 (1968) (statement of Rep. Emanuel Celler); see also *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2521 (2015) (“Recognition of disparate-impact claims is consistent with the FHA’s central purpose . . . to eradicate discriminatory practices within a sector of our Nation’s economy.”).

also “the present white-Negro registration disparity.”<sup>206</sup> A literacy test could therefore be an illegal “barrier to the franchise,” according to the 1965 Senate report, if its racially unequal effect was unintentional yet still “a result of recent legal separation of the races in education.”<sup>207</sup>

Crucially, however, none of these statutes was *maximalist* in its ambitions, bent on eradicating racial discrepancies at any cost. Rather, the drafters of all three laws took the more moderate position that the struggle against racial stratification, while important, must be balanced against other legitimate objectives. The House report on Title VII, for instance, stressed that the provision would not “promot[e] equality with mathematical certainty” or “impose forced racial balance upon employers or labor unions.”<sup>208</sup> To the contrary, “management prerogatives, and union freedoms are to be left undisturbed” as long as “jobs in companies or membership in unions are strictly filled on the basis of qualification.”<sup>209</sup>

When Congress revised the FHA in 1988, similarly, the House report on the amendments “recognized that liability should not attach when a justification is necessary to the covered entity’s business.”<sup>210</sup> In *Inclusive Communities*, the Supreme Court repeatedly cited this report as support for its decision to apply the usual framework to FHA disparate impact claims.<sup>211</sup> And as for section 2, not only is one of the factors recognized by the 1982 Senate report the tenuousness of the government’s rationale for a policy,<sup>212</sup> but the measure itself states that it

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206. S. REP. NO. 89-162, pt. 3, at 16 (1965) (joint views of twelve members of the Judiciary Committee); *see also* *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) (observing that in several southern states, “registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration”).

207. S. REP. NO. 89-162, pt. 3, at 32-33 (additional views of Sen. Thomas J. Dodd et al.); *see also id.* at 33 (objecting to the poll tax regardless of its intent because it is “a far heavier economic burden on Negroes than on whites”).

208. H.R. REP. NO. 88-914, pt. 2, at 29 (additional views of Rep. William M. McCulloch et al.).

209. *Id.*; *see also* Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305, 333 (1983) (noting that “both proponents and opponents of the Act agreed that Title VII did not mandate a rigid kind of distributive equality”). When Congress amended Title VII in 1991, it confirmed that the provision “does not prohibit all practices with a discriminatory effect, however, only those that are not justified by business necessity.” S. REP. NO. 101-315, at 40 (1990).

210. FHA Implementation, *supra* note 172, at 11472 (citing H.R. REP. NO. 100-711, at 30 (1988)).

211. *See* *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2519-21 (2015).

212. *See* S. REP. NO. 97-417, at 29 (1982) (asking “whether the policy underlying the [practice] is tenuous”). It follows from the inclusion of this factor that there exist some policies that are *not* tenuous—that there are some excuses that can justify impositions on the rights protected by section 2.

does not require perfect racial balancing. “[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population,”<sup>213</sup> reads the “compromise disclaimer” that enabled the bill’s passage.<sup>214</sup>

Accordingly, the legislative histories of Title VII, the FHA, and section 2 resemble one another in two key respects. They establish that the provisions *may* be violated by racial disparities even in the absence of discriminatory intent. And they hold that liability does not *necessarily* follow from such disparities, depending instead on what interests the challenged practices serve and how well they serve them.<sup>215</sup> The usual framework captures both of these themes by including a *prima facie* case, based on disparate impact alone, that may then be rebutted by a sufficiently compelling and tailored justification. The courts’ two-part test for section 2 vote denial claims, on the other hand, is true to the first theme but not the second. As explained earlier,<sup>216</sup> the test comes too close to finding a breach whenever an electoral policy differentially affects minority and nonminority citizens—even if it does so for good reason.

## 2. Theoretical Accounts

Turn next to the theoretical accounts of disparate impact law. Its essence, from one perspective, is the removal of obstacles that unjustifiably prevent racial minority members from enjoying the same opportunities as nonminority members. By lowering these hurdles, disparate impact law is supposed to improve conditions for minorities, to prevent their existing disadvantages from spreading into new areas, and ultimately to undermine the racial hierarchies of American society.<sup>217</sup> This is the model the *Griggs* Court embraced when it condemned “artificial, arbitrary, and unnecessary barriers” that “operate as ‘built-in headwinds’

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213. 52 U.S.C. § 10301(b) (2018).

214. See S. REP. NO. 97-417, at 95 (additional views of Sen. Orrin G. Hatch) (noting “the euphoria generated by the proposed ‘compromise,’ virtually ensuring the swift enactment of this measure”).

215. See Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 CHI.-KENT L. REV. 1, 16 (1987) (noting that, in passing Title VII, Congress both “was intent on securing *visible and measurable* improvement in employment of minorities” and “did not want jobs to be allocated mechanically to members of various groups by reference to population or labor force”).

216. See *supra* Section I.D.

217. For examples of scholars discussing this account, see Samuel R. Bagenstos, *Disparate Impact and the Role of Classification and Motivation in Equal Protection Law After Inclusive Communities*, 101 CORNELL L. REV. 1115, 1132 (2016) (“Others have seen [disparate impact’s] function as more distributive—as aiming to overcome an unfair group-based distribution of jobs or

for minority groups.”<sup>218</sup> Hints of the model are also apparent in *Inclusive Communities*, which quoted this language from *Griggs*<sup>219</sup> and further criticized policies that “arbitrarily creat[e] discriminatory effects or perpetuat[e] segregation.”<sup>220</sup>

Another account of disparate impact law sees it as a way to target racially discriminatory *motives* that are suspected but cannot directly be proven. On this view, few contemporary defendants are so foolish as to create records that reveal their invidious objectives. In the absence of smoking guns, discriminatory intent must be inferred from circumstantial evidence. And perhaps the most probative such evidence is a significant racial disparity, caused by a particular practice, that could have been avoided without compromising any legitimate interest.<sup>221</sup> Justice Scalia characterized disparate impact law in these terms in a 2009 concurrence, “framing it as simply an evidentiary tool used to identify genuine, intentional discrimination—to ‘smoke out,’ as it were, disparate treatment.”<sup>222</sup> The *Inclusive Communities* Court also gestured in this direction, observing that “disparate-impact liability . . . plays a role in uncovering discriminatory intent.”<sup>223</sup>

A third model of disparate impact law, recently developed by Joseph Fishkin, emphasizes its ability to eliminate (or at least widen) bottlenecks in American life.<sup>224</sup> A bottleneck is a criterion that is applied to a certain pool of people and that allocates a desired good to only a subset of them. A bottleneck produces a racial disparity if it is harder for minority members to pass through it than for nonminority members. And whenever a bottleneck is lifted (or loosened), the

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other resources.”); and Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1376 (2010) (“[D]isparate impact doctrine can be understood . . . as intended to redress self-perpetuating racial hierarchies inherited from the past . . .”).

218. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971).

219. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522, 2524 (2015).

220. *Id.* at 2522.

221. Scholars presenting this account include Bagenstos, *supra* note 217, at 1132, Primus, *supra* note 217, at 1376–77, and, most prominently, George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1311 (1987) (“The theory of disparate impact only addresses the difficulty of proving pretextual discrimination . . .”).

222. *Ricci v. DeStefano*, 557 U.S. 557, 595 (2009) (Scalia, J., concurring).

223. *Inclusive Cmty.*, 135 S. Ct. at 2522. The *Inclusive Communities* Court, though, paired this statement with a sophisticated view of discriminatory intent as “unconscious prejudices and disguised animus that escape easy classification as disparate treatment.” *Id.*

224. See, e.g., JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 10–24 (2014); Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 WASH. U. L. REV. 1429, 1470–74 (2014) [hereinafter Fishkin, *The Anti-Bottleneck Principle*].

benefits accrue not just to minorities but also to nonminorities who previously were unable to comply with the criterion as well.<sup>225</sup>

I find some of these accounts more compelling than others. The point I want to make here, though, is that all of them extend to voting just as easily as to employment or housing. They thus provide no reason, as a matter of disparate impact theory, to differentiate between voting and the fields where the usual framework already governs. Consider the anti-racial-stratification model. Inequality in the workplace is reduced when a hiring practice that disproportionately and unnecessarily excludes minority applicants is struck down. So is residential segregation when a court invalidates a housing policy that unjustifiably prevents a larger fraction of minority members from settling in a given neighborhood. And so too is unequal *political* participation when the measure being nullified is a *voting* requirement that unreasonably burdens the franchise for a greater share of minority citizens.

Or take the view of disparate impact law as an “evidentiary dragnet” for purposeful racial discrimination.<sup>226</sup> The logic that allows an invidious aim to be inferred is identical whether the practice at issue pertains to employment, housing, or voting. In each context, one may surmise that a defendant intends to disadvantage minority members when she adopts a policy that causes a substantial and unwarranted racial disparity. This sort of disparity in the electoral process seems no more or less suspicious than anywhere else.

The claim holds for Fishkin’s bottleneck theory too. A bottleneck, again, is any criterion that restricts access to a good. It can therefore be a hiring test that job applicants must pass to earn employment, a condition for selling a house that homebuyers must satisfy to complete the purchase, or a voting requirement with which citizens must comply to cast a ballot. In each case, there is a pool of people who *want* something and a practice that permits some but not all of them to *get* it. In each case, moreover, if the bottleneck were removed, “the *benefits* of the policy change [would be] universal.”<sup>227</sup> Minority and nonminority job applicants, homebuyers, and citizens alike would be able to enjoy opportunities that had previously been denied to them.<sup>228</sup>

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225. See Fishkin, *The Anti-Bottleneck Principle*, *supra* note 224, at 1498 (“The changes made to loosen the bottleneck apply to everyone, not only to members of the statutorily protected group.”).

226. The phrase belongs to Richard Primus. See Primus, *supra* note 217, at 1376–77.

227. Fishkin, *The Anti-Bottleneck Principle*, *supra* note 224, at 1498.

228. If anything, a voting bottleneck may be more problematic than an employment or housing bottleneck because it is harder to circumvent. Someone denied a job can apply to another employer; someone denied an apartment can find another landlord; but someone denied the franchise cannot vote without moving to another jurisdiction (if even then).

### 3. *Nature of the Activity*

The final factor bearing on the usual framework's applicability is the nature of voting. Voting plainly differs from employment and housing in certain key respects. It is exclusively regulated by the state; indeed, it cannot even occur unless the government first establishes and administers an electoral system.<sup>229</sup> In contrast, private actors make most decisions about the workplace and real estate, based on their own considerations rather than those of any higher authority. Voting is also not a market good; it has no price set by the forces of supply and demand. On the other hand, market dynamics largely determine the wages of employees and the costs of houses.<sup>230</sup> And voting is not a rival good either; when I cast a ballot, I do not stop you from doing the same. Conversely, when a job is filled or a home is sold, the position or the property becomes unavailable to everybody else.<sup>231</sup>

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229. See, e.g., Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 51 (2004) (“[E]lections and related democratic processes are pervasively regulated . . .”).

230. See, e.g., Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1141 (1989) (distinguishing between “political, criminal, and educational rights” and “‘ordinary’ social and economic goods, like jobs and housing”).

231. See, e.g., Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 304 (1971) (observing that “enfranchising an illiterate . . . [does not] deprive the literate of the vote,” while “the job that goes to one cannot go to the other”).

Another difference between voting and all other goods (including employment and housing) is that it is arguably *antecedent* to them. Voting, that is, helps to allocate political power, and thus to set the terms on which all other goods are granted (at least to the extent the state is involved in the goods' provision). As the Supreme Court put it more than a century ago, the franchise is “a fundamental political right, because preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). This point is true enough, but it does not counsel against the usual framework's adoption in the section 2 context. Voting may be conceptually upstream from all other goods, but it is not more *important* than them, nor are a jurisdiction's justifications for limiting the franchise rendered irrelevant by its antecedent status.

A further contrast between voting and other areas is that defendants may have more of an incentive to discriminate racially with respect to voting. Racial discrimination in, say, the employment context is often irrational because it prevents employers from hiring the best possible employees (who may, of course, be minorities). In the voting domain, though, racial discrimination is frequently highly beneficial to politicians because of the severe racial polarization of American politics. By burdening the votes of minority citizens, in particular, politicians unlikely to receive those votes can improve their odds of staying in office. This point, too, is accurate but orthogonal to the issue of whether the usual framework should be implemented under section 2. If discriminatory intent is more prevalent with respect to voting, then liability is simply more likely to be found under both the Constitution and whatever test is used in statutory vote denial cases.

Significant as these distinctions are, they do not render the usual framework any less apt for voting. Instead, they either are legally irrelevant or suggest that courts should have *fewer* qualms about striking down electoral (versus employment or housing) practices. Start with the fact that the defendant in section 2 vote denial cases is necessarily the government. This does not actually distinguish these cases from Title VII and FHA suits, which can be brought against public employers and housing providers as readily as against private ones. Additionally, the governmental status of section 2 defendants simply means that public rather than private interests must be analyzed under the usual framework's second and third prongs. Public interests like preventing fraud, conserving resources, and efficiently administering elections are *different* from the private pursuit of profit. But they are no less amenable to being weighed for their importance, scrutinized for their fit with challenged policies, and having this fit compared to that of alternative measures.<sup>232</sup>

Similarly, the main implication of voting not being a market good is that there is no market-based reason to limit it. The restriction of the franchise, that is, cannot be justified by what *Griggs* called "business necessity"<sup>233</sup> or *Inclusive Communities* described as "the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."<sup>234</sup> The most familiar (and perhaps the most powerful) rationale for permitting racial disparities is thus off the table when it comes to disputed electoral practices. To defend such disparities, jurisdictions must resort to less common (and maybe less compelling) interests than profit maximization.

As for voting's lack of scarcity, it too cuts in favor of liability in section 2 cases. When a good (like employment or housing) is in short supply, courts may be concerned about the innocent victims of their decisions: the nonminority job applicants who would no longer get offers if a hiring criterion were dropped, the nonminority homebuyers who would no longer be sold units if a housing policy were revised, and so on.<sup>235</sup> These worries may convince courts not to strike down

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232. Recognizing the equivalence of public and private interests under the usual framework, HUD simply substituted the phrase "substantial, legitimate, nondiscriminatory interest" for Title VII's "business necessity" when it promulgated its disparate impact rule. FHA Implementation, *supra* note 172, at 11470. HUD noted approvingly that the former term "applies to individuals, businesses, nonprofit organizations, and public entities." *Id.* (emphasis added); see also *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2522 (2015) (citing this HUD analysis and referring interchangeably to "housing authorities and private developers" as FHA defendants).

233. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

234. 135 S. Ct. at 2518.

235. For a good discussion of such "visible victims," see Primus, *supra* note 217, at 1369-75.

challenged practices, or at least to dilute the remedies they ultimately impose. But with a nonrivalrous good like voting, there is no risk of such collateral damage. A ruling that makes it easier for minority citizens to vote does not impede nonminority citizens from casting ballots. In fact, it *helps* them to vote, thus yielding innocent *beneficiaries* rather than victims—a dynamic that could plausibly induce courts to err on the side of liability in section 2 litigation.<sup>236</sup>

### C. Answered Questions

Several different modes of analysis, then, lead to the same conclusion: that the usual framework is applicable to section 2 vote denial claims. The VRA's legislative history, like those of Title VII and the FHA, expresses concern about *unjustified*, but not *all*, racial disparities. The theoretical accounts of disparate impact law make as much sense for voting as for employment and housing. And while voting (unlike employment and housing) is a nonmarket, nonrivalrous good regulated solely by the state, these features simply make the usual framework more likely to result in proplaintiff rulings in electoral cases.<sup>237</sup>

Not only is the usual framework applicable to section 2 vote denial claims; it also should, in fact, be applied to them. One reason why, to which I now turn, is that in the decades in which the usual framework has been used under Title VII and the FHA, courts, legislatures, and agencies have arrived at answers—reasonable answers—to the questions that have divided judges under section 2. If the usual framework were extended to section 2, these doctrinal solutions would

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236. See *id.* at 1381 (noting that VRA remedies generally do not create visible victims); see also Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Nondiscrimination Principle*, 90 HARV. L. REV. 1, 36 (1976) (“The voting test suspension remedies have been relatively uncontroversial because they do not frustrate the legitimate expectations of third parties or prefer the intended beneficiaries to others similarly situated . . .”).

237. This is a good place to note that, in my view, the usual framework is *inapplicable* to section 2 *vote dilution* claims. First, the Supreme Court has already specified a different approach for vote dilution claims. See *Thornburg v. Gingles*, 478 U.S. 30 (1986). Second, section 2's legislative history identifies a series of factors, most importantly racial polarization in voting, that must be considered in vote dilution cases but that are foreign to the usual framework. See S. REP. NO. 97-417, at 28-30 (1982). And third, conceptually, vote dilution is concerned above all with the legislative representation of racially defined groups. See Stephanopoulos, *supra* note 28, at 1361-93. This focus on group representation sharply distinguishes section 2 vote dilution claims from the usual framework, in which election outcomes play no role and the overriding goal is to avoid unjustified racial disparities in political *participation*. The focus on group representation also explains why vote dilution law emphasizes issues like racial polarization and geographic compactness that appear nowhere in the usual framework. These issues have no bearing on whether a disparate impact exists or is justified—but they have everything to do with whether a minority group is adequately legislatively represented.

presumably come with it. They would thereby settle disputes that show no sign of fading on their own and lend coherence to a body of law whose current hallmark is disagreement over matters large and small.<sup>238</sup>

### 1. *Specific Practice or Entire System?*

The first unanswered question about section 2 vote denial claims is whether they should be brought against specific electoral practices or systems of election administration in their entirety.<sup>239</sup> In the Title VII context, Congress opted in most circumstances for particularity in the Civil Rights Act of 1991. Echoing a pair of earlier Supreme Court decisions,<sup>240</sup> Congress required “the complaining party [to] demonstrate that each particular challenged employment practice causes a disparate impact.”<sup>241</sup> The only exception arises “if the complaining party can demonstrate to the court that the elements of a respondent’s decisionmaking process are not capable of separation for analysis.”<sup>242</sup> HUD took the same position when it clarified the operation of the usual framework in FHA cases. In general, a plaintiff must “identif[y] the specific practice that caused the alleged discriminatory effect.”<sup>243</sup> On occasion, though, “it may be appropriate to challenge the decision-making process as a whole.”<sup>244</sup>

The point of this particularity requirement is to focus litigation—to prevent it from sprawling into all of a defendant’s policies and all of the effects they might have, individually or in unison.<sup>245</sup> The requirement is also advantageous to defendants, on balance. It forces plaintiffs either to isolate the measures that, in their view, cause racial disparities or to convince courts that no such isolation is

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<sup>238</sup>. For a detailed discussion of this doctrinal discord, see *supra* Section I.C.

<sup>239</sup>. See *supra* Section I.C.1.

<sup>240</sup>. See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657 (1989) (“[A] plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack.”), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015); *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 994 (1988) (plurality opinion) (“The plaintiff must begin by identifying the specific employment practice that is challenged.”).

<sup>241</sup>. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2018).

<sup>242</sup>. *Id.*

<sup>243</sup>. FHA Implementation, *supra* note 172, at 11469.

<sup>244</sup>. *Id.*

<sup>245</sup>. See generally Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 459–60 (1998) (discussing in detail the particularity requirement).

possible. As a result, defendants may avoid liability when plaintiffs cannot pinpoint the responsible practices or, even if found liable, defendants may be compelled to change only small parts of their decision-making processes. These prodefendant elements may explain why the Supreme Court first endorsed particularity in the late 1980s, during its period of greatest hostility toward Title VII disparate impact claims.<sup>246</sup>

In section 2 vote denial cases, particularity would typically oblige plaintiffs to establish separately the racial disparity attributable to each challenged electoral policy. Except in unusual circumstances, plaintiffs would *not* be able to point to an overall difference in political participation by race and then to ascribe it to the totality of a jurisdiction's voting practices. Also precluded would be judicial analyses that "consider the sum of those parts and their cumulative effect on minority access to the ballot box," in the Fourth Circuit's words,<sup>247</sup> or that "look not at [a measure] in isolation but to the entire voting and registration system," as the Seventh Circuit put it.<sup>248</sup> Court decisions of this kind plainly aggregate electoral policies instead of disentangling them and then assessing them one by one.

## 2. *Does the Size of the Disparity Matter?*

The second question that has perplexed courts in section 2 vote denial cases is whether *any* racial disparity is actionable or only one that reaches a certain size.<sup>249</sup> As early as *Albemarle*, the Supreme Court held that, under Title VII, only employment practices that have "*significantly* different" effects on minorities and nonminorities establish a *prima facie* case.<sup>250</sup> Consistent with this ruling, the Equal Employment Opportunity Commission (EEOC) published guidelines in 1978 stating that "[a] selection rate for any race . . . which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded . . . as evidence of adverse impact."<sup>251</sup> The guidelines added

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<sup>246</sup> See *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657 (1989) (adopting "this specific causation requirement" despite the counterargument that it is "unduly burdensome on Title VII plaintiffs"), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

<sup>247</sup> *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 242 (4th Cir. 2014).

<sup>248</sup> *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014).

<sup>249</sup> See *supra* Section I.C.2.

<sup>250</sup> *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (emphasis added); see also, e.g., *Connecticut v. Teal*, 457 U.S. 440, 446 (1982) (requiring "a significantly discriminatory impact").

<sup>251</sup> 29 C.F.R. § 1607.4(D) (2018).

that “[s]maller differences in selection rate” may also suffice if “they are significant in both statistical and practical terms.”<sup>252</sup> Since their issuance, courts have often cited the guidelines but have not followed them slavishly. As the Supreme Court has observed, the guidelines have functioned as “a rule of thumb.”<sup>253</sup>

The reason to require a significant (not just any) racial disparity is to direct enforcement efforts toward the more meaningful disparate impacts in American society.<sup>254</sup> Disparate impacts are ubiquitous, alas, so if they were all actionable, many institutions might be paralyzed by litigation and more severe discrepancies could be overshadowed by relatively trivial ones.<sup>255</sup> Additionally, as several scholars have pointed out, the four-fifths rule cannot be used in all circumstances. When minority and nonminority selection rates are low, in particular, the *difference* between them is more informative than their *ratio*.<sup>256</sup> The four-fifths rule can also be misleading when the sample size is small because the observed ratio is then the result of a limited number of observations.<sup>257</sup> Due to these drawbacks, academics have urged<sup>258</sup> — and courts have mostly agreed<sup>259</sup> —

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252. *Id.*

253. *Ricci v. DeStefano*, 557 U.S. 557, 587 (2009) (quoting *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995-96 n.3 (1988) (plurality opinion)). In the FHA context, interestingly, HUD declined to “codify a significance requirement” due to “the numerous and varied practices and wide variety of private and governmental entities covered by the Act.” FHA Implementation, *supra* note 172, at 11468. For a recent article that does address the issue of significance in FHA cases, see Robert G. Schwemm & Calvin Bradford, *Proving Disparate Impact in Fair Housing Cases After Inclusive Communities*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 685, 697-710 (2016).

254. See, e.g., Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 791 (2009) (describing this requirement as “well-suited for aiding courts in determining whether a disparity is sufficiently large to matter—that is, whether it has practical significance”).

255. See, e.g., Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 696 (2011) (“Adverse impact is everywhere, and the world is full of disparate impact lawsuits waiting to happen.”).

256. See, e.g., DAVID C. BALDUS & JAMES W.L. COLE, STATISTICAL PROOF OF DISCRIMINATION 154 (1980); Elaine W. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII*, 91 HARV. L. REV. 793, 810 (1978); Wax, *supra* note 255, at 629.

257. See, e.g., BALDUS & COLE, *supra* note 256, at 88-90; SULLIVAN ET AL., *supra* note 160, at 50; Shoben, *supra* note 256, at 809.

258. See sources cited *supra* notes 256-257; see also RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION § 5:7, at 5-19 (1994) (“Plaintiffs should have the option, however, of demonstrating adverse impact by statistical significance instead of the four-fifths rule.”); Peresie, *supra* note 254, at 776 (arguing that these two approaches “fulfill complementary roles and thus should [not] be viewed . . . as alternatives”).

259. See, e.g., *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995 n.3 (1988) (plurality opinion) (describing how courts have used both the four-fifths rule and “the ‘standard deviation’ analysis”).

that the four-fifths rule should be supplemented by scrutiny of whether the difference in selection rates is statistically significant.

Applying these methods to section 2 vote denial claims, small, statistically insignificant disparities would not give rise to liability. Normatively, the Fourth Circuit might be right that “even one disenfranchised voter . . . is too many,”<sup>260</sup> but legally it would be wrong. At a more granular level, the methods would operate as follows: First, the selection rates for otherwise qualified minority and nonminority citizens would be determined—that is, the rates at which they are able to comply with a given requirement for voting. (Survey evidence could be used to calculate these rates, as could a jurisdiction’s own electoral records.) Next, the lower of the rates would be divided by the higher, *and* the statistical significance of the difference between the rates would be computed. A *prima facie* case would most clearly be established when the rates’ ratio is below four-fifths and the rates’ difference is statistically significant. Conversely, a plaintiff’s claim would be weaker if the four-fifths rule was not satisfied or statistical significance was not shown.

### 3. *Ability to Comply or Effect on Turnout?*

Third, which selection rates, exactly, should be considered in this analysis: minority and nonminority citizens’ capacities for compliance with a provision, or their eventual levels of voter turnout?<sup>261</sup> In the 1982 case of *Connecticut v. Teal*,<sup>262</sup> the Supreme Court held that Title VII is concerned with the direct effects of employment practices, not their downstream consequences. The Court faced an employer whose written exam for promotion to supervisor had a disparate racial impact but whose affirmative-action program ensured a proportionate share of minority supervisors.<sup>263</sup> The Court ruled that the “‘bottom line’” of proportionality “does not preclude [plaintiffs] from establishing a *prima facie* case, nor does it provide [defendants] with a defense to such a case.”<sup>264</sup> The Court explained that a racial disparity at one stage of the promotion process, which bars certain minority employees from becoming supervisors, cannot be offset by racial balance after the process has concluded, which benefits a different set of minority employees. “Title VII does not permit the victim of a . . . discriminatory

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<sup>260</sup>. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014).

<sup>261</sup>. *See supra* Section I.C.3.

<sup>262</sup>. 457 U.S. 440 (1982).

<sup>263</sup>. *Id.* at 443-44.

<sup>264</sup>. *Id.* at 442.

policy to be told that he has not been wronged because other persons of his or her race . . . were hired.”<sup>265</sup>

In a section 2 vote denial suit, a particular electoral practice is the analogue to the written exam that was disputed in *Teal*. And voter turnout by race is the equivalent of the supervisors’ racial makeup: the “bottom line” that is the outcome of the entire electoral system in the former case, and the whole promotion process in the latter. Under *Teal*, it is plain that voter turnout (like the makeup of the supervisor pool) is legally irrelevant. Plaintiffs need not prove a racial disparity in turnout; defendants cannot escape liability by showing that minority and nonminority citizens vote at similar rates—and the numerous lower courts that have held to the contrary are incorrect.<sup>266</sup> Under *Teal*, too, the disparate impact that *does* matter is the one directly caused by the electoral policy at issue. Plaintiffs’ burden is simply to demonstrate that minority citizens have more difficulty abiding by the policy than do nonminority citizens.

#### 4. *Is Interaction with Discrimination Necessary?*

Fourth, once plaintiffs have met this burden, must they also establish that the *reason* for the policy’s disparate impact is its interaction with social and historical discrimination?<sup>267</sup> In the 1977 case of *Dothard v. Rawlinson*, the Supreme Court addressed two hiring criteria for Alabama prison guards: a minimum height of five feet two inches and a minimum weight of 120 pounds.<sup>268</sup> In tandem, these criteria excluded far more women (forty-one percent) than men (less than one percent).<sup>269</sup> But they did so not through any interaction with discriminatory conditions, but rather because women, as a biological matter, tend to be shorter and lighter than men. The Court nevertheless found Alabama liable under Title VII on a disparate impact theory.<sup>270</sup> The Court thus codified the principles that “the reason the [practice] has an adverse impact is [not] at issue” and

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265. *Id.* at 455; *see also id.* (“Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees’ group.”). The EEOC, however, states in its guidelines that if “the total selection process does not have an adverse impact,” then federal agencies generally “will not take enforcement action based upon adverse impact of any component of that process.” 29 C.F.R. § 1607.4(C) (2018); *see also Teal*, 457 U.S. at 453 n.12 (discussing the EEOC’s position).

266. *See supra* notes 91–96 and accompanying text.

267. *See supra* Section I.C.4.

268. 433 U.S. 321, 323–24 (1977).

269. *Id.* at 329–30.

270. *Id.* at 331.

that “the mere fact of adverse impact requires the employer to justify its practice.”<sup>271</sup>

It is true, as noted earlier,<sup>272</sup> that most racial disparities can be connected to social and historical discrimination. Disparities like those in *Dothard*, attributable to biology rather than to prejudice, are quite unusual, especially if the relevant cleavage is race instead of gender.<sup>273</sup> But it is also true that *proving* a policy’s interaction with discriminatory conditions can be difficult, requiring discovery and expert testimony about a host of issues extraneous to the challenged measure. *Dothard*’s approach therefore saves plaintiffs the time and cost of documenting discrimination and its implications—even though, typically, they could do so if they had to (and if money were no object).<sup>274</sup>

*Dothard* may be the Supreme Court decision most inconsistent with the lower courts’ two-part test for section 2 vote denial claims. The test’s second prong (and conceptual centerpiece) is the linkage of a racial discrepancy to a practice’s interaction with social and historical discrimination.<sup>275</sup> This is the prong to which the Senate factors are relevant, and on which courts spend much of their analytical energy.<sup>276</sup> Yet *Dothard* holds that all of this judicial exertion is unnecessary. *Why* a policy causes a disparate impact is immaterial; the disparity alone is enough to establish a *prima facie* case (so long as it is substantial and the direct result of a specific measure).<sup>277</sup> Accordingly, *Dothard* has the potential to transform section 2 vote denial litigation. It would negate one of the elements of the lower courts’ test, and along with that prong, the Senate factors that have been used to analyze it. These doctrinal features do not exist under Title VII, and

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271. Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 963; see also, e.g., Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 959 (2005) (“*Dothard* is significant because it cut disparate impact free from any necessity that the disparity’s cause be traced either to *de jure* or more general societal discrimination . . .”).

272. See *supra* notes 140–143 and accompanying text.

273. Indeed, in the vote denial context, it is hard to think of any racial disparities that could be tied to biology. What possible electoral policy could disproportionately affect minority citizens because of biological differences between them and nonminority citizens?

274. See, e.g., Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1402–03 (2017) (arguing that if interaction with social and historical discrimination had to be proven, “an evidentiary quagmire would arise from trying to sort out which mechanisms generated the disparities”).

275. See *supra* Section I.A.

276. See *id.*

277. See *supra* Sections II.C.1–.3 (discussing the particularity, substantiality, and directness requirements).

if disparate impact law were unified, they would not remain under section 2 either.

### 5. *Are Minority Preferences a Defense?*

Fifth, even if *plaintiffs* need not identify the reason for a practice's disparate impact, can *defendants* avoid liability by showing that minorities' subjective preferences are the explanation?<sup>278</sup> *Dothard* suggests the answer is no. Alabama argued that women were underrepresented in its workforce because few of them were "seriously interested in applying[] for prison guard positions."<sup>279</sup> The Court rejected this defense because applicant interest can be shaped by the very criterion at issue. "A potential applicant could easily determine her height and weight and conclude that to make an application would be futile."<sup>280</sup> In a portion of *Wards Cove* that is still good law, the Court elaborated that the "proper comparison" under Title VII is "between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs."<sup>281</sup> The qualified persons in the labor market, of course, are not those who are *interested* in a position or who have actually *applied* for it but, rather, the individuals with the requisite skills and experience to do the job effectively. The qualified persons' subjective preferences, in other words, are beside the point.<sup>282</sup>

If the lack-of-interest defense were unavailable in section 2 vote denial cases, then jurisdictions could not claim that minorities are more affected by a policy because they prefer to participate electorally in ways targeted by the policy. With respect to a voter-purge law, contra the Third Circuit, it would be irrelevant that

<sup>278</sup> See *supra* Section I.C.5.

<sup>279</sup> *Dothard v. Rawlinson*, 433 U.S. 321, 348 (1977) (White, J., dissenting).

<sup>280</sup> *Id.* at 330 (majority opinion); see also *id.* ("[O]therwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.").

<sup>281</sup> *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650 (1989) (quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977)), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

<sup>282</sup> In the leading article on the lack-of-interest defense, Vicki Schultz agrees that "[i]f the disparate impact model is to have any meaning," the defense cannot apply to it. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1762 n.44 (1990); cf. Peter Siegelman, *Contributory Disparate Impacts in Employment Discrimination Law*, 49 WM. & MARY L. REV. 515, 534 (2007) (noting that "no court has ever based its decision on the 'failure to train' rationale," a defense that is similar to lack of interest).

minorities are removed from the rolls at higher rates because they more frequently “choose” not to vote or register.<sup>283</sup> With respect to a ban on same-day voter registration, likewise, its disparate impact could not be excused on the ground that minorities “*preferred* to use [same-day registration] over [other registration] methods.”<sup>284</sup> These are classic arguments about minorities’ inclinations, which would have no place in the doctrine.

#### 6. *How Does Tenuousness Work?*

Sixth, turning from barred defenses to ones that are very much available, what kinds of justifications, tied in which ways to disputed measures, may jurisdictions offer for the measures’ disparate impacts?<sup>285</sup> HUD discussed these issues in detail in its statement about the usual framework’s operation in FHA cases. “[A]ny interest justifying a practice with a discriminatory effect,” the agency announced, must be “substantial, legitimate, [and] nondiscriminatory.”<sup>286</sup> “A ‘substantial’ interest is a core interest of the organization that has a direct relationship to the function of that organization.”<sup>287</sup> A legitimate interest is one that is “genuine and not false.”<sup>288</sup> And a nondiscriminatory interest “does not itself discriminate based on a protected characteristic.”<sup>289</sup> Moreover, the defendant must prove not only the *existence* of a substantial, legitimate, and non-discriminatory interest, but also “the *necessity* of the challenged practice to achieve that interest.”<sup>290</sup> This necessity requirement, according to HUD, “best effectuates the broad, remedial goal of the [FHA]” and is “comparable to the protections afforded under Title VII.”<sup>291</sup>

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283. *Ortiz v. City of Phila. Office of the City Comm’rs Voter Registration Div.*, 28 F.3d 306, 315 (3d Cir. 1994).

284. *N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 351 (M.D.N.C.), *aff’d in part and rev’d in part sub nom. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014).

285. *See supra* Section I.C.6.

286. FHA Implementation, *supra* note 172, at 11470.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 11471 (emphasis added).

291. *Id.* at 11471–72. In *Inclusive Communities*, the Court agreed with HUD’s formulation, holding that “housing authorities and private developers [must] be allowed to maintain a policy if they can prove it is *necessary* to achieve a *valid* interest.” *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015) (emphasis added).

These Title VII protections have not been articulated as clearly as their FHA counterparts<sup>292</sup> but are materially equivalent. Under the Civil Rights Act of 1991, “job related[ness]” and “business necessity” are the rationales an employer may assert for an employment practice’s disparate impact.<sup>293</sup> These rationales, the Act’s accompanying Senate report adds, are synonymous with “effective job performance.”<sup>294</sup> The report further states that “the employer must prove that the practice . . . [is] essential to effective job performance,” meaning that “the relationship between the practice and effective job performance must be a close one.”<sup>295</sup> The gold standard for establishing this relationship, per the EEOC’s guidelines, is a formal validation study “consist[ing] of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance.”<sup>296</sup> However, the Supreme Court has repeatedly held that while validation studies may be advisable, “employers are not required” to use them to “show[] that particular criteria predict actual on-the-job performance.”<sup>297</sup>

This justification defense is a vital component of the usual framework. Without it, the framework would imperil *all* measures that cause disparate impacts, thus flouting Congress’s intent that liability be limited to *unwarranted* racial disparities.<sup>298</sup> If the defense were recognized in section 2 vote denial cases, the Senate factor asking “whether the policy underlying the [electoral practice] is tenuous”<sup>299</sup> would rise dramatically in importance. This, after all, is the only factor relating to the strength of a jurisdiction’s rationale for a voting requirement. Tenuousness, then, would no longer be an afterthought for courts, as it (mostly)

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292. See, e.g., Wax, *supra* note 255, at 633 (complaining that “courts vary widely in the standards they apply and retain broad discretion in deciding what kind of evidence satisfies the business necessity defense”).

293. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018). Even though they are conceptually distinct, job relatedness and business necessity are not often analyzed separately in Title VII cases. *Griggs*, notably, referred to them interchangeably. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

294. S. REP. NO. 101-315, at 41 (1990).

295. *Id.* at 42; see also *id.* (further explaining that “use of the disputed practice [must] produce[] workers who effectively perform important aspects of the job”).

296. 29 C.F.R. § 1607.5(B) (2018). The EEOC’s guidelines go into great detail specifying technical standards for validation studies. See *id.* § 1607.14; see also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 430-31 (1975) (approvingly citing these standards).

297. *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 998 (1988) (plurality opinion); see also, e.g., *Washington v. Davis*, 426 U.S. 229, 247 n.13 (1976) (“[T]here is no single method for appropriately validating employment tests for their relationship to job performance.”).

298. See *supra* Section II.B.1.

299. S. REP. NO. 97-417, at 29 (1982).

is today.<sup>300</sup> Instead, it would be a distinct element of the cause of action—a consideration that would have to be addressed whenever it was raised by a jurisdiction.

But while the tenuousness factor bears some resemblance to the justification defense, its actual wording leaves room for improvement. For one thing, the factor does not specify which party bears the burden of proving tenuousness (or the lack thereof). Under the defense, this burden is squarely on the jurisdiction maintaining the voting requirement. For another, it is somewhat awkward to speak of proving the lack of tenuousness. It would be better to say (as the defense does) that the jurisdiction must show that its electoral practice is *justified*. And tenuousness pertains to the substantiality of a jurisdiction’s interest but not to how well this interest is advanced by a given policy. Again, a preferable formulation would encompass both an interest’s weight and a measure’s fit with it. Accordingly, the tenuousness factor should not simply be lifted from the Senate report into the legal test for section 2 vote denial claims. Rather, it should first be amended so that it mirrors the justification defense under Title VII and the FHA.

### 7. *What Is the Remedy?*

Lastly, once a court finds a jurisdiction liable, what relief should the court order?<sup>301</sup> Under Title VII, “the usual remedy in a disparate impact case” is “general invalidation of the challenged policy.”<sup>302</sup> The court simply nullifies the unlawful employment practice; it does not try to reduce the practice’s racial disparities or to make it more “consistent with business necessity.”<sup>303</sup> Under the FHA, similarly, the Supreme Court held in *Inclusive Communities* that “[r]emedial orders in disparate-impact cases should concentrate on the elimination of the offending practice.”<sup>304</sup> But in both employment and housing doctrine there is precedent for more aggressive relief: in particular, the adoption of race-conscious measures that aim to reverse the effects of the defendant’s discrimination. In the 1986 case of *Local 28 v. EEOC*, a plurality of the Court held that “affirmative race-

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300. See *supra* notes 113–114 and accompanying text.

301. See *supra* Section I.C.7.

302. Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 680 (2001); see also Fishkin, *The Anti-Bottleneck Principle*, *supra* note 224, at 1498 (noting that “on the remedy side, [disparate impact] law is universal and race-neutral”).

303. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2018).

304. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015).

conscious relief . . . may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination.”<sup>305</sup> The *Inclusive Communities* Court likewise cautioned that “[r]emedial orders that impose racial targets or quotas might raise more difficult constitutional questions,” but did not categorically bar such approaches.<sup>306</sup>

Extending these remedial principles to section 2 vote denial claims, courts should generally strike down electoral practices that they deem illegal. They should not try—as the Fifth and Seventh Circuits have attempted<sup>307</sup>—to relax burdensome policies while still leaving them in place. Under Title VII and the FHA, this kind of remedial creativity is for defendants, not courts. Under those provisions, though, a different sort of remedial resourcefulness is judicially permissible. In extreme cases involving large and longstanding disparate impacts, courts may consider race-conscious relief like targeted outreach to minority citizens and poll-worker training to accommodate minority voters.<sup>308</sup> Still more racially explicit measures are conceivable, too, but should probably be avoided lest they raise the “difficult constitutional questions” flagged by *Inclusive Communities*.<sup>309</sup> Under current law, less drastic steps like outreach and training are on firmer ground than remedies that racially differentiate with respect to voting itself.<sup>310</sup>

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If disparate impact law were unified, then, section 2 vote denial cases would follow the same rules as Title VII and FHA proceedings. (1) Plaintiffs would challenge particular electoral practices, not whole systems of election administration. (2) Substantial (but not all) racial disparities in citizens’ access to the franchise would be actionable. (3) Disparities caused directly by disputed practices

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305. 478 U.S. 421, 445 (1986) (plurality opinion); see also, e.g., Eric Schnapper, *The Varieties of Numerical Remedies*, 39 STAN. L. REV. 851, 852 (1987) (noting that “courts quickly arrived at a consensus in favor of permitting [race-conscious] remedies”).

306. *Inclusive Cmty.*, 135 S. Ct. at 2524.

307. See *supra* notes 123–126 and accompanying text.

308. For a rare example of such measures being ordered in a section 2 vote denial case, see *United States v. Berks County*, 277 F. Supp. 2d 570, 583–85 (E.D. Pa. 2003).

309. *Inclusive Cmty.*, 135 S. Ct. at 2524.

310. See *id.* at 2525 (conceding that “race may be considered in certain circumstances and in a proper fashion” when crafting remedies). A racial quota is the quintessential example of a more aggressive race-conscious remedy. In the electoral context, the judicial imposition of a quota is almost unthinkable. It is very hard to imagine a court barring nonminority citizens from voting, or otherwise burdening their exercise of the franchise, in order to eliminate a racial disparity.

would be relevant, while ultimate voter turnout would not be. (4) Disparities would not have to be linked to practices' interaction with social and historical discrimination. (5) Nor would it matter if disparities stem from minorities' subjective preferences. (6) If a *prima facie* case were established, a jurisdiction could try to show (with empirical evidence) that its electoral policy is necessary to achieve a valid interest.<sup>311</sup> And (7) if liability were imposed, invalidation of the offending measure would typically be the remedy.

To be clear, I do not claim that all of these doctrinal parameters are *optimal*. Rather, my argument is that they are *reasonable*—consistent with the goals of disparate impact law and plausibly balancing plaintiffs' and defendants' interests—and, equally importantly, that they are *settled* under Title VII and the FHA. The unification of disparate impact law would thus answer many of the lingering questions about section 2 vote denial claims and answer them in defensible ways. It would provide the benefit of doctrinal coherence without exacting a serious substantive cost.<sup>312</sup>

#### D. Resolved Concerns

There is one more reason to extend the usual framework to section 2 vote denial claims. It is to dispel the constitutional cloud that hangs over the two-part test that courts have applied thus far to these suits.<sup>313</sup> Compared to this test, the usual framework would find liability less often because it would arm jurisdictions with a potent new defense: that their electoral practices are necessary to further their substantial interests. By limiting fault in this way, the usual framework would improve section 2's congruence and proportionality with the Reconstruction Amendments. Discriminatory intent must be shown to prove a violation under these provisions, and it can often be inferred when a voting

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311. And if this showing were made, the plaintiff could try to prove that the jurisdiction's interest could be comparably advanced by some other policy that produces a smaller racial disparity. See *supra* Section II.A. I did not discuss this aspect of the usual framework in this Section because courts in section 2 vote denial cases have not disagreed with respect to it. See *supra* Section I.C.

312. For good discussions of the value of doctrinal unity, see Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38–40 (1994); and Eric Stein, *Uniformity and Diversity in a Divided-Power System: The United States' Experience*, 61 WASH. L. REV. 1081, 1088–92 (1986). Doctrinal unity, moreover, is just one of the reasons to abide by the usual framework's answers to the questions that persist about vote denial law. The others are (1) the reasonableness of these answers; (2) the answers' consistency with the history and theory of disparate impact law, see *supra* Section II.B; and (3) the fact that some of the answers may be constitutionally compelled, see *infra* Section II.D.

313. For a discussion of this constitutional uncertainty, see *supra* Section I.D.

requirement unjustifiably causes a racial disparity. The usual framework would also ease the tension between section 2 and the colorblindness principle that, according to the current Supreme Court, animates the Equal Protection Clause. Jurisdictions would not have to consider race to the same extent because they could be confident that, if their electoral policies are warranted, the measures would not be at risk.

As a logical matter, the argument that the usual framework restricts liability relative to the courts' two-part test is ironclad.<sup>314</sup> In most circumstances, the two-part test boils down to a single inquiry: whether an electoral practice produces a disparate impact.<sup>315</sup> In contrast, the usual framework never stops with proof of a racial disparity; it always gives a jurisdiction an opportunity to *justify* the discrepancy. Whenever a justification is successfully presented (and the plaintiff cannot identify a comparably effective but less discriminatory alternative), liability does not arise under the usual framework even though it does under the two-part test. The framework's reach is thus a subset of the test's. Some policies are unlawful under the test but not the framework, while no measures are proscribed by the framework but not the test.

Empirical studies of Title VII, the FHA, and Title VI confirm this reasoning. They demonstrate that, far from being toothless, the usual framework's justification defense frequently accounts for plaintiffs' defeats in disparate impact cases. With respect to Title VII, Michael Selmi surveyed about three hundred decisions from the 1980s, 1990s, and 2000s.<sup>316</sup> He found that plaintiffs prevailed in only twenty to twenty-five percent of these disputes,<sup>317</sup> and that "the business necessity prong . . . *always* proved [a] greater hurdle" than establishing a racial disparity.<sup>318</sup> In challenges to hiring tests, in particular, "[a]s employers began to validate their examinations"—that is, to show they are related to effective job performance—outcomes "migrated from successful plaintiff cases to successful defendant cases."<sup>319</sup>

With respect to the FHA, similarly, Stacy Seicshnaydre analyzed all ninety-two appellate decisions involving disparate impact claims between 1971 and

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314. At least, the argument is ironclad if all of the elements of the plaintiff's *prima facie* case are held constant. As explained above, there remains considerable doubt about these elements under existing section 2 doctrine. See *supra* Sections I.C.1-.5, II.C.1-.5.

315. See *supra* notes 140-143 and accompanying text.

316. See Selmi, *supra* note 14, at 734-35.

317. See *id.* at 738-39.

318. *Id.* at 749.

319. *Id.* at 742.

2013.<sup>320</sup> Again, plaintiffs' win rate was just 20%<sup>321</sup> and defendants had an "easier time" justifying their policies, especially when the measures sought to improve housing rather than to limit access to it.<sup>322</sup> As to Title VI too, Charles Abernathy examined all sixteen appellate decisions in which disparate impact theories were raised.<sup>323</sup> Once more, plaintiffs were victorious less than 15% of the time,<sup>324</sup> and it was the "balancing defense . . . that eventually undermined Title VI in the lower appellate courts."<sup>325</sup> "The interests asserted by grantees . . . [were] by any measure substantial," and "judges [could not] say that these [were] less important than the fight against residual effects of racial distinctiveness."<sup>326</sup>

These experiences with the usual framework suggest that if it were extended to section 2 vote denial claims, plaintiffs would often lose their suits.<sup>327</sup> Moreover, a key *reason* they would often lose would be the usual framework's justification defense. Jurisdictions would assert interests allegedly served by their electoral practices, and courts would hold that the interests are substantial and that the practices are necessary to achieve them. To be sure, many Title VII and FHA decisions may be of limited relevance here because the interests they evaluate are job relatedness and business necessity. These market-based concerns have no equivalent in the nonmarket domain of voting.<sup>328</sup> But some Title VII and FHA cases, and all Title VI disputes, feature governmental defendants invoking public rationales for their policies. These scenarios are analogous to the section 2 vote denial context, and so are probative of how the usual framework would operate in this new area.<sup>329</sup>

Why would section 2 be less constitutionally vulnerable, though, if it were harder to satisfy? The explanations are straightforward. Start with Congress's

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320. See Seicshnaydre, *supra* note 14, at 391-92.

321. See *id.* at 393, 399 fig.6.

322. *Id.* at 413-14.

323. See Abernathy, *supra* note 188, at 312. All of these decisions were announced prior to *Alexander v. Sandoval*, 532 U.S. 275 (2001), which held that no private right of action exists to enforce disparate impact regulations promulgated under Title VI.

324. See Abernathy, *supra* note 188, at 312 (noting just two decisions in plaintiffs' favor).

325. *Id.* at 286.

326. *Id.* at 313-14.

327. In fact, section 2 plaintiffs *already* lose most of their suits. See Cox & Miles, *supra* note 28, at 13-14 (observing that "decisions in our dataset assigned section 2 liability about 30% of the time" and that "the rate at which courts found section 2 liability exceeded 40% during 1982-1989 . . . , but it fell to 26% during the 1990s").

328. See *supra* Section II.B.3.

329. I do not consider here how the usual framework would apply to particular electoral practices. For analyses along these lines, see *infra* Part IV.

authority to enact the provision, which depends on the “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>330</sup> The harm to be avoided or cured by the Reconstruction Amendments is intentional racial discrimination.<sup>331</sup> Such discrimination can seldom be deduced from a racial disparity alone. As the Supreme Court has explained, a “disproportionate impact” has “limited probative value” by itself, and “cases are rare” in which it means that an “invidious discriminatory purpose was a motivating factor.”<sup>332</sup> Conversely, when a racial discrepancy cannot be justified by a valid interest, it becomes easier to conclude that an illicit aim is afoot. Per *Inclusive Communities*, a needless discrepancy helps to “uncover[] discriminatory intent” and so “permits plaintiffs to counteract unconscious prejudices and disguised animus.”<sup>333</sup>

If disparate impact law were unified, then, section 2 would prohibit only electoral practices that are, or plausibly might be, driven by racial bias. Section 2, that is, would bar only governmental activity that unjustifiably causes a racial disparity—and that thus supports a finding of a discriminatory purpose. This narrower scope, in turn, would enhance section 2’s congruence and proportionality with the Reconstruction Amendments. These Amendments are offended only by intentional racial discrimination, and that is all that section 2 would target: voting requirements that are actually invidious or from which an invidious objective can reasonably be inferred. Section 2 would no longer reach the broader swath of governmental conduct, involving disparate impact alone, that does not permit this inference to be drawn.<sup>334</sup>

Turning to the potential clash between section 2 and the equal protection principle of colorblindness, *Inclusive Communities* is again instructive. In it, the Court warned that “serious constitutional questions” would arise if disparate impact liability “were imposed solely on a showing of a statistical disparity.”<sup>335</sup> These concerns would be allayed, though, if the legal standard were “properly limited in key respects.”<sup>336</sup> One such restriction is that “a disparate-impact claim

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330. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

331. At least according to the current Supreme Court. See *supra* note 147 and accompanying text.

332. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 & n.15 (1977).

333. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2511–12 (2015).

334. See *Primus*, *supra* note 217, at 1377 (concurring that “disparate impact doctrine is more likely to be” upheld if it is aimed at “[p]reventing intentional discrimination”).

335. *Inclusive Cmty.*, 135 S. Ct. at 2522.

336. *Id.*

that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."<sup>337</sup> Another "important and appropriate means of ensuring that disparate-impact liability is properly limited is to give [defendants] leeway to state and explain the valid interest served by their policies."<sup>338</sup>

Based on these passages, section 2 would avoid excessive race consciousness if it employed the usual framework in vote denial cases. As required by the Court, a plaintiff would have to identify a particular electoral practice that produces a disparate impact in order to establish a *prima facie* case.<sup>339</sup> Also consistent with the Court's admonitions, a jurisdiction would be able to defend itself by showing that its practice is "necessary to achieve a valid interest."<sup>340</sup> Thanks to these "adequate safeguards," section 2 would not "cause race to be used and considered in a pervasive way" or "'almost inexorably lead' [jurisdictions] to use 'numerical quotas.'"<sup>341</sup> Section 2 would have these consequences only if it were violated by a naked racial disparity. It would not unduly racialize the electoral process if, instead, it banned unjustified discrepancies linked to specific voting requirements.<sup>342</sup>

### III. OBJECTIONS AND RESPONSES

This concludes the affirmative case for unifying disparate impact law: the usual framework (1) is applicable to section 2 vote denial claims, and it should be applied to them in order (2) to resolve doctrinal disputes and (3) to bolster section 2's constitutionality. Next, I consider a number of legal and practical objections to this thesis. One counterargument is that section 2's text and precedent

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337. *Id.* at 2523; *see also id.* (requiring a "robust causality requirement").

338. *Id.* at 2522; *see also id.* (adding that "[t]his step of the analysis . . . provides a defense against disparate-impact liability").

339. *See supra* Section II.C.1.

340. *Inclusive Cmty's.*, 135 S. Ct. at 2523; *see supra* Section II.C.6.

341. *Inclusive Cmty's.*, 135 S. Ct. at 2523 (quoting *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989)).

342. *See Bagenstos, supra* note 217, at 1129 (agreeing that if the usual framework is used, then "any frontal constitutional assault on disparate-impact liability should fail"). Of course, this argument puts a great deal of weight on the 5-4 majority decision in *Inclusive Communities*, which was written by Justice Kennedy, who no longer serves on the Court. But the main dissent in *Inclusive Communities* did not question Justice Kennedy's claim that the usual framework is constitutional; it merely disagreed that the FHA recognizes disparate impact discrimination. *See* 135 S. Ct. at 2532 (Alito, J., dissenting). Only Justice Thomas, in a solo dissent, contended that "[d]isparate-impact liability" is "a rule without a reason, or at least without a legitimate one," and is thus constitutionally dubious. *See id.* at 2531 (Thomas, J., dissenting).

bar the usual framework's extension to it. Another is that the usual framework would simply repeat the analysis that is already conducted when an electoral policy is challenged on constitutional grounds. And a third is that the prior record of the usual framework is so poor that every effort should be made not to expand its domain any further. These concerns cannot be dismissed lightly. But neither alone nor in tandem, in my view, do they lead to the conclusion that disparate impact law should not be unified after all.

#### A. Text and Precedent

The first objection is that standard legal sources do not support the usual framework's use for section 2 vote denial claims. Section 2's own language mentions neither a justification defense for jurisdictions nor an opportunity for plaintiffs to rebut this defense by introducing a less discriminatory alternative.<sup>343</sup> Nor does any Supreme Court decision about section 2 require these doctrinal features. To the contrary, the Court's preeminent section 2 case, *Thornburg v. Gingles*, states that "[t]he essence of a § 2 claim is that a certain electoral law . . . interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters."<sup>344</sup> *Gingles* adds that the Senate factors are "probative of a § 2 violation"<sup>345</sup> and "elaborate[] on the nature of § 2 violations and on the proof required to establish these violations."<sup>346</sup> These comments are plainly more consistent with the courts' two-part test than with the usual framework. Indeed, they largely explain the test's origins: lacking authoritative guidance for vote denial (as opposed to vote dilution) claims, judges relied on the portions of *Gingles* that seemed generally applicable to all section 2 theories.<sup>347</sup>

It is true, of course, that section 2's language does not mandate the usual framework's use. If it did, there would be little point to an article that merely echoed the textual command. But section 2 is equally silent regarding the courts' two-part test. The need to show a practice's interaction with social and historical discrimination and the relevance of the Senate factors—these points are present

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343. See 52 U.S.C. § 10301 (2018).

344. 478 U.S. 30, 47 (1986).

345. *Id.* at 36.

346. *Id.* at 43.

347. See, e.g., *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 377-79 (9th Cir. 2016) (en banc) (citing and discussing *Gingles*); *Veasey v. Abbott*, 830 F.3d 216, 243-46 (5th Cir. 2016) (en banc) (same); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240-41 (4th Cir. 2014) (same); *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 550-51, 554 (6th Cir. 2014), *vacated as moot*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (same).

in *Gingles*, but they are nowhere to be found in section 2 itself. In fact, all the provision says about vote denial claims is that they are cognizable because they assert “a denial . . . of the right of any citizen . . . to vote on account of race or color.”<sup>348</sup> Section 2 is entirely mute as to *which* legal standard should govern these claims. It is just as compatible with the usual framework as with the courts’ two-part test.<sup>349</sup>

Based on precedent, moreover, an agnostic statute is no obstacle to the usual framework’s imposition. In *Griggs*, the Supreme Court famously unveiled the framework without even specifying from which part of Title VII it stemmed.<sup>350</sup> The Court’s reasoning was only slightly more textually bound in *Smith v. City of Jackson*,<sup>351</sup> the 2005 case that extended the usual framework to the ADEA. Because the ADEA’s language is very similar to that of Title VII, the Court held, disparate impact claims must follow the same rules under both laws.<sup>352</sup> The Court reprised this logic in *Inclusive Communities*, explaining that the FHA’s text, too, is “equivalent in function and purpose” to that of Title VII and the ADEA.<sup>353</sup> Because the FHA “refers to the consequences of actions and not just to the mind-set of actors,” it “must be construed to encompass” the usual framework.<sup>354</sup>

This line of argument is an even easier sell when it comes to section 2. Title VII, the ADEA, and the FHA are ambiguous as to whether they can be breached

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348. 52 U.S.C. § 10301(a); *see also supra* notes 30–35 and accompanying text (discussing section 2’s coverage of vote denial claims).

349. A more radical version of the textual argument is that section 2’s language is inconsistent with *both* the courts’ two-part test and the usual framework, because it requires liability to be imposed based on a disparate impact *alone*. This claim also wrongly infers from section 2’s silence about doctrinal elements beyond a disparate impact that these elements are precluded. The claim, furthermore, cannot be reconciled with the Court’s approach to racial vote dilution in *Gingles* and its progeny. This approach includes a host of factors (geographic compactness, racial polarization, and so on) that are nowhere to be found in the statutory text. *See generally* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 404 (2012) (characterizing section 2 as a “common law statute” that courts develop with little reference to the provision’s language).

350. The Court merely cited a pair of FHA subsections, without further comment, in its opinion’s first footnote. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971); *see also* *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2517 (2015) (observing that in *Griggs*, “[t]he Court did not quote or cite the full statute”).

351. 544 U.S. 228 (2005).

352. *See id.* at 233 (plurality opinion) (“[W]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.”).

353. *Inclusive Cmty.*, 135 S. Ct. at 2518; *see also id.* at 2519 (noting “the structure common to all three statutes” and “[t]his similarity in text and structure”).

354. *Id.* at 2518.

without a showing of discriminatory intent.<sup>355</sup> In *Griggs*, *City of Jackson*, and *Inclusive Communities*, the Court therefore had to resolve this ambiguity first; only then could it rule that the usual framework would govern disparate impact claims in these areas.<sup>356</sup> In contrast, there is no doubt that section 2 can be infringed even in the absence of an invidious motive. The whole point of its 1982 revision was to make this clear,<sup>357</sup> and the provision now explicitly bans electoral practices that “result[] in” a race-based denial or abridgment of the franchise.<sup>358</sup> Accordingly, it would take the Court just one step, not two, to apply the usual framework to section 2. The Court would not have to puzzle over whether section 2 recognizes disparate impact discrimination since it obviously does. Instead, the Court could skip ahead to holding that this form of discrimination, when it relates to voting, is regulated by the usual framework.

As for the Court’s landmark decision in *Gingles*, it involved only vote dilution—indeed, only one kind of vote dilution: the use of multimember districts to submerge minority voters within a larger white population.<sup>359</sup> Aware of the case’s limited scope, the Court stressed that it did not mean to address other section 2 issues. It had “no occasion to consider whether [its] standards . . . are fully pertinent” to claims against single-member districts.<sup>360</sup> It also had “no occasion to consider whether § 2 permits” challenges by minority groups that are too small to control their own districts.<sup>361</sup> And the Court remarked that while the Senate factors are “pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered.”<sup>362</sup> “[S]ome Senate factors are more important to . . . vote-dilution

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355. More accurately, Title VII *was* ambiguous prior to its 1991 amendment. It now clearly recognizes “unlawful employment practice[s] based on disparate impact.” 42 U.S.C. § 2000e-2(k)(1)(A) (2018); see also *supra* notes 167–170 and accompanying text.

356. See, e.g., *Inclusive Cmty.*, 135 S. Ct. at 2518 (first examining whether “antidiscrimination laws . . . encompass disparate-impact claims” and only then explaining how “[d]isparate-impact liability must be limited” under the usual framework).

357. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 71 (1986) (“In amending § 2, Congress rejected the requirement . . . that § 2 plaintiffs must prove the discriminatory intent of state or local governments in adopting or maintaining the challenged electoral mechanism.”).

358. 52 U.S.C. § 10301(a) (2018) (emphasis added).

359. See *Gingles*, 478 U.S. at 42 (titling the opinion’s key section “Section 2 and Vote Dilution through Use of Multimember Districts”).

360. *Id.* at 46–47 n.12.

361. *Id.*

362. *Id.* at 45.

claims,” but other considerations might be more pressing when different theories are advanced.<sup>363</sup>

In light of *Gingles*’s circumspectness, it makes little sense to treat its dicta as gospel in other section 2 contexts. *Gingles* did not even try to answer every major vote dilution question. It certainly did not purport to specify a test for vote denial claims—challenges that barely registered with Congress when it amended section 2 or with the Court when it decided *Gingles*.<sup>364</sup> *Gingles*’s references to “interact[ion] with social and historical conditions” and the “probative” Senate factors are thus best understood as a gloss on section 2’s brief text: a guide to the provision’s typical operation.<sup>365</sup> What these snippets are *not* is precisely what the lower courts have wrongly made them: a legally enforceable standard for electoral practices that allegedly deny (but do not dilute) the franchise.

In any event, the tension between *Gingles* and the usual framework should not be overstated. *Gingles* discusses measures’ links with past and present discrimination while the usual framework requires no such connection. But as noted above,<sup>366</sup> these links are almost always present when policies cause racial disparities, even if they do not actually have to be proven. Likewise, neither *Gingles* nor the Senate factors include a justification defense, though it is a crucial stage of the usual framework. But the defense is substantively quite similar to the Senate factor about the tenuousness of the government’s explanation. This factor could be modified to heighten further its resemblance to the defense and then made a more significant part of the doctrine.<sup>367</sup> Notably, this adjustment would not conflict with *Gingles*, but rather would follow from its flexible view of the Senate factors. A revamped tenuousness factor would “also be relevant” and one that “may be considered.”<sup>368</sup> It would become “more important to [vote denial] claims,” just as other elements are more meaningful elsewhere.<sup>369</sup>

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363. *Id.* at 48-49 n.15; see also S. REP. NO. 97-417, at 30 (1982) (noting that vote denial claims “would not necessarily involve the same factors” as vote dilution claims).

364. See *supra* notes 26-29 and accompanying text.

365. *Gingles*, 478 U.S. at 47.

366. See *supra* notes 140-143 and accompanying text.

367. See *supra* Section II.C.6.

368. *Gingles*, 478 U.S. at 45.

369. *Id.* at 48 n.15.

*B. Constitutional Convergence*

The next objection to the unification of disparate impact law is not that it is *barred* but rather that it is *redundant*. Under the First and Fourteenth Amendments, plaintiffs may dispute electoral practices that make it more difficult for them to vote. Courts considering such claims first “weigh ‘the character and magnitude of the asserted injury to the rights protected by the [Constitution].’”<sup>370</sup> The degree of judicial scrutiny then rises or falls along with the extent of the burden on the franchise. “[W]hen those rights are subjected to ‘severe’ restrictions, the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’”<sup>371</sup> “But when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ . . . ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”<sup>372</sup>

The overlap between the usual framework and the constitutional inquiry arises after a *prima facie* case has been established in a disparate impact suit. At this point, assuming the jurisdiction mounts a justification defense, the key issues under the usual framework are (1) whether the jurisdiction’s asserted interest is substantial; and (2) whether the challenged policy is necessary to achieve this interest.<sup>373</sup> Critically, these are the *same* issues that must be addressed in a constitutional case after a court determines the severity of a measure’s burden on the franchise. The court must next evaluate the strength of the jurisdiction’s interest and the measure’s fit with this goal. Tailoring,<sup>374</sup> in other words, is an indispensable element of the analysis under both section 2 and the First and Fourteenth Amendments. The same questions must be asked, and the same evidence considered, whether the claim is statutory or constitutional.

The charge that the usual framework partly converges with the constitutional inquiry cannot be wholly rebutted. The doctrines *are* similar in that they both rely on tailoring. Tailoring, though, is a ubiquitous feature of American

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370. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

371. *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

372. *Id.* (quoting *Anderson*, 460 U.S. at 788).

373. See *supra* Section II.C.6.

374. For the sake of brevity, I use “tailoring” to refer to *both* the evaluation of a jurisdiction’s interests and how closely the challenged policy serves these goals.

public law. As Richard Fallon observes, “it dominate[s] numerous fields of constitutional law”<sup>375</sup> because it offers a “solution to a generic problem”<sup>376</sup>: how to balance a valued good (like section 2’s aspiration of racial equality in voting, or the First and Fourteenth Amendments’ aim that the franchise be exercised freely) against countervailing state interests, of varying weight, that demand the good’s sacrifice. So it cannot be much of a strike against the usual framework that it employs this methodology. Given the methodology’s prevalence, it would be more of a surprise if it did *not* make an appearance in disparate impact law.

If the usual framework were adopted, it would also not be the first time that the same facts could spawn suits under both section 2 and the Constitution. It is already black-letter law, with respect to any type of electoral practice, that it equally violates section 2<sup>377</sup> and the Reconstruction Amendments<sup>378</sup> if it was enacted with racially discriminatory intent.<sup>379</sup> In the vote dilution context, too, at-large elections and district plans may be invalid under both section 2 (if they fail the elaborate test created by *Gingles* and its progeny<sup>380</sup>) and the Reconstruction Amendments (if an invidious objective is inferred from the totality of circumstances<sup>381</sup>). Under the usual framework, then, vote denial law would be one more entry on this list: one more area where statutory and constitutional theories intersect.

As a doctrinal matter, furthermore, this intersection would be quite limited. First, the usual framework and the constitutional inquiry have different triggers for their tailoring stages. Under the former, a *prima facie* case of a racially disparate impact must be proven, while under the latter, a policy’s burden on the right to vote must be ascertained. Second, once the tailoring stage is reached, it

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375. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1275 (2007) (discussing strict scrutiny specifically rather than tailoring more generally).

376. *Id.* at 1270.

377. See, e.g., *Nipper v. Smith*, 39 F.3d 1494, 1520 (11th Cir. 1994) (en banc) (“[A] plaintiff . . . may demonstrate a [section 2] violation by proving *either*: (1) the subjective discriminatory motive of legislators or other relevant officials; *or* (2) [discriminatory results].”).

378. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 61-65 (1980) (discussing the Fifteenth Amendment); *id.* at 65-80 (discussing the Fourteenth Amendment).

379. The same is true with respect to public employees’ claims of intentional racial discrimination. “[T]he law of equal protection” has “the same substantive content as Title VII’s prohibition on disparate treatment.” Primus, *supra* note 217, at 1354.

380. See *Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986) (setting forth the preconditions for liability now known as the “*Gingles* prongs”).

381. For an example of an illicit motive being inferred in the absence of smoking-gun evidence, see *Rogers v. Lodge*, 458 U.S. 613, 622-28 (1982).

proceeds differently under each doctrine. Under the usual framework, the question is always the same: is the measure necessary to achieve a substantial interest? But under the Constitution, judicial review can vary from highly deferential (if the burden on the franchise is light) to very stringent (if the burden is severe).<sup>382</sup> And third, after the tailoring stage concludes, the plaintiff may still offer a less discriminatory alternative under the usual framework. The constitutional inquiry, though, includes no opportunity for a surrebuttal.

It is not hard to see how these doctrinal distinctions could be consequential. Suppose a plaintiff in a vote denial case cannot show a significant racial disparity or cannot link it to a particular electoral practice.<sup>383</sup> Then the plaintiff loses under the usual framework before its tailoring stage even begins. If the same policy is challenged under the Constitution, in contrast, the tailoring stage cannot be avoided. Whether the measure's burden on the franchise is light or heavy, a court will have to assess the importance of the interest the provision serves and how well it serves it. Tailoring is thus a necessary component of the constitutional inquiry but only a contingent part of the usual framework.

Or take a practice that causes a large racial disparity but does not make it much more difficult to vote. (Photo ID requirements for voting arguably fit in this category. Some studies find sizeable differences in valid photo ID possession by race,<sup>384</sup> while in the Supreme Court's view, the requirements' burdens on the franchise are "neither so serious nor so frequent."<sup>385</sup>) Under the usual framework, a *prima facie* case can typically be established against this sort of policy, meaning that for it to be upheld, it must be necessary to achieve a substantial interest. Under the Constitution, on the other hand, the level of scrutiny is much lower. Because the law's burden is light, it need only have *some* relation to a legitimate goal to be sustained. Again, then, the usual framework and the constitutional inquiry diverge despite the tailoring stage they nominally share.

### C. *Prior Record*

The last counterargument I address is more historical than legal. It is that the usual framework has been so disappointing in the areas where it has already

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382. Cf. *Washington v. Davis*, 426 U.S. 229, 247 (1976) (observing that, under Title VII, the justification defense "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives than is appropriate under the Constitution" when rational basis review is applied).

383. See *supra* Sections II.C.1, II.C.2 (discussing these requirements).

384. See, e.g., *Hopkins et al.*, *supra* note 2, at 83 (summarizing eleven such studies).

385. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008).

been tried that it should not be exported to any new field. Why are (some) scholars unhappy with the usual framework? Plaintiffs' low success rates in disparate impact claims brought pursuant to it are the main explanation. As summarized earlier, these rates are 20% to 25% under Title VII,<sup>386</sup> less than 20% under the FHA,<sup>387</sup> and less than 15% under Title VI.<sup>388</sup> The recurring defeats are compounded by the limited numbers of disparate impact claims that are filed in the first place. Under Title VII, there has only been a "small volume of . . . disparate impact litigation in recent years,"<sup>389</sup> while under the FHA and Title VI, only a few dozen disparate impact cases have *ever* been decided at the appellate level.<sup>390</sup>

Due to these sobering statistics, several academics have reached gloomy conclusions about the usual framework's utility. For instance, Selmi writes (in an article titled *Was the Disparate Impact Theory a Mistake?*) that "there has been no area where [Title VII's] disparate impact theory has proved transformative or even particularly successful."<sup>391</sup> Similarly, Abernathy comments (in *Legal Realism and the Failure of the "Effects" Test for Discrimination*) that Title VI's "effects test . . . was a concept that judges profoundly distrusted and were unable or unprepared to implement."<sup>392</sup> Neither Selmi nor Abernathy has anything to say about section 2. But their implicit message is clear: Be careful what you wish for. Do not put your faith in a legal standard that has brought nothing but tears in other domains.

To begin with, lawsuits' numbers and success rates are a poor guide to a legal theory's social value. A theory could be symbolically significant even if it generates few cases and fewer plaintiff victories. As Richard Primus has remarked about the usual framework in the Title VII context, "[I]t does preserve some awareness that existing racial hierarchies are products of past discrimination and that a level-playing-field approach today could help those hierarchies perpetuate

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386. See Selmi, *supra* note 14, at 738-39.

387. See Seicshnaydre, *supra* note 14, at 393.

388. See Abernathy, *supra* note 188, at 300-11.

389. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 587 (2003).

390. See Abernathy, *supra* note 188, at 312; Seicshnaydre, *supra* note 14, at 391-92.

391. Selmi, *supra* note 14, at 753 (but excepting cases about employment tests from this judgment).

392. Abernathy, *supra* note 188, at 273; see also, e.g., Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 45 (2006) ("Disparate impact doctrine [under Title VII] has been in a massive decline over the past few decades."); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 396 (2007) (noting "judicial concerns about whether [the usual framework in Title VI cases] would require the judiciary to broadly restructure social institutions").

themselves indefinitely.”<sup>393</sup> Additionally, a theory might be characterized by infrequent and ineffective litigation because it has *already* managed to change defendants’ behavior. This seems to be at least part of the Title VII story. In George Rutherglen’s words, “The failure of the theory of disparate impact as a vehicle for continued litigation can . . . be attributed . . . to its past successes.”<sup>394</sup> It previously “caus[ed] employers to abandon facially neutral employment practices, such as general aptitude tests,” and “encourag[ed] employers to adopt affirmative action plans to eliminate the most obvious forms of disparate impact.”<sup>395</sup>

An equivalent dynamic is plausible in vote denial law.<sup>396</sup> Say the usual framework is adopted and that plaintiffs then use it to prevail in a series of suits against photo ID requirements for voting. Next, assume that jurisdictions respond either by abandoning these requirements or by passing less onerous provisions (like ones that waive the need to show ID for citizens who sign hardship affidavits). Finally, imagine that plaintiffs challenge few of these next-generation laws and often lose when they do sue. Section 2 would then exhibit the same features as Title VII, the FHA, and Title VI: namely, a low volume of litigation and a depressed win rate. Yet no one would infer from this data that section 2 is a “mistake” (Selmi) or a “failure” (Abernathy). The right conclusion, rather, would be that section 2 has succeeded in its mission. It has ended (or at least alleviated) practices responsible for unjustified racial disparities, leaving scarcer and less promising targets for further suits.<sup>397</sup>

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393. Primus, *supra* note 389, at 587; see also, e.g., Jolls, *supra* note 302, at 671 (“[T]he simple number of disparate impact claims is not a good measure of their underlying importance.”).

394. George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 139 (1995).

395. *Id.* at 136–37. Congress viewed the usual framework even more sunnily when it amended Title VII in 1991. According to the Senate report, “the *Griggs* decision has had an extraordinarily positive impact on the American workplace.” S. REP. NO. 101-315, at 15 (1990). “In hundreds of cases, federal courts have struck down unnecessary barriers to the full participation of minorities and women in the workplace, and employers have voluntarily eliminated discriminatory practices in countless other instances.” *Id.*; see also, e.g., Ricci v. DeStefano, 557 U.S. 557, 622 (2009) (Ginsburg, J., dissenting) (“Federal trial and appellate courts applied *Griggs* and *Albamarle* to disallow a host of hiring and promotion practices . . .”).

396. Of course, this dynamic would be even more potent if the underlying legal standard were easier to satisfy (as the courts’ two-part test is compared to the usual framework). My point, though, is that the dynamic is still strong even under the usual framework, as evidenced by a less jaundiced appraisal of the record of Title VII and the FHA.

397. Interestingly, there is some evidence that this dynamic is occurring even without the usual framework’s adoption. After a series of photo ID requirements were struck down on section 2 grounds, some states responded by passing less stringent provisions. These measures have largely been upheld after they, in turn, were challenged. See, e.g., Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016) (sustaining Virginia’s photo ID law); Greater Birmingham

Another response to the pessimism of Selmi, Abernathy, and their ilk highlights the differences rather than the commonalities between voting and the areas already governed by the usual framework. As discussed above, voting is a nonmarket good regulated exclusively by the state.<sup>398</sup> The strongest justification for racial disparities in employment and housing—private actors’ pursuit of profit—therefore cannot be asserted in defense of electoral practices. Voting is also a nonrivalrous good whose consumption by one citizen does not affect its use by others.<sup>399</sup> The invalidation of franchise restrictions thus yields no innocent victims: no nonminorities are denied the ballot so minorities may vote instead. Both of these points suggest that, under the usual framework, outcomes could be quite different in section 2 cases from those in Title VII and FHA suits. Plaintiffs might have more luck because defendants would be unable to raise their most potent objection and a zero-sum calculus would not apply to court-ordered relief.

Lastly, what if Selmi, Abernathy, and the other skeptics are right? If the usual framework has dashed its backers’ hopes in other fields, and if it would also be a letdown in the vote denial context, *then* should it not be extended to section 2? This is admittedly an unpleasant scenario: one where the usual framework neither promotes racial equality in voting, nor unearths discriminatory motives, nor removes bottlenecks to political participation.<sup>400</sup> But even in this case, I think there is no alternative to the usual framework’s adoption. If I am correct that the courts’ two-part test collapses into a single requirement of a racial disparity,<sup>401</sup> then the test is simply not a viable option. Under current constitutional law, Congress lacks the authority to impose such a requirement, and the judiciary cannot employ it either without transgressing the colorblindness principle.<sup>402</sup> Nor is any other legal standard feasible unless it shares the usual framework’s “adequate safeguards,” in particular its justification defense.<sup>403</sup> These doctrinal protections, the Supreme Court’s decisions make clear, are matters of constitutional necessity, not legislative grace.

I should reiterate that my own appraisal of the usual framework is rosier than Selmi’s or Abernathy’s. I think it has produced real improvements in employment and housing practices—and that it would be even more effective in vote

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Ministries v. Merrill, 284 F. Supp. 3d 1253 (N.D. Ala. 2018) (sustaining Alabama’s photo ID law).

398. See *supra* Section II.B.3.

399. See *id.*

400. See *supra* Section II.B.2 (discussing the various theories of disparate impact law).

401. See *supra* Section I.D.

402. See *id.*

403. Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2523 (2015).

denial cases. This more optimistic perspective is the primary reason the usual framework's past performance does not deter me from recommending its expansion. My secondary reason, though, is that the usual framework's record is ultimately immaterial. Even if it has been the fiasco alleged by its critics, it is, at present, the only doctrinal structure available for disparate impact law.

#### IV. APPLICATIONS

The objections to extending the usual framework to section 2 vote denial claims are therefore unconvincing. Neither the statutory text nor *Gingles* calls for the usual framework's use—but the text does not endorse any other approach either, and as a vote dilution case, *Gingles* sheds little light on vote denial issues. The usual framework shares a tailoring stage with the constitutional analysis of policies that burden the franchise—but this overlap is neither unusual nor very extensive given the doctrines' considerable differences. And the usual framework may not have been a rousing success in other areas—but this judgment is debatable, potentially inapplicable to section 2, and irrelevant in the end due to the lack of viable alternatives.

Since the objections do not persuade, it is natural to ask what the unification of disparate impact law would mean for particular electoral measures. Could they be sensibly evaluated under the usual framework? If so, what would this evaluation look like—what evidence would be presented to prove which points? In this Part, I discuss the usual framework's application to three common practices: photo ID requirements for voting, cutbacks to early voting, and all-mail voting. I examine these laws not only because they are familiar but also because each one is illustrative of a different kind of electoral policy. A photo ID requirement is an example of a new franchise restriction: a barrier to voting that did not previously exist. A cutback to early voting is a reversal of a prior franchise expansion: a hardening of a regime that had earlier been softened. And all-mail voting is a new franchise expansion: an innovation that makes it easier for certain citizens to vote.<sup>404</sup>

The theme of the ensuing analysis is the flexibility of the usual framework. It can be used, without restrictions or caveats, to assess all three types of electoral measures. Because my focus is on *how* the usual framework would operate in a range of settings, I do not comment on what its *outcome* might be in any specific

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404. The missing fourth category is a reversal of a prior franchise restriction. Few recent laws fall into this category. Laws in this category also raise section 2 issues only in the unlikely event that the prior restriction benefited *minority* citizens (meaning that its repeal would advantage *nonminority* citizens).

case. No such conclusion could be generally valid anyway, due to the many differences that exist among jurisdictions and their voting practices. The usual framework's verdict, in other words, is inherently fact dependent, and the necessary facts cannot all be gathered *ex ante*.<sup>405</sup>

#### A. Photo ID Requirements

Starting with photo ID requirements, they are currently in effect in seventeen states.<sup>406</sup> Seven of these states categorically refuse to count ballots cast by voters lacking proper IDs, while the other ten offer some sort of failsafe: an opportunity to sign an affidavit of identity, for instance, or a chance to submit a provisional ballot that is eventually counted if poll workers determine that the voter is eligible and registered.<sup>407</sup> To establish a *prima facie* case under the usual framework, a section 2 plaintiff challenging one of these provisions would have to show that its selection rate for minorities is significantly lower than its selection rate for nonminorities. Selection rate, here, means the proportion of otherwise-eligible citizens who possess a valid ID (or who are able to vote, despite lacking one, due to a failsafe). These are the people who are “selected” for the benefit of voting—the ones, that is, who are not denied the franchise because of their inability to comply with the photo ID requirement.

The requirement's minority and nonminority selection rates may be estimated through a survey. Otherwise-eligible citizens in the jurisdiction may simply be asked if they have a proper ID (or are able to vote due to a failsafe).<sup>408</sup> The requirement's selection rates may also be determined using governmental records. Databases of registered voters and of people with valid IDs may be merged, thus revealing the shares of registered voters, by race, who are able to

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405. One more note: When analyzing the usual framework's applications in this Part, I do not cite to my earlier discussion of the framework's doctrinal features. *See supra* Sections II.A, II.C. I trust that the reader recalls these features and does not need to be repeatedly reminded of them.

406. *See* Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (Oct. 31, 2018), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/7MWN-VBJD>].

407. *See id.* Note that in states with “strict” photo ID requirements, voters may cast provisional ballots, but these ballots are counted only if voters manage to obtain valid IDs within the specified timeframe.

408. For examples of surveys being used in section 2 suits about photo ID requirements, see *Brakebill v. Jaeger*, No. 1:16-cv-008, 2018 WL 1612190, at \*2-3 (D.N.D. Apr. 3, 2018); *Greater Birmingham Ministries v. Merrill*, 284 F. Supp. 3d 1253, 1269 (N.D. Ala. 2018); and *Frank v. Walker*, 17 F. Supp. 3d 837, 871-72 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

satisfy the requirement.<sup>409</sup> However the selection rates are ascertained, the difference between them must be statistically significant in order for the plaintiff to make out a *prima facie* case.<sup>410</sup> It would also be helpful to the plaintiff if the difference was substantively large—for example, if the minority selection rate was less than four-fifths of the nonminority selection rate.<sup>411</sup>

Note that while the photo ID requirement's *selection* rates are crucial under the usual framework, minority and nonminority *turnout* rates are irrelevant. The plaintiff need not demonstrate a difference in turnout by race, and the jurisdiction may not defend itself by arguing that minority and nonminority citizens vote in similar proportions. Note also that, if there is a significant racial difference between the photo ID requirement's selection rates, the *reason* for the difference is immaterial. The plaintiff need not prove that the gap arose because of the requirement's interaction with social and historical discrimination, and it is no defense for the jurisdiction that minority citizens' subjective preferences might explain the gap.

If a *prima facie* case is set forth, the next step would be for the jurisdiction, if it wishes, to assert a justification defense. The prevention of voter-impersonation fraud is the state interest most often invoked on behalf of photo ID requirements,<sup>412</sup> though additional cited goals include following the lead of other states

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409. For examples of database matching being used in section 2 suits about photo ID requirements, see *Greater Birmingham Ministries*, 284 F. Supp. 3d at 1268-70; *Lee v. Virginia State Bd. of Elections*, 188 F. Supp. 3d 577, 598-99 (E.D. Va.), *aff'd*, 843 F.3d 592 (4th Cir. 2016); *North Carolina State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 364-65 (M.D.N.C.), *rev'd*, 831 F.3d 204 (4th Cir. 2016); and *Veasey v. Perry*, 71 F. Supp. 3d 627, 661-62 (S.D. Tex. 2014), *aff'd in part and rev'd in part sub nom. Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc).

410. See, e.g., 29 C.F.R. § 1607.4(D) (2018) (requiring "differences in selection rate" that "are significant in both statistical and practical terms").

411. My review of relevant decisions suggests that the difference between photo ID requirements' minority and nonminority selection rates is frequently statistically significant but that the minority selection rate is rarely less than four-fifths of the nonminority selection rate. See, e.g., *Brakebill*, 2018 WL 1612190, at \*2 (Native American selection rate of 81% and non-Native American selection rate of 88%); *Greater Birmingham Ministries*, 284 F. Supp. 3d at 1269 (black selection rate of 98% and white selection rate of 99%); *Lee*, 188 F. Supp. 3d at 599 (black selection rate of 94-95% and white selection rate of 96-97%); *McCrory*, 182 F. Supp. 3d at 365 (black selection rate of 94% and white selection rate of 98%); *Veasey*, 71 F. Supp. 3d at 661 (Latino selection rate of 94% and non-Latino selection rate of 96%); *Frank*, 17 F. Supp. 3d at 872 (Latino selection rate of 85%, black selection rate of 87%, and white selection rate of 93%).

412. For examples of fraud prevention being asserted as a state interest in section 2 suits about photo ID requirements, see *Greater Birmingham Ministries*, 284 F. Supp. 3d at 1277-78; *McCrory*, 182 F. Supp. 3d at 440-45; *Veasey*, 71 F. Supp. 3d at 653; and *Frank*, 17 F. Supp. 3d at 847-50.

with such provisions, stopping undocumented immigrants from voting, and bolstering voter confidence.<sup>413</sup> Any interest named by the jurisdiction must be substantial in order to be recognized. Voter-impersonation fraud (the only kind a photo ID requirement could thwart) must therefore be a real problem;<sup>414</sup> legal consistency with other states must be a genuine concern; a nontrivial number of undocumented immigrants must seek to vote; and/or voter confidence in the electoral system must be worrisomely low. It is also the jurisdiction's obligation to make these showings. It bears the burden of introducing probative evidence and convincing the court of the weight of its interests.

The jurisdiction bears the further burden of establishing that its photo ID requirement is necessary to achieve its objectives. The requirement must, in fact, deter would-be voter impersonators from carrying out their fraud, yield legal harmony with other states, dissuade undocumented immigrants from going to the polls, and/or improve voters' faith in elections. There must also be no obvious alternative that would be equivalently effective. If one exists, then the photo ID requirement is not actually necessary for the attainment of the jurisdiction's aims.<sup>415</sup>

Lastly, if the jurisdiction successfully mounts a justification defense, the plaintiff may canvass other options more exhaustively and try to identify a policy that serves the jurisdiction's interests as well—but without causing as large a racial disparity. One substitute for a conventional photo ID requirement is such

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413. See *Veasey v. Abbott*, 830 F.3d 216, 262–64 (5th Cir. 2016) (en banc) (noting these aims); see also *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 192–94 (2008) (also citing election modernization as a goal).

414. The evidence is mostly undisputed that voter-impersonation fraud is extremely rare. Even courts upholding photo ID requirements have conceded this point. See, e.g., *Greater Birmingham Ministries*, 284 F. Supp. 3d at 1273 (“[T]here is a lack of evidence of any significant in-person voter fraud in Alabama . . .”); *Lee*, 188 F. Supp. 3d at 608–09 (“[S]tatistics reveal few convictions nationally for voter impersonation fraud . . .”); *McCrory*, 182 F. Supp. 2d at 441 (“[T]here was no evidence of voter impersonation fraud in North Carolina.”).

415. The best example of a court analyzing the necessity of a photo ID requirement in a section 2 case is the Fifth Circuit's en banc decision in *Veasey*, 830 F.3d 216. The court found that Texas's law had a “dubious connection” with fraud prevention because it “pushed more vulnerable elderly voters away from in-person voting—a form of voting with little proven incidence of fraud—and toward mail-in voting, which . . . is far more vulnerable to fraud.” *Id.* at 263. The court also observed that while Texas “claimed to model its law after those from” other states, it “rejected many ameliorative amendments that would have brought [its law] in line with those states' voter ID laws.” *Id.* The court further noted that Texas's law “would not prevent noncitizens from voting, since noncitizens can legally obtain a Texas driver's license or concealed handgun license, two forms of [valid] ID.” *Id.* And in the court's view, not only was there “no credible evidence” that Texas's law would “increase public confidence in elections,” but witness testimony suggested that the law's implementation “might actually undermine voter confidence.” *Id.* (quoting *Veasey v. Perry*, 71 F. Supp. 3d 627, 655 (S.D. Tex. 2014)).

a law *paired* with the free and automatic provision of photo IDs to all eligible voters in the state. If everyone entitled to vote possessed a valid ID, then a photo ID requirement could no longer have different minority and nonminority selection rates.<sup>416</sup> Another possibility is taking and storing people's photos when they register to vote or go to the polls. These photos (rather than ones on IDs) could then be used to prevent voter-impersonation fraud. One more idea (already used by several states<sup>417</sup>) is adding a failsafe to a photo ID requirement. If the failsafe allowed eligible and registered voters to cast ballots even if they lacked proper IDs, it could eliminate (or at least mitigate) any disparate racial impact.

Proof of the availability of one of these less discriminatory alternatives would result in a judgment for the plaintiff. A plaintiff victory, in turn, would typically result in the invalidation of the photo ID requirement (whether the win occurred at the final stage of the usual framework or earlier in the process). In general, the court would not attempt to revise the requirement in order to reduce its racially disparate effect. The court would simply deem the provision a violation of section 2.

### B. Early-Voting Cutbacks

Turning to cutbacks to early voting, they have been enacted by seven states since 2010.<sup>418</sup> All of these cutbacks have reduced the number of days prior to an election in which early voting is offered. Some of the cutbacks have also limited the number of locations in which early voting may take place<sup>419</sup> or eliminated citizens' ability simultaneously to register and then to vote early.<sup>420</sup> To make out a *prima facie* case under the usual framework, a section 2 plaintiff disputing one of these laws would have to show that, prior to the cutback, minority citizens voted early at a significantly higher rate than nonminority citizens. This racial difference in early voting under the *previous* system would suggest that minority

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416. For a similar idea, proposing the pairing of a photo ID requirement with automatic voter registration, see Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 99-105 (2014).

417. See Underhill, *supra* note 406.

418. See *New Voting Restrictions*, *supra* note 1.

419. See *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 931 (W.D. Wis. 2016) (discussing Wisconsin's policy that each municipality offer early voting in only one location).

420. See *Ohio State Conference of the NAACP v. Husted*, 43 F. Supp. 3d 808, 812 (S.D. Ohio) (discussing Ohio's elimination of the "Golden Week" during which voters could simultaneously register and vote early), *vacated as moot*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

citizens would be comparatively disadvantaged by the *new* policy. That is, the new policy's minority and nonminority selection rates likely would not be as favorable for minority citizens as those of the old one.<sup>421</sup>

These selection rates (like those of a photo ID requirement) may be estimated in at least two ways. Minority and nonminority citizens may be asked, via a survey, if they cast their ballots early, by mail, on Election Day itself, or not at all.<sup>422</sup> Governmental records of voter participation may also be consulted.<sup>423</sup> These records have the advantage that they often track when exactly voters cast

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421. Of course, if data are available about the new policy (because the section 2 suit is brought after the cutback has gone into effect), then no speculation is necessary regarding the new policy's effects: its minority and nonminority selection rates can be compared directly to those of the old policy. Additionally, while the comparison between the old and new laws is explicit here, it was implicit in the above discussion of photo ID requirements. See *supra* Section IV.A. In the absence of a photo ID requirement, the minority and nonminority selection rates are both 100% with respect to voter identification. This is the baseline against which the challenged provision's selection rates are tacitly compared. Furthermore, the comparison between the old and new laws is *not* identical to the retrogression inquiry under section 5 of the VRA. That inquiry focuses "*solely* on voting opportunities enjoyed by minorities, and whether those opportunities would be reduced under the proposed law," while the section 2 analysis examines "whether minorities enjoy less opportunity to vote *as compared to other voters*." *Husted*, 768 F.3d at 558.

Lastly, one might argue that, under the usual framework, only the new law's minority and nonminority selection rates matter—that is, that the status quo ante is irrelevant. I think this is not the best reading of the usual framework's particularity requirement. The specific provision being challenged in these cases is the *cutback* to early voting, not the new early-voting policy alone, stripped of its historical context. Cf. *Graoch Assocs. #33 v. Louisville/Jefferson Cty. Metro Human Relations Comm'n*, 508 F.3d 366, 377 (6th Cir. 2007) (holding that "it is possible to bring [FHA] disparate-impact challenges to withdrawals" from previous defendant policies); *Muhammad v. N.Y.C. Transit Auth.*, 52 F. Supp. 3d 468, 487 (E.D.N.Y. 2014) (recognizing a Title VII disparate impact challenge to a "narrow change in [uniform] policy" rather than the "broad requirement that bus operators wear a uniform"). Moreover, if the old law's selection rates were immaterial, then no voting restriction could be disputed under section 2 if its new selection rates revealed an advantage for minority citizens. It would be beside the point that minority citizens previously benefited to a greater extent and then had this edge significantly reduced. In the absence of precedent compelling this result under the usual framework, there seems to be no good reason to insist on it in the vote denial context. Cf. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 (2000) (noting that section 2 cases may involve electoral "changes" in addition to "the status quo itself"); S. REP. NO. 97-417, at 29 n.117 (1982) (stating that liability under section 2 is more likely "[i]f the procedure markedly departs from past practices").

422. For an example of a survey being used in a section 2 suit about an early-voting cutback, see *Husted*, 43 F. Supp. 3d at 830.

423. For examples of governmental records being used in section 2 suits about early-voting cutbacks, see *North Carolina State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 384-85 (M.D.N.C.), *rev'd*, 831 F.3d 204 (4th Cir. 2016); and *Husted*, 43 F. Supp. 3d at 828-30.

their early ballots; this is helpful in predicting the effects of reductions to (rather than abolitions of) early voting.<sup>424</sup> The records sometimes have the drawback, though, of not listing the race of each voter; in this case, the race may be inferred based on the voter's name or (in racially homogeneous areas) place of residence.<sup>425</sup> However the selection rates are calculated, the gap between them must be worse for minority citizens under the new regime than under the old. And worse (again as in the photo ID context) means a difference that is at least statistically significant and preferably substantively large too.<sup>426</sup>

If the plaintiff sets forth a *prima facie* case, the burden would then shift to the jurisdiction to prove that its early-voting cutback is necessary to achieve a substantial interest. The only rationales that have been advanced for cutbacks, to date, are the related ones of saving money and allocating limited resources to tasks other than administering early voting.<sup>427</sup> For these explanations to pass muster, the jurisdiction must convince the court that they are weighty: that money is indeed tight and that election officials are, in fact, harried. The jurisdiction must also demonstrate that restricting early voting is crucial to the realization of these goals. The cutback must save sizeable sums and enable employees to do their jobs considerably more efficiently, and there must be no other way to bring about these benefits.<sup>428</sup>

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424. See, e.g., *McCrory*, 182 F. Supp. 3d at 384-85 (analyzing voter participation “when broken down by the first seven days of early voting”).

425. See, e.g., *Husted*, 43 F. Supp. 3d at 828-30 (using “three standard ecological inference techniques to draw inferences about the [early voting] rates of blacks and whites in Ohio” (quoting Expert Rebuttal Declaration of Dr. Daniel A. Smith at 2, *Husted*, 43 F. Supp. 3d 808 (No. 14-cv-404), ECF No. 53-11)).

426. My review of relevant decisions suggests that early-voting cutbacks tend to have an adverse effect on minority citizens that is both statistically significant and substantively large. See, e.g., *McCrory*, 182 F. Supp. 3d at 384 n.74 (finding that more than 60% of black voters in North Carolina voted early in 2008 and 2012, compared to less than 50% of white voters); *Husted*, 43 F. Supp. 3d at 829 (finding that about 20% of black voters in Ohio voted early in 2012, compared to less than 10% of white voters).

427. See, e.g., *One Wis. Inst. v. Thomsen*, 198 F. Supp. 3d 896, 933 (W.D. Wis. 2016) (noting Wisconsin’s arguments that reducing early voting would “allow the state to conduct uniform, orderly elections,” give election officials “more time for other tasks,” and “save[] money”); see also *McCrory*, 182 F. Supp. 3d at 445-47 (citing similar arguments by North Carolina); *Husted*, 43 F. Supp. 3d at 844-46 (citing Ohio’s antifraud and efficiency arguments).

428. Courts have tended to doubt that early-voting cutbacks would yield significant improvements in cost or efficiency. See, e.g., *One Wis. Inst.*, 198 F. Supp. 3d at 934 (expressing skepticism that “[a]lleviating the workload for clerks could be sufficient reason to limit the hours for in-person absentee voting”); *Husted*, 43 F. Supp. 3d at 845 (“[N]othing in the record . . . demonstrate[s] that the old system created undue or burdensome costs.”). But see *McCrory*, 182 F. Supp. 3d at 446 (pointing out that “by reallocating the resources devoted to the first seven

If the jurisdiction makes these showings to the court's satisfaction, the plaintiff would have a final opportunity to demonstrate that a comparably effective but less discriminatory alternative does actually exist. The plaintiff might argue that if the number of early-voting days was reduced, but more early-voting sites were opened for longer hours each day, then minority citizens would not be as disadvantaged while the jurisdiction would retain most of its scarce resources.<sup>429</sup> Or, switching these variables into another configuration, the plaintiff might recommend that the number of early-voting days be kept constant but with fewer early-voting sites open for shorter hours each day. If either of these options (or another proposal) would be similarly efficient while generating a smaller racial disparity, then the plaintiff would prevail. And if the plaintiff won, of course, the remedy would be the nullification of the jurisdiction's early-voting cutback.

### C. All-Mail Voting

All-mail voting is the last policy I consider to illustrate the flexibility of the usual framework. Twenty-two states conduct at least some elections by mail, meaning every registered voter is sent a ballot that the voter may then complete and return by mail during a specified period.<sup>430</sup> Three states use all-mail voting for *all* of their elections.<sup>431</sup> Preliminarily, certain observers claim that franchise expansions are beyond the scope of section 2 vote denial suits. A Fifth Circuit judge, for instance, has stressed the “difference between making voting *harder* in

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days of early voting,” North Carolina’s law “provides for more polling places rather than fewer” and “establishes longer, more convenient hours of early voting”).

It is also relevant in a cutback case if, until recently, the state did provide more opportunities for early voting. “[I]f a jurisdiction has successfully run an extended early voting period . . . this fact will tend to undercut arguments that the burdens a more restrictive system imposes on minority voters are the unavoidable cost of pursuing the jurisdiction’s other permissible goals.” Karlan, *supra* note 8, at 782.

429. This is essentially the regime that North Carolina instituted in 2013 (at least according to the district court’s decision about the state’s omnibus law). See *McCrory*, 182 F. Supp. 3d at 446. As in this case, a jurisdiction’s past or ongoing practice is one place to which a plaintiff may turn for data. Other jurisdictions’ records may also illuminate reasonable alternatives.

430. See Dylan Lynch, *All-Mail Elections*, NAT’L CONF. ST. LEGISLATURES (Aug. 15, 2018), <http://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx> [https://perma.cc/YBU9-JDXE]. All-mail states still provide some opportunities for in-person voting before and on Election Day.

431. These are Colorado, Oregon, and Washington. See *id.*

ways that . . . disproportionately burden minorities and making voting *easier* in ways that may not benefit all demographics equally.”<sup>432</sup>

I think this position is untenable. In the extreme case, suppose a jurisdiction passes a law that facilitates voting only for nonminority citizens. Perhaps nonminority citizens get an extra week to vote early, or may vote without displaying a photo ID, or may bypass the line at the polling place. Everyone presumably agrees that such a measure could be challenged under section 2.<sup>433</sup> Even if the law does not affect the *absolute* position of minority citizens, it still produces a racial disparity by worsening their *relative* position vis-à-vis nonminority citizens. The same logic holds for less dramatic hypotheticals. A facially neutral statute, too, may benefit nonminority citizens to a greater extent than minority citizens, thus causing a disparate impact. That the race-neutral policy does not *harm* minority citizens, in absolute terms, is beside the point. The policy’s minority and nonminority selection rates are still less favorable for minority citizens than the status quo ante.<sup>434</sup>

Assuming all-mail voting is subject to section 2 attack, the first step under the usual framework would be for the plaintiff to prove that the law significantly disadvantages minority citizens. The law does so if it boosts nonminority participation by considerably more than it raises minority involvement.<sup>435</sup> In this case, the minority selection rate is substantially lower compared to the nonminority selection rate under all-mail voting than it was under the previous regime.<sup>436</sup> This scenario is plausible because minority citizens are less likely to have perma-

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432. *Veasey v. Abbott*, 830 F.3d 216, 279 (5th Cir. 2016) (en banc) (Higginson, J., concurring); see also Karlan, *supra* note 8, at 787 n.128 (“[E]xpansions of the franchise to constitutionally eligible citizens cannot, in themselves, impair any constitutional right of other citizens.”).

433. Of course, such a measure could also be challenged under the Constitution due to its racially discriminatory intent.

434. This is a good example of a law that would not be retrogressive under section 5 of the VRA but that could nevertheless be challenged under section 2. See *supra* note 421 and accompanying text. For a scholar agreeing with my view that section 2 applies to franchise expansions, see Pershing, *supra* note 60, at 1174 (“For purposes of determining inequalities of access under section 2, a convenience or benefit to voting should be no different from a burden or other imposition on that activity.”). For a case striking down a franchise expansion on section 2 grounds, see *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987) (invalidating a relaxation of Mississippi’s dual registration system because, even as amended, it remained racially discriminatory).

435. Note that voter turnout is the concept of interest here because that is what mail-in voting directly affects. When citizens submit ballots by mail, they necessarily turn out to vote.

436. See *supra* note 421 (discussing the need to compare the new policy’s selection rates with those of the old policy).

nent addresses than nonminority citizens, more apt to live in areas with inconsistent mail delivery, and more prone not to return mail they receive.<sup>437</sup> These factors need not be documented by the plaintiff since the reason for the racial disparity is irrelevant. But they help explain why a practice as seemingly innocuous as all-mail voting could raise section 2 concerns.

Second, the jurisdiction would have the chance to present a justification defense. All-mail voting is most often endorsed on the grounds that it increases voter turnout and allows most or all polling locations to be shuttered.<sup>438</sup> The jurisdiction must therefore show that voter participation and resource preservation are important ends. The jurisdiction must also establish a strong link between these ends and all-mail voting. It must clearly lift voter turnout and save a good deal of money and labor, and it must be the best way to achieve these goals.<sup>439</sup>

And third, the plaintiff would be able to offer an equivalently effective but less discriminatory alternative. *Mostly*-mail (not *all*-mail) voting might be one such policy. If citizens could vote by mail or in person at a reasonable number of polling sites, then the racial disparity of all-mail voting could be reduced at a relatively low cost.<sup>440</sup> Another possibility is combining all-mail voting with targeted outreach to minority citizens and (for minorities who speak limited English) ballot instructions in additional languages.<sup>441</sup> These supplements could also lessen the disparate impact of all-mail voting at an affordable price. A final

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437. See, e.g., Thad Kousser & Megan Mullin, *Does Voting by Mail Increase Participation? Using Matching to Analyze a Natural Experiment*, 15 POL. ANALYSIS 428, 440 n.13 (2007) (finding that under all-mail voting in Oregon, “[p]articipation was significantly lower in precincts with more Hispanic, Asian, black, or multiethnicity residents”).

438. See, e.g., Lynch, *supra* note 430 (noting “possible advantages” for all-mail voting, including “turnout” and “financial savings”).

439. The empirical evidence is ambiguous as to whether all-mail voting increases voter turnout. See, e.g., Paul Gronke & Peter Miller, *Voting by Mail and Turnout in Oregon: Revisiting Southwell and Burchett*, 40 AM. POL. RES. 976, 984-87 (2012) (finding higher turnout under all-mail voting in Oregon in special but not in primary or general elections); Priscilla L. Southwell, *Analysis of the Turnout Effects of Vote by Mail Elections, 1980-2007*, 46 SOC. SCI. J. 211, 213-15 (2009) (same, though with a small bump in general election turnout); Priscilla L. Southwell & Justin I. Burchett, *The Effect of All-Mail Elections on Voter Turnout*, 28 AM. POL. Q. 72 (2000) (finding a ten-percentage-point increase in participation among Oregon voters based on three all-mail elections in 1995 and 1996).

440. See, e.g., Lynch, *supra* note 430 (noting that, in Colorado, “voters can choose to cast a ballot at an in-person vote center during the early voting period or on Election Day (or drop off, or mail, their ballot back”).

441. Section 203 of the VRA, codified at 52 U.S.C. § 10503(c) (2018), already requires covered jurisdictions to provide voting materials in additional languages and is thus a good precedent for this proposal.

option is voting via cell phone rather than via mailed ballot. Although there remain security issues with telephonic (and internet) voting, minority and non-minority citizens now own cell phones at virtually identical rates.<sup>442</sup> If these rates of cell-phone possession could be exported to the political sphere, racial differences in voting might be erased.

## CONCLUSION

In geology, an oxbow lake is a body of water that has become detached from a river's main route. The lake lies near the river but is no longer part of it.<sup>443</sup> This is essentially the relationship that now exists between disparate impact law and vote denial doctrine under section 2. Disparate impact law is the river in the analogy: a broad waterway that holds within its banks Title VII, the FHA, and several more statutes. Section 2 vote denial doctrine, in turn, is the oxbow lake: a small and strange lagoon cut off from, and so unaffected by, the flow of the current.

In this Article, I have argued that the oxbow lake should join the river—that disparate impact law, in other words, should be unified. Because of its isolation, section 2 vote denial doctrine has been stymied by questions the rest of disparate impact law answered long ago. Even worse, section 2 vote denial doctrine has failed to develop the feature—the justification defense—that bolsters the constitutionality of the rest of disparate impact law. Linking the oxbow lake to the river would thus resolve a series of contentious issues and avert a looming threat to section 2's validity. This merger also remains appealing despite the objections that have been raised to it and would be viable in every electoral context. It is time, then, for the civil engineers to get to work. A major hydrological project awaits them.

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442. See *Mobile Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/mobile> [<https://perma.cc/78Y2-245T>] (showing white, black, and Hispanic smartphone ownership rates of 77%, 75%, and 77%, respectively).

443. See *Oxbow Lake*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.org/encyclopedia/oxbow-lake> [<https://perma.cc/KW3P-2L36>]. Unlike an oxbow lake, of course, section 2 was not part of the disparate impact river at some previous point.