

# The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After *Shelby County*

Christopher S. Elmendorf\*  
Douglas M. Spencer\*\*

*The Supreme Court in Shelby County v. Holder (2013) effectively enjoined the preclearance regime of the Voting Rights Act. The Court deemed the coverage formula, which determines the jurisdictions subject to preclearance, insufficiently grounded in current conditions. This Article proposes a new, legally defensible approach to coverage based on between-state differences in the proportion of voting age citizens who subscribe to negative stereotypes about racial minorities and who vote accordingly. The new coverage formula could also account for racially polarized voting and minority population size, but, for constitutional reasons, subjective discrimination by voters is the essential criterion. We demonstrate that the racial-stereotyping, polarized-voting, and population-size criteria would yield similar patterns of coverage, at least with respect to African Americans, and we show, ironically, that the new pattern of coverage would coincide with historic coverage under the “outdated” formula invalidated by Shelby County. Recently developed statistical techniques permit the new coverage formula to be further refined based on estimates of racial*

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\* Professor of Law, University of California, Davis. Faculty affiliate, Institute for Governmental Studies and Center for the Study of Law and Society, UC Berkeley (2013–14).

\*\* Associate Professor of Law and Public Policy, University of Connecticut. For helpful feedback we thank Guy Charles, Jack Chin, Kevin Johnson, Thad Kousser, Justin Levitt, Katerina Linos, Kevin Quinn, Bertrall Ross, David Schleicher, Paru Shah, Nick Stephanopoulos, and participants who attended presentations of our paper at the 2013 conference of the Midwest Political Science Association, the 2013 CCES Sundance conference, and faculty workshops at the University of Chicago Law School, Emory Law School, UC Davis School of Law, and the Center for the Study of Law and Society at UC Berkeley. We are also indebted to Lynn Vavreck and Simon Jackman for sharing the 2008 Cooperative Campaign Analysis Project dataset, and to the Annenberg National Election Survey for sharing the results of their 2008 online survey. Replication code and technical appendix available at: [http://www.dougspencer.org/research/geography\\_of\\_discrimination.html](http://www.dougspencer.org/research/geography_of_discrimination.html).

*stereotyping within substate geographic units, such as cities and counties. We suggest that Congress establish default rules for coverage based on our state-level results, and delegate authority to make substate coverage determinations to an administrative agency (along with other responsibilities for keeping the coverage formula up to date). Finally, we show that if Congress does not act, the courts could use our results to reestablish coverage in a number of states, entering much broader “bail in” remedies for constitutional violations than would otherwise be justified.*

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*CHIEF JUSTICE ROBERTS: General, is it—is it the government’s submission that the citizens in the South are more racist than citizens in the North?*

*GENERAL VERRILLI: It is not, and I do not know the answer to that, Your Honor.*<sup>1</sup>

#### INTRODUCTION

In a decision as foreseeable as it was momentous,<sup>2</sup> the Supreme Court in *Shelby County v. Holder* effectively enjoined the preclearance regime (“Section 5”) of the Voting Rights Act (VRA).<sup>3</sup> Section 5 had prevented certain states and localities from changing election procedures without prior approval from the federal government. The Court determined that Congress had not sufficiently tied the coverage formula, which defines the jurisdictions subject to preclearance, to “current conditions.”<sup>4</sup> *Shelby County* left standing the VRA’s main nationally applicable provision, the results test of Section 2, but it too is in jeopardy.<sup>5</sup> Section 2 has been repeatedly narrowed via textually doubtful statutory constructions that rest on the constitutional avoidance canon.<sup>6</sup>

The Supreme Court’s VRA jurisprudence is unified by a sense that neither the preclearance regime of Section 5 nor the results test of Section 2 is well-tailored to remedy constitutionally prohibited race discrimination in the electoral process. The VRA was adopted to enforce the Fourteenth and Fifteenth Amendments, which proscribe only subjective racial discrimination by state actors. Yet the geographic reach of Section 5 and the standards for liability under Section 2 seem to bear at best an attenuated connection to the forms of discrimination the Constitution prohibits.

In this Article, which concerns Section 5, and in a companion article on Section 2,<sup>7</sup> we argue that the VRA’s constitutional difficulties can be resolved using data on the geography of voter discrimination. By “geography of voter discrimination,” we mean the relative propensity of citizens in different

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1. Transcript of Oral Argument at 41–42, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

2. See *infra* notes 16–18 and accompanying text.

3. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

4. *Shelby Cnty. v. Holder*, No. 12-96, slip op. at 21 (U.S. June 25, 2013).

5. See Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & PUB. POL’Y 125 (2010); Richard L. Hasen, *Shelby County and the Illusion of Minimalism* 17–18 (UC Irvine Sch. of Law Legal Studies Research Paper Series No. 2013-116, 2013).

6. Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 379–91, 399–403 (2012) [hereinafter Elmendorf, *Making Sense of Section 2*] (discussing cases).

7. Christopher S. Elmendorf & Douglas M. Spencer, *After Shelby County: Getting Section 2 of the Voting Rights Act to Do the Work of Section 5* (2014) (UC Davis Legal Studies Research Paper No. 372, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2414652](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414652).

geographic units to vote on the basis of racial motives or criteria that the Constitution disallows for state action. Though the individual voter is not a state actor, voter discrimination increases the risk of unconstitutional state action and therefore justifies remedial legislation under Congress's power to enforce the Fourteenth and Fifteenth Amendments.

The available data on voter discrimination as such are limited and problematic, but there are very good data on a decent proxy: racial stereotyping. Recently developed statistical techniques allow these data to be used to estimate racial attitudes within small geographic units, such as cities, counties, and legislative districts.

Part I of this Article examines the Supreme Court's objections to the extant coverage formula for Section 5 and explains why Congress—if it wishes to resuscitate Section 5—ought to ground the new formula on current evidence of subjective racial discrimination by voters. Though we are sympathetic to recent proposals for linking coverage to political polarization between racial groups, or to the size of the minority population, we argue that these approaches may be legally vulnerable because they track a type of discrimination that can be characterized as constitutionally innocuous political—as opposed to racial—discrimination. Racial polarization and minority population size are probably best treated as “plus factors” for coverage, rather than as substitutes for evidence of voter discrimination.<sup>8</sup>

Part II turns to more technical matters: the choice among measures of voter discrimination; the analytics for obtaining state- and local-level estimates of opinion and behavior from national surveys; and the options for aggregating population characteristics, such as the distribution of racial attitudes, into one-dimensional scales that can be used to rank states or localities for coverage purposes. We defend a proxy for voter discrimination derived from survey questions that ask respondents to rate members of a racial group “in general” in terms of their work effort, intelligence, and trustworthiness. This measure has face validity, and it explains political preferences.

Part III presents results on racial stereotyping within states and individual congressional districts using two analytic methods. The first method, disaggregation, requires no modeling assumptions. It generates reasonably precise estimates at the state level but not for geographic units within states. The alternative to disaggregation, multilevel regression with poststratification (MRP), requires modeling but yields estimates within small geographic units, such as cities, counties, and legislative districts.

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8. Throughout this Article, we will use the term “racial polarization” as the *Gingles* plurality understood it: “Racial polarization” exists if and only if members of the racial groups in question “constitute [] politically cohesive unit[s],” who generally vote “as a bloc” in opposition to one another. *Thornburg v. Gingles*, 478 U.S. 30, 56 (1984) (plurality opinion).

Our central finding is that the recently invalidated coverage formula actually did a remarkably good job of picking out states whose non-black residents harbor exceptionally negative stereotypes of African Americans. We also show that our ranking of states by anti-black stereotyping correlates very highly—but not perfectly—with rankings based on black population share and racially polarizing voting in the 2008 presidential election. This convergence result is fortuitous. It means that Congress could enact a new coverage formula justified in several different ways, with each justification serving distinct legal and political constituencies. And, because of slight variations in state ranking under each criterion, Congress would be able to accommodate political exigencies by adjusting the cutoffs for coverage or weights assigned to each criterion.

Part IV summarizes our recommendations to Congress. Taking stock of legal uncertainties and the prospect for new and better data going forward, we propose that Congress enact a default coverage formula based on our state-level results, and authorize the Department of Justice or a new administrative body to update the coverage formula prospectively using new data and results on voter discrimination in substate geographic units.

But what if Congress doesn't act? Part V explains how our findings could be used to recreate coverage through state-specific litigation. A rarely used provision of the VRA authorizes courts to impose preclearance as a remedy for constitutional violations. The logic of *Shelby County* requires such “bail in” remedies to be used sparingly and drafted narrowly, unless it can be shown that conditions in the defendant jurisdiction present an unusual risk of Fourteenth and Fifteenth Amendment violations. By showing that most of the formerly covered states really are different from other states, we provide the necessary predicate for broad bail-in remedies. Our results can be used to answer the liability-stage question of whether unconstitutional race discrimination actually occurred.

One caveat before we begin: we will not mount a normative defense of the preclearance regime. That argument has been made (and of course disputed) by many others.<sup>9</sup> Our goal here is simply to show how the regime can be put back to work after *Shelby County*.

## I.

### SECTION 5 AFTER *SHELBY COUNTY*

This Part introduces Section 5 and then turns to the Supreme Court's decision in *Shelby County*. We explain why the logic of *Shelby County*, given current understandings of the Fourteenth and Fifteenth Amendments, favors a

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9. Compare, e.g., Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605 (2005), with Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004).

new coverage formula based on population demographics and voter preferences. We make the case for treating racial discrimination by voters as the linchpin for coverage, and we discuss the limitations of some leading alternatives, such as basing coverage on direct evidence of minority political incorporation (e.g., voter turnout rates and the election of minority candidates) or data on Section 2 violations.

#### A. Section 5 and the Supreme Court

Section 5 of the VRA requires certain states and localities—the so-called “covered jurisdictions”—to obtain permission from the U.S. Department of Justice or the District Court for the District of Columbia before making any changes to a “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.”<sup>10</sup> Covered jurisdictions bear the burden of proving that their proposed change is not discriminatorily motivated and will not diminish the opportunity of minority voters to elect their “preferred candidates of choice.”<sup>11</sup>

Originally a temporary measure, Section 5 has been extended repeatedly, most recently in 2006 for another twenty-five years.<sup>12</sup> When Congress debated the 2006 amendments, legal scholars warned that the extension of Section 5 might be struck down unless Congress updated the coverage formula to reflect current conditions in the states.<sup>13</sup> For many years, the coverage formula had been based primarily on between-state differences in voter registration and turnout during the early 1970s, and the use of “tests or devices” as a

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10. 42 U.S.C. §1973(c)(a) (2006).

11. *Id.* §1973(c)(b).

12. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified at 42 U.S.C. §§ 1971–1973aa–1a (2006)).

13. See, e.g., *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (2006) (statement of Nathaniel Persily, Professor of Law, University of Pennsylvania School of Law) (“[T]he coverage formula or trigger found in section 4 of the VRA, while never having perfectly captured the universe of jurisdictions that deserve suspicion, has become more over and underinclusive since 1982 . . . [and] it is far from clear that renewing section 5 with the outdated coverage formula would be constitutional.”); *The Continuing Need for Section 5 Pre-Clearance: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. 200 (2006) (statement of Richard H. Pildes, Sudler Family Professor of Law, New York University School of Law) (expressing “fundamental constitutional and policy concern regarding whether the evidence in the record is sufficient to justify re-authorizing Section 5 in its current form”); *An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. 8, 10 (2006) (statement of Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola Los Angeles School of Law) (“I urge the Committee to spend the time to craft a bill that will both pass constitutional muster in the Supreme Court and do the important work of continuing to protect minority voting rights in this country. . . . The proposed amendments would not update this formula in any way.”).

prerequisite to voting prior to the enactment of the VRA in 1965.<sup>14</sup> Covered states were those with low turnout and a history of impeding voting.<sup>15</sup> This formula was reverse engineered as a facially neutral mechanism for identifying most of the states in the former Jim Crow South.<sup>16</sup> The problem facing Congress in 2006 was that covered and non-covered states looked similar in terms of minority political participation.<sup>17</sup> “[I]t turned out to be an impossible task” to find a new formula that would “capture an appropriate group of jurisdictions while passing constitutional muster and not giving rise to concerted political opposition.”<sup>18</sup> So Congress left the coverage formula untouched, figuring that its historical pedigree and connection to Jim Crow gave it better odds in the courts than any shot-in-the-dark alternative.<sup>19</sup>

Conservative jurists have not looked kindly on this decision. In the Supreme Court’s first opinion about the newly extended Section 5, Chief Justice Roberts declared, “Things have changed in the South.”<sup>20</sup> The Court avoided deciding the constitutionality of Section 5, but warned, “[T]he Act imposes current burdens *and must be justified by current needs*.”<sup>21</sup> Jim Crow history was not enough. Congress did not answer this invitation to update the coverage formula, and in *Shelby County v. Holder*, a five-Justice majority held that Section 5 could not be enforced unless or until Congress revisits the coverage question.<sup>22</sup>

Though *Shelby County* dodged an important question about the standard of review,<sup>23</sup> its central message is clear: if Congress wants to compel certain states to obtain the federal government’s approval before implementing changes to their election laws, Congress must make plain how the formula used to select those states (using current data) tracks the constitutional harms that Congress means to remedy.

Consider the Court’s casual dismissal of the massive record that Congress had amassed about voting problems and racial polarization in the covered jurisdictions. For the majority, it was essentially irrelevant whether the full

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14. See *About Section 5 of the Voting Rights Act*, UNITED STATES DEPARTMENT OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/about.php](http://www.justice.gov/crt/about/vot/sec_5/about.php) (last visited June 18, 2014).

15. *Id.*

16. *Shelby Cnty. v. Holder*, 679 F.3d 848, 878–79 (D.C. Cir. 2012), *rev’d*, 133 S. Ct. 2612 (2013) (“As the district court explained, the election years that serve as coverage ‘triggers’ under section 4(b) were never selected because of something special that occurred in those years. Instead, Congress identified the jurisdictions it sought to cover—those for which it had evidence of actual voting discrimination—and then worked backward, reverse-engineering a formula to cover those jurisdictions.”) (internal quotations and citations omitted).

17. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 192–207 (2007).

18. *Id.* at 209.

19. *Id.* at 209–11.

20. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009).

21. *Id.* at 203 (emphasis added).

22. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

23. See Hasen, *supra* note 5, at 11–18.

record before Congress in 2006 established that voting discrimination remains worse in covered than non-covered jurisdictions.<sup>24</sup> The “fundamental problem,” wrote Chief Justice Roberts, is that “Congress did not use the record it compiled to shape a coverage formula grounded in current conditions.”<sup>25</sup> That Congress amassed numerous examples of “second-generation barriers” to political participation in the covered jurisdictions, such as electoral district boundaries that dilute minority voting power, “simply highlights the irrationality of continued reliance on the [extant] coverage formula, which is based on voting tests and access to the ballot, not vote dilution.”<sup>26</sup>

Courts applying *Shelby County* will assess any new coverage formula that Congress may enact not by whether it results in a defensible categorization of states, but by whether the formula (1) uses current data, and (2) bears a facially evident relationship—a “logical relationship”<sup>27</sup>—to the constitutional injuries that Congress means to remedy or prevent. Perhaps the underlying concern is one of legitimacy: the statute establishing coverage must make it clear to citizens in the covered jurisdictions why their state has been singled out, and how this singling out serves to prevent constitutional violations.<sup>28</sup>

*B. Why Coverage Must Be Based on Societal Risk Factors for Racially Discriminatory State Action*<sup>29</sup>

In the run-up to *Shelby County* and in its immediate aftermath, legal scholars proposed a number of “current conditions” that might justify singling out a group of states for Section 5 coverage. Broadly speaking, there are three general proposals: (1) link coverage to geographic variation in Section 2 litigation, in effect treating Section 2 violations as a proxy for unconstitutional

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24. The evidence and what it means is briefly discussed—and then dismissed—at page 21 of the slip opinion. *Shelby Cnty. v. Holder*, No. 12-96, slip op. at 21 (U.S. June 25, 2013).

25. *Id.*

26. *Id.* For other passages speaking to this point, see *id.* at 17 (noting that the coverage formula was “rational in both practice and theory” in 1965, as it “looked to cause (discriminatory tests) and effect (low voter registration and turnout), and tailored the remedy (preclearance) to those jurisdictions exhibiting both”). See also *id.* at 20 (“The coverage formula that Congress reauthorized in 2006 ignores [the abolishment of voting tests, and the erasure of differences in registration and turnout between covered and non-covered jurisdictions], keeping the focus on decades-old data relevant to decades-old problems, rather than current data reflecting current needs.”).

27. *Id.* at 18.

28. Cf. Christopher S. Elmendorf, *Empirical Legitimacy and Election Law*, in *RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY* 117 (Guy-Uriel E. Charles et al. eds., 2011) (examining the role of legitimacy concerns in the Supreme Court’s election law jurisprudence). We are indebted to Jack Chin for suggesting that the *Shelby County* decision can also be understood in this way.

29. Portions of this section draw on a commentary we published in *Slate*. Christopher S. Elmendorf & Douglas M. Spencer, *How to Save the Voting Rights Act*, *SLATE* (July 17, 2013, 3:11 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/07/voting\\_rights\\_act\\_how\\_congress\\_can\\_save\\_it.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/voting_rights_act_how_congress_can_save_it.html).



discrimination; (2) link coverage to geographic variation in minority political incorporation, as measured by voter registration and turnout rates, the election of minority candidates, etc.; and (3) link coverage to geographic variation in minority population size and racially polarized voting.

As we explain here, the first two approaches are constitutionally vulnerable, and the third approach is doubtful too unless the formula takes account of preferences or beliefs that the Constitution disallows as the basis for state action. The fundamental problem is that the Fourteenth and Fifteenth Amendments are violated only by intentionally discriminatory state action.<sup>30</sup> When the VRA was enacted in 1965, certain familiar devices of intentional discrimination, such as literacy tests and related prerequisites to voting, were still in widespread use throughout the South.<sup>31</sup> Section 5 coverage was tied to those devices. There exists no present-day analogue for anchoring a post-*Shelby County* coverage formula.

It won't suffice to base coverage simply on low minority turnout, or lack of minority candidate success, since these are indicia of discriminatory results rather than discriminatory intent (and, in any event, between-state differences in minority voter participation and candidate success are almost certainly endogenous to the history of Section 5 coverage). We recognize that discriminatory intent is likely to generate discriminatory results. In a weak sense, low rates of minority participation may evidence discriminatory intent, but the modern Supreme Court has been hostile to results tests in antidiscrimination law.<sup>32</sup> If a results test is to serve as a "danger sign" of discriminatory intent,<sup>33</sup> it must, at the very least, be coupled with evidence that the state is administering its elections in some unusual and poorly justified manner. But unusual, poorly justified election laws with a severely disparate impact are likely to violate Section 2 of the VRA.<sup>34</sup> So they are rare. It is

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30. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Washington v. Davis*, 426 U.S. 229 (1976).

31. *Shelby Cnty. v. Holder*, No. 12-96, slip op. at 3–4, 12–13 (U.S. June 25, 2013).

32. See, e.g., *Ricci v. DeStefano*, 557 U.S. 557 (2009). As Richard Primus notes, the Supreme Court's sense that results tests (as applied to state actors) may themselves violate equal protection norms "represents a complete turnabout in antidiscrimination law." Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341 (2010).

33. Cf. *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997) (recognizing that Congress may enact overbroad remedial legislation under the Fourteenth Amendment so long as there is a "significant likelihood" that the prohibited activity would violate the Constitution); Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 324 (2007) (noting that the Supreme Court in electoral mechanics cases has varied the intensity of review depending on danger signs of constitutional violations).

34. Legal standards under Section 2 are murky, but the courts generally consider a broad range of factors concerning the history, effects, context, and rationale for the challenged measure. See generally Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Endings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006) (summarizing Section 2 jurisprudence).

therefore infeasible for Congress to craft a new coverage formula modeled on the test-or-device-plus-low-turnout approach of the VRA's drafters.

Perhaps in recognition of this, Ellen Katz, Peyton McCrary, Morgan Kousser, and Bernie Grofman have suggested that Section 5 coverage might be tied to a state's history of Section 2 violations.<sup>35</sup> Katz and McCrary focus on geographic disparities in the probability of litigant success and favorable settlements. Kousser and Grofman focus on the total number of violations and settlements within each geographic unit. Either approach would be vulnerable.<sup>36</sup> The legal standards for liability under Section 2 are fuzzy, and bear an uncertain relationship at best to the risk of Fourteenth and Fifteenth Amendment violations.<sup>37</sup> Given the constitutional doubts the Supreme Court's conservatives have expressed about the results test of Section 2, it would be playing with fire for Congress to tie Section 5 coverage to the history of successful Section 2 claims.

Moreover, as Adam Cox and Thomas Miles explain, there is no necessary or consistent relationship between the probability of litigant success and the

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35. *Id.*; *Shelby Cnty. v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd*, 133 S. Ct. 2612 (2013) (citing Peyton McCrary et al., *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275 (2006)); Bernard Grofman, *Devising a Sensible Trigger for Section 5 of the Voting Rights Act*, 12 ELECTION L.J. 332 (2013); Ellen D. Katz & Anna Baldwin, *Why Counting Votes Doesn't Add Up: A Response to Cox and Miles' Judging the Voting Rights Act*, 108 COLUM. L. REV. SIDEBAR 23 (2008); Morgan Kousser, *Gutting the Landmark Civil Rights Legislation*, REUTERS BLOG (June 26, 2013), <http://blogs.reuters.com/great-debate/2013/06/26/gutting-the-landmark-civil-rights-legislation/>.

36. A totally different approach would be to give up on a general coverage formula based on current or past conduct, and instead to make preclearance a supplemental remedy for particular future Section 2 violations. For proposals to this effect, see Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992 (2010); Justin Levitt, *Shadowboxing and Unintended Consequences*, SCOTUSBLOG (June 25, 2013, 10:39 PM), <http://www.scotusblog.com/2013/06/shadowboxing-and-unintended-consequences/>; Spencer Overton, *How To Update the Voting Rights Act*, HUFFPOST BLOG (June 25, 2013, 12:52 PM), [http://www.huffingtonpost.com/spencer-overton/how-to-update-the-voting\\_b\\_3497350.html](http://www.huffingtonpost.com/spencer-overton/how-to-update-the-voting_b_3497350.html); Richard Pildes, *One Easy, But Powerful, Way to Amend the VRA*, ELECTION LAW BLOG (June 28, 2013, 6:53 AM), <http://electionlawblog.org/?p=52349>.

We think this approach would be viable if judges were required to make a determination about the risk of future constitutional violations before imposing the remedy of coverage. The resulting pattern of coverage would, however, probably be pretty limited. We think most judges would be reluctant to issue preclearance remedies that go much beyond the conduct at issue in the case—unless the plaintiff made a strong showing that circumstances in the defendant jurisdiction present an exceptional risk of constitutional violations. *Cf.* E-mail from John Tanner, former chief of the voting rights section at the Department of Justice, to law-election@department-lists.uci.edu (July 10, 2013) (on file with author) (noting that judicial bail-in remedies under Section 3 of the VRA have generally been limited in this way); *see also infra* Part V (explaining how our results on the geography of voter discrimination could be used to shape broader bail-in remedies for certain jurisdictions). And we suspect that the Roberts Court would not accept what it has called the “extraordinary” remedy of preclearance as an automatic remedy for Section 2 violations—at least not unless Congress first amends the standard for liability under Section 2 to better connect it to actual or threatened constitutional violations.

37. *See* Elmendorf, *Making Sense of Section 2*, *supra* note 6, at 387–95.

frequency of legal violations.<sup>38</sup> Success rates can vary hugely depending on the relative risk aversion of plaintiffs and defendants, available legal resources, etc. As for the total number of successful Section 2 claims (Kousser's measure), this probably has as much to do with political incentives for litigation and settlement as it does with race discrimination. Samuel Issacharoff has observed that political parties, unions, and other actors deeply invested in the design of legislative districts turn to the VRA because it is the only available legal tool for challenging legislative districts.<sup>39</sup> The absence of justiciable limits on partisan gerrymandering means that political claims get recast as racial claims.<sup>40</sup> Other research shows that a disproportionate number of election lawsuits are brought in swing states.<sup>41</sup> Cases that are not meritorious may well settle—and thus get counted in McCrary's and Kousser's datasets—because risk-averse elected officials defending the cases worry that opposite-party judges will be biased against them.<sup>42</sup>

The final difficulty with the Katz, McCrary, and Kousser standards is their retrospective nature. They capture accumulated histories, not current conditions. To our minds this is reasonable, but it may not satisfy the Roberts Court, which rejects the idea that states may be singled out for coverage based on racial discrimination that took place “decades” ago.<sup>43</sup>

The remaining option is to base coverage on current societal conditions that plainly correlate with the risk of unconstitutional race discrimination. This approach permits relativistic distinctions to be drawn among the states, based on geographic disparities in risk factors for constitutional violations, but it does not permit absolute judgments about the severity of the problem of unconstitutional race discrimination in the typical state (or any other state). In an era when discriminators generally conceal their motives, such absolute judgments are probably impossible.

So what societal conditions might anchor Section 5 coverage? Stephen Ansolabehere, Nathaniel Persily, and Charles Stewart have pointed to racially polarized voting.<sup>44</sup> Morgan Kousser has proposed minority population size.<sup>45</sup>

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38. See Adam B. Cox & Thomas J. Miles, *Documenting Discrimination?*, 108 COLUM. L. REV. SIDEBAR 31 (2008).

39. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630–45 (2002).

40. *Id.* at 630–31.

41. Charles Anthony Smith & Christopher Shortell, *The Suits That Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251 (2007).

42. Cf. GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* (2002) (exploring redistricters' incentives, against the backdrop of litigation); Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413 (1995) (finding that district judges are more likely to uphold redistricting maps adopted by legislatures controlled by their own parties).

43. *Shelby Cnty. v. Holder*, No. 12-96, slip op. at 20 (U.S. June 25, 2013).

44. Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385 (2010); Stephen

We support these approaches on policy grounds, but for legal reasons we think it is also necessary to condition coverage on voter discrimination, or a good proxy for voter discrimination.

A coverage formula based on the size of the minority population would, at least arguably, have a “logical relation” to unconstitutional race discrimination in the electoral process. If the minority population is very small, then schemes to disenfranchise it are not worth the bother. Minority populations become targets for electoral discrimination only when they are large enough to matter politically. The problem with basing coverage on demographics alone is that doing so would be insensitive to motives. Some demographic majorities in some places are perfectly happy with large minority groups exercising political power. We are aware of no pattern of actual or threatened disenfranchisement of men by women, or of blondes by brunettes.

At first glance, one might think the motive problem with basing coverage on the size of the minority population could be solved by further conditioning coverage on the existence of severe racial polarization in political preferences. When the racial majority and a racial minority have opposing partisan or policy preferences, and when the minority is large enough to matter politically, the majority has a powerful political incentive to jigger election rules so as to burden and dilute minority voting.

As a matter of constitutional law, however, there is a plausible argument that such politically motivated discrimination with respect to voting is not “race discrimination” within the meaning of the Fourteenth and Fifteenth Amendments. This may be so even if the state actor self-consciously targets minority-race voters, so long as the state actor merely treats race as a proxy for partisanship or ideology. Our point is well illustrated by the racial gerrymandering cases. The Supreme Court requires plaintiffs challenging racial gerrymanders to prove that “race was the *predominant factor* motivating the legislature’s districting decision.”<sup>46</sup> By contrast, under general equal protection jurisprudence, a showing that race was only one factor behind the decision at issue shifts the burden to defendants to prove that race was not a but-for cause of the decision.<sup>47</sup>

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Ansolahehere et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. FORUM 205 (2013); cf. Persily, *supra* note 17, at 240–43 (arguing that courts should interpret Section 5 to limit its application in jurisdictions that are not characterized by severely polarized voting).

45. Morgan Kousser, *Gutting the Landmark Civil Rights Legislation*, REUTERS BLOG (June 26, 2013), <http://blogs.reuters.com/great-debate/2013/06/26/gutting-the-landmark-civil-rights-legislation/>.

46. *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (quoting *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999)).

47. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977).

The “predominant factor” test requires plaintiffs who challenge a racial gerrymander that serves political objectives—advancing the fortunes of a political party, or protecting an incumbent—to produce an alternative map that would serve the legislature’s political objectives equally well while yielding less racially homogenous districts.<sup>48</sup> That redistricters categorized citizens by race and purposefully shifted these race-categorized citizens among districts to achieve their objectives generally does not give rise to a presumptive equal protection violation,<sup>49</sup> unless the line-drawers pursued their political objectives ineptly,<sup>50</sup> or “subordinated [to racial considerations] traditional race-neutral districting principles . . . .”<sup>51</sup> At root, as Justice Thomas pointed out in dissent in *Easley v. Cromartie*, the racial gerrymandering cases shift the equal protection inquiry from the question of *whether* the decision maker classified persons because of their race, to the question of *why* race was considered (partisan politics, or something more nefarious).<sup>52</sup>

This is a problem for any coverage formula that privileges racially polarized voting and minority population size. At best, such a formula would capture the incentive to discriminate against racial minorities because of their political views. But if targeting a group because of its political views while being “aware”<sup>53</sup> of its race does not transgress the Constitution’s race discrimination norms, then a polarization-based coverage formula would not seem very well-connected to constitutional violations either. There is a solid argument, nicely put by both Judge Alex Kozinski and Justice Thomas, that political discrimination is unconstitutional race discrimination when the discriminator targets a racial group, using race as a proxy for political beliefs.<sup>54</sup> But because there are plausible doctrinal arguments against this position, we remain wary of grounding coverage on political incentives alone.

The doctrinal infirmities of a polarization-based coverage formula would not infect a formula based on what we call “voter discrimination.” By voter discrimination, we mean expressions of preference at the ballot box that would violate the Constitution’s race discrimination norms if voting were a state action. Where large numbers of voters form preferences and make choices using race in a fashion that the Constitution disallows to state actors—e.g.,

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48. *Easley*, 532 U.S. at 258.

49. See, for example, Justice Thomas’s discussion of such evidence in *Easley*, 532 U.S. at 266–67 (Thomas, J., dissenting).

50. Such that plaintiffs can produce an alternative map that better serves the redistricters’ political objectives.

51. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

52. *Easley*, 532 U.S. at 266 (Thomas, J., dissenting) (*italics in original*).

53. “Aware[ness]” and “consciousness” are euphemisms the Supreme Court has used in the racial gerrymandering cases. *See id.* at 254 (quoting earlier cases).

54. *Garza v. Cnty. of L.A.*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J., dissenting) (analogizing political discrimination against a racial group by incumbents who feared that they would be dislodged, to an agreement by Anglo homeowners—who harbor no animus against the minority group—not to sell to minority buyers in order to protect property values).

acting on the basis of negative stereotypes about minorities—there is a “logical”<sup>55</sup> basis for suspecting an elevated risk of unconstitutional state action.

Three independent grounds support this inference. First, as one of us has recently argued, the electorate as a whole performs a “public function” within the meaning of state action doctrine when it puts in office officials who will exercise the coercive power of the state (even though the individual voter is not a state actor).<sup>56</sup> It follows that election outcomes are unconstitutional—though probably not judicially remediable—when determined by racially discriminatory votes.<sup>57</sup> Nothing in the VRA prohibits or could prohibit voting for racially discriminatory reasons,<sup>58</sup> but the downstream effect of unconstitutional election outcomes on minority representation can be mitigated through the preclearance mechanism of Section 5.

Second, if voters discriminate in a constitutionally impermissible way when choosing candidates, it is likely (or at least more likely than would otherwise be the case) that the officials they elect will share their prejudices.<sup>59</sup> If the officials act on such predispositions—canceling early voting, for example, because it is popular with African Americans<sup>60</sup>—they are violating the Constitution’s guarantee of equal protection.

Third, lawmakers who don’t share the voters’ stereotypes will nonetheless face electoral pressure to cater to their constituents’ racial attitudes and attendant policy preferences. It is settled law that state action undertaken in response to private citizens’ racially discriminatory preferences violates the Fourteenth Amendment, even if the state actor does not share or approve of the private preference.<sup>61</sup> Whites with dim views of blacks’ work ethic, intelligence, and trustworthiness, for example, are probably more supportive of laws that

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55. *Shelby Cnty. v. Holder*, No. 12-96, slip op. at 21 (U.S. June 25, 2013).

56. This argument is developed in Elmendorf, *Making Sense of Section 2*, *supra* note 6, at 428–36.

57. Elmendorf, *Making Sense of Section 2*, *supra* note 6, at 428–36.

58. The First Amendment likely protects an individual right to vote for racially discriminatory reasons. *See id.*

59. This is likely because of both “pool effects” (the pool of eligible candidates is drawn from voting-age residents of the jurisdiction), and “selection effects” (voters who discriminate presumably prefer like-minded candidates). We recognize, though, that there is much work still to be done on elected officials’ propensities to discriminate. For a recent, promising effort in this regard, see David Broockman & Daniel M. Butler, *Do Politicians Racially Discriminate Against Constituents? A Field Experiment on State Legislators*, 55 AM. J. POL. SCI. 463 (2011).

60. *See* Michael C. Herron & Daniel A. Smith, *Early Voting in Florida in the Aftermath of House Bill 1355* (Apr. 15, 2013) (unpublished manuscript), available at <http://www.dartmouth.edu/~herron/HerronSmithFloridaEarly2012.pdf> (using statewide data and natural experiments to show that racial minorities were disproportionately burdened by Florida’s cutbacks in early voting).

61. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (holding that “the reality of private biases and the possible injury they might inflict are [not] permissible considerations for removal of an infant child from the custody of its natural mother”).

dampen minority turnout or diminish minority voting power.<sup>62</sup> Who wants a government of the dumb, the lazy, and the dishonest?

Our claim that voter discrimination generates a heightened risk of unconstitutional state action should not be controversial, even among conservatives. Acceptance of our claim is implicit in Chief Justice Roberts's questioning during oral argument in *Shelby County* ("Are citizens in the South more racist than citizens in the North?"<sup>63</sup>), and also in a standard doctrinal move by conservative lower court judges in cases under Section 2 of the VRA (requiring plaintiffs to trace their injury to intentional race discrimination, whether by conventional state actors or by the electorate).<sup>64</sup>

The central task for linking preclearance to voter discrimination is not answering the conceptual question of whether the electorate is a state actor, but rather: (1) identifying forms of voter reliance on race that the Constitution disallows to state actors, (2) measuring that reliance or a good, observable proxy for it, and (3) estimating the prevalence of voter discrimination within discrete geopolitical units, such as states.

The first task is not difficult. Animus and stereotyping are the overarching concerns of equal protection law.<sup>65</sup> Voters discriminate in the constitutional sense if they act on the basis of their loathing of a racial minority, their belief that the minority group is fundamentally inferior, or even (probably) their lesser concern for the welfare of members of the minority group relative to members of their own group.<sup>66</sup>

Voters also discriminate if they stereotype candidates on the basis of race. Equal protection cases often suggest that state actors may not make any inferences about persons based on membership in a protected class, except perhaps in rare instances where the inference serves a compelling state interest

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62. See Parts II and III for data concerning such stereotypes.

63. Transcript of Oral Argument, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96).

64. For summaries of where the circuits stand on this question, see Elmendorf, *Making Sense of Section 2*, *supra* note 6, at 407; Katz et al., *supra* note 34, at 670–72. We have scoured the cases and found not a single instance in which a lower court judge questioned whether a showing of private discrimination by voters should suffice to establish "causation" in a vote dilution case.

65. See generally Cary Franklin, *The Anti-stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 1831 (2010); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

66. The last point—a lesser concern for minority groups as a violation of equal protection—may seem a stretch. But clearly the Equal Protection Clause would be violated if, say, a disability benefits adjudicator, in the exercise of his discretion, were to award lesser benefits to black than to similarly situated white applicants, reflecting his relative lack of care for the well-being of African Americans. So too, a lawmaker would violate equal protection if she voted to fund road paving in white communities but not in minority communities because she personally cared less about the well-being of persons of the minority race. These are biases within the meaning of equal protection law, and if the biases are held privately (rather than by the lawmaker or adjudicator herself), they may not be catered to and given legal effect by state actors per *Palmore v. Sidoti*, 466 U.S. 429 (1984).

and is statistically warranted.<sup>67</sup> The law is particularly concerned with negative stereotypes that may operate to lock members of a historically disadvantaged group into inferior jobs, neighborhoods, or social positions.<sup>68</sup> Not all stereotypes are normatively objectionable, however. As we noted above, the racial gerrymandering cases carve out some room for state actors to infer partisanship or ideology from the race of voters.<sup>69</sup> We see little basis for impugning reliance on race as a voting cue if voters are just making statistically accurate inferences about the candidates' party affiliations or policy preferences.

By contrast, voter stereotyping clearly transgresses equal protection norms if the voter assumes, based on a minority candidate's race, that the candidate is less competent, honest, or hard-working than his white opponent, or more likely to get caught up in sex scandal, etc. We also think that voters would violate equal protection norms if they overgeneralized and made actuarially unwarranted inferences about partisanship, ideology, or policy preferences of the candidate—for example, assuming that the typical African American candidate is much more liberal than the typical African American candidate actually is.<sup>70</sup> Our results do not depend on the latter claim, however. We will focus on evidence concerning negative racial stereotypes that are unquestionably beyond the pale as bases for state action.

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67. See, e.g., *Johnson v. California*, 543 U.S. 499 (2005) (applying strict scrutiny to California's practice of initially segregating inmates by race during a 60-day evaluation period, notwithstanding undisputed record evidence concerning violent prison gangs organized on racial lines); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) ("Even if a measure of truth can be found in some of the gender stereotypes . . . that fact alone cannot support discrimination on the basis of gender in jury selection. We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.").

68. Jack M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2353–54 (1997).

69. See *supra* notes 48–53 and accompanying text; cf. Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 533 (2011) (arguing that race is a useful proxy for whether a voter registered as a Democrat reliably votes for the Democratic candidate).

70. There is some evidence that voters confronted with information about minority candidates that conforms to stigmatic stereotypes respond by perceiving the candidate to be much more liberal than she or he actually is. See, e.g., Adam J. Berinsky et al., *Sex and Race: Are Black Candidates More Likely to be Disadvantaged by Sex Scandals?*, 33 POL. BEHAV. 179 (2011); Adam J. Berinsky & Tali Mendelberg, *The Indirect Effects of Discredited Stereotypes in Judgments of Jewish Leaders*, 49 AM. J. POL. SCI. 845 (2005). Observational data also show that Americans generally perceive African American members of Congress to be more liberal than they actually are as implied by their roll call votes. See Matthew L. Jacobsmeier, *Racial Stereotypes and Perceptions of Representatives' Ideologies in U.S. House Elections* (Oct. 2013) (unpublished manuscript), available at [http://works.bepress.com/matthew\\_jacobsmeier/11/](http://works.bepress.com/matthew_jacobsmeier/11/).



## II.

## ESTIMATING THE GEOGRAPHY OF RACIAL DISCRIMINATION IN VOTING

This section introduces and defends our approach to ranking states and political subdivisions by voter discrimination, which we proxy with a measure of racial stereotyping.

We begin by explaining the methodological challenge of measuring voter discrimination at the individual level. Under the conventions of modern social science, it is nearly impossible to say whether a particular racial attitude or belief (e.g., animus, unequal concern, stereotype) caused a particular political behavior or preference (e.g., voting for Romney over Obama, opposing a path to citizenship for illegal immigrants). Researchers can, however, establish correlations between racial attitudes and political preferences. The law may presume causation when these correlations coincide with widely shared understandings about the expected effects of attitudes on behavior.

It follows that if Congress wishes to base a coverage formula on voter discrimination, Congress may rely on geographic variation in the distribution of negative racial stereotypes or animus within the majority-group electorate, provided that the measure of racial attitudes is positively correlated with voters' political preferences. Alternatively, Congress could rely on geographic variation in voters' disparate treatment of candidates who appear similar in all respects but their race, at least if the disparate treatment is unlikely to have resulted from voters making statistically accurate inferences about candidates' ideology or partisanship from their race.

After setting forth this argument, we dig into two large datasets on racial stereotyping and political preferences. We develop a measure of racial stereotyping based on survey questions about the intelligence, work effort, and trustworthiness of members of different racial groups, and we show that, controlling for other factors, voters who stereotype minorities negatively are less likely to vote for minority candidates. We then introduce parametric and nonparametric techniques for generating state-level and substate estimates of the prevalence of racial stereotyping. Finally, we discuss the art of creating one-dimensional summaries of the distribution of racial attitudes within a geographic unit, summaries which are needed to compare and rank units for VRA coverage. We show that nonlinearities in the relationship between racial stereotyping and political preferences usefully inform the choice among summary measures.

*A. Measuring Voter Discrimination**1. The Conceptual Challenge*

Questions about voter discrimination are, fundamentally, questions about causation. In light of the constitutional doctrine canvassed in Part I, the causal inquiry must proceed on two levels. First, does the race or apparent race of

minority candidates cause majority-group voters to give less support to minorities than to otherwise similar white candidates? (Analogous questions may be asked about voter support for policies sponsored by or beneficial to minorities.) Second, does the racial “treatment effect,” if any, result from voters acting on motives that the Constitution proscribes for state actors, or is it instead due to voters’ actuarially warranted use of race as a signal of ideology or partisanship?

The first question can in principle be answered with experimental or even observational data, but there are some complications. Political scientists and psychologists have in recent years conducted numerous controlled experiments in which voting-age adults are asked to state their preferences between candidates or policies, and racial primes are experimentally manipulated.<sup>71</sup> Voters in the control group may see a white candidate; voters in the treatment group see exactly the same candidate, except he is presented as African American or Latino.

This method can reveal disparate treatment on the basis of race, but it is quite a challenge to create state-level or substate estimates of racial discrimination using experiments. The central difficulty is that standard experimental protocols, with random assignment of subjects to treatment and control conditions, only support causal inferences about the average treatment effect across a group of subjects.<sup>72</sup> To obtain state-specific estimates of treatment effects, one must either run the experiment on large numbers of subjects in each state (which is costly), or else develop a model that permits information about treatment effects on subjects in state *x* to be used to estimate treatment effects on subjects in state *y*.<sup>73</sup>

The other large difficulty is that experimental treatments designed to prime racial considerations may end up priming other things too, making it hard to know whether the treatment effect is really a racial effect. For example, an experiment that presents respondents with an image of Obama (treatment) or a prominent white Democrat (control) may induce a response that has more to do with respondents’ evaluations of Obama’s performance than their sense of his race. A third limitation of most existing studies is that researchers generally randomize few attributes of the scenario presented to respondents except the

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71. For a recent review, see Darren Davis, *Racial Identity and Experimental Methodology*, in CAMBRIDGE HANDBOOK OF EXPERIMENTAL POLITICAL SCIENCE 559 (James N. Druckman et al. eds., 2011).

72. Paul W. Holland, *Statistics and Causal Inference*, 81 J. AM. STAT. ASS’N 945 (1986).

73. One of us is presently working on such a model-building exercise, and the results may in time help to refine the non-experimental estimates of the geography of discrimination in voting presented in this Article. See also Justin Grimmer et al., *Estimating Heterogeneous Treatment Effects and the Effects of Heterogeneous Treatments with Ensemble Methods* (Mar. 30, 2014) (unpublished manuscript), available at <http://www.stanford.edu/~jgrimmer/het.pdf> (exploring model-based approaches to the estimation of treatment effects on subgroups of subjects).

racial prime, which makes it impossible to say whether the racial treatment effect is conditional on some idiosyncratic feature of the experimental scenario.<sup>74</sup>

Disparate treatment can also be studied non-experimentally by comparing support for actual minority candidates with support for putatively similar white candidates. Simon Jackman and Lynn Vavrek have pursued this idea,<sup>75</sup> as have Stephen Ansolabehere, Nathaniel Persily, and Charles Stewart.<sup>76</sup> But to create state-specific estimates of voter discrimination, voters everywhere must be comparing the same candidates. Since no minority politician other than Barack Obama has been a serious contender in recent national elections, these studies have been limited to comparing support for Obama with support for other candidates.<sup>77</sup> This makes it impossible to disentangle race effects from other traits that differentiate Obama from other leading Democrats.

Assuming that one has accumulated evidence of disparate treatment, the next question—from a legal perspective—is whether the disparate treatment was caused by stereotyping, animus, or some other constitutionally disfavored motive.<sup>78</sup> It is exceedingly difficult to answer this definitively.<sup>79</sup> Social scientists learn about causation by randomly assigning experimental treatments to some subjects and a placebo to others, or by looking for real-world events (“natural experiments”) that are akin to controlled experiments.<sup>80</sup> But racial beliefs cannot be randomly assigned to research subjects, and events in the world that might induce the development of a racial attitude in particular subjects probably induce many other changes as well, many of which go

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74. For a recent and promising effort to solve this problem, see Jens Hainmueller et al., *Causal Inference in Conjoint Analysis: Understanding Multidimensional Choices via Stated Preference Experiments*, 22 POL. ANALYSIS 1 (2014).

75. Simon Jackman & Lynn Vavrek, *How Does Obama Match-Up? Counterfactuals & The Role of Obama’s Race in 2008* (Aug. 31, 2011) (unpublished manuscript), available at <http://jackman.stanford.edu/papers/index.php> (modeling likely vote share of different actual or potential Democratic candidates—including Obama—against McCain).

76. Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1424–35 (2010) (comparing different structure of support for Obama in 2008 and support for Kerry in 2004, and contrasting support for Obama versus other Democratic candidates in the primary election).

77. This kind of analysis requires a national survey about candidate preferences in which at least one of the candidates is a racial minority. Obama is the only minority candidate to have been nominated for President.

78. There is a plausible case that disparate treatment regardless of motive is unconstitutional unless necessary to serve a compelling state interest, but as noted above this position is in tension with Supreme Court cases that seem to allow some disparate treatment for “political” reasons. See *supra* notes 46–54 and accompanying text.

79. For an accessible introduction to the problem from leading political scientists, see Donald P. Green et al., *Enough Already About “Black Box” Experiments: Studying Mediation is More Difficult Than Most Scholars Suppose*, 628 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 200 (2010).

80. See generally JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, *MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST’S COMPANION* (2009); D. James Greiner, *Causal Inference in Civil Rights Litigation*, 122 HARV. L. REV. 553 (2008).

unmeasured or even unrecognized by the analyst.<sup>81</sup> It is easy to test for correlations between racial attitudes and political behavior, but nearly impossible to determine whether the attitude caused the behavior.

This point would be devastating to the project of grounding Section 5 coverage on voter discrimination if the law's standards for causal inference tracked those of preeminent social science and statistics journals. But law is a practical endeavor. Just as adjudicative fact-finders bring their background understandings of human motivation and behavior to bear when they decide whether a witness is telling the truth, or whether a defendant acted with criminal intent, so too may Congress rely on conventional understandings about the effects of racial attitudes on behavior when interpreting correlational evidence. Racial stereotyping would not be condemned if it were not thought to affect behavior.

To put the point simply: Congress will have made a reasonable, good faith effort to tie Section 5's coverage to evidence of voter discrimination if Congress relies on studies that (1) show geographic variation in disparate treatment of minority candidates by white voters, and (2) establish that the negative effect of minority candidates' race on majority-voter support is larger among voters who disparagingly or inaccurately stereotype the racial minority, express animus toward the minority, or otherwise demonstrate less concern about the welfare of minority citizens. The law can demand no more.

It would also be reasonable for Congress to begin with evidence concerning geographic variation in citizens' racial attitudes, and then look to see whether the attitude correlates with political preferences. If the attitude or belief is one that state actors may not rely upon, and if it correlates with political behavior or preferences in ways that are "likely" to be causal—given background societal understandings about the effects of racial attitudes on behavior—then Congress could treat the attitude as a plausible proxy for discriminatory voting. Congress could then base Section 5 coverage on the regional variation in the proportion of citizens who subscribe to the attitude, as opposed to geographic variation in the effect of candidate race on vote choice. This is the approach we will pursue in the balance of this Article.

We have adopted this approach not because we think it is conceptually superior to working with evidence of candidate "race effects" on voter support, as documented through survey, field, or natural experiments, but because it is practicable. In the last few years, huge national surveys have been conducted that ask voting-age Americans about their racial attitudes. The surveys also ask about political preferences. As we explain below, these data make it possible to

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81. Cf. Green et al., *supra* note 79, at 204 ("[I]t is seldom easy to design an experiment that manipulates only *M* [the hypothesized mediator of an experimental treatment] and not some other *M*' that might also mediate the effect of *X*").

estimate the geography of racial attitudes at a pretty fine scale, and to establish the requisite correlations between racial stereotypes and political preferences.

## 2. *Choosing the Measure of Racial Attitudes*

Political psychologists have devoted enormous energy over the last several decades to the measurement of racial prejudice. There is no disciplinary consensus about the best measure. Some researchers rely on survey questions designed to tap what is now known as “old-fashioned racism.”<sup>82</sup> Hallmarks include opposing intermarriage, and believing that interracial socioeconomic disparities are due to underlying genetic differences.<sup>83</sup> Researchers have also sought to measure stereotyping, asking respondents whether they think persons of a given group are hardworking or lazy, trustworthy or untrustworthy, and intelligent or unintelligent.<sup>84</sup>

Other researchers prefer metrics of what they call “racial resentment” or “symbolic racism.”<sup>85</sup> These scales are constructed from questions about whether the respondent perceives racial discrimination to be pervasive and severe; whether she believes that blacks would close the socioeconomic gap if only they worked harder; whether she thinks that blacks have gotten less than they deserve, and, conversely, whether she agrees that blacks have been too demanding in their push for civil rights.<sup>86</sup>

Still others scholars defend (or attack) new-fangled measures of “implicit bias,” derived from subtle tests of the reaction times of subjects who have been presented with racial primes so fleeting that they never enter the respondent’s consciousness.<sup>87</sup>

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82. HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (rev. ed. 1997).

83. The preeminent exponents of continued (and refined) use of old-fashioned racism measures today are Stanley Feldman and Leonie Huddy. See, e.g., Leonie Huddy & Stanley Feldman, *On Assessing the Political Effects of Racial Prejudice*, 12 ANN. REV. POL. SCI. 423 (2009) [hereinafter Huddy & Feldman, *Assessing Racial Prejudice*]; Stanley Feldman & Leonie Huddy, *The Structure of White Racial Attitudes* (APSA 2010 Annual Meeting Paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1643879](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1643879).

84. For a review of the racial stereotyping literature, with attention to political effects, see Huddy & Feldman, *Assessing Racial Prejudice*, *supra* note 83, at 429–30.

85. DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* (1996); Donald R. Kinder & David O. Sears, *Prejudice and Politics: Symbolic Racism Versus Racial Threats to the Good Life*, 40 J. OF PERSONALITY & SOC. PSYCHOL. 414 (1981); Christopher Tarman & David O. Sears, *The Conceptualization and Measurement of Symbolic Racism*, 67 J. POL. 731 (2005). For reviews of the literature, see David O. Sears & P.J. Henry, *Over Thirty Years Later: A Contemporary Look at Symbolic Racism*, in *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 95 (Mark P. Zanna ed., 2005); Huddy & Feldman, *Assessing Racial Prejudice*, *supra* note 83, at 429–30.

86. For the exact question wording, see Christopher Tarman & David O. Sears, *The Conceptualization and Measurement of Symbolic Racism*, 67 J. POL. 731, 738 (2005).

87. See generally Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297 (2003).

For VRA purposes, the choice among these measures is straightforward. Racial stereotyping and old-fashioned racism are adequate to the task, assuming that the necessary correlation with political preferences can be established. But neither racial resentment nor implicit bias presently suffice. The fatal weakness of racial resentment is that state action is not rendered unconstitutional if motivated by the belief that racism is no longer pervasive, that blacks have not gotten less than they deserve, or that blacks have been too demanding in their push for civil rights. Whether or not racial resentment correlates with racism,<sup>88</sup> the particular beliefs that the racial resentment questions tap are not impermissible bases for state action.

Implicit bias presents a more difficult case. If reaction-time tests capture differential sympathy or concern for members of different racial groups, then perhaps they could serve as the attitudinal predicate for a voter-discrimination coverage formula—if the implicit bias measure can be connected to political preferences. One study found that anti-black implicit bias was correlated with voter abstention in the 2008 presidential race.<sup>89</sup> But data from the gold-standard survey of Americans' political beliefs show essentially no relationship between implicit racial bias and numerous measures of political preferences.<sup>90</sup> It would be premature, at the very least, to base Section 5 coverage on implicit racial bias.

### 3. *Our Measure, Explicit Stereotyping—Validated*

The geography of discrimination results reported in this Article are based on explicit stereotyping questions that were included in the online module of the 2008 National Annenberg Election Survey (NAES),<sup>91</sup> and an online survey administered in the same year by the Cooperative Campaign Analysis Project (CCAP).<sup>92</sup> We use these data because the sample sizes are very large, and because the questions get at motives that the Constitution proscribes for state actors.<sup>93</sup>

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88. For an introduction to this debate, see Huddy & Feldman, *Assessing Racial Prejudice*, *supra* note 83.

89. B. Keith Payne et al., *Implicit and Explicit Prejudice in the 2008 American Presidential Election*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 367, 370 (2010).

90. Donald R. Kinder & Timothy J. Ryan, *Prejudice and Politics Re-Examined: The Political Significance of Implicit Racial Bias* 19 (APSA 2012 Annual Meeting Paper), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2105240](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2105240) (explaining that “the weak correlation between implicit and explicit prejudice means that the effect of implicit prejudice mediated by explicit prejudice—the indirect effect of implicit prejudice—is necessarily tiny”).

91. NAES 08 *National Annenberg Election Survey*, THE ANNENBERG PUBLIC POLICY CENTER, <https://services.annenbergpublicpolicycenter.org/naes08/online> (last visited June 18, 2014).

92. SIMON JACKMAN & LYNN VAVRECK, COOPERATIVE CAMPAIGN ANALYSIS PROJECT: EDWARDS' SUPPORT BREAKS FOR OBAMA (2008), *available at* <http://jackman.stanford.edu/CCAP2008/ccapEDWARDS.pdf>.

93. There is no similar large-N survey with questions about old-fashioned racism.

The 2008 NAES online panel comprised “a nationally representative random sample of 28,985 respondents.”<sup>94</sup> Participants were interviewed in several waves before and after primaries and the general election, with questions in each wave tailored to contemporaneous events. Similarly, the opt-in 2008 CCAP online survey was a nationally representative multi-wave panel study.<sup>95</sup> We rely on the 20,000 responses to the CCAP “common content” questions.<sup>96</sup>

NAES respondents were asked to rate the work ethic, trustworthiness, and intelligence of members of their own ethnic group “in general” using a slider.<sup>97</sup> The scales ranged from “extremely hardworking” to “extremely lazy,” “extremely intelligent” to “extremely unintelligent,” and “extremely trustworthy” to “extremely untrustworthy.” Responses were coded using a 100-point scale. Subsequently, the survey asked participants to rate blacks “in general” for the same traits in the same way. These questions have been asked for a number of years on the General Social Survey and the American National Election Survey, and have been studied extensively.<sup>98</sup> They have “long been considered a valid measure of racial prejudice,” even by vehement critics of the racial resentment scales.<sup>99</sup>

The CCAP posed similar questions about the intelligence and work effort of “Whites,” “African Americans,” “Hispanic Americans,” and “Asian Americans.”<sup>100</sup> The CCAP asked respondents to rate members of these groups on a 7-point scale (“where ‘1’ means you think almost all of the people in that group are ‘lazy’; and 7 means you think almost everyone in the group is

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94. See *NAES 08 National Annenberg Election Survey*, THE ANNENBERG PUBLIC POLICY CENTER, <https://services.annenbergpublicpolicycenter.org/naes08/online> (last visited June 18, 2014).

95. The CCAP was administered in six waves between December 2007 and November 2008. The NAES was administered in five waves between October 2007 and January 2009. We apply survey weights provided by the Principal Investigators of the CCAP to adjust for the selection bias of an opt-in survey. On the representativeness of such opt-in samples, see Stephen Ansolabehere & Brian F. Shaffer, *Does Survey Mode Still Matter? Findings from a 2010 Multi-Mode Comparison*, 22 POL. ANALYSIS \_\_\_\_ (forthcoming 2014), available at <http://pan.oxfordjournals.org/content/early/2014/05/28/pan.mpt025.short>; Douglas Rivers & Delia Bailey, *Inference From Matched Samples in the 2008 U.S. National Elections*, 2009 PROCEEDINGS OF THE JOINT STATISTICAL MEETINGS 627 (2009).

96. Our analysis relies on the subset of survey respondents that answered all of the available racial stereotyping questions. For a discussion of cooperative survey projects and the mechanics of administering a “common content” see Lynn Vavreck & Douglas Rivers, *The 2006 Cooperative Congressional Election Survey*, 18 J. ELECTIONS, PUB. OPINION & PARTIES 355 (2008).

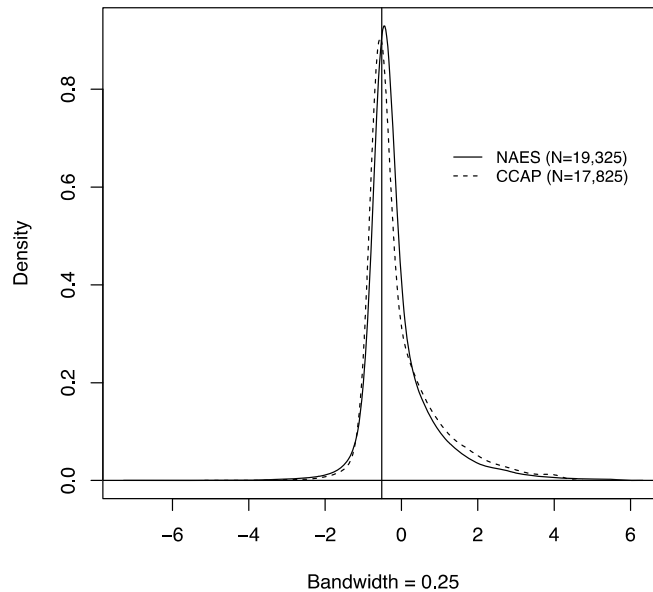
97. For exact question wording, see variables SB01, SB02, SB03, SB04, SB05, and SB06 in the on-line catalogue for the 2008 National Annenberg Election Survey. *NAES 08 National Annenberg Election Survey: Variable Catalog*, THE ANNENBERG PUBLIC POLICY CENTER, [https://services.annenbergpublicpolicycenter.org/naes08/online/variables/index.html#subject\\_\\_SB](https://services.annenbergpublicpolicycenter.org/naes08/online/variables/index.html#subject__SB) (last visited June 18, 2014).

98. For a review, see Huddy & Feldman, *supra* note 83, at 429–30.

99. Edward G. Carmines et al., *On the Meaning, Measurement, and Implications of Racial Resentment*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 102 (2011).

100. SIMON JACKMAN & LYNN VAVRECK, COOPERATIVE CAMPAIGN ANALYSIS PROJECT: RELEASE 2.1 (2010) (on file with author) [hereinafter “CCAP CODEBOOK”] (questions SCAP718 and SCAP719).

‘hardworking’”), and, unlike NAES, CCAP used a single question to elicit ratings of several different racial groups. However, as Figure 1 shows, the empirical distribution of normalized racial attitudes per the CCAP survey is quite similar to the distribution found by NAES.<sup>101</sup> In light of Figure 1 and for succinctness in reporting results, we pooled the CCAP and NAES data.<sup>102</sup> (Results using un-pooled data are reported in Appendix A online.<sup>103</sup>)



**Figure 1.** Estimated density of anti-black stereotypes among non-black respondents to the 2008 National Annenberg Election Survey<sup>104</sup> (N=19,325) and the 2008 Cooperative Campaign Analysis Project<sup>105</sup> (N=17,825) surveys. For ease of comparison, the measures have been normalized so that the mean value is 0 and the standard deviation is 1 for each distribution. The vertical line represents the median value of the pooled distribution, which is less than zero due to the positive skew of responses in both datasets. Larger (i.e. positive) numbers represent more negative stereotyping.

Responses to questions about racial stereotypes may be distorted to some extent by social desirability biases (a reluctance to acknowledge one’s

101. See Huddy & Feldman, *supra* note 83, at 429 (“Survey respondents often complain about the blatant nature of racial stereotype items, and a sizeable number simply rate blacks at the scale midpoint to avoid any appearance of racial bias.”).

102. We applied survey weights to both datasets before pooling.

103. See Douglas M. Spencer, *The Geography of Voter Discrimination*, DOUGLAS M. SPENCER, [http://www.dougspencer.org/research/geography\\_of\\_discrimination.html](http://www.dougspencer.org/research/geography_of_discrimination.html) (last visited June 17, 2014). Unpooled results are very similar to the results presented below.

104. See *supra* note 91.

105. See *supra* note 92.



societally disfavored beliefs). The density of responses right at the median—which, as Figure 2 shows, corresponds to an equal rating of the minority group and one’s own group—is quite suggestive of social desirability bias. But this problem should not be overstated. The surveys were conducted online, and online surveys are less susceptible to social desirability biases than phone and in-person surveys.<sup>106</sup> The privacy afforded by an anonymous online survey is analogous to the privacy of the voting booth, and it is plausible that some “contamination” of survey answers by social desirability biases in this context actually results in a better measure of politically relevant stereotyping than would uncontaminated survey responses. People who try to conform to social norms against race discrimination when answering anonymous online surveys about their political preferences may feel a similar pressure when voting.

We aggregated the stereotyping questions into a single measure of stereotyping (“overall stereotyping”) for each respondent, as follows:

$$S_i = \sum R_{ij}^M - R_{ij}^O$$

In this formula  $R$  is a stereotyping rating,  $i$  indexes the respondent,  $j$  indexes group attributes (work effort, intelligence, or trustworthiness; higher scores mean lazy, unintelligent, or untrustworthy), and  $O$  and  $M$  refer, respectively, to the respondent’s own racial group and to the minority group in question (blacks, Latinos, or Asian Americans).  $S_i$  is positive if, on average, the respondent views her own racial group as better than the minority group on these criteria; it is negative if the respondent deems the minority better than her group.

By aggregating across several attributes, we reduce the impact of measurement error on our prejudice variable.<sup>107</sup> By using the difference between the respondent’s evaluation of his own group and his evaluation of the target group, rather than the absolute value of the respondent’s evaluation of the target, we limit the impact of interpersonal differences in interpretation of the rating scale. It would be misleading to characterize respondent A as more prejudiced than respondent B solely on the basis of their respective placements of blacks on the scale, if respondent A—who by assumption rated blacks worse than did respondent B—gave similarly low marks to his own group as well.<sup>108</sup>

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106. Frauke Kreuter et al., *Social Desirability Bias in CATI, IVR, and Web Surveys: The Effects of Mode and Question Sensitivity*, 72 PUB. OPINION Q. 847, 858 (2008).

107. On the importance of aggregation for overcoming measurement error in surveys of public opinion, see Stephen Ansolabehere et al., *The Strength of Issues: Using Multiple Measures to Gauge Preference Stability, Ideological Constraint, and Issue Voting*, 102 AM. POL. SCI. REV. 215, 218 (2008) (showing that citizen preferences measured with a single survey item appear very unstable, but that almost any method of aggregating answers to several related survey questions reveals that citizens have much more stable opinions than political scientists had long thought).

108. The survey did not include evaluations of racial groups other than the respondent’s own group and blacks. Therefore, this Article analyzes the difference between own-group and black evaluations in our formula, rather than the difference between the respondent’s evaluation of blacks and her average evaluation of all non-black groups.

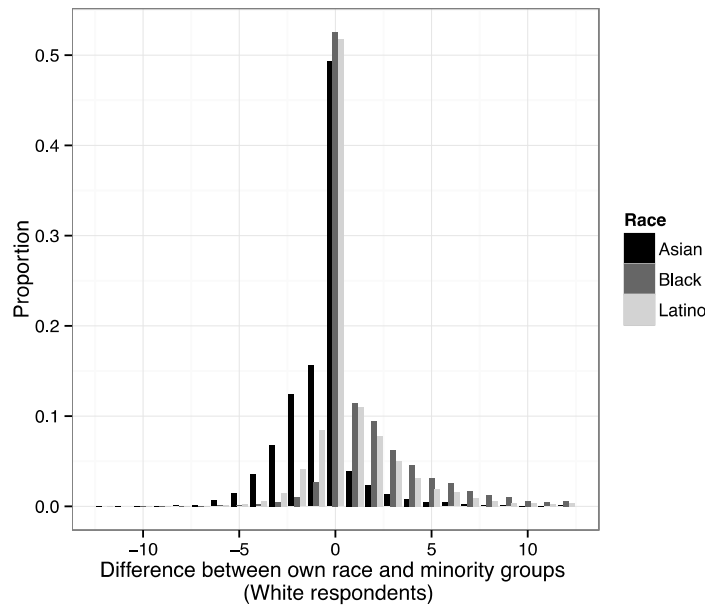
Finally, we normalized the CCAP- and NAES-based prejudice measures, to make them comparable to one another (see Figure 1).

The CCAP data enable a preliminary comparison of stereotypes about Asian Americans, Latinos, and blacks. As Figure 2 shows (next page), the modal reported stereotype for all three groups is zero (non-normalized data), which may reflect social desirability biases. The distribution of stereotypes around the mode varies with the group, however. For stereotypes of blacks and Latinos, the distributions are quite similar, with many more whites expressing adverse stereotypes (recall that favorable stereotypes of minorities correspond to negative numbers on the stereotype scale). White stereotyping of Asian Americans presents a totally different picture, with the number of whites reporting favorable stereotypes greatly exceeding the number reporting bad ones.

A measure of prejudice designed for VRA applications ought to satisfy tests of predictive as well as face validity. We explained earlier that the impossibility of randomizing racial attitudes and beliefs means that one cannot make definitive causal claims about the effects of racial stereotypes on political behavior. But if there is not even a correlation between racial stereotyping and lack of support for minority candidates or opposition to minority-preferred policies, it would seem most unlikely that majority-group stereotyping of the minority deprives the minority community of an “equal opportunity to participate in the political process and elect candidates of its choice.”<sup>109</sup>

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109. See 42 U.S.C. 1973(b) (2006).



**Figure 2.** Whites' stereotypes of minorities. The histogram represents the difference between whites' stereotypes of their own race and stereotypes of Asian Americans, blacks, and Latinos. The scale runs from negative fourteen to fourteen and captures the sum of respondents' placement of each race on a seven-point scale for perceived intelligence and work ethic. *Data: White respondents to the 2008 CCAP*<sup>110</sup> ( $N \approx 13,000$ ).

One can imagine a world in which many white citizens believe (1) that blacks in general are less trustworthy, less intelligent, and less hardworking than whites, but also (2) that basic fairness demands that each black candidate be evaluated purely on his or her own merits, without regard to negative qualities that the white citizen thinks are generally characteristic of the black population. If white citizens actually adhere to this fairness norm, their negative stereotypes of blacks might prove inconsequential politically.<sup>111</sup>

The large body of literature on prejudice and political behavior suggests, however, that whites who derogate blacks as a group form candidate, policy, and partisan preferences that reflect their racial beliefs.<sup>112</sup> The balance of this section confirms these findings for the case of anti-black stereotyping.

110. See *supra* note 92.

111. However, it is hard to even imagine a world in which such negative views of blacks do not shape white preferences with respect to public policies that particularly concern the black community.

112. See, e.g., Huddy & Feldman, *Assessing Racial Prejudice*, *supra* note 83, at 429–30 (summarizing results of several other studies); Mark Peffley & Jon Hurwitz, *The Racial Components of "Race-Neutral" Crime Policy Attitudes*, 23 POL. PSYCHOL. 59 (2002) (showing that whites who stereotype blacks as lazy and violent support much harsher criminal policies, and that these whites' negative evaluations of particular black prisoners—but not otherwise identical white prisoners—are

Consider first the relationship between anti-black stereotyping and vote choice in the 2008 general election, reported in Table 1 (p. 1152). The coefficients represent the effect on the outcome variable (e.g., probability of voting for Obama) when the independent variable shifts from its mean value to one standard deviation above the mean, assuming a linear relationship. Model (A) shows that our measure of anti-black stereotyping is strongly and negatively related to voting for Obama, controlling for partisanship, ideology, region, and other factors that correlate with political preferences.<sup>113</sup> A voter who is one standard deviation more prejudiced than the national average is, other things equal, about three percentage points less likely to support Obama than an otherwise-similar voter with the mean level of anti-black prejudice. These results almost certainly understate the effect of anti-black stereotyping on support for Obama, since we control for partisanship and ideology, which to some extent are intermediate outcomes of racial attitudes.<sup>114</sup> There is considerable evidence that racial attitudes drove late twentieth-century shifts in party identification,<sup>115</sup> and that Obama's ascension as the Democratic Party's

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translated into greater support for punitive criminal laws); Mark Peffley et al., *Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime*, 41 AM. J. POL. SCI. 30 (1997) (finding, with survey experiments, that whites who negatively stereotype blacks judge individual blacks more harshly in scenarios involving welfare and crime); Jackman & Vavrek, *supra* note 75 (modeling thirty-three head-to-head actual and hypothetical matchups of presidential candidates, and showing that negative stereotyping of blacks has a singularly large correlation with preferences in head-to-heads involving Obama); Michael Tesler, *The Return of Old Fashioned Racism to White Americans' Partisan Preferences in the Early Obama Era* (unpublished manuscript), available at [http://mst.michaeltesler.com/uploads/jop\\_rr\\_full.pdf](http://mst.michaeltesler.com/uploads/jop_rr_full.pdf) (showing that old-fashioned racism has shaped party identification and voting in the Obama Era).

113. In models not presented (available upon request), we find that each of the three racial stereotypes, considered individually, is also strongly and negatively related to voting for Obama. No single stereotype does all the work. This is true for all models presented in the Article. *See also* Spencer Piston, *How Explicit Racial Prejudice Hurt Obama in the 2008 Election*, 32 POL. BEHAV. 431 (2010) (finding similar results with same prejudice questions, but using ANES rather than NAES data).

114. In our dataset, Republicans were more prejudiced than Democrats overall and anti-black prejudice increases linearly with conservativeness. On average, the average Republican stereotype was 3% more negative than the national average whereas the average Democratic stereotype was 3% more positive than the national average. In relative terms, where positive scores mean worse than the national average and negative scores mean better than the national average, the (normalized) score among Republicans is 0.14 and among Democrats is -0.17. Broken down by ideology, the relative, normalized prejudice scores are:

Extremely <u>liberal</u>	<u>Liberal</u>	Slightly <u>liberal</u>	<u>Moderate</u>	Slightly <u>conservative</u>	<u>Conservative</u>	Extremely <u>conservative</u>
-0.394	-0.246	-0.234	0.059	0.089	0.118	0.236

115. *See* Nicholas A. Valentino & David O. Sears, *Old Times There Are Not Forgotten: Race and Partisan Realignment in the Contemporary South*, 49 AM. J. POL. SCI. 672 (2005).

standard-bearer led prejudiced whites to become more Republican in their party identification.<sup>116</sup>

Support for Obama among Democratic primary voters in 2008 is also strongly correlated with racial stereotyping, as shown in Model (B). Again, Obama did worse among non-blacks who negatively stereotype blacks, controlling for ideology, income, region, and other factors.<sup>117</sup>

The NAES survey asked some respondents whom they had supported in the 2004 general election.<sup>118</sup> We created a dummy variable that captures vote switching between 2004 and 2008.<sup>119</sup> The dependent variable in Model (C) in Table 1 is coded as “1” if the respondent voted for Kerry in 2004 but not for Obama in 2008. There is a positive, statistically significant association between anti-black stereotyping and defection. That is, among 2004 Kerry voters, the highly prejudiced were the most likely to defect to the Republican candidate in 2008. Because Obama induced Republican identification among prejudiced voters,<sup>120</sup> and because we control for partisanship, our results probably understate the effect of anti-black stereotyping on Kerry-voter defections.

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116. See Michael Tesler, *The Return of Old Fashioned Racism to White Americans' Partisan Preferences in the Early Obama Era* (unpublished manuscript), available at [http://mst.michaeltesler.com/uploads/jop\\_rr\\_full.pdf](http://mst.michaeltesler.com/uploads/jop_rr_full.pdf).

117. In the primary, though, the measure of party identification no longer explains non-support for Obama, and women were less likely than men to support Obama in the primary.

118. See *NAES 08 National Annenberg Election Survey*, THE ANNENBERG PUBLIC POLICY CENTER, <https://services.annenbergpublicpolicycenter.org/naes08/online> (last visited June 18, 2014).

119. A “dummy variable” is a variable that can have only two values.

120. See Tesler, *supra* note 116.

	(A) (Obama) (‘08 gen.)	(B) (Obama) (‘08 prim.)	(C) (Kerry/ McCain)
Negative stereotype	-0.03*** (0.00)	-0.06*** (0.01)	0.06*** (0.00)
Age	-0.01*** (0.00)	-0.04*** (0.01)	0.00 (0.00)
Conservativeness	-0.07*** (0.00)	-0.02*** (0.00)	0.03*** (0.00)
Party ID (7 point)	-0.13*** (0.00)	0.00 (0.00)	0.06*** (0.00)
Female	-0.00 (0.00)	-0.04*** (0.01)	0.01** (0.00)
R is Hispanic	0.04*** (0.01)	-0.01 (0.02)	-0.03** (0.01)
R is “other” race	0.12*** (0.03)	0.15* (0.06)	-0.09* (0.04)
Education	0.01*** (0.00)	0.05*** (0.01)	-0.01*** (0.00)
Income	0.00 (0.00)	0.01* (0.01)	-0.00 (0.00)
Midwest	0.00 (0.01)	0.04** (0.01)	-0.01 (0.01)
South	-0.03*** (0.01)	-0.05*** (0.01)	0.02* (0.01)
West	-0.01 (0.01)	0.08*** (0.01)	-0.01 (0.01)
(Intercept)	1.06*** (0.01)	0.56*** (0.03)	-0.03* (0.02)
<i>N</i>	21033	10163	7619
<i>R</i> <sup>2</sup>	0.66	0.06	0.21
adj. <i>R</i> <sup>2</sup>	0.66	0.06	0.21

Standard errors in parentheses

† significant at  $p < .10$ ; \* $p < .05$ ; \*\* $p < .01$ ; \*\*\* $p < .001$

**Table 1.** Linear probability models predicting votes for or against Obama. All non-dichotomous independent variables (prejudice, age, education, and income) have been normalized to facilitate interpretation. Model (A) predicts the probability of voting for Obama in the 2008 general election. Model (B) predicts the probability of voting for Obama in the 2008 primary election and only includes primary voters. Model (C) predicts the probability that a person who voted for John Kerry in 2004 defected and did not vote for Obama in 2008. The model only includes people who voted for Kerry in 2004. *Data: All non-black respondents in the 2008 NAES*<sup>121</sup> *and 2008 CCAP.*<sup>122</sup>

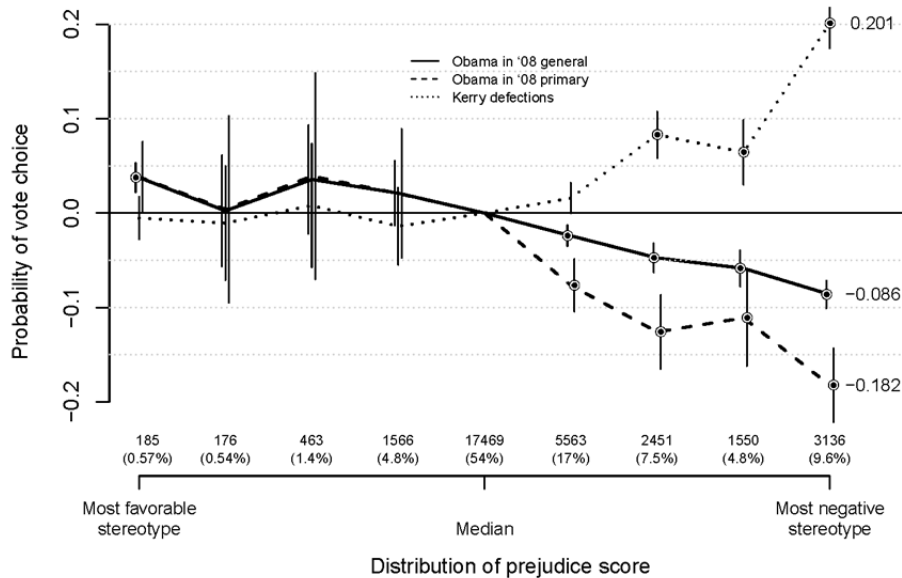
121. See *supra* note 91.

The models in Table 1 presuppose a linear relationship between racial attitudes and political behavior. But the relationship could be more complex. Voters who subscribe to positive stereotypes of racial minorities may be less affected by these views than voters who express negative stereotypes. To dig into this question, we reran the models in Table 1 after sorting respondents into nine groups based on their stereotyping score. Each category of respondents represents one-half of a standard deviation of the normalized distribution of stereotyping scores. In the new model, we replace the stereotype variable with a set of indicator variables for these respondent categories. The omitted category, captured by the constant term in the model, consists of respondents within one-quarter standard deviation of the median. Respondents in the “most negative stereotype” and “most favorable stereotype” categories are at least 2.25 standard deviations away from the median. This setup provides a transparent picture of how respondents at a given (approximate) distance from the median racial attitude differ in their political preferences from respondents at the median, because the model embeds no functional-form assumption about the relationship between racial stereotyping and preferences over minority candidates.

The results are striking. As Figure 3 shows, there is little if any correlation between racial stereotypes and political preferences for respondents who are less prejudiced than the median—that is, respondents who stereotype blacks positively relative to their own group. The effects reported in Table 1 are clearly driven by respondents who harbor negative stereotypes and, in particular, those whose negative stereotypes are extreme. Respondents who expressed the worst views of blacks (roughly 10% of all respondents) were nearly 20% more likely than respondents at the median to vote for McCain in 2008 after voting for Kerry in 2004, 8% less likely to vote for Obama in the general election, and 17% less likely to vote for Obama in the 2008 primary. These models do not prove that anti-black stereotyping *caused* Obama to lose votes—they show correlations only. But given the deep epistemic barriers to making inferences about the causal effect of racial stereotypes on political preferences, correlational evidence is for now the most that a practically minded court or policy maker can reasonably hope for.

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122. See *supra* note 92.



**Figure 3.** Probability of vote choice conditional on varying levels of racial stereotyping (intervals of 0.5 standard deviation). Probabilities are estimated using linear probability models that control for ideology, party identification, age, sex, race, education, income, and region (see Table 1). Reported probabilities are relative to the national median. Vertical bars represent 95% confidence intervals and points represent values that are statistically significantly different from zero. Data: 2008 NAES<sup>123</sup> and 2008 CCAP.<sup>124</sup>

What about anti-Latino and anti-Asian American stereotyping? We obviously cannot establish the predictive validity of our prejudice measures using support for Latino or Asian American candidates for president.<sup>125</sup> But CCAP did ask respondents whether they agreed more with the statement, “Illegal immigrants should be arrested and deported,” or “Illegal immigrants now living in the U.S. should be allowed to become citizens if they pay a fine.”<sup>126</sup> In Figure 4, we plot the coefficients from a linear probability model predicting agreement with the position that illegal immigrants should be arrested and deported. The outcome variable is coded “1” if a respondent

123. See *supra* note 91.

124. See *supra* note 92.

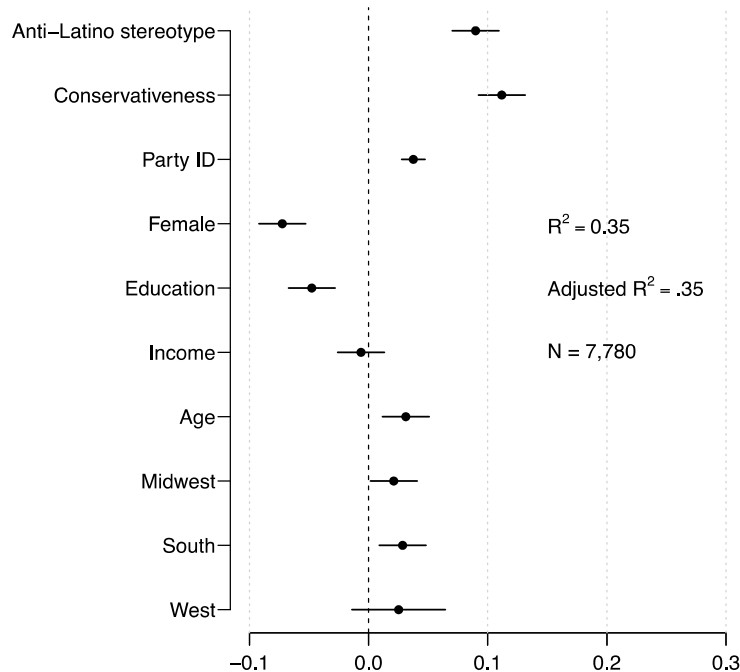
125. In 2008, there were no Latino or Asian American candidates among the major party nominees or among the front-runners for the major party nominations.

126. CCAP CODEBOOK, *supra* note 100 (question JCAP16).



agrees that illegal immigrants should be arrested and deported and “0” otherwise. We observe that respondents who are one standard deviation more prejudiced against Latinos than the national average are also, other things equal, about nine percentage points more likely to agree that illegal immigrants should be arrested and deported instead of fined and granted citizenship. We ran the same model after substituting anti-Asian American stereotyping for anti-Latino stereotyping, and found only a small, statistically insignificant correlation between Asian American stereotypes and immigration policy preferences.

We remain reluctant to put much weight on the evidence concerning Latino and Asian American stereotyping. The CCAP did not ask about trustworthiness stereotypes with respect to these groups—and trustworthiness is the stereotype we expect to be the most pervasive and harmful with respect to immigrant populations.



**Figure 4.** Coefficients from a linear probability model predicting agreement with the statement “illegal immigrants should be arrested and deported.” All non-dichotomous independent variables (stereotype, age, education, and income) have been normalized to facilitate interpretation. *Data: All non-Latino respondents in the 2008 CCAP.*<sup>127</sup>

127. *Id.*

Also, we lack a candidate-election validation of the political relevance of the Latino and Asian American stereotype measures, and the VRA today is centrally concerned with barriers to the election of minority candidates.<sup>128</sup> We note in passing, however, that the data on stereotyping of Asian Americans do raise the question of whether Asian American should receive the same VRA protections as blacks and Latinos. Per the CCAP, Asian Americans are stereotyped more favorably than whites on balance, and it may well be the case that Asian American candidates generally benefit from voters' stereotypes.<sup>129</sup>

*B. From Individual Survey Responses to Jurisdiction-Level Ratings*

After constructing an individual-level measure of prejudice, the next step is to estimate overall levels of prejudice within discrete geopolitical units, such as states, counties, or legislative districts. This presents two challenges: estimating the views of voting-age citizens within each unit, and aggregating those views into a summary measure for each jurisdiction.

*1. Estimation: Disaggregation vs. MRP*

Opinion within subnational political jurisdictions can be estimated by disaggregation, or multilevel regression with poststratification (MRP).<sup>130</sup> Disaggregation treats the sample of respondents within a geographic unit as representative of the population of the unit. This is a fair assumption if every member of the population within the unit had an equal probability of being surveyed, and if the number of respondents within the unit is reasonably large. The first condition is never exactly satisfied, because some people are more

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128. Cf. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (criticizing Congress for using a coverage formula based on voter registration and turnout, given that much of the evidence in the congressional record concerned vote dilution).

129. Cf. Cheryl Boudreau et al., *Racial or Spatial Voting? The Effects of Ethnic Group Endorsements in Low-Information Elections*, Paper presented at the Conference of the Midwest Political Science Association (April 2013) (finding that white voters in San Francisco elections respond favorably to Chinese interest-group endorsements, and negatively to Latino interest-group endorsements). Of course, it may be the case that Asian American candidates are disadvantaged by racial stereotypes in some parts of the country, and/or that the CCAP stereotyping questions fail to capture certain pernicious stereotypes about Asian Americans (e.g., disloyalty).

130. See, e.g., ANDREW GELMAN & JENNIFER HILL, *DATA ANALYSIS USING REGRESSION AND MULTILEVEL/HIERARCHICAL MODELS* (2007); Yair Ghitza & Andrew Gelman, *Deep Interactions with MRP: Election Turnout and Voting Patterns Among Small Electoral Subgroups*, 57 AM J. POL. SCI. 762 (2013); Jeffrey R. Lax & Justin H. Phillips, *How Should We Estimate Public Opinion in the States?*, 53 AM. J. POL. SCI. 107 (2009) [hereinafter Lax & Phillips, *How Should We Estimate Public Opinion?*]; Jeffrey R. Lax & Justin H. Phillips, *Gay Rights in the States: Public Opinion and Policy Responsiveness*, 103 AM. POL. SCI. REV. 367 (2009); Juliana Pacheco, *Using National Surveys to Measure Dynamic U.S. State Public Opinion: A Guideline for Scholars and an Application*, 11 ST. POL. & POL'Y Q. 415 (2011); David K. Park et al., *Bayesian Multilevel Estimation with Poststratification: State-Level Estimates from National Polls*, 12 POL. ANALYSIS 375 (2004).

likely than others to accept invitations to answer surveys.<sup>131</sup> Public opinion researchers can nonetheless achieve high levels of predictive validity by weighting imperfectly representative samples, so that the demographics of the survey sample (after weighting) resemble Census Bureau estimates of the demographics of the target population.<sup>132</sup>

The bigger problem for estimating opinion within small geographic units is that typical national surveys contain only a small number of respondents from any given subnational unit. When the number of respondents is small, estimates of the average or typical opinion within a subnational unit remain unbiased—insofar as every person in the unit had an equal probability of being surveyed—but the estimates are very imprecise. The less precise the estimate, the harder it is to say whether residents of one geographic unit are more prejudiced than residents of another.

A recently popularized solution to this problem is to build and fit a multilevel statistical model of public opinion.<sup>133</sup> Respondent opinion is modeled as a function of individual-level demographics, such as age, education, and race; geographic place of residence, such as the respondent's state; and attributes of the geographic unit, such as region, religiosity, or income inequality. The model yields an estimate of opinion for each demographic type in each geographic unit. The average or median opinion within each unit can then be calculated by weighting (poststratifying) the opinion of each demographic type in the unit by the number of persons of that type in the unit's population, using Census data.

This approach, called multilevel regression with poststratification (MRP), has been shown to yield reliable estimates of public opinion on policy questions, even if there are few respondents within many of the units.<sup>134</sup> MRP has been used to estimate public opinion within states,<sup>135</sup> congressional districts,<sup>136</sup> state legislative districts,<sup>137</sup> cities,<sup>138</sup> and even local school board

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131. Further difficulties arise if the national survey was conducted with cluster sampling. See Alissa Stollwerk, *The Application of Multilevel Regression with Post-Stratification to Cluster Sampled Polls: Challenges and Suggestions* (May 22, 2013) (unpublished manuscript), available at [http://www.uiowa.edu/~stpols13/papers/Stollwerk\\_SPP\\_2013.pdf](http://www.uiowa.edu/~stpols13/papers/Stollwerk_SPP_2013.pdf). Fortunately, neither the NAES nor the CCAP used cluster sampling.

132. This is so even if the survey administrators do not purport to draw a random sample from the target population. See Stephen Ansolabehere & Douglas Rivers, *Cooperative Survey Research*, 16 ANN. REV. POL. SCI. 307 (2013).

133. See *supra* note 130.

134. Leading validation studies include Lax & Phillips, *How Should We Estimate Public Opinion?*, *supra* note 130; Christopher Warshaw & Jonathan Rodden, *How Should We Measure District-Level Public Opinion on Individual Issues?*, 74 J. POL. 203 (2012).

135. See, e.g., Ghitza & Gelman, *supra* note 130; Lax & Phillips, *How Should We Estimate Public Opinion?*, *supra* note 130; Pacheco, *supra* note 130. For a user-oriented introduction to the methods, see GELMAN & HILL, *supra* note 130.

136. See, e.g., Warshaw & Rodden, *supra* note 134.

137. See, e.g., Christopher Tausanovitch & Christopher Warshaw, *Measuring Constituent Policy Preferences in Congress, State Legislatures, and Cities*, 75 J. POL. 330 (2013); Warshaw &

districts.<sup>139</sup> It has been validated by comparing MRP-generated estimates of public opinion with election outcomes, in both candidate and ballot-initiative elections.<sup>140</sup>

MRP and disaggregation each has benefits and costs. The strong suit of disaggregation is its nonparametric, “model-free” character. It does not depend in any way on the researcher’s assumptions about the demographic or aggregate-level correlates of public opinion. Researchers cannot manipulate the results of their study by fitting different models and only reporting the model whose results match the conclusion the researchers hoped to find. There are also well-established, nonparametric techniques for quantifying the margin of error associated with disaggregation-based estimates of mean or median opinion in the target population.<sup>141</sup> For these reasons, we consider disaggregation preferable to MRP for legal applications *if* the resulting estimates have adequate statistical precision (margin of error) for the contemplated application.<sup>142</sup>

The downside of disaggregation is that it essentially throws away information that is probative of public opinion within any given geographic unit. Unlike disaggregation, MRP takes advantage of the fact that public opinion varies in systematic ways with demography and geography. The information in a national sample about the typical opinions of college-educated Latinas, for example, sheds some light on the likely opinions of college-educated Latinas in, say, Boston. The likely opinion of any given person in Boston is also illuminated by systematic differences, across demographic types, between the opinions of respondents in Boston and the typical opinions of their type in the national survey sample. Because MRP borrows information from people outside the unit to estimate opinion within the unit, it yields more precise estimates of in-unit opinion than disaggregation.

But this precision is deceptive if the underlying model isn’t very good. And fitting models is more art than science. Indeed, researchers have shown

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Rodden, *supra* note 134; David E. Broockman & Christopher Skovron, What Politicians Believe About Their Constituents: Asymmetric Misperception and Prospects for Constituency Control (Mar. 3, 2013) (unpublished manuscript), available at [http://www.ocf.berkeley.edu/~broockma/broockman\\_skovron\\_asymmetric\\_misperceptions.pdf](http://www.ocf.berkeley.edu/~broockma/broockman_skovron_asymmetric_misperceptions.pdf).

138. See, e.g., Tausanovitch & Warshaw, *supra* note 137.

139. See, e.g., MICHAEL BERKMAN & ERIC PLUTZER, EVOLUTION, CREATIONISM, AND THE BATTLE TO CONTROL AMERICA’S CLASSROOMS (2010).

140. See *supra* notes 124–29 and accompanying text.

141. Both analytic or bootstrap-based methods may be used. See GEORGE CASELLA & ROGER L. BERGER, STATISTICAL INFERENCE 417–515 (2d ed. 2002).

142. An important question about disaggregation (which we plan to pursue in future work) is whether better estimates can be created by reweighting the disaggregated data so that it better matches the demographics of the geographic sub-population of interest (e.g., residents of a state). “Disaggregation plus reweighting” would represent something of an intermediate approach between pure disaggregation and MRP.

that more complex MRP models, with greater numbers of explanatory variables, sometimes yield *worse* estimates of target-population opinion, even though the complicated model does a *better* job of explaining opinion within the pool of survey respondents.<sup>143</sup> This phenomenon, called overfitting, arises because the estimated parameters in the more complex model capture idiosyncratic features of the sample—features that are not representative of the target population.

Our companion article on Section 2 and the geography of discrimination discusses MRP in more detail, because our proposal for Section 2 requires substate estimates of opinion.<sup>144</sup> For Section 5, we think Congress can and probably should tie coverage to disaggregation-based estimates of racial stereotyping at the state level. This is more likely to win over a skeptical judiciary than the model-based alternative, which might be seen as smoke and mirrors. To address substate discrimination, Congress could permit an administrative agency to remove cities and counties from coverage based on local racial attitudes.<sup>145</sup> This would shift discussions about MRP and model-fitting from Congress to the administrative forum for adjudicating bailout petitions, and it would allay any residual judicial concern that Congress ginned the model so as to create a politically convenient pattern of Section 5 coverage. We return to this point in Part IV.

## 2. Summarizing Opinion Within Geographic Units

Disaggregation and MRP yield estimates of the distribution of opinion within the geographic unit. But to rank or otherwise compare the units—a predicate for basing Section 5 coverage on geographic disparities in voter discrimination—one needs a one-dimensional summary measure of the distribution. For example, one could create a ranking of the states by anti-black stereotyping using the average stereotype of the state's non-black residents, the median stereotype, the percentage of the state's non-black residents who harbor worse stereotypes than the national average stereotype, or the percentage of the state's non-black residents more than one standard deviation more prejudiced than the average non-black person in the national sample. The possibilities can be proliferated almost endlessly.

We don't have strong views about the best summary measure of racial attitudes within a unit. From the point of view of a minority citizen or a legislator concerned with minority interests, it's hard to know a priori whether one would be better off with a white population that has a large fraction of

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143. See, e.g., Jeffrey R. Lax & Justin H. Phillips, How Should We Estimate Sub-National Opinion Using MRP? Preliminary Findings and Recommendations (Apr. 10, 2013) (unpublished manuscript), available at <http://www.columbia.edu/~jrl2124/mrp2.pdf>.

144. See Elmendorf & Spencer, *supra* note 7.

145. The agency might also extend coverage to certain political subdivisions within otherwise non-covered states. See *infra* Part IV.

moderate racists, or a smaller fraction of severe racists. The results in Figure 3 do suggest, however, that there is little if any relationship between racial stereotyping and political preferences for citizens who subscribe to more favorable views of African Americans than is typical nationally.

This implies that Section 5 coverage should not be based on the average stereotype of a state's non-black residents, but rather on the proportion of residents who are more prejudiced or substantially more prejudiced than the national median. In Part III we compare these approaches and show that state rankings by anti-black stereotyping are quite stable regardless of the metric used to summarize state opinion. The choice among summary measures is difficult in theory but not very important in practice.

### III.

#### RESULTS

##### *A. State Rankings by Anti-Black Stereotyping*

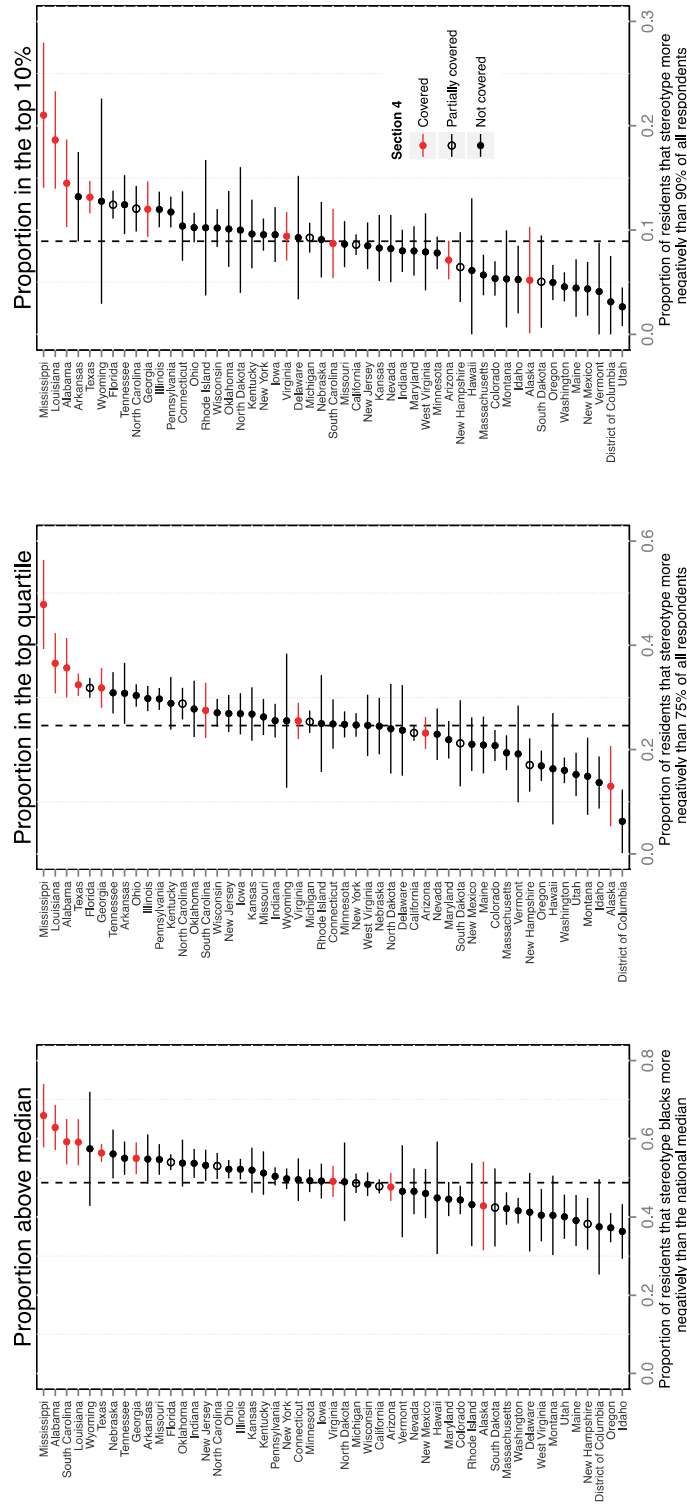
Figure 5 (p. 1161) ranks the states by anti-black stereotyping among their non-black populations. Results are calculated by disaggregation. In the panel on the left, states are ranked by the proportion of the state's non-black residents who regard blacks more negatively than does the median non-black American; in the middle panel, by the proportion of non-black residents who are in the upper quartile of the national non-black population by anti-black stereotyping; and in the panel on the right, by the proportion of non-black residents who are in the top 10% of the national non-black population by anti-black stereotyping. The state rankings are quite similar across these three summary measures of stereotyping.

The most striking pattern in Figure 5 is the clustering of historically covered jurisdictions—states to which Section 5 applied prior to *Shelby County*—in the upper register of the rankings. Of the nine fully covered states, seven are former slave states: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. All seven except Virginia place in the *top ten states by anti-black stereotyping*.<sup>146</sup> The horizontal error bars show that the differences in racial stereotyping between each of these states and the national “average” state reach conventional levels of statistical significance except for Virginia and, by some metrics, South Carolina. Two of the covered states, Alaska and Arizona, rank in the lower half of the prejudice rankings. However, these states were covered because of discrimination against Native Americans and Latinos, not blacks.<sup>147</sup>

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146. It's worth noting in this regard that about 25% of Virginia's counties have escaped from coverage through the “bail out” mechanisms of Section 4. See *Section 4 of the Voting Rights Act*, UNITED STATES DEPARTMENT OF JUSTICE, [http://www.justice.gov/crt/about/vot/misc/sec\\_4.php#bailout](http://www.justice.gov/crt/about/vot/misc/sec_4.php#bailout) (last visited June 18, 2014).

147. See Voting Rights Act Amendments of 1975, 40 Fed. Reg. 43,746, 49,422 (1975).



**Figure 5.** State-level estimates of stereotyping by non-blacks. States are ranked by the proportion of non-black residents who stereotype blacks more negatively than (A) the national median, (B) 75% of all respondents, and (C) 90% of all respondents. Horizontal lines are 95% confidence intervals. Vertical lines represent the “average” state. Data: Non-black respondents to the 2008 NAES and 2008 CCAP (pooled  $N=32,559$ ).

Let us return to the Chief Justice's question: "Are citizens in the South more racist than citizens in the North?"<sup>148</sup> If by "racist" Justice Roberts meant to invoke "old-fashioned" beliefs about the genetic inferiority of African Americans, then our data shed no light on his question. But if he simply meant "adherence to a set of beliefs about racial differences that the Constitution disallows as the basis for state action," then our answer is clear: non-black residents of the *covered* states in the South—with the exception of Virginia, and possibly South Carolina—are, in general, more racist than residents of other states.<sup>149</sup> The fact that six of the seven Southern covered states rank in the top-ten by anti-black stereotyping means that the coverage formula invalidated by *Shelby County* was plainly legitimate—at least according to the normative standard for coverage implicit in the Chief Justice's questioning.

Today, however, this is water under the bridge. *Shelby County* assessed the coverage formula on its face, rather than how it worked in practice. Our results do not establish that Congress could reenact the invalidated formula and have it approved by the Supreme Court. Rather, they show that Congress could create a new, legally defensible coverage formula based on racial stereotyping that would reach most of the states that Congress covered in 2006—and few if any others.

### B. County-Level Results

The old coverage formula attended to differences among political subdivisions in the same state. If a particular county used a test or device as a prerequisite to voting and had low rates of voter participation, but the parent state did not, only the county was covered.<sup>150</sup> Many states therefore ended up partially covered, with some political subdivisions subject to preclearance and others exempt.<sup>151</sup>

A new coverage formula based on racial stereotyping could use either states or political subdivisions of the states as the presumptive unit of coverage.<sup>152</sup> As we explain above, the advantage of making states the unit of coverage is that reasonably precise state-level estimates of racial stereotyping can be created by disaggregation.<sup>153</sup> Substate estimates must be created with

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148. *Supra* note 1.

149. The data do not allow us to meaningfully differentiate citizens from other residents at the state level. Only eighteen respondents to the CCAP report being non-citizens (question SCAP764) and the NAES does not ask about citizenship at all. Nevertheless, we would be very surprised if the distribution of attitudes among citizens differed meaningfully from the distribution of attitudes among the total population in many states.

150. See *Jurisdictions Previously Covered by Section 5*, UNITED STATES DEPARTMENT OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/covered.php](http://www.justice.gov/crt/about/vot/sec_5/covered.php) (last visited June 17, 2014).

151. *Id.*

152. If states are the unit coverage, then substate jurisdictions would be subjected to preclearance if and only if the parent state is covered.

153. See *supra* Part II.B.1.



models, and rankings of substate geographic units will therefore depend to some extent on modeling assumptions.

To provide a very rough sense of which counties might end up covered if counties rather than states were the units of coverage, we created two versions of what is called a “varying intercept, constant slope” MRP model.<sup>154</sup> We model racial stereotypes as a function of non-black respondents’ demographic attributes (simplified into three race, two sex, and four education categories) and their county of residence. Our models presume that demographic attributes correlate with racial attitudes in the same way in all counties, and that they shape opinion independently of one another. This means, for example, that the effects of education on anti-black stereotyping are assumed to be the same for men and women, for Asian Americans and whites, and so forth.

The varying intercept allows estimated racial attitudes for all demographic types in a county to be adjusted upward or downward, based on information in the second level of the model. The same adjustment is made for each demographic type.<sup>155</sup> We model the intercept as a function of the black share of each county’s population, because much previous research suggests that whites are less tolerant of blacks where the black population is larger.<sup>156</sup> Additionally, in one version of the model, we include a unique identifier for each state in the intercept regression. The underlying assumption is that the racial attitudes of any pair of randomly selected persons of the same demographic type are more likely to be similar when both persons are drawn from the same state as opposed to different states.<sup>157</sup>

Figure 6 depicts our results. The top panel shows the estimated distribution of anti-black stereotyping when the state identifier is omitted from the intercept model; the lower panel shows the distribution when the state identifier is included. The upper panel suggests that anti-black stereotyping is prevalent among counties in the Southern states as well as large areas of California, New Mexico, Washington state, and Wyoming. When the state identifier is included, we observe less within-state variation, as the intercept for

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154. For an introduction to this class of models, see GELMAN & HILL, *supra* note 130, at 251–78.

155. The intercept term for any given county is a weighted average of the predicted intercept (based on the county’s black population and, in the second model, the state within which the county is located) and the actual difference between the average reported stereotype of respondents in the county and the predicted average stereotype given those respondents’ demographics. See GELMAN & HILL, *supra* note 130, at 253–59.

156. The canonical work is V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1949).

157. For more discussion of this assumption (and corresponding evidence from our models), see CRISTOPHER S. ELMENDORF & DOUGLAS M. SPENCER, TECHNICAL APPENDIX, *THE GEOGRAPHY OF RACIAL STEREOTYPING: EVIDENCE AND IMPLICATIONS FOR VRA “PRECLEARANCE” AFTER SHELBY COUNTY* (2014), available at [http://www.dougspencer.org/research/geography\\_of\\_discrimination/s5%20Appendix.pdf](http://www.dougspencer.org/research/geography_of_discrimination/s5%20Appendix.pdf).

each county is pulled toward the state's average. Notably, counties in the Deep South have nearly identical estimates in both models.

The differences between the top and bottom panels in Figure 6 drive home the point that county-level coverage decisions would be sensitive to modeling assumptions. The two models presented here hardly exhaust the universe of plausible models. For example, the second level of the model (the regression for the intercept term) might be enriched with county-level data on residential integration, income inequality, black poverty, and the like—although this might result in overfitting.<sup>158</sup> One could also relax the “constant slope” assumption, allowing the effects of individual-level predictors to vary across geographic units.<sup>159</sup> For example, it might be the case that Asian Americans' and Latinos' stereotypes of blacks vary with the size of the Asian American or Latino population in the county, or that old people in the South (but not young people in the South) have very different racial attitudes than their demographic counterparts in the North.

Several other caveats are in order. First, our county-level results use only the CCAP data, because Annenberg was unable to obtain county or zip code identifiers for its respondents. This cuts our effective sample size by more than half, and it means that our estimates do not account for the untrustworthiness stereotype. Second, our estimates ignore the stereotypes of persons who are younger than twenty-five, because the Census FactFinder tables on which we must rely for poststratification do not include people younger than twenty-five.<sup>160</sup> Third, we cannot include age as a predictor, or differentiate between citizens and noncitizens, because, again, this information is absent from the FactFinder tables.<sup>161</sup>

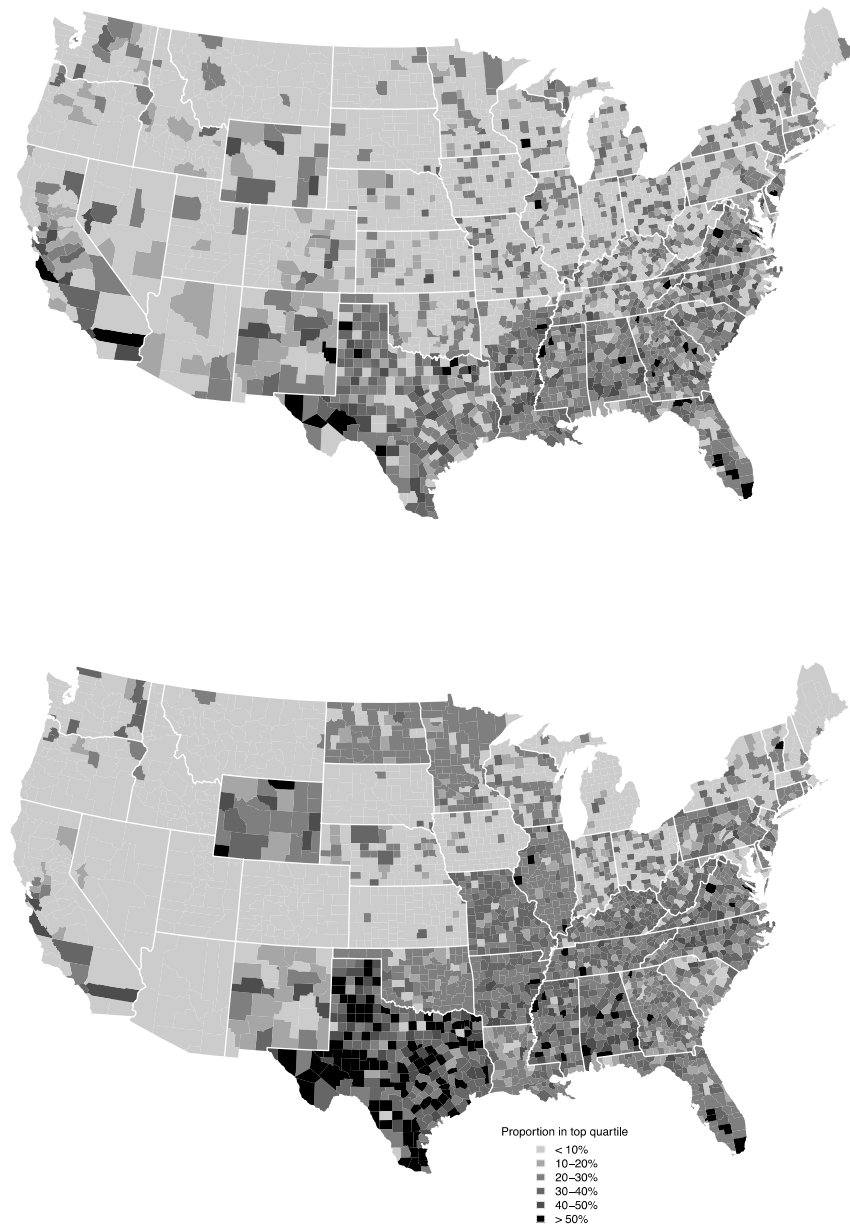
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158. See *supra* note 146 and accompanying text.

159. Varying intercept/constant slope models are standard in the MRP literature, but for a recent exception, see Ghitza & Gelman, *supra* note 130.

160. In addition to the FactFinder tool, the Census publishes untabulated “microdata” samples of various sizes based on the American Community Survey. MINN. POPULATION CTR. OF THE UNIV. OF MINN., *Integrated Public Use Microdata Series*, <https://usa.ipums.org/usa> (last visited Aug. 12, 2014). These microdata samples easily lend themselves to customization and are ideal for post-stratification because they include information about the full adult population (eighteen and above) at the individual and household level, with more than one hundred demographic and geographic variables. Unfortunately, the smallest geographic identifier in the microdata samples are “Public Use Microdata Areas” or PUMAs which are census-defined places (typically combinations of contiguous counties) with at least one hundred thousand residents. The lack of finer-grained geographic identifiers precludes our use of microdata samples for political subdivisions with less than one hundred thousand people. Thus, one can (and should) use microdata samples to estimate prejudice at the congressional district level, where average district size exceeds one hundred thousand. Estimates for smaller subdivisions—counties, state legislative districts, and cities—must rely on post-stratification using data from the American FactFinder tool, as we do here.

161. A fourth, though rather trivial, caveat is that we rely on a 5% sample that includes data from 2005 to 2009. Five percent samples are unavailable from 2004 to 2008 and relying on the available 3% sample would require us to drop all counties with less than twenty thousand people, or about one third of all counties.



**Figure 6.** County-level estimates of anti-black stereotyping using two different constant slope, varying intercept MRP models. In the top map, the county-level intercept is modeled as a function of black population share. In the bottom map, the model for the intercept also includes a dummy variable for the

state in which the county is located. This means that the bottom map pools information within states, pulling the estimated intercept for each county toward the state mean. Shading reflects the proportion of non-black residents in each county who are in the upper quartile of the national distribution of anti-black stereotyping (i.e., who stereotype blacks more negatively than 75% of all non-black respondents). Darker shades represent larger proportions.

These flaws aren't trivial, but they needn't be fatal either. Very good MRP estimates of electorate opinion—validated with actual election returns—have been created at the county and city levels using FactFinder tables for poststratification.<sup>162</sup> But before county-level estimates are used to determine coverage, the Department of Justice should probably invest in validation studies. For example, the Department could commission large-sample surveys of voting-age citizens within a randomly selected subset of counties, and then compare MRP estimates with nonparametric estimates created from the validation-study dataset.<sup>163</sup> The Department might also convene an expert panel to advise on model building and to test the sensitivity of coverage decisions to modeling assumptions.

Our purpose here is not to offer the definitive MRP model of anti-black stereotyping at the county level. It is enough for now to provide an initial picture of how coverage might vary if tied to county-level estimates of stereotyping, and to introduce the model-building process.

### *C. Alternative Coverage Criteria and Convergence Results*

It is not our view that voter discrimination or racial stereotyping must be the exclusive criteria for coverage. We generally agree that the formula should also account for racial polarization in political preferences and minority population size.<sup>164</sup> The latter criteria track the majority's political incentive to discriminate on the basis of race. We argued earlier that a pure "political incentives" formula could prove constitutionally vulnerable,<sup>165</sup> but nothing in our argument cuts against a formula that supplements the stereotyping criterion with additional thresholds based on racially polarized voting and minority population size. Minorities probably face an especially great risk of electoral discrimination where the racial stereotyping and political incentives criteria for coverage coincide.

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162. See Tausanovitch & Warshaw, *supra* note 137; Warshaw & Rodden, *supra* note 134.

163. For present purposes, a "nonparametric estimate" is one that does not depend on modeling assumptions about the demographic or geographic correlates of public opinion.

164. See *supra* Part I.B.

165. See *id.*

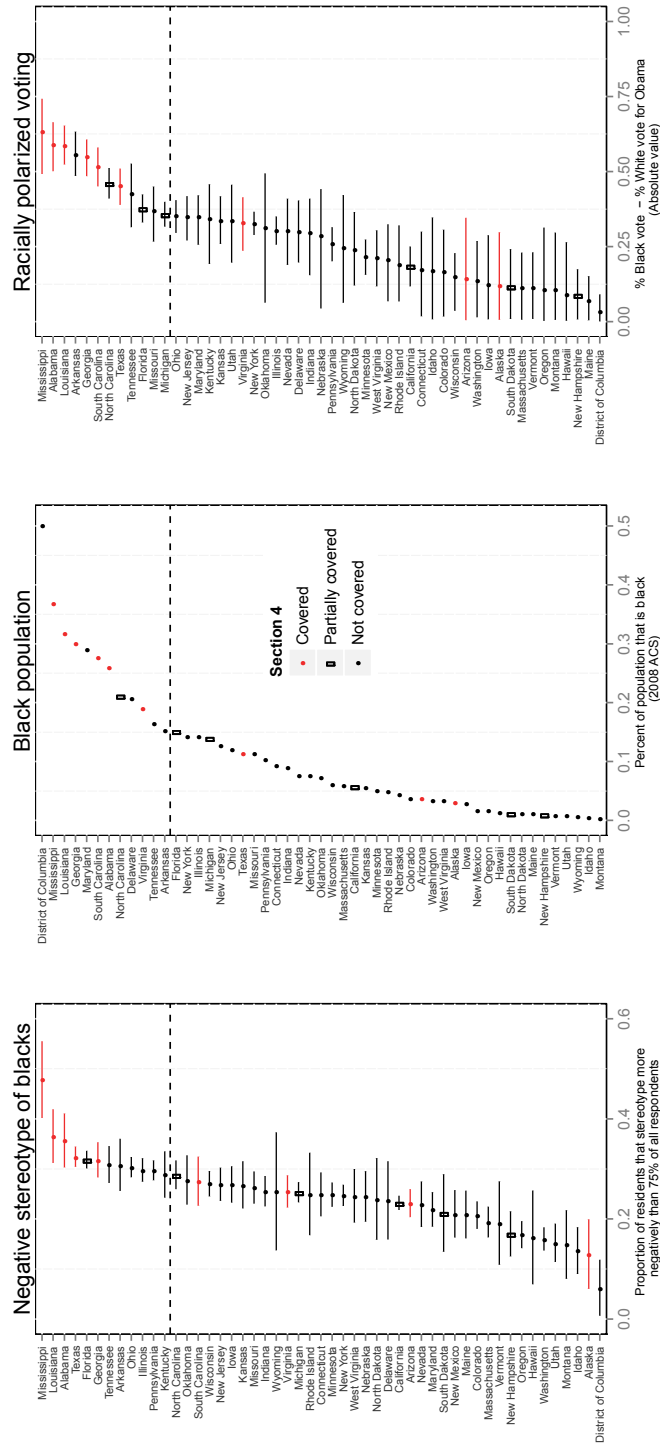
Figure 7 (next page) reveals a stunningly high correlation between state rankings by anti-black stereotyping, by racially polarized voting, and by black population size.<sup>166</sup> The covered states of the Deep South are concentrated near the top of all three rankings. One is tempted to say that Congress knew what it was doing when it extended the putatively outdated coverage formula in 2006. The convergence across these three criteria provides a very robust “current conditions” rationale for continued coverage of most of the historically covered states.<sup>167</sup>

Going forward, the close but not exact correspondence between these rankings also gives Congress some useful wiggle room for political compromise. If Congress deems the racial stereotyping criterion too incendiary to put forward as the public face of coverage—yet still useful for justifying coverage to the courts—Congress could cast the new coverage formula as one primarily concerned with polarization (but which also accounts for stereotyping). If Congress concludes for independent and perhaps basely political reasons that certain states that rank high by polarization should not be covered (e.g., Arkansas, Utah, West Virginia, New Jersey, and Delaware), Congress could achieve that result by conditioning coverage on a very high stereotyping threshold.

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166. The correlation between the fifty-state rankings by anti-black stereotyping and polarized voting is 0.78; by black population size and stereotyping, the ranking correlation is 0.42; and by polarized voting and black population size, it is 0.52.

167. Our measure of polarized voting is derived from self-reported voting behavior in the 2008 NAES and CCAP. Because the number of black respondents was small (even zero) in some states, we used MRP to estimate Obama’s vote share among blacks at the state level. We then subtracted Obama’s white vote share in each state and reported the absolute value of the difference.



**Figure 7.** State rankings based on (A) negative stereotyping of blacks by non-blacks, (B) proportion of the population that is black, and (C) racially polarized voting. Negative stereotypes are estimated using the 2008 NAES and 2008 CCAP (see *supra* Figure 5, middle panel). Black population size and proportion are reported in the 2008 American Community Survey. Our measure of racially polarized voting is the absolute difference between votes for Obama among black and white voters as reported by respondents to the 2008 NAES and CCAP surveys. We estimate black support for Obama using MRP because the sample of black respondents is very small in some states. (Details available at [http://www.dougspencer.org/research/geography\\_of\\_discrimination.html](http://www.dougspencer.org/research/geography_of_discrimination.html).) Solid horizontal lines represent 95% confidence intervals for estimates in Panels 1 and 3. The horizontal dashed lines denote the top quartile of states (12) in each panel.

	Stereotyping	Black population	Polarized voting	ALL MEASURES
Top decile				
Top quartile				
Top half				

#### D. Consistency with Previous Research

Consistency with previous research strengthens our confidence in our findings about anti-black stereotyping. Two scholars before us have created

state-specific estimates of old-fashioned racism, using different metrics but reaching generally similar results. Seth Stephens-Davidowitz treated the relative frequency of Google searches for the N-word as a proxy for anti-black animus at the state level.<sup>168</sup> The great virtue of his measure is that it's tied to racial animus, and probably undistorted by social desirability effects. It also strongly correlates with regions of the country where Obama underperformed relative to Kerry.<sup>169</sup> But it has limitations too: the metric says nothing about the proportion of adult residents in each geographic unit who have searched for the N-word. A coverage formula based on Stephens-Davidowitz's work could conceivably punish some states for the behavior of a relatively small number of residents who happen to search for the N-word with great frequency. Also, the N-word measure cannot detect the mass of citizens who think blacks generally lack the qualities found in good leaders and indeed good citizens—honesty, intelligence, and work effort—but who are not so culturally retrograde as to spend their time searching the internet for racist jokes.

Nonetheless, Stephens-Davidowitz's findings are broadly concordant with ours.<sup>170</sup> Except for Virginia, the Southern covered states rank in the top third of the nation by the Google-search measure of racial animus.<sup>171</sup> They are not clustered at the very top of the rankings as they are by our measure, but they are still markedly worse than average. Also consistent with our results, Virginia shows up near the middle of Stephens-Davidowitz's rankings, and Alaska and Arizona in the lower third.<sup>172</sup>

The other ranking of states by anti-black prejudice was compiled by political scientist Ben Highton.<sup>173</sup> Highton aggregated twenty years of public

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168. See Seth Stephens-Davidowitz, *The Cost of Racial Animus on a Black Presidential Candidate: Using Google Search Data to Find What Surveys Miss* (June 9, 2012) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2050673](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2050673).

169. Nevertheless, his measure of prejudice is electorally consequential. Stephens-Davidowitz shows that Obama did relatively poorly compared to Kerry in media markets that are more prejudiced than the national norm by the Google-search measure. See *id.* at 17–23.

170. One of us wrote a brief commentary arguing that Stephens-Davidowitz's results would probably undermine the case for Section 5's constitutionality. See Christopher Elmendorf, *Googling the Future of the Voting Rights Act*, JURIST - FORUM (June 29, 2012, 2:30 PM), <http://jurist.org/forum/2012/06/christopher-elmendorf-voting-future.php>. That conclusion relied in part on the low ranking of Virginia, Alaska, and Arizona; in part on the high ranking of non-covered states in Appalachia and Midwest; and in part on the idea that the mere availability of state rankings by anti-black prejudice might lead the Supreme Court to hold Congress to a tougher standard for the coverage formula's fit. Elmendorf now believes, however, that the coverage formula probably should not be evaluated vis-à-vis Arizona and Alaska in terms of anti-black prejudice, and that the rankings reported in this Article—which place almost all of the Deep South/covered states above most Appalachian and Midwestern states—strongly support the formula's constitutionality even under the very demanding normative standard implicit in the Chief Justice's questioning.

171. See Stephens-Davidowitz, *supra* note 168, at 24, Table A1.

172. See *id.*

173. See Benjamin Highton, *Prejudice Rivals Partisanship and Ideology When Explaining the 2008 Presidential Vote Across the States*, 44 PS: POL. SCI. & POL. 530 (2011).



opinion surveys that asked white respondents whether they agreed or disagreed with the statement, “I think it’s all right for blacks and whites to date each other.”<sup>174</sup> He then disaggregated the results by state, and coded “state prejudice” as the mean response of whites (in the state) to this survey question over the twenty-year period. He showed that state prejudice so measured is strongly correlated with the state-level non-black vote for Obama in 2008 (controlling for partisanship and ideology), yet does not explain voting patterns in 2000 or 2004, when both presidential candidates were white.<sup>175</sup>

Highton’s measure of prejudice is vulnerable to measurement error, and it cannot capture over-time changes in public opinion within states.<sup>176</sup> Even so, his results coincide quite nicely with Stephens-Davidowitz’s and ours. Highton’s ranking puts all seven of the covered Southern states into the top third by anti-black prejudice, including Virginia (ranked number fourteen).<sup>177</sup> Arizona shows up in the lower third.<sup>178</sup> The big anomaly is Alaska, which ranks in the upper third by Highton’s measure,<sup>179</sup> but in the lower third by Stephens Davidowitz’s<sup>180</sup> and ours. “Things have changed in Alaska” might be a more apt refrain for the Chief Justice than, “Things have changed in the South.”<sup>181</sup>

Additionally, Stephen Ansolabehere, Nate Persily, and Charles Stewart have created a ranking of the states, not by racial prejudice per se but by the difference between the share of white voters who supported Kerry in 2004 and Obama in 2008 (as revealed by exit polls).<sup>182</sup> The correlation between their ranking and ours is strongly positive,<sup>183</sup> though the covered states aren’t as

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174. *See id.* at 531–32.

175. *See id.* at 532.

176. *See id.* at 534 n.5 (noting that a measure based on multiple items would improve validity); *cf. Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (warning that Section 5 “imposes current burdens and must be justified by current needs”); Ansolabehere et al., *supra* note 107 (showing that citizens’ opinions are much more stable and ideologically coherent when measured with multiple survey items rather than single items). Because it aggregates twenty years of data, courts might resist efforts to ground the coverage formula on Highton’s measure of prejudice, reasoning that it does not sufficiently measure *current* discrimination (notwithstanding that it predicts between-state variation in current voting patterns).

177. *See* Highton, *supra* note 173, at 534, Table 4.

178. *See id.*

179. *See id.*

180. *See* Stephens-Davidowitz, *supra* note 168.

181. “Things have changed in the South” was Roberts’s assertion in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 202 (2009).

182. Ansolabehere et al., *supra* note 76, at 1422, Table 9.

183. The correlation is 0.35 overall, and 0.52 if one limits the analysis to the top thirty states by anti-black prejudice. There is no positive relationship between prejudice and the Kerry-Obama delta for the less-prejudiced states (the bottom twenty), suggesting that patterns of party switching in presidential voting between the 2004 and 2008 election were not much affected by racial attitudes in these states. We see a similar pattern when analyzing individual-level data from the 2008 NAES online survey; there is a strong relationship between stereotyping and defection for voters who are more prejudiced than average, and essentially no relationship for voters who are less prejudiced than average.

tightly clustered near the top using their metric.<sup>184</sup> This makes sense: while racial stereotypes were one factor that drove party switching in presidential voting between 2004 and 2008, other factors that varied between the states probably contributed too.

A number of other scholars have uncovered aggregate differences between the South and other regions, and between covered and non-covered states, using a variety of race-related survey questions.<sup>185</sup> These studies do not yield state-specific prejudice measures and so could not serve as inputs for a new coverage formula. But they do corroborate that the South has remained more prejudiced than other regions of the nation.

#### *E. Latinos and Asian Americans*

Though the VRA is commonly associated with African Americans, it has also provided important protections for Latinos, the largest non-white minority group in America today.<sup>186</sup> Asian Americans, meanwhile, have not had as much success bringing claims, perhaps because of less internal political cohesion.<sup>187</sup>

We do not, however, observe a tight correspondence between the coverage formula invalidated in *Shelby County* and anti-Latino stereotyping. To the contrary, Figure 9 suggests that there is essentially no correlation between coverage status and anti-Latino stereotyping per the CCAP data.<sup>188</sup> Note also that levels of prejudice in several of the most extreme states (high and low) by anti-Latino stereotyping are imprecisely estimated. This is the kind of pattern one would find if the states don't differ very much by anti-Latino stereotyping and outliers are mainly an artifact of sample size (i.e., the small number of respondents from less populous states).

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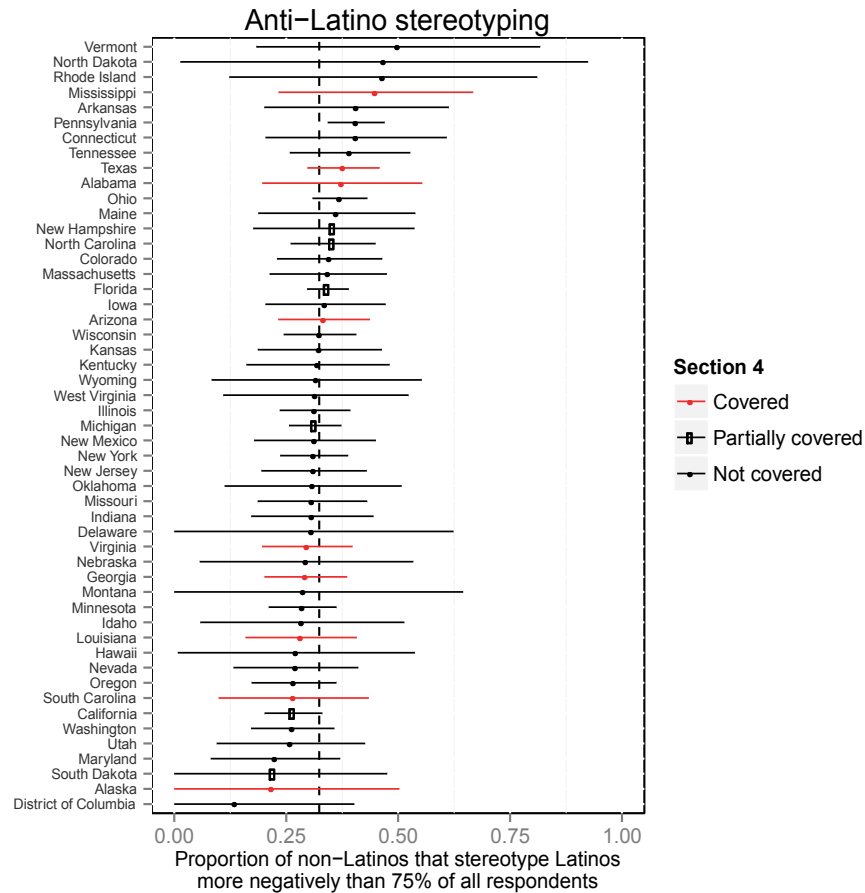
184. Only Louisiana, Alabama, Mississippi and Georgia are in the top ten by their ranking.

185. See, e.g., Brief of Political Science and Law Professors as *Amici Curiae* in Support of Respondents at 8–11, *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96) (summarizing aggregate differences between covered and uncovered states as revealed by racial resentment and related questions on American National Election Survey in 2000 and 2008); Valentino & Sears, *supra* note 115, at 674–75 (2005) (reviewing literature), 677–79 (showing convergence of Deep South toward North on measures of “Jim Crow racism” but not symbolic racism or racial stereotyping); see also Jonathan Knuckey, *Racial Resentment and the Changing Partisanship of Southern Whites*, 11 PARTY POL. 5 (2005).

186. *Facts for Features: Hispanic Heritage Month 2012: Sept. 15 – Oct. 15*, U.S. CENSUS BUREAU (Aug. 6, 2012), [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb12-ff19.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb12-ff19.html).

187. See generally Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. IRVINE L. REV. 359 (2013).

188. We note that the NAES does not ask about stereotypes of Latinos. To test whether the results in Figure 9 are driven by unique features of the CCAP sample, we replicated the state rankings by anti-black stereotyping in Figure 5 using only the CCAP sample and obtained the same results (available upon request). The congruence of state rankings holds whether we subset the data to all non-black respondents (for anti-black stereotypes), to all non-Latinos (for anti-Latino stereotypes), or to white respondents only.



**Figure 9.** State-level estimates of anti-Latino stereotyping. States are ranked by the proportion of non-Latino respondents who stereotype Latinos more negatively than 75% of all respondents. Horizontal lines are 95% confidence intervals. Vertical line is average value. *Data: self-identified white, black, and Asian respondents to the 2008 CCAP survey.*<sup>189</sup>

We don't put great weight on these results. As noted earlier, our measure of anti-Latino stereotyping omits trustworthiness and has not been validated with data on preferences between Latino and non-Latino candidates.<sup>190</sup> But these results do raise the question of whether courts would accept a coverage formula grounded solely in anti-black stereotyping for purposes of preclearance denials that were intended to protect other minority groups. If Congress bases the new coverage formula exclusively on anti-black stereotyping, a newly

189. See *supra* note 92.

190. By contrast, Table 1 and Figure 3, *supra*, show a strong correlation between anti-black stereotyping and voting against Obama.

covered jurisdiction might challenge Section 5 as applied to instances of alleged discrimination against Latinos. Similarly, a covered jurisdiction that eliminates a majority-Asian American legislative district might argue that Section 5 is unconstitutional as applied to this change, especially since Asian Americans—in contrast to blacks and Latinos—appear to be stereotyped more favorably than whites.<sup>191</sup>

#### IV.

##### RECOMMENDATIONS FOR CONGRESS

In light of the legal arguments and empirical findings presented above, we recommend a two-track approach to coverage. First, Congress should enact a *default* coverage formula using our ranking of the states by anti-black stereotyping. States would be covered if their non-black populations subscribe to dim views of African Americans' work effort, intelligence, and trustworthiness. The new coverage formula could take account of other factors as well, such as racially polarized voting and minority population size, but worse-than-ordinary racial stereotyping would be a necessary condition for coverage. Second, Congress should give the Department of Justice or an independent commission authority to update the coverage formula prospectively.<sup>192</sup>

The agency exercising this authority should be permitted to exclude substate political subdivisions from coverage on the ground that electorate prejudice in those subdivisions is no worse than the national norm. Conversely, the agency should be able to extend coverage to political subdivisions of non-covered states if the local electorate displays a level of stereotyping comparable to the covered states. Finally, the agency should be authorized to update the measure of voter discrimination embodied in the coverage formula itself—to account for new and better measures of prejudice, new evidence concerning the correlation between racial stereotyping and political behavior, and judicial glosses or attacks on the coverage formula. Congress should instruct the agency to maintain a close connection, in fact and appearance, between the coverage formula and actual or likely race discrimination in violation of the Fourteenth and Fifteenth Amendments.

The administrative process we contemplate would bear a loose resemblance to the judicial “bail in” and “bailout” procedures found in Sections

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191. See Figure 2, *supra*.

192. Because the Attorney General serves at the President's pleasure, the independent commission could be located within the Department of Justice if Congress so desires. *Cf.* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (holding that Congress cannot create a double layer of political insulation by putting an independent agency within an independent agency). For design ideas about independent commissions with electoral responsibilities, see Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005).

3 and 4 of the VRA—but with some important differences. The crux of Section 4 is that a jurisdiction may escape coverage (bail out) if, during the preceding ten years, the jurisdiction and its political subdivisions have neither faced any preclearance objections from the Department of Justice, nor have lost or settled any lawsuits under the VRA or the race-discrimination provisions of the Constitution.<sup>193</sup> The jurisdiction seeking bailout must also satisfy the court that it has engaged in constructive efforts to better incorporate minorities into the political process and has abated any vestiges of discrimination.<sup>194</sup> The bail-in provision of Section 3 allows a court that finds intentional racial discrimination by a non-covered jurisdiction to compel coverage as part of the remedy.<sup>195</sup>

Unlike the existing bailout and bail-in provisions, our administrative mechanism for updating coverage would base changes on the same criteria employed to determine coverage initially. This distinction is important. Many observers were puzzled by the *Shelby County* Court's failure to discuss the bailout and bail-in mechanisms, which make Section 5 more responsive to current conditions than it initially appears.<sup>196</sup> But the Court's disregard for these procedures is understandable if, as we suggested above, the Court's main concern was the facial legitimacy of the coverage formula.<sup>197</sup> The coverage formula had an appearances problem because it was based on old data, and because the dynamic aspects of coverage ("bailout" and "bail in") were not linked to the criteria that purportedly legitimized coverage in the first instance (voter registration and turnout). If low turnout justifies coverage, why not tie bailout and bail-in to turnout? Conversely, if a lack of Department of Justice objections and Section 2 settlements legitimizes bailout, why not link coverage to risk factors for vote dilution? The mechanism we propose would solve the appearances problem by grounding the initial basis for coverage and subsequent exit from and entry to coverage in the same criteria.<sup>198</sup>

The importance of an administrative mechanism for updating coverage is hard to overstate. The evidence in Part III suggests that most of the currently covered states rank high for anti-black stereotyping but not for anti-Latino stereotyping. We would not be surprised if the Roberts Court were to hold that a coverage formula based on anti-black stereotyping cannot sustain Section 5 as

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193. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973b (2006)). In addition to being completely clean in these respects, the jurisdiction must also show that it has engaged in "constructive efforts" to facilitate political participation by minorities. *Id.* § 1973b(a)(1)(F) (2006).

194. 42 U.S.C. § 1973b(a)(1)(F).

195. Voting Rights Act § 3, 42 U.S.C. § 1973a(c) (2006). For more on the bail-in mechanisms, see Crum, *supra* note 36.

196. Justin Levitt has made this point especially forcefully. See Justin Levitt, *Section 5 as Simulacrum*, 123 YALE L.J. ONLINE 151 (2013); Justin Levitt, *supra* note 36.

197. See *supra* note 28 and accompanying text.

198. Of course, Congress might still allow jurisdictions with a coverage-worthy propensity for voter discrimination to escape coverage on additional grounds such as those now provided in Section 4.

applied to instances of alleged discrimination or retrogression against Latino, Native American, or Asian American voters. An administrative process for updating the evidentiary basis of the coverage formula would make the prospect of this holding much less threatening, as the agency charged with updating the formula could commission new studies of voter discrimination against these groups and extend coverage to new states or subdivisions based on its findings.

## V.

### WHAT IF CONGRESS DOES NOTHING? JUDICIAL BAIL-IN REMEDIES UNDER SECTION 3

Perhaps the most likely congressional response to *Shelby County* is capitulation.<sup>199</sup> A Congress polarized on ideological and partisan lines may be incapable of reaching agreement on revisions to the coverage formula, even if the revisions would not much change the states subject to preclearance.

If Congress does not act, civil rights litigators will try to put Section 5 back to work via Section 3 “bail in” remedies.<sup>200</sup> As noted above, Section 3 of the VRA empowers district courts to compel otherwise non-covered states or political subdivisions to enter the preclearance regime, if the court “finds that violations of the fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision.”<sup>201</sup>

Section 3 case law is sparse, presumably because there was little incentive to litigate potential constitutional violations and seek bail-in remedies in the pre-*Shelby County* era.<sup>202</sup> State action that violates the Constitution also violates Section 2, and it is easier to prove a Section 2 violation.<sup>203</sup> So at a time when most jurisdictions with exceptional propensities for discrimination were covered via Section 4, plaintiffs had little reason to bring constitutional claims and seek bail-in remedies. But keen observers expect a flurry of bail-in litigation after *Shelby County*.<sup>204</sup>

There are many open questions under Section 3, such as whether multiple constitutional violations are necessary before a court may impose the

199. For one pessimistic prognostication to this effect, see Hasen, *supra* note 5, at 23–24.

200. Days after *Shelby County*, civil rights groups that had intervened in litigation over Texas’s 2010 redistricting sought leave to counterclaim for bail-in under Section 3. See Defendant-Intervenors’ Motion for Leave to File Amended Answer and Counterclaim, *State of Texas v. United States*, No. 1:11-cv-1303 (RMC-TBG-BAH) (D.D.C. July 3, 2013), available at <http://electionlawblog.org/wp-content/uploads/241-motion-sec-3redux.pdf>.

201. Voting Rights Act of 1965, Pub. L. No. 89-110, § 3(c), 79 Stat. 437, 437–38 (1965).

202. See Crum, *supra* note 36, at 2010–15 (chronicling history of bail-in litigation).

203. See generally Elmendorf, *Making Sense of Section 2*, *supra* note 6.

204. See, e.g., Levitt, *supra* note 36.

preclearance remedy;<sup>205</sup> whether preclearance should be limited to the particular type of law found to violate the Constitution or applied more broadly;<sup>206</sup> and whether preclearance may extend to units of government other than the unit found to have violated the Constitution.<sup>207</sup> Given Section 3's reference to "equitable relief" and its lack of detail, we expect many courts to adopt the open-ended balancing framework of *Jeffers v. Clinton*, the leading Section 3 case.<sup>208</sup> Under *Jeffers*, a court considering bail-in must ask:

- Have the [constitutional] violations been persistent and repeated?
- Are they recent or distant in time?
- Are they the kinds of violations that would likely be prevented, in the future, by preclearance?
- Have they already been remedied by judicial decree or otherwise?
- How likely are they to recur?
- Do political developments, independent of this litigation, make recurrence more or less likely?<sup>209</sup>

After weighing these considerations, the court decides whether to issue a bail-in remedy and how to delimit its geographic scope (which units of government are covered), topical scope (which election practices and procedures are covered), and temporal scope (how long the remedy will last).<sup>210</sup>

Though *Shelby County* did not address Section 3, it casts a long shadow. Per *Shelby County*, preclearance is an "extraordinary" remedy that can only be justified by "exceptional" conditions.<sup>211</sup> In effect, *Shelby County* boils the *Jeffers* factors down to this:

- Is the threat of constitutional violations in the defendant jurisdiction sufficiently exceptional to warrant, by way of remedy, an "extraordinary departure from the traditional

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205. See Crum, *supra* note 36, at 2007 ("One district court has held that section 3 requires multiple constitutional violations, but other courts have imposed preclearance through consent decree without addressing the issue.").

206. See Pildes, *supra* note 36 (describing the potential for narrowly defining the types of measures subject to preclearance as a benefit of Section 3); see also *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990) (limiting preclearance to majority-vote requirements for at-large and multimember district elections, which the court found to have been adopted on four occasions with a discriminatory purpose).

207. Cf. *Jeffers*, 740 F. Supp. at 600 ("We agree with plaintiffs that both State and local violations of the voting guarantees of the Fourteenth and Fifteenth Amendments must be taken into account. The statute does not say that the State or its officials must be guilty of the violations, but only that the violations must 'have occurred within the territory' of the State.").

208. 740 F. Supp. 585.

209. *Id.* at 601.

210. See Crum, *supra* note 36, at 2006–17 (summarizing cases).

211. See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (reiterating these points).

course of relations between the States and the Federal Government”?<sup>212</sup>

Because of *Shelby County*, it will be difficult for courts to justify broad bail-in remedies unless plaintiffs establish that the situation in the defendant jurisdiction really is exceptional.

Here our results come into play. We have shown systematic differences between the states with respect to three risk factors for Fourteenth and Fifteenth Amendment violations: racial stereotyping, racially polarized voting, and minority population size. We have also demonstrated that states at risk of violating the Fourteenth and Fifteenth Amendments according to any one of these criteria are usually at risk per the other criteria too. The same arguments that would justify Congress relying on our findings to craft a generic coverage formula would equally justify judicial reliance on our findings for bail-in decisions about particular states or political subdivisions.

Were it not for our results, judges crafting bail-in remedies under Section 3 would probably feel compelled by *Shelby County* to draft the remedy narrowly—covering only the particular unit of government found to have violated the Fourteenth or Fifteenth Amendment and the particular type of law that that government used to burden minority participation. Our results should enable courts to recreate some semblance of a broad coverage regime through state-specific bail-in rulings.

One final point is worthy of remark. In ordinary constitutional litigation, plaintiffs must prove it “more likely than not” that a discrete state action violated the Constitution.<sup>213</sup> But for purposes of bail-in remedies under Section 3, the requisite “find[ing] [of] violations of the [F]ourteenth or [F]ifteenth [A]mendment justifying equitable relief” might be established rather differently.<sup>214</sup> Imagine that political subdivisions in the defendant jurisdiction independently undertook one hundred somewhat suspicious actions, such as redistricting that disadvantages a minority community. Or, if one accepts Elmendorf’s account of the electorate as a state actor for certain purposes,<sup>215</sup> imagine one hundred separate elections in the defendant jurisdiction, each with racially polarized voting. After tracing the history of these state actions and weighing information about racial stereotyping, racially polarized voting, and minority population size in the defendant jurisdiction, the court concludes that the odds of an unconstitutional outcome are roughly one in ten for each occurrence of the state action (i.e., for each election outcome). Applying the

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212. *Id.* at 12 (quoting *Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 500–01 (1992)).

213. *See Addington v. Texas*, 441 U.S. 418, 423–24 (1979) (describing typical “preponderance of the evidence” standard for civil cases and noting that exceptions with higher standards of proof have been created only where the government seeks to deprive an individual of “particularly important . . . interests”).

214. 42 U.S.C. § 1973a(c) (2006).

215. *See Elmendorf, Making Sense of Section 2*, *supra* note 6, at 428–48.



more likely than not standard, the court should further conclude *that at least nine constitutional violations occurred*.<sup>216</sup> It may be impossible to say whether any one of the one hundred state actions violated the Constitution, but it follows from the court's judgment of probabilities that the odds of at least nine constitutional violations exceed 0.50.<sup>217</sup>

To be sure, it doesn't follow that there are exceptional circumstances in the defendant jurisdiction, which warrant the "extraordinary" remedy of preclearance. Our point, rather, is that very same risk factors that may justify broad preclearance remedies under Section 3 are also relevant at the liability stage of bail-in cases. They are pertinent not because Section 3 relaxes the evidentiary standard for constitutional violations to something looser than "more likely than not,"<sup>218</sup> but because the Section 3 question is whether violations that might justify bail-in occurred, not whether *this* or *that* state action should be enjoined because it was probably unconstitutional. The threshold question in a Section 3 case—whether it is more likely than not that violations occurred—will often have an affirmative answer if many state actions took place, each with small positive probability of violating the Constitution. Once this hurdle has been cleared, the court can decide whether the violations warrant equitable relief in the form of a preclearance remedy, and if so, the appropriate scope of the remedy.

We recognize that it may not be feasible to quantify precisely the risk of Fourteenth and Fifteenth Amendment violations in states that rank high by anti-black stereotyping, racially polarized voting, and minority population size.<sup>219</sup>

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216. This follows from the binomial distribution, assuming that the state actions are independent, (i.e., that the realization of unconstitutional motives in one action does not affect the probability of unconstitutional motives in another action). The binomial distribution gives the probability of at least  $x$  "successes" occurring in  $n$  trials, where trial outcomes are binary ("success" or "failure"), the probability of success is fixed across trials, and the  $n$  trials are independent. In our example, the trials consist of 100 elections, "success" is an unconstitutional election outcome, and the probability of "success" in each trial is 0.10.

217. It is worth noting that the considerations that led Elmendorf to argue that federal courts may not adjudicate the question of whether particular election outcomes are unconstitutional because of electorate prejudice do not apply to Section 3 bail-in proceedings. Elmendorf showed that several strands of the political question doctrine cut strongly against federal court efforts to review and remedy the outcomes of particular elections. See Elmendorf, *Making Sense of Section 2*, *supra* note 6, at 436–48. But in a bail-in proceeding, a court would not have to pass on whether particular incumbent officials were impermissibly elected (see the above discussion of probabilities), nor would it have to "undo" the outcome of particular elections. Rather, without passing on whether the outcome of any particular election "rested on prejudice," the court could look at racial stereotyping, the correlation between stereotyping and behavior, racially polarized voting, minority population size, electoral competitiveness, and so forth, and then hazard a guess at the probability of prejudiced votes providing the margin of victory in any given election. Once this average or typical probability has been estimated, and once the total number of elections in the sample is known, it is easy to estimate the probability that at least  $X$  unconstitutional outcomes occurred.

218. For an argument that Section 2 does relax evidentiary standards in this way, see Elmendorf, *Making Sense of Section 2*, *supra* note 6, at 377, 404.

219. Put differently, the outcome of bail-in cases will depend on the judge's prior beliefs about the probability of unconstitutional race discrimination in the defendant jurisdiction. But prior beliefs

But this should not forestall the courts from recognizing either (1) the laws of probability (i.e., that events with small positive probability do occur with predictable frequencies in large samples), or (2) the fact that the type of “finding of constitutional violation” needed to justify an injunction against a particular instance of state action is wholly different from the type of finding that may justify the procedural remedy of preclearance. Evidence concerning the present and future risk of constitutional violations throughout a jurisdiction says much more about whether bail-in is warranted than does documentation of particular constitutional violations that have been remedied in the past.

#### CONCLUSION

The Supreme Court has invited Congress to craft a new coverage formula for the VRA’s preclearance regime that is expressly grounded in current conditions. Meshing legal arguments with empirical evidence about the geography of racial stereotyping, we have shown that Congress could create a new coverage formula based on citizens’ racial attitudes (1) that would cover most of the states historically subject to the preclearance regime; (2) that need not reach many (or indeed any) of the states not historically covered; and (3) that would be closely connected on its face to geographic disparities in the likelihood of Fourteenth and Fifteenth Amendment violations. The first two factors speak to the political advantages of our approach,<sup>220</sup> and the third means that it should survive judicial review. We have also shown that if Congress does not act, courts and litigants could use our results to recreate some semblance of the preclearance regime through the bail-in provisions of Section 3. Our findings should enable courts to issue broader bail-in remedies than could otherwise be justified, and they may help courts decide whether it is more likely than not that constitutional violations occurred.

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affect the outcomes of many other cases, too. *See generally* RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

220. Efforts to revise the coverage formula in 2006 floundered because of political opposition from jurisdictions that would have become newly covered. *See* Persily, *supra* note 17, at 209–11.