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The Causal Context of Disparate Vote Denial

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THE CAUSAL CONTEXT OF DISPARATE VOTE DENIAL

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Abstract: For nearly fifty years, the Voting Rights Act of 1965 ("VRA") and its amendments have remedied racial discrimination in the electoral process with unparalleled muscularity. Modern vote denial practices that have a disparate impact on minority political participation, however, increasingly fall outside the VRA's ambit. As judicial tolerance of disparate impact claims has waned in other areas of law, the contours of Section 2, one of the VRA's most powerful provisions, have also narrowed to fit the shifting landscape. Section 2's "on account of race" standard to determine discrimination in voting has evolved from one of quasi-intent determined by a totality of the circumstances, to a short-lived intent requirement, followed by an enhanced disparate impact analysis, culminating in a more recent standard that simulates proximate cause. This Article proposes a test for Section 2 vote denial claims that comports with the narrowing construction of disparate impact claims and reclaims the robust contextual analysis that the VRA contemplates. The "causal context" test proposed here is anchored to "core values" mined from Section 2's legislative history, particularly the "Senate factors." The causal context analysis relies on proof of explicit or implicit bias, as well as circumstances internal and external to elections that give rise to disparate vote denial, without requiring proof of intent. This approach is historically consistent with the VRA's totality of the circumstances test and cognizant of courts' increasing demands for proof of a causal link within disparate impact jurisprudence. Moreover, the proposed causal context analysis is consonant with recent federal proceedings evaluating the racially disparate impact of voter identification laws, voter purges, early voting restrictions, and other forms of modern vote denial.

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Introduction

President Barack Obama's historic election and reelection is evidence of the increasing durability and resilience of minority voting power. Minority voters participated in the 2008 general election in record numbers and returned to the polls in 2012 at nearly equal levels.[1] It was dubious that such turnout and participation could recur in 2012 in light of the legal framework of mutually reinforcing voter identification ("voter ID") requirements, voter purges, felon disfranchisement laws, and restrictive voting periods.[2] Indeed, the 2008 election that

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[1] The 2008 electorate was the most racially and ethnically diverse in U.S. history, with nearly one in four votes cast by non-whites. Mark Hugo Lopez & Paul Taylor, Dissecting the 2008 Electorate: Most Diverse in U.S. History 3 (2009), *available at* http://pewresearch.org/assets/pdf/dissecting-2008-electorate.pdf. Moreover, the rise in minority voter registration in 2008 narrowed the registration gap between blacks and whites from ten percentage points in 2004 to four percentage points in 2008, and black voter participation nearly matched that of whites for the first time in history. *Id.* at i–ii, 4. Overall voter turnout decreased from 61.6% in 2008 to 58.2% in 2012. Michael P. McDonald, *Turnout in the 2012 Presidential Election*, Huffington Post (Feb. 11, 2013, 1:09 PM), http://www.huffingtonpost.com/michael-p-mcdonald/turnout-in-the-2012-presi_b_2663122. html; *see* Juliet Lapidos, *Voter Turnout*, N.Y. Times, Taking Note Blog (Mar. 13, 2013, 10:02 AM), http://takingnote.blogs.nytimes.com/2013/03/13/voter-turnout/; Sean Sullivan, *The States with the Highest and Lowest Turnout in 2012, in 2 Charts*, Wash. Post, The Fix (Mar. 12, 2013, at 12:36 PM), http://www.washingtonpost.com/blogs/the-fix/wp/2013/03/12/the-states-with-the-highest-and-lowest-turnout-in-2012-in-2-charts/. In this most recent election, young and minority voter turnout increased as compared to 2008, and young voters were the most racially and ethnically diverse segment of the voting population. Nonprofit Vote, American Goes to the Polls 2012: A Report on Voter Turnout in the 2012 Election 13 (n.d.), *available at* http://www.nonprofitvote.org/voter-turnout.html. Latino voter turnout increased to 10% of the general electorate and was even higher in western states such as Nevada, where Latino turnout was 18%. *Id.* at 15. Blacks maintained their 2008 voter turnout rate of 13% of the electorate and may have voted at a higher rate than whites. Paul Taylor, *The Growing Electoral Clout of Blacks Is by Turnout, Not Demographics*, Pew Res. Center (Dec. 26, 2012), http://pewsocialtrends.org/2012/12/26/the-growing-electoral-clout-of-blacks-is-driven-by-turnout-not-demographics/1/; *see* Nonprofit Vote, *supra*, at 17.

[2] *See, e.g.*, Keesha Gaskins & Sundeep Iyer, Brennan Ctr. for Justice, The Challenge of Obtaining Voter Identification 1 (2012), http://brennan.3cdn.net/f5f28dd844a143d303_i36m6lyhy.pdf (assessing the difficulties that eligible voters may face in acquiring photo identification); Jon C. Rogowski & Cathy J. Cohen, Black Youth Project, Turning Back the Clock on Voting Rights: The Impact of New Photo Identification Requirements on Young People of Color 1 (2012), http://research.blackyouthproject.com/files/2012/09/Youth-of-Color-and-Photo-ID-Laws.pdf (reporting that between 170,000 and 475,000 young black voters, 68,000 and 250,000 young Latino voters, 13,000 and 46,000 young Asian American voters, 1700 and 6400 young Native American voters, and 700 and 2700 young Pacific Islander voters might not have been able to vote in the 2012 general elections because they did not possess the identification required under new state laws); Wendy R. Weiser & Lawrence Norden, Brennan Ctr. for Justice, Voting Rights Changes in 2012, at 19 (2011), http://brennan.3cdn.net/9c0a034a4b3c68a2af_9hm6bj6d0.pdf (tracking election law changes in 2011 that impacted the right to vote, in-

brought the United States its first African American[3] head of state and the world its first black leader of a non-majority black nation occurred under markedly less restrictive voting conditions.[4]

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cluding voter registration and voter ID requirements). Preliminary analyses show that voter ID laws had less of an effect on the 2012 election than was anticipated. Suevon Lee, *What Effect, If Any, Did Voter ID Laws Have on the Election*, ProPublica (Nov. 15, 2012, 2:34 PM), http://www.propublica.org/article/what-effect-if-any-did-voter-id-laws-have-on-the-election (noting that, although voter ID laws had received the most attention, they would prove to be a far less significant problem as compared with limited early voting hours, lengthy ballots, and precinct shutdowns because of Hurricane Sandy). Estimates show that less than five percent of provisional ballots in Virginia were cast because of lack of valid identification. *Id.* Likewise, in Tennessee, where new voter ID laws were put into effect in 2012, only 674 voters filled out provisional ballots due to lack of a valid identification, and the overall voter turnout remained consistent with past years. *Id. But see* Deborah Charles, *Complaints About Voter IDs, Ballots, Long Lines in Election*, Reuters, Nov. 7, 2012, *available at* http://www.reuters.com/article/2012/11/07/us-usa-campaign-voting-idUSBRE8A609820121107 (reporting that some Pennsylvanians were turned away at the polls for lack of valid photo ID even though Pennsylvania voter ID laws are not in effect). True the Vote recently released a report asserting that voter ID laws did not have any negative impact on voter turnout, and new voter ID laws may have bolstered voter turnout due to increased voter confidence. *See generally* True the Vote, Report on Voter Suppression in the Elections of November 2012 (2013), *available at* http://www.scribd.com/doc/127481956/Voter-Suppression-in-the-Elections-of-November-2012 (summarizing True the Vote's research and findings). This report has been widely criticized as false and misleading. *See, e.g.*, Paul Gronke, *True the Vote Continues to Print Untrue Things*, Early Voting Center (Mar. 6, 2013), http://earlyvoting.net/commentary/true-the-vote-continues-to-print-untrue-things/; Rob Richie, *True the Vote Presents False Findings*, Huffington Post (Mar. 1, 2013, 6:41 PM), http://www/huffingtonpost.com/rob-richie/true-the-vote-fudges-numb_b_2785093.html. Critics of the True the Vote report revealed that it incorrectly compared voter turnout of eligible voters in 2008 to registered voters in 2012 to support the claim that voter turnout had not decreased in states that passed new voter ID laws. *See* Gronke, *supra*; Richie, *supra*. True the Vote twice revised the report to delete the false statistical analysis on voter turnout, but did not revise the claims concerning the effect of voter ID laws on voter turnout. *See* Gronke, *supra*; Richie, *supra*. True the Vote maintains that the original conclusions in the report are correct. *See* Rick Hasen, *True the Vote Comment on Corrected Voter Suppression Report*, Election L. Blog (Mar. 1, 2013, 10:37 AM), http://electionlawblog.org/?p=47938 (reprinting True the Vote's statement).

[3] Although President Obama is biracial, he self-identifies as an African American. *See* Sam Roberts & Peter Baker, *Asked to Declare His Race for Census, Obama Checks 'Black,'* N.Y. Times, Apr. 3, 2010, at A9 (reporting that President Obama designated himself as "Black, African Am., or Negro" on the 2010 U.S. Census).

[4] One dozen states, including eight of the eleven states in the former Confederacy, approved new voting restrictions leading up to the 2012 election. *Election 2012: Voting Laws Roundup*, Brennan Ctr. for Justice (Oct. 16, 2012), http://www.brennancenter.org/content/resource/2012_summary_of_voting_law_changes [hereinafter *Voting Laws Roundup*]. Kansas and Alabama passed legislation requiring would-be voters to provide proof of citizenship before registering. *Id.* Florida and Texas imposed significant obstacles for groups like the League of Women Voters and Rock the Vote to register new voters. *Id.*; *see also* Diana Kasdan, Brennan Ctr. for Justice, State Restrictions on Voter Registration Drives 4 (2012), http://brennan.3cdn.net/17c2fc295ef1249450_26m6bt3yf.pdf (discussing laws governing voter registration drives). Maine repealed its nearly forty-year-old law

On balance, election laws adopted since 2008 comprise a powerful, interlocking grid of modern vote denial that is disproportionately visited upon racial minorities.[5] These restrictions run counter to election reform's general expansion of the franchise and trajectory toward increasing electoral participation.[6] The disparate impact[7] of these laws also runs counter to the Voting Rights Act of 1965 ("VRA").[8] The VRA has played a pivotal role in enhancing racial minorities' political participation and the integrity of American democracy. In the most recent election cycle, the VRA blocked restrictive voting laws in three jurisdictions.[9] Although these laws did not alter the outcome of elections, and

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permitting Election Day voter registration. Weiser & Norden, *supra* note 2, at 25. Five states—Florida, Georgia, Ohio, Tennessee, and West Virginia—cut short their early voting periods amid litigation. *Id.* Florida and Iowa reversed executive orders and disenfranchised tens of thousands of previously eligible voters by barring all ex-felons from the polls. *Id.* at 3. Under the previous executive order, 87,000 Floridians would have had their voting rights reinstated prior to the 2012 election. *Id.* Finally, six states—Alabama, Kansas, South Carolina, Tennessee, Texas, and Wisconsin—required voters to show government-issued ID in order to cast a standard ballot. Rogowski & Cohen, *supra* note 2, at 6–8, 11–12; *see also* Weiser & Norden, *supra* note 2, at 2 (tracking election law changes in 2011 that impact the right to vote, including voter registration and voter ID requirements).

[5] The current president and chief executive officer of the National Association for the Advancement of Colored People (NAACP), Ben Jealous, observed, "We are living through the greatest wave of legislative assaults on voting rights in more than a century. In 2011 and 2012, more states have passed more laws pushing more voters out of the ballot box than at any time since the rise of Jim Crow." Benjamin Todd Jealous, President & Chief Exec. Officer, Nat'l Ass'n for the Advancement of Colored People, Keynote Address at First Plenary Session, NAACP 103d Annual Convention 5 (July 9, 2012), http://naacp.3cdn.net/ee144c598135908d65_wwm6iyzz7.pdf; *see also* Rogowski & Cohen, *supra* note 2, at 2 (noting that immediately after President Obama took office, Republican legislatures began enacting new voter ID laws that greatly restricted people's ability to vote).

[6] *See generally* Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (2000) (examining the expansion of suffrage throughout the history of the United States).

[7] Disparate impact refers to "an adverse, disproportionate impact [that] is brought about by decisionmaking criteria or practices that operate to harm individuals on the basis of a protected status characteristic" such as race. Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 Hous. L. Rev. 1469, 1473 (2005); *see also* Black's Law Dictionary 538 (9th ed. 2009) (defining "disparate impact" as "[t]he adverse effect of a facially neutral practice (esp. an employment practice) that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability and that is not justified by business necessity"). Disparate impact is discerned through evidence of statistical disparities. *See* Foster, *supra*, at 1513.

[8] *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973–1973bb-1 (2006).

[9] *See* South Carolina v. United States, No. 12-203, 2012 WL 4814094, at *17 (D.D.C. Oct. 10, 2012) (blocking South Carolina's amendment to its voter ID laws for the 2012 elections, but approving it for use beginning in 2013); Texas v. Holder, No. 12-cv-128, 2012 WL 3743676, at *32 (D.D.C. Aug. 30, 2012) (striking down the Texas voter ID law); Florida v. United States, No. 11-1428, 2012 WL 3538298, at *47 (D.D.C. Aug. 16, 2012) (holding

turnout among young black and Latino voters remained comparable to 2008,[10] preliminary data suggest that these laws threatened to suppress minority voter turnout in measurable ways.[11] Despite suggestions that voter suppression tactics can trigger a "backlash" increase in minority voter turnout,[12] these tactics nonetheless violate the VRA's core principle—to ensure that the race of a voter has no bearing on his or her ability to vote.[13] Moreover, the backlash effect does not negate the increased burden placed on minorities' right to vote even if, ultimately and intermittently, minority voters can bear it and elect candidates of their choice.

Congress's broad mandate that the VRA provide racial minorities "equal access to the process of electing their representatives" and that Section 2 of the VRA serve as "the major statutory prohibition of all voting rights discrimination" has largely been effectuated through the persistent enforcement (and threat of enforcement) of the VRA.[14] The VRA's purpose is not only to rid the electoral arena of existing racial discrimination, but also to insulate the electoral process from future

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that a decrease in time for early voting from twelve to eight days disproportionately affected minority voters).

[10] *See* LOPEZ & TAYLOR, *supra* note 1, at 3–4 (stating that minority voters made up an unprecedented share of the electorate in 2008); *Election 2012: Young and Minority Voters Turn Out in Levels Close to 2008*, PATRIOT-NEWS (Nov. 7, 2012, 10:23 AM), http://www.pennlive.com/midstate/index.ssf/2012/11/election_2012_young_and_minori.html (reporting that minority voters made up a large portion of the electorate in both 2008 and 2012); *see also* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 81 (2012) ("Whether or not there's a lot of voter suppression, fear of it and Democratic efforts at 'election protection' seem to . . . bring out Democratic voters.").

[11] *See* Karen Tanenbaum, *Voter ID Laws and Blocking Access to the Ballot: New Tools, Old Tricks*, LEADERSHIP CONF., http://www.civilrights.org/monitor/winter-2012/voter-id-laws-and-blocking.html (last visited Mar. 11, 2013) (stating that the new voter ID laws will have an impact on minority voters' access to the polls based on a Brennan Center for Justice study); *Voting Laws Roundup*, *supra* note 4; *see also* HASEN, *supra* note 10, at 81 (arguing that fear of voter suppression seems to increase Democratic voter turnout).

[12] Ari Berman, *How the GOP's War on Voting Backfired*, THE NATION (Nov. 8, 2012, 2:24 PM), http://www.thenation.com/blog/171146/gops-failed-voter-suppression-strategy ("We're still waiting on the data to confirm this theory, but a backlash against voter suppression laws could help explain why minority voter turnout increased in 2012.").

[13] *See, e.g.*, Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 478 (1997); Morse v. Republican Party of Va., 517 U.S. 186, 193 (1996); Holder v. Hall, 512 U.S. 874, 880 (1994); Beer v. United States, 425 U.S. 130, 131–33 (1976); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). The VRA has its basis in the Fourteenth and Fifteenth Amendments to the U.S. Constitution. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *id.* amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

[14] S. REP. NO. 97-417, at 30, 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207, 214.

racial discrimination.[15] This latter, prophylactic goal underscores the VRA's continuing relevance and the breadth of its reach. However, in the midst of palpable retrenchment in the area of voting rights, including a pending challenge to the constitutionality of Section 2's most able counterpart, Section 5,[16] the VRA has become increasingly feckless in defending against laws that disproportionately threaten to frustrate racial minorities' right to vote. Key provisions of the VRA have come under assault, in part because of a misguided understanding of minority voter turnout and a failure to recognize that unlawful minority voter suppression tactics persist despite minority candidate success.[17]

Judicial reticence to acknowledge disparate impact in voting and other contexts compounds the weakening force of the VRA in vote denial challenges.[18] Equal protection jurisprudence's notorious ambivalence toward proof of bias (explicit or implicit) sufficient to sustain a constitutional violation[19] also appears to have infected analyses of the VRA. In addition, the advent of modern vote denial measures has coincided with significant constrictions of the disparate impact standard in

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[15] Section 2 of the VRA forbids any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (2006). Section 5 of the VRA requires that certain covered states and political subdivisions seek preclearance before enforcing "any voting qualification or prerequisite to voting" in order to ensure that it does not have the "purpose nor will have the effect of denying or abridging the right to vote on account of race or color." *Id.* § 1973c(a) (2006).

[16] *See* Shelby County, Ala. v. Holder, 679 F.3d 848, 884 (D.C. Cir.), *cert. granted*, 81 U.S.L.W. 3064 (U.S. Nov. 9, 2012) (No. 12-96) (challenging the constitutionality of Section 5).

[17] *See infra* notes 179–199 and accompanying text.

[18] *See infra* notes 126–173 and accompanying text.

[19] *See* Sheila Foster, *Intent and Incoherence*, 72 Tul. L. Rev. 1065, 1069–73 (1998) (commenting that "the Court's application of the discriminatory intent requirement has been far from coherent" and examining the disparate approaches that are currently used); Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105, 1106–07 (1989) (stating that the doctrine of intent actually shifts burdens of proof to allow the judging of substantive outcomes consistent with liberal ideology); Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 Geo. L.J. 279, 287, 294 (1997) (arguing that the U.S. Supreme Court employs such a broad definition of intentional discrimination that it limits its understanding of the doctrine).

Moreover, Justice Antonin Scalia's ominous declaration, in the 2009 Supreme Court case, *Ricci v. DeStefano*, that "the war between disparate impact and equal protection will be waged sooner or later" underscores his concerns about the constitutionality of disparate impact theory. 557 U.S. 557, 595–96 (2009) (Scalia, J., concurring). Just one year later, however, Justice Scalia authored a unanimous opinion in which the Court stated that its "charge is to give effect to the [disparate impact] law Congress enacted." Lewis v. City of Chi., 130 S. Ct. 2191, 2200 (2010). This ambivalence toward disparate impact theory permeates courts' treatment of disparate impact claims.

litigation under Section 2 of the VRA, which expressly prohibits any law or practice that denies or diminishes the right to vote on account of race.[20] Most notably, the role of intent under Section 2 of the VRA remains a vexing question nearly fifty years after the VRA's inception and three decades since Section 2 was amended specifically to omit an intent requirement.[21]

Challenges to Section 2's constitutionality on the one hand and expansive constructions of its reach and remedies on the other have confounded courts' and commentators' struggle to make sense of the provision's application to modern vote denial. Section 2 has been rehashed and deconstructed to such a degree that the provision's plain meaning has become obscured. Proposals concerning the interpretation of Section 2 include relaxed evidentiary standards, complex burdens of proof, and heightened scrutiny.[22] Notwithstanding their individual merit, each proposal fails to reconcile the historical context that gave rise to the VRA's passage and anchors its normative goals with the increasingly prevalent view that non-intent-based race discrimination cannot be remedied in the courts.[23] Moreover, a recent U.S. Supreme Court decision *Ricci v. DeStefano*, an employment discrimination case, raises challenging questions concerning disparate impact evidence as a touchstone for, but not the sole evidence of, racial discrimination.[24]

Ricci's holding that evidence of statistical disparity is not "a strong basis in evidence" to advance a claim of employment discrimination, despite contrary language in Title VII of the Civil Rights Act of 1964 ("Title VII"),[25] potentially informs Section 2's vote denial jurisprudence. Like Title VII, Section 2 relies on evidence of statistical disparity, among other proof, as part of its totality of the circumstances analysis.[26] *Ricci*'s Title VII standard[27] and other legal developments have forced an overdue grappling with Section 2's "on account of race" clause, upon which every Section 2 claim hinges. This inquiry, in turn, informs the overarching question plaguing Section 2: what, other than an intent to

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[20] *See infra* notes 82–102 and accompanying text.

[21] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (2006)).

[22] *See infra* notes 126–173 and accompanying text.

[23] *See infra* notes 63–66 and accompanying text.

[24] *See Ricci*, 557 U.S. at 584.

[25] See Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2.

[26] *See infra* notes 58–81 and accompanying text (discussing Section 2's totality of the circumstances test).

[27] *See Ricci*, 557 U.S. at 584.

discriminate based on race, proves that disparate vote denial is "on account of race"?

This Article responds to that question by identifying two "core values" of Section 2 that compel a deeper inquiry into what I term the "causal context of disparate vote denial." Mined from the plain language of Section 2 and the legislative history of its amendments— specifically, the "Senate factors"—the core values of Section 2 are based on a principle of equality that is both remedial and prophylactic. Reduced to their simplest terms, Section 2's core values are that (1) racial context matters and (2) implicit bias counts.[28] As the Senate factors reveal, Congress intended to neutralize the effects of past racial discrimination in the electoral arena by requiring courts to take account of race when evaluating electoral systems and practices. In other words, Section 2's remedial function elevates the importance of racial context as proof of causation. Courts must examine the historical racial context of discrimination in which contemporary race-neutral laws operate to determine whether persistent racial inequality interacts with these laws to cause disparate vote denial. The second core value of Section 2 that the Senate factors reveal is recognition of the complexity of racial discrimination, in all its forms, including implicit bias.[29] In considering evidence of implicit bias in addition to other direct and indirect proof of discrimination in voting, courts must demand that disparate vote denial be explained in terms other than race to avoid invalidation under Section 2.

These core values oblige courts to consider disparate impact and its causes in broad terms; that is, Section 2 requires courts to take account of the "causal context" of the statistical disparities that define disparate vote denial. Section 2's dual remedial and prophylactic aims are best served when courts evaluate not only statistical evidence of racial impact, but also the racial context in which this evidence is situated. In other words, the aims are best served by taking account of the causal context, including evidence of implicit bias. The causal context analysis is legally and historically consistent with the impact of race in the electoral process, as well as with recent studies demonstrating that consideration of implicit bias is indispensable to the modern treatment of race.[30] Contrary to the notion that vote denial claims do not square

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[28] *See infra notes* 84–86 and accompanying text.

[29] *See infra* notes 85–86 and accompanying text.

[30] *See generally, e.g.*, Implicit Bias Across the Law (Justin D. Levinson & Robert J. Smith eds., 2012) (chronicling, in a series of essays, how pervasive implicit racial attitudes and stereotypes perpetuate the continued subordination of historically disadvantaged groups

with Section 2's jurisprudence, this Article demonstrates that the Senate factors, which have defined Section 2 claims, are a template for the causal context analysis because they rely on expansive evidence of discrimination that includes both explicit and implicit bias.[31]

Recent federal proceedings in Texas, Florida, South Carolina, and New Hampshire, where Section 5 of the VRA was used to challenge voter ID restrictions and early voting restrictions, also reinforce the causal context analysis as the appropriate treatment for disparate vote denial claims.[32] In those cases, there was a broad inquiry into the election laws at issue and the racial inequality in areas external to voting to determine the lawfulness of their impact. This Article briefly examines these cases to guide its construction of an invigorated Section 2 analysis.[33] This Article also proposes a new framework for analyzing certain Senate factors by drawing upon disparate impact analyses under Title VII.[34] Cut from similar cloth, both Title VII and the VRA invite a deductive evaluation of state motives without requiring proof of intentional discrimination. Issued in the wake of narrowing constructions of Title

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through the legal system); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 Calif. L. Rev. 969 (2006) (investigating the possibility of using the law as a "debiasing" tool to counter implicit bias); Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489 (2005) (applying a social cognitive model of implicit bias to Federal Communications Commission regulations); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Calif. L. Rev. 997 (2006) (advancing a theory of "behavioral realism" to identify discriminatory motives in Title VII disparate treatment cases); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987) (evaluating the doctrine of discriminatory purpose in light of the potential for implicit bias); Michael H. LeRoy, *Do Partisan Elections of Judges Produce Unequal Justice When Courts Review Employment Arbitrations?*, 95 Iowa L. Rev. 1569 (2010) (examining how judicial elections impact courts' review of arbitrator rulings in employment disputes); Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 Mich. J. Race & L. 1 (2009) (analyzing polling places as a site for implicit bias).

[31] Implicit bias theory has been summarized and defined as "discriminatory biases based on implicit attitudes or implicit stereotypes." Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Calif. L. Rev. 945, 951 (2006). By its very nature, implicit bias is not cognizable by its perpetrator; rather, it operates as a subterranean influence on actions and decision making. *See* Lawrence, *supra* note 30, at 322 ("[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation." (footnote omitted)).

[32] *South Carolina*, 2012 WL 4814094, at *19; *Texas*, 2012 WL 3743676, at *32; *Florida*, 2012 WL 3538298, at *47; Letter from T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice, to J. Gerald Hebert & Stephen B. Pershing 1–2 (Sept. 4, 2012) [hereinafter New Hampshire Preclearance Letter], *available at* http://www.scribd.com/doc/105005436/DOJ-New-Hampshire-Voter-ID.

[33] *See infra* notes 103–125 and accompanying text.

[34] *See infra* notes 126–173 and accompanying text.

VII claims, the Equal Employment Opportunity Commission's (EEOC) new guidelines for age discrimination claims illuminate the application of certain Senate factors under the VRA.[35]

Importantly, the causal context analysis does not contemplate that all disparate impact will be eliminated from the electoral arena. For example, if a race-neutral voting qualification has a racially disparate impact because the qualification operates within a context of discrimination, Section 2 invalidates the practice for as long as the disparate impact or the discriminatory context persists.[36] Once the discriminatory context is cured, a Section 2 violation can no longer be sustained.[37] Section 2's constitutionality is thus reinforced, because its ability to remedy disparate vote denial is not unending or unlimited. Moreover, although factually rigorous, the causal context test is determinate enough for courts to apply it consistently and for it to inform legislatures and election officials prospectively of potential violations. The VRA's role in challenging societal discrimination also should not be overstated. The VRA recognizes the existence of societal discrimination but does not seek a direct remedy for it; instead, the VRA modestly aims to immunize the political process from its effects. That is the rub that both preserves the constitutionality of Section 2 and makes claims under this provision especially challenging to prove.

This Article proceeds in three Parts. First, Part I provides a broad overview of the VRA as a disparate impact statute.[38] Section A begins by examining Section 2's core values.[39] Section B then briefly traces the evolution of Section 2's intent standard from its broad origins, to a subsequently narrowed judicial interpretation, to expansive amendments that place it within the legal realm of disparate impact, to its current, circumscribed form.[40] Section C considers recent Section 5 proceedings concerning voter ID and early voting laws as examples of how the context of discrimination is integral to the VRA inquiry.[41] Finally, Section D looks to the Court's recent disparate impact jurisprudence in the area of employment discrimination to inform a constitutionally

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[35] *See Questions and Answers on EEOC Final Rule on Disparate Impact and "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act of 1967*, U.S. Equal Emp. Opportunity Commission, http://www.eeoc.gov/laws/regulations/adea_rfoa_qa_final_rule.cfm (last visited Mar. 10, 2013) [hereinafter *EEOC Questions & Answers*].

[36] 42 U.S.C. § 1973(a) (2006).

[37] *Id.*

[38] *See infra* notes 49–173 and accompanying text.

[39] *See infra* notes 58–81 and accompanying text.

[40] *See infra* notes 82–102 and accompanying text.

[41] *See infra* notes 103–125 and accompanying text.

permissible evidentiary standard in vote denial claims.[42] In particular, this Section examines the *Ricci* decision and identifies parallels between the VRA and Title VII to explain how EEOC guidelines may be used to apply to certain Senate factors.

The Article then proceeds to Part II, which introduces the causal context test as a workable analysis for Section 2 vote denial claims that complements Section 2's core values.[43] Section A distinguishes existing proposals for Section 2 analyses.[44] Section B explores the components of the causal context test, including the role of implicit bias in Section 2, the standard of proof for evidence of discrimination external to voting that produces disparate vote denial, and the analysis of the tenuousness of the state policy.[45] The Article concludes with Part III, which briefly outlines how the causal context test would apply to modern vote denial practices, including voter ID laws,[46] felon disenfranchisement,[47] and voter purges.[48]

Importantly, this Article does not go down the inviting and equally challenging path of defining the right to political participation or what constitutes meaningful participation in the political process. Rather, this Article's focus is on how Section 2 protects the right to political participation by casting a ballot on an equal basis as other groups, regardless of race. The Article concludes that, to the extent that a voter's race is predictive of the relative ease or difficulty he or she will face in casting a ballot, the causal context test can reveal whether discrimination is present, and Section 2 can provide a remedy. It further establishes that, despite current constrictions, Section 2 litigation preserves a relevant space for proof of racially disparate impact both internal and external to the electoral process, and, consequently, helps to insulate our democracy from racial discrimination's deleterious effects.

I. The VRA as a Disparate Impact Statute

For nearly fifty years, the VRA and its amendments have remedied racial discrimination in the electoral process with unparalleled muscularity. The VRA revolutionized minority voters' access to the political process and enabled diverse candidates to compete for leadership and

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[42] *See infra* notes 126–173 and accompanying text.
[43] *See infra* notes 174–263 and accompanying text.
[44] *See infra* notes 178–199 and accompanying text.
[45] *See infra* notes 200–263 and accompanying text.
[46] *See infra* notes 282–292 and accompanying text.
[47] *See infra* notes 293–307 and accompanying text.
[48] *See infra* notes 308–312 and accompanying text.

office-holding on scales that were unfathomable prior to its 1965 enactment.[49] The VRA's success in this regard is owed largely to its two most frequently enforced provisions: Section 2 and Section 5.[50] Section 2 of the VRA provides a remedy within the electoral arena for any voting practice, procedure, or law that has the intent or effect of denying or abridging the right to vote on account of race.[51] Section 5, by contrast, is limited to certain jurisdictions with a history of discrimination in voting, and prohibits voting changes that (1) are retrogressive, that is, that worsen the electoral position of minorities, or (2) are intended to discriminate based on race, regardless of effect.[52]

Both Sections 2 and 5 employ disparate impact theory by measuring the effect of a particular election law or practice on racial minorities as compared to non-minority groups.[53] Because of Section 5's lim-

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[49] *See* Judson L. Jeffries, Huey P. Newton: The Radical Theorist 85 (2002) ("Prior to 1964, there were 103 black elected officials throughout the United States. That number climbed to 1,400 with the passage of the Voting Rights Act of 1965."). By the end of the 1970s, the total number of black elected officials nationwide had more than doubled, to nearly 5000. U.S. Census Bureau, Statistical Abstract of the United States: 2011, at 258 (2011), *available at* http://www.census.gov/compendia/statab/2011/tables/11s0413.pdf. Currently, there are approximately 10,000 black elected officials nationwide. Joint Ctr. for Political & Econ. Studies, National Register of Black Elected Officials Fact Sheet 1 (2011), *available at* http://www.jointcenter.org/sites/default/files/upload/research/files/National%20Roster%20of%20Black%20Elected%20Officials%20Fact%20Sheet.pdf; *see also* Steven Andrew Light, "The Law Is Good": The Voting Rights Act, Redistricting, and Black Regime Politics, at ix (2010) (noting the VRA's impact in expanding the ranks of black, Latino, and Asian elected officials).

[50] In addition, other provisions of the VRA, most notably Sections 4 and 203 (and its accompanying provisions), have eliminated significant barriers to political participation. *See* 42 U.S.C. § 1973b (2006 & Supp. II 2008) (prohibiting certain devices such as literacy tests as voting prerequisites, providing for the appointment of federal examiners and federal observers, and establishing the triggering formula for Section 5 of the VRA); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §§ 203, 301, 89 Stat. 400 (codified as amended at 42 U.S.C. §§ 1973–1973bb) (requiring translated election materials for certain populations).

[51] *Id.* § 1973a.

[52] *Id.* § 1973c(a).

[53] *See id.* §§ 1973a, 1973c(a). Section 2 claims fall into either of two categories: vote denial or vote dilution. *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. Rev. 689, 691 (2006). Vote denial occurs when an individual is prevented from casting a ballot because of a law, practice, or procedure that makes it impossible or overly burdensome to do so. *Id.* Vote dilution is when a person or group of persons is permitted to cast ballots, but the ballots are not counted equally with other votes. *Id.* Vote dilution is often framed as a group right to have its votes cast and counted equally. *Id.*

There are significant parallels between Sections 2 and 5 in the area of disparate impact. For example, Section 5's retrogression standard measures the degree to which minority voting power is diminished relative to its existing power vis-à-vis whites. Rick Pildes, *How* Ricci *Will Affect the Voting Rights Act*, Balkinization (June 29, 2009, 10:43 AM), http://balkin.

ited geographic coverage and unique preclearance standard,[54] however, it is not the ideal situs for large-scale disparate vote denial challenges.[55] Instead, Section 2's nationwide reach, covering all voting-related measures, makes it especially fitting to address modern vote denial resulting from voter ID requirements, voter purges, restricted voting periods, stringent voter registration regulations,[56] and felon disfranchisement, among other voting rights encumbrances.[57]

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blogspot.com/2009/06/how-ricci-will-affect-voting-rights-act.html (noting that Section 2's prohibition of election practices that result in denial or abridgement of the right to vote on account of race and Section 5's retrogression standard are "a form of disparate-impact law").

[54] *See* Tokaji, *supra* note 53, at 691.

[55] Moreover, Section 5's constitutionality is the subject of intense scrutiny, as the Supreme Court's 2012 grant of certiorari in *Shelby County, Alabama v. Holder* demonstrates. *See* 679 F.3d 848, 884 (D.C. Cir.), *cert. granted*, 81 U.S.L.W. 3064 (U.S. Nov. 9, 2012) (No. 12-96). The Court has avoided the constitutional question in recent cases by incrementally dispossessing Section 5 of its full breadth. *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 202–03 (2009) (declining to decide Section 5's constitutionality, but stating that Section 5 imposes "substantial federalism costs" and "current burdens" that "must be justified by current needs"); s*ee also* Bartlett v. Strickland, 556 U.S. 1, 24–25 (2009) (holding that Section 5 does not require states to maximize electoral opportunities for minority voters); Riley v. Kennedy, 553 U.S. 406, 428 (2008) (resolving conflicting federal and state statutory mandates in a Section 5 redistricting challenge in favor of the state). For these reasons, it is imperative that Section 2 operate to the fullest extent of its constitutional capacity to remedy and prevent racial discrimination in voting on a national scale. Indeed, how well Section 2 can address a variety of voting challenges is an important consideration in the debate about the continuing role of Section 5.

[56] For example, in 2011, Florida legislators enacted H.B. 1355, an omnibus bill of election law changes that included severe restrictions and burdensome administrative requirements for voter registration, including shorter deadlines for submitting completed registration forms and stiff penalties for delay or error. *See* FLA. STAT. § 97.0575 (2011). As a result, several civil rights groups ceased conducting voter registration in Florida and successfully challenged the laws. *See* League of Women Voters of Fla. v. Detzner, 863 F. Supp. 2d 1155, 1167 (N.D. Fla. 2012) (conditionally granting a motion to enjoin the implementation of Florida's new voter registration requirements).

[57] To date, no federal appellate court has held that Section 2 applies to felon disfranchisement, and several have expressly held that it does not. *See, e.g.*, Simmons v. Galvin, 575 F.3d 24, 34–36 (1st Cir. 2009) (holding that Section 2 does not apply to state laws that disenfranchise incarcerated felons); Hayden v. Pataki, 449 F.3d 305, 329 (2d Cir. 2006) (en banc) (holding that Congress made no clear statement of intent to apply Section 2 to felon disenfranchisement laws); Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc) (holding that Section 2 does not apply to felon disenfranchisement laws because a contrary holding would conflict with the Fourteenth Amendment). *But see* Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (assuming without holding that the VRA applied to Tennessee's felon disenfranchisement laws, but holding that there was no Section 2 violation).

A. *Disparate Vote Denial and the Mechanics of Section 2*

Modern vote denial is characterized by disparate impact caused by discrimination within or outside the electoral arena that is transmitted into the electoral arena via election laws, procedures, or practices.[58] Section 2 broadly states that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote *on account of race*."[59] Section 2 was not always this expansive, however. In 1982, Congress amended Section 2 to address vote dilution claims by including the terms "results" and "on account of race" to make clear that the provision did not require a showing of intentional racial discrimination or discriminatory purpose.[60] Instead, plaintiffs pursuing a claim under Section 2 could prevail by showing discriminatory effect.[61] Importantly, Congress was not focused on vote denial at the time of the 1982 amendments, nor was the Supreme Court in the 1986 case, *Thornburg v. Gingles*, which was the first case to apply the amended standard.[62] For this reason, the legislative history of the amendments and the seminal cases that followed do not provide much guidance on what the test for vote denial should be.[63] They do, however, reveal certain principles that guide the vote denial analysis.

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[58] *See* Tokaji, *supra* note 53, at 691 (describing the set of regulations, rules, and practices governing the administration of elections that result in the disproportionate denial of minority voters' votes as new vote denial).

[59] 42 U.S.C. § 1973(a) (2006) (emphasis added).

[60] *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973). In 1980, in *City of Mobile, Alabama v. Bolden*, a plurality of the Supreme Court held that Section 2 required a showing of intentional discrimination to invalidate an at-large election scheme. 446 U.S. 55, 74 (1980). The plaintiffs had alleged that Mobile, Alabama's at-large election of its commissioners effectively disabled black voters from electing their preferred candidates because blacks were a numerical minority voting in a climate of entrenched racial polarization. *Id.* at 58. The 1982 amendments to Section 2 restored the evidentiary standard established in earlier cases that considered the totality of the circumstances and did not require direct evidence of discriminatory intent. *See* S. REP. NO. 97-417, at 27–28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205. Indeed, the results test that was added to Section 2 in 1982 was borne out of a direct response to *Bolden*. *Id.*

[61] *See* 42 U.S.C. § 1973(a). As a result of amended Section 2, plaintiffs need only show "that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." S. REP. NO. 97-417, at 27. This is expressly distinct from proof that the *purpose* of the system or practice is to discriminate.

[62] *See* 478 U.S. 30, 47 (1986).

[63] *See* Johnson v. De Grandy, 512 U.S. 997, 1022 (1994); *Gingles*, 478 U.S. at 80.

In *Gingles*, the Supreme Court clarified that the "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[64] The *Gingles* Court adopted principles developed by the U.S. Court of Appeals for the Fifth Circuit in the 1973 case, *Zimmer v. McKeithen*, a Section 2 case, to formulate its preconditions and totality of the circumstances analysis for Section 2 claims.[65] What emerged was a multi-pronged test for Section 2 claims based on a theory of vote dilution—that is, based on whether an electoral practice resulted in minority voters having less opportunity to elect a candidate of their choice on account of their race.[66] The Senate Report accompanying the 1982 amendments to the VRA also relied on *Zimmer* and a Supreme Court vote dilution case from 1973, *White v. Regester*, to identify a wide-ranging list of non-exhaustive factors that can reveal the racial impact of electoral laws under Section 2.[67] The following seven "Senate factors" are typical indicia of voting practices that deny minority voters an equal opportunity to participate in the political process and to elect candidates of their choice:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

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[64] *Gingles*, 478 U.S. at 47; *see also Johnson*, 512 U.S. at 1022 (holding that Section 2 was not violated where, in spite of racial discrimination, minority voters were able to form voting majorities in several districts roughly proportional to the minority's distribution in the voting-age population).

[65] *See Gingles*, 478 U.S. at 36 n.4 (citing Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom.* E. Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam)).

[66] *See infra* notes 65–68 and accompanying text.

[67] *See* S. Rep. No. 97-417, at 21–23 & nn.73–76, 79–81 (1982) (citing White v. Regester, 412 U.S. 755, 766–69 (1973); *Zimmer*, 485 F.2d at 1305), *reprinted in* 1982 U.S.C.C.A.N. 177, 198–200.

> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[68]

The Senate Report identified two additional factors that are relevant proof in certain cases:

> A. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
> B. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[69]

The Senate Report makes clear, and the Supreme Court has affirmed, that "there is no requirement that any particular number of factors be proved or that a majority of them point one way or the other."[70] The Report further states that the "ultimate test" for racial discrimination under Section 2 is "whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice."[71] Along with certain pre-

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[68] *Id.* at 28–29 (footnotes omitted).

[69] *Id.* at 29 (footnote omitted) ("A" and "B" indications added). These two factors are referred to interchangeably as factors A and B or factors 8 and 9.

[70] *Id.* at 29 & n.118 (stating that the factors were not intended "to be used[] as a mechanical 'point counting' device").

[71] *Id.* at 30. A violation of Section 2 is established "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by members of a protected class, "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (2006).

requisites established in *Gingles*,[72] these Senate factors have become the standard mechanism for evaluating Section 2 vote dilution claims.[73]

Although *Gingles* did not purport to pronounce a broad rule for all Section 2 cases, its legal framework has come to characterize Section 2 more broadly, despite the framework's ill-fitted application to vote denial.[74] As a result, the legal contours of vote denial claims remain woefully underdeveloped as compared to vote dilution claims.[75] The development gap between Section 2's vote denial and vote dilution jurisprudence can be narrowed, however, if Section 2 is recognized as a disparate impact provision and the unique characteristics of modern vote denial are incorporated into the Section 2 analysis. The *Gingles* prerequisites, for example, have no bearing procedurally or substantively on disparate vote denial claims. As a procedural matter, the *Gingles* preconditions have no place in the vote denial analysis because there are no relevant preconditions to individual vote denial other than voting eligibility, or to disparate vote denial other than eligibility and statistical dis-

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[72] *Gingles* involved a challenge by black voters to North Carolina's state legislative redistricting plan following the 1990 U.S. Census. *Gingles*, 478 U.S. at 34–35. In considering the plaintiffs' claims, the *Gingles* Court established a tripartite threshold examination of vote dilution claims under Section 2 of the VRA. *Id.* at 50–51. Groups alleging a violation must establish that they are: (1) sufficiently large and geographically compact; (2) politically cohesive; and (3) routinely denied an equal opportunity to elect candidates of their choice because of racially polarized voting patterns. *Id.* If these "preconditions" are met, then the court must consider the challenged practice under the "totality of circumstances." *Id.* at 43, 50, 79–80.

[73] *See* Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982: Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643, 675 (2006).

[74] One scholar has noted the *Gingles* framework's inefficacy at addressing Section 2 claims that do not involve redistricting and reapportionment. *See* Tokaji, *supra* note 53, at 709, 721. Vote denial claims (and some vote dilution claims) still lack a standardized litigation framework. As of 2005, less than a quarter of Section 2 cases addressed vote denial claims. *See id.* at 708–09. Since then, the numbers have not increased significantly. In 2006, the University of Michigan Law School's Voting Rights Initiative issued a comprehensive survey of lawsuits raising Section 2 claims for which rulings were available. *See* Katz et al., *supra* note 73, at 654. The report cited 321 lawsuits in total, of which more than two-thirds involved vote dilution claims such as challenges to at-large districts, redistricting plans, and majority vote requirements. *Id.* at 654–57. A remaining seventy-two cases involved challenges to election procedures or other practices (such as felon disfranchisement, voter registration regulations, ballot requirements, appointments, and annexations) that may be characterized as vote denial. *Id.*; *see also* Tokaji, *supra* note 53, at 709 ("While some may disagree as to how to categorize some cases, it is clear that the overwhelming majority of Section 2 lawsuits since 1982 have involved claims of vote dilution and not vote denial.").

[75] Tokaji, *supra* note 53, at 709 ("While *Gingles* and its progeny have generated a well-established standard for vote dilution, a satisfactory test for vote denial cases under Section 2 has yet to emerge.").

parities.[76] As a substantive matter, of the *Gingles* prerequisites, only racially polarized voting is potentially relevant to establishing the causal context, but only as part of the totality of the circumstances and not as a precondition to asserting a Section 2 claim.[77] Although not wholly applicable to disparate vote denial,[78] the *Gingles* test nonetheless provides important tools for litigating and conceptualizing such claims. Racially polarized voting and the other Senate factors illuminate the context in which specific electoral laws operate, and, more importantly, the degree to which race defines that context.

The Senate factors are not, of course, limited to examining the electoral sphere. The fifth Senate factor, "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process," looks beyond the confines of elections and is particularly instructive to vote denial cases.[79] Indeed, in *Gingles*, the Supreme Court underscored the importance of the fifth factor, stating that the "essence of a § 2 claim is that a certain electoral law, practice, or structure *interacts with social and historical conditions* to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[80] In proving Senate factor five, "Section 2 plaintiffs are not required to demonstrate intentional discrimination, much less intentional discrimination on the part of state actors, to make out a claim."[81] Although the other Senate factors are arguably less relevant as direct evidence of vote denial, they are nonetheless relevant to understanding the impact of vote denial. In

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[76] *See supra* note 74.

[77] *See* Kareem U. Crayton, *Sword, Shield, and Compass: The Uses and Misuses of Racially Polarized Voting Studies in Voting Rights Enforcement*, 64 Rutgers L. Rev. 973, 985 (2012) ("From its early constitutional interpretations of the Voting Rights Act, the Supreme Court has recognized that confronting polarized voting behavior is a key to promoting equality in the political sphere.").

[78] Tokaji, *supra* note 53, at 721 ("The size of minority populations, their geographical compactness, and racial bloc voting are irrelevant to measuring the impact of such practices on minority participation. It is therefore quite appropriate that lower courts have mostly disregarded these factors in Section 2 vote denial cases.").

[79] *Id.* at 724; *see supra* note 68 and accompanying text.

[80] *See Gingles*, 478 U.S. at 47 (emphasis added).

[81] Tokaji, *supra* note 53, at 724. At least one court has suggested that, other than factor five, the Senate factors are misplaced in the disparate vote denial context. *See* Farrakhan v. Gregoire (*Farrakhan IV*), 590 F.3d 989, 999, 1005 (9th Cir.) (concluding that the district court erred in giving weight to the plaintiff's failure to produce evidence of Senate factor seven and Senate factor eight, because both factors are irrelevant to vote denial claims), *aff'd in part, overruled in part en banc*, 623 F.3d 990 (9th Cir. 2010) (*Farrakhan V*); *see also supra* note 68 and accompanying text (listing the factors).

other words, if vote denial occurs when none of the other Senate factors are present, it may still be cognizable on the strength of the fifth Senate factor—the inequality external to the electoral system that is transmitted into the electoral arena via election laws. If the other Senate factors are also present, they underscore the impact of the vote denial on the ability of minority voters to elect candidates of their choice by establishing the context in which the vote denial operates.

B. *The Role of Intent, Disparate Impact, and Core Values in Section 2*

Read together, the Senate factors reveal Congress's intent to evaluate behavior within and outside the electoral context—without necessarily ascribing intent to that behavior—in order to determine whether racial inequality exists in the electoral sphere.[82] The Senate factors also reveal certain ideals that are based on a principle of equality that is both remedial and prophylactic in nature. Until now, however, the Senate factors have been overlooked for what they reveal about Section 2's core values.[83]

The first core value that the Senate factors reveal is that racial context matters in pursuing the neutralization of the effects of past racial discrimination in the electoral arena. This value is furthered by taking account of race within and outside the electoral arena when evaluating electoral systems and practices.[84] In other words, Section 2's remedial function elevates the importance of racial context as proof of causation. The goal of neutrality in the electoral sphere requires courts to examine the historical racial context of discrimination in which contemporary, race-neutral laws operate to determine whether persistent racial inequality interacts with these laws to cause disparate vote denial. The

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[82] *See supra* notes 67–71 and accompanying text.

[83] Senator Orrin Hatch, who presided over the Senate proceedings, was a staunch critic of Section 2's amendments, stating that "[t]here is no core value under the results test other than election results. There is no core value that can lead anywhere other than toward proportional representation by race and ethnic group." *See* S. REP. NO. 97-417, at 96 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 269. He further argued that the totality of the circumstances standard that the results test compelled, including reliance on the Senate factors, guided courts only as to "the *scope* of the evidence," but not the "*standard* of evidence." *Id.* That is, the VRA does not guide courts as to "the test or criteria by which such evidence is assessed and evaluated." *Id.*; *see also Gingles*, 478 U.S. at 85 (O'Connor, J., concurring) (asserting that "the Court has disregarded the balance struck by Congress in amending § 2 and has failed to apply the results test as described by this Court in *Whitcomb* and *White*"); *id.* at 92–93 (stating that the Court's opinion "require[s] no reference to most of the [Senate factors]" and enumerating the factors that may now be unnecessary).

[84] *See* S. REP. NO. 97-417, at 29 (identifying as a relevant factor what is now Senate factor five).

second core value that the Senate factors reveal is recognition of the complexity of racial discrimination, in all its forms, including implicit bias.[85] In considering evidence of implicit bias in addition to other proof of discrimination in voting, courts adjudicating Section 2 claims must determine that the disparate vote denial can be explained in terms other than race to deny a Section 2 challenge.[86]

In addition to its core values, Section 2 is defined, in part, by what it is not. Section 2 is not a mandate for proportional representation; indeed, it expressly says as much.[87] Section 2 also does not demand proof of intentional discrimination, which the amendments and their underlying proceedings make clear.[88] Despite Congress's categorical rejection of an intent standard in Section 2 claims, however, the role of intent in Section 2 jurisprudence remains perpetually fraught. Recent voter ID, voting equipment, and felon disfranchisement cases evidence a perplexing ambiguity among courts as to whether and to what extent intent is required in vote denial claims.[89] The results test under Section 2, as well as the retrogression standard in Section 5, however, hinge up-

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[85] One of the earliest accounts of implicit bias in legal scholarship describes the complexity and universality of racial discrimination as it relates to implicit bias as follows:

> Racism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race. . . . It is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities.

Lawrence, *supra* note 30, at 330.

[86] *See Gingles*, 478 U.S. at 63 (plurality opinion).

[87] 42 U.S.C. § 1973(b) (2006) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

[88] *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973); *see also* Chisom v. Roemer, 501 U.S. 380, 404 (1991) (noting that "Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone"); Old Person v. Brown, 312 F.3d 1036, 1040 (9th Cir. 2002) (asserting that "Congress amended section 2 of the Voting Rights Act to eliminate any intent requirement with respect to vote-dilution claims"); Ruiz v. City of Santa Maria, 160 F.3d 543, 557 (9th Cir. 1998) (noting Congress's statement that the "intent test . . . placed an inordinately difficult burden of proof on plaintiffs, and . . . asked the wrong question" (internal quotation marks and citation omitted)); Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 716 (1983) (examining what is required to prove a violation under the Section 2 results standard).

[89] *See supra* note 9 (collecting cases); *infra* notes 264–312 and accompanying text.

on the impact of—and not necessarily the intent behind—the challenged voting practice.[90]

Section 2's link to disparate impact arises from the fact that proving a Section 2 violation does not require a showing of discriminatory intent, but only discriminatory results.[91] As a practical matter, evidence of disparate impact in Section 2 cases serves the dual function of (1) affirming the existence of actual vote denial and (2) quantifying the racial effect. Tallying or estimating the raw numbers of persons whose right to vote is or will be adversely affected can quantify the denial or abridgment that results from a particular law or practice. The disparate impact—that is, the disproportionate percentage of racial minorities whose right to vote is abridged or denied vis-à-vis whites—is evidence that the practice's results are on account of race.

The accepted rubric of "totality of the circumstances" tests considers a host of factors, but neither the existence nor nonexistence of a single factor is dispositive.[92] Moreover, the Senate factors are constructed to require affirmative findings: the presence of one or more factors may provide evidence of a violation, but the absence of these factors does not mean that no violation exists.[93] In theory, the sheer weight of a single factor could itself be dispositive. Following the 1982 amendments, courts were unclear with respect to whether proof of disparate impact is ever enough *by itself* to satisfy the results test; in other words, whether statistical evidence of disparate impact alone could be actionable.[94] Federal courts have resoundingly held, however, that "a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 results inquiry."[95] Rather, proof of a "causal

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[90] The most recent evidence of this in the Section 5 context is the U.S. District Court for the District of Columbia's refusal to issue a declaratory judgment that Texas's newly enacted voter ID law "'neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race[,] color," or "member[ship] [in] a language minority group.'" *Texas*, 2012 WL 3743676, at *3 (alterations in original) (quoting 42 U.S.C. §§ 1973b(f)(2), 1973c(a) (2006 & Supp. II 2008).

[91] *See supra* note 61 and accompanying text.

[92] *See* S. Rep. No. 97-417, at 33–34 (1982) (noting that Congress did not intend to require that Section 2 plaintiffs prove a majority or any other particular number of factors to make out a case), *reprinted in* 1982 U.S.C.C.A.N. 177, 211–12.

[93] *See id.*

[94] *See* Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997) (emphasis and internal quotation marks omitted) (citing Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 312 (3d Cir. 1994)).

[95] *Id.* (citing cases); *see also* Farrakhan v. Washington (*Farrakhan III*), 359 F.3d 1116, 1118 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) (emphasis omitted) (quoting *Smith*, 109 F.3d at 595) (arguing that the Section 2 results inquiry was not satisfied by a statistical showing of disproportionate impact).

connection between the challenged electoral practice and the alleged discrimination" is required.[96] In short, there must be some evidence that the challenged voting qualification causes the disparity.

This limitation on the evidentiary power of statistical disparities marked a significant doctrinal development in Section 2 jurisprudence. The previously unscripted weighing of factors identified either in the Senate Report, or independently by the trier of fact as part of the totality of the circumstances test, now has at least one clear evidentiary limitation. In effect, evidence of disparate impact is now muddled with the other Senate factors, and no matter how compelling the statistical proof of disparate impact, a Section 2 claim cannot succeed without more.[97] This baseline understanding of the evidentiary limitations of disparate impact does little to enlighten the broader inquiry of the role of disparate impact in general.

There are clues, however, as to what a viable Section 2 test could entail. As one scholar has noted, the Senate Report "did not qualify the type of discrimination a court should consider under the test—for example, a court is not limited to considering 'intentional discrimination' or 'official discrimination'—even though the intent/impact distinction and the public/private distinction were both firmly established components of constitutional law by 1982."[98] Likewise, plaintiffs can establish Senate factor five, which asks whether an electoral practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives," and which the Supreme Court has described as the "essence of a § 2 claim," without proof of intentional discrimination.[99] Indeed, the 1982 amendments did not change how intent may be proved, including the fact that both direct and circumstantial evidence can estab-

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[96] *Ortiz*, 28 F.3d at 310; *see also* Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) ("To establish a Section 2 violation, plaintiffs need only demonstrate 'a causal connection between the challenged voting practice and [a] prohibited discriminatory result.'" (alteration in original) (quoting *Smith*, 109 F.3d at 595) (internal quotation marks omitted)). The causal context test proposed by this Article differs from causal connection in that the latter has been interpreted to simulate proximate cause, whereas the former reinvigorates the totality of the circumstances test by taking account of the full context in which disparate vote denial operates. *See infra* notes 225–235 and accompanying text.

[97] *See Smith*, 109 F.3d at 595; *cf.* McCleskey v. Kemp, 481 U.S. 279, 298 (1987) (rejecting an Equal Protection challenge based on compelling statistical evidence of racial disparity in the application of the death penalty due to a lack of evidence of discriminatory intent).

[98] Tokaji, *supra* note 53, at 724.

[99] *Gingles*, 478 U.S. at 47 (majority opinion).

lish intent under Section 2.[100] Rather, the amendments were designed to address instances of discrimination even when there is no evidence of intentional discrimination. To be sure, although "[a]n impact-based test may serve as a prophylactic against intentional discrimination that might otherwise seep into the voting process undetected,"[101] the test may also serve solely to address voting practices with no link whatsoever to intentional discrimination in the electoral arena. This distinction underscores that the results test must be distinct from circumstantial evidence of intent, which was already cognizable prior to the 1982 amendments.[102]

C. *Section 5 and Disparate Vote Denial*

Recent federal proceedings challenging voter ID laws in Texas, New Hampshire, South Carolina, and Virginia, as well as a proceeding in Florida opposing a shorter early voting period, reveal a disparate impact analysis that is consistent with the causal context analysis introduced here.[103] Although Section 5's coverage and scope differ from

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[100] *See* S. REP. No. 97-417, at 27 n.108 (1982) ("[D]irect or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions . . . 'is one type of quite relevant evidence of racially discriminatory purpose.'" (quoting Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979))), *reprinted in* 1982 U.S.C.C.A.N. 177, 205. Although the amended act did not include an intent standard for Section 2 cases, it did not prevent plaintiffs from successfully proving intent through circumstantial evidence of discrimination. *See, e.g.*, Major v. Treen, 574 F. Supp. 325, 355 (E.D. La. 1983) (finding circumstantial evidence of intent to discriminate in the exclusion of blacks from the Louisiana House and Senate Joint Congressional Reapportionment Committee and from a private meeting of legislators and other interested parties where the final redistricting decisions were made).

[101] Tokaji, *supra* note 53, at 720.

[102] *See Bolden*, 446 U.S. at 74.

[103] *See supra* note 32 (collecting cases). Voter ID laws from Mississippi and Alabama are also pending preclearance from the U.S. Department of Justice (DOJ). *See, e.g.*, MISS. CODE ANN. § 23-15-563 (2013). If precleared, Alabama's requirement for all voters to present a photo ID will not take effect until 2014. *See* ALA. CODE § 17-9-30 (Supp. 2011). The DOJ has already rejected voter ID laws in South Carolina and Texas. *See* Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to H. Christopher Bartolomucci, Bancroft PLLC 2 (June 29, 2012), *available at* http://www.slideshare.net/andersonatlarge/justice-department-letter-to-south-carolina-denying-preclearance-of-voter-id-law; Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to Keith Ingram, Dir. of Elections, Elections Div., Office of the Tex. Sec'y of State 2 (Mar. 12, 2012) [hereinafter Texas Objection Letter], *available at* http://www.scribd.com/doc/85051426/DOJ-Letter-To-Texas-On-Voter-ID-Law; Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dep't of Justice, to C. Havird Jones, Jr., S.C. Assistant Deputy Attorney Gen. (Dec. 23, 2011) [hereinafter South Carolina Objection Letter I], *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_122311.php.

Section 2's,[104] Section 5's application to modern voting practices that have a disparate impact on minority voter participation is nonetheless instructive. Both the U.S. District Court for the District of Columbia (the "DCDC") and the U.S. Department of Justice (DOJ) have evaluated the impact of certain voter ID and early voting laws on minority voter participation pursuant to Section 5's preclearance standard.[105] As noted above, unlike Section 2, Section 5 does not prohibit all election laws that have a discriminatory effect on account of race.[106] Rather, a Section 5 violation results from laws that would place minority voters in a worse position than the status quo, or that were enacted with the intent to discriminate.[107]

In evaluating voter ID laws, the DOJ and the DCDC investigated whether these laws would retard minority voter turnout in upcoming elections, resulting in the retrogression that Section 5 prohibits. The results were mixed. The DOJ precleared Virginia's voter ID laws, which expand the forms of identification voters can present at the polls, do not require photo identification, and require the State to mail a voter card to all registered voters prior to the general election.[108] Similarly, New Hampshire's voter ID laws were precleared.[109] New Hampshire's voter ID laws require photo identification, but permit voters to execute a "challenged voter affidavit," which entitles the voter to cast a regular ballot upon affirming his or her identity, ability to vote, and domicile in the applicable town or ward.[110] These measures eliminate the burden

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[104] *Compare* 42 U.S.C. § 1973a (2006) (describing procedures for proceedings to enforce the right to vote under the Fourteenth and Fifteenth Amendments), *with* 42 U.S.C. § 1973c (describing preclearance requirements for changes to voting qualifications or procedures).

[105] *See South Carolina*, 2012 WL 4814094, at *17; Texas Objection Letter, *supra* note 103, at 2.

[106] 42 U.S.C. § 1973c.

[107] *Id.*

[108] *See* Va. Code Ann. § 24.2-643(B) (2012); Letter from T. Christian Herren, Jr., Chief, Voting Section, Civil Rights Div., U.S. Dep't of Justice, to Joshua N. Lief 3 (Aug. 20, 2012), *available at* http://www.ag.virginia.gov/Media%20and%20News%20Releases/News_Releases/Cuccinelli/USDOJ_82012_Ltr_Preclearing_VA_Voter_ID_Law.pdf. Virginia's new voter ID law discontinues the State's practice of allowing voters to sign an affidavit to attest to their identity in lieu of providing the statutorily required identification. *See id.*

[109] New Hampshire Preclearance Letter, *supra* note 32, at 2.

[110] N.H. Rev. Stat. Ann. § 659:13 (2012) (effective Sept. 1, 2013). A voter may execute a "challenged voter affidavit" without notarization or excuse. *Id.* After September 1, 2013, voters wishing to execute a "challenged affidavit ballot" will be photographed at the polling site, barring religious objection. *Id.*

on voters to obtain the necessary documentation to vote—a burden that falls disproportionately on minority voters.[111]

By contrast, South Carolina's proposed voter ID law requires government-issued photo identification at the polls for a voter to cast a non-provisional ballot, and does not provide for meaningful alternatives to photo identification.[112] The DOJ denied preclearance on the ground that the law discriminated against black voters because they are twenty percent more likely than white voters to lack a driver's license or state photo identification card.[113] In response, South Carolina brought a federal lawsuit seeking preclearance.[114] In 2012, in *South Carolina v. United States*, the DCDC precleared South Carolina's voter ID law because the state expanded the number of permissible identifications—many of which are free and do not require a photo—and, for those lacking any form of identification, the state permitted the use of voter affidavits.[115] The court, however, enjoined implementation of the new voter ID law in 2012, stating that voters and voting officials need to be educated on the new law before it is implemented in order to avoid a disparate impact on minorities.[116]

Similarly, in the 2012 case, *Texas v. Holder*, the DCDC denied preclearance of Texas's voting law on the grounds not only that the state failed to prove that its law would not have a retrogressive effect on minority voters, but also that the evidence showed that the law would affirmatively disenfranchise minorities and the poor.[117] The court rejected the argument that, because factors other than race, such as poverty or

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[111] *See* NAACP Legal Def. & Educ. Fund., Inc. & NAACP, Defending Democracy: Confronting Modern Barriers to Voting in America 32–36 (2011) [hereinafter NAACP, Defending Democracy], http://naacp.3cdn.net/67065c25be9ae43367_mlbrsy48b.pdf (describing voter suppression tactics allegedly intended to combat increasing minority participation in the electoral process). *See generally* Gaskins & Iyer, *supra* note 2 (examining voter ID laws); Rogowski & Cohen, *supra* note 2 (evaluating the potential effects of photo identification requirements on young minority voters).

[112] *See* S.C. Code Ann. § 7-13-710 (2011).

[113] *See* South Carolina Objection Letter I, *supra* note 103 (finding that "[n]on-white voters were therefore disproportionately represented, to a significant degree, in the group of registered voters who, under the proposed law, would be rendered ineligible to go to the polls and participate in the election"). In addition, the DOJ found "particularly persuasive" evidence that the laws were enacted with the intent to discriminate. *Id.*

[114] *See South Carolina*, 2012 WL 4814094, at *19.

[115] *Id.*

[116] *Id.* at *17 (precleaving South Carolina's voter ID law for the 2013 election to allow time to educate voters, voting officials, and polling place attendants).

[117] 2012 WL 3743676, at *33. Texas filed suit in federal district court to seek preclearance of its voter ID law while it awaited preclearance from the DOJ, which was ultimately denied. *See id.* at *1; Texas Objection Letter, *supra* note 103, at 2.

lack of vehicular access, may proximately cause the disenfranchisement, the law did not disenfranchise on account of race.[118] The court stated, "Never has a court excused 'retrogression in the position of racial minorities' because that retrogression was proximately caused by something other than race."[119]

Florida's law restricting early voting was also struck down under Section 5 by the DCDC in the 2012 case, *Florida v. United States*.[120] The court held that the early voting law disproportionately affected minority voters and had a retrogressive effect.[121] The court accepted evidence that black voters use early voting more than white voters,[122] and concluded that "Florida is left with nothing to rebut either the testimony of . . . witnesses or the common-sense judgment that a dramatic reduction in the form of voting that is disproportionately used by African-Americans would make it materially more difficult for some minority voters to cast a ballot."[123]

The proceedings preclearing voter ID laws, as well as those denying preclearance to voter ID and early voting laws, reveal that, in determining whether such laws pose a retrogressive harm to minority voters, the relevant inquiry includes an analysis of factors external to voting and the nature of the burden the laws impose. These factors may intersect with race-neutral voting laws to produce a disparate impact. For example, the context of inequality in Texas would cause voter ID laws disproportionately to burden the right of minorities to vote in the state.[124] No evidence of intent or purpose was required. Indeed, "[i]nterpreting 'purpose' and 'effect' as synonymous would run afoul of th[e] principle" that all words used by Congress must be given effect.[125] The same

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[118] *Texas*, 2012 WL 3743676, at *33.

[119] *Id.* at *32 (quoting *Beer*, 425 U.S. at 141).

[120] 2012 WL 3538298, at *47.

[121] *Id.* In 2011 Florida cut its early voting period from 14 days to 8 days despite the popularity of early voting and a lack of evidence of fraud. Michael C. Herron & Daniel A. Smith, Florida's 2012 General Election Under HB 1355: Early Voting, Provisional Ballots, and Absentee Ballots 2 (n.d.), *available at* http://electionsmith.files.wordpress.com/2013/01/lwv-pr-herron-smith.pdf. As a result, less than 2.44 million early votes were cast in 2012, compared to 2.66 million in 2008. *Id.* Additionally, the shortened early voting period disproportionately affected blacks, who comprised more than 22% of early voters despite only representing 12.5% of the population. *Id.* at 2–3. The reduction in early voting in Florida contributed to a decrease in early voting from 32% of all votes cast in 2008 to 29% in 2012. Nonprofit Vote, *supra* note 1, at 12.

[122] *Id.* at *17 (accepting an expert witness's opinion that this disparity in early voting was especially pronounced in 2004 and 2008).

[123] *Id.* at *26.

[124] *Texas*, 2012 WL 3743676, at *31.

[125] *Id.*

logic should hold for practices that result in denial or abridgement of the right to vote on account of race in violation of Section 2.

D. *The Evolving Disparate Impact Standard Beyond Voting*

The years following the 1982 amendments to the VRA coincided with a precipitous decline in the Supreme Court's receptivity toward evidence of disparate impact. Most notably, in 1987, in *McCleskey v. Kemp*, the Court held that a litigant alleging an equal protection violation has the "burden of proving the existence of purposeful discrimination" and that "the purposeful discrimination had a discriminatory effect" on him or her.[126] This was hardly the first time the Court demanded evidence of intent.[127] In 1976, in *Washington v. Davis*, the Supreme Court held that the Equal Protection Clause only reaches facially neutral statutes if there is evidence of intentional discrimination.[128] In other words, a plaintiff challenging a facially neutral statute must prove both discriminatory effect and the intent to discriminate.[129]

Discriminatory intent requires a showing that racial animus motivated the state action in question "at least in part because of . . . its adverse effects upon an identifiable group."[130] The plaintiff does not need to show that the state acted solely because of the discriminatory purpose, only that it was part of the motivation.[131] As noted above,

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[126] 481 U.S. at 292 (internal quotation marks omitted).

[127] *See* Washington v. Davis, 426 U.S. 229, 241 (1976).

[128] *Id.* ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." (citation omitted)).

[129] *See, e.g.*, Bradley v. United States, 299 F.3d 197, 205 (3d Cir. 2002) ("To make an equal protection claim in the profiling context, [the plaintiff] was required to prove that the actions of customs officials (1) had a discriminatory effect and (2) were motivated by a discriminatory purpose."); Chavez v. Ill. State Police, 251 F.3d 612, 635–36 (7th Cir. 2001) ("To show a violation of the Equal Protection Clause, plaintiffs must prove that the defendants' actions had a discriminatory effect and were motivated by a discriminatory purpose."); Christman v. Kick, 342 F. Supp. 2d 82, 92 (D. Conn. 2004) ("[T]o establish a violation of equal protection based on selective enforcement, the plaintiff must ordinarily show (1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations, such as race." (internal quotation marks omitted)); Flowers v. Fiore, 239 F. Supp. 2d 173, 178 (D.R.I. 2003) ("In order to prevail on this claim, [the plaintiff] must present evidence that he was treated differently from similarly situated white motorists and that the action taken against him was motivated, at least in part, by his race.").

[130] *McCleskey*, 481 U.S. at 298 (internal quotation marks omitted); *accord Christman*, 342 F. Supp. 2d at 93–94 ("Disparate treatment by itself, not resulting from an impermissible consideration or malicious or bad faith intent to injure, is an insufficient basis for an equal protection claim.").

[131] Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

McCleskey further constricts the equal protection claim by imposing a requirement of individual harm.[132] A plaintiff must show that "the decisionmakers in *his* case acted with discriminatory purpose."[133] In this way, the *McCleskey* Court introduced a requirement of causation under the Equal Protection Clause whereby a litigant must prove not only systemic discrimination, but also that discrimination occurred in his or her particular case.[134] Once the plaintiff succeeds in meeting this burden, the state may still rebut the prima facie case with a showing, by a preponderance of the evidence, that the state would have taken the same action absent the discriminatory purpose.[135]

These cases anchored the principle in the Court's equal protection jurisprudence that disparate impact or discriminatory effect alone cannot sustain a constitutional violation.[136] Instead, plaintiffs seeking to prove discriminatory effect must show "that they are members of a protected class, that they are otherwise similarly situated to members of the unprotected class, and that plaintiffs were treated differently from members of the unprotected class."[137] It is nearly impossible not to consider the impact of these intensified limitations on disparate impact claims in the context of the VRA.[138] Most significantly, recent develop-

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[132] *See McCleskey*, 481 U.S. at 292.

[133] *Id.* The *McCleskey* decision is not without its detractors. *See* Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 723 (2002) ("*McCleskey* has been widely criticized, and rightly so. As Justice Brennan points out in dissent, there was no real doubt that race did influence capital sentencing in Georgia; everybody who dealt with the issue in practice knew it and acted on that knowledge. The Court denies the obvious." (footnotes omitted)).

[134] *See McCleskey*, 481 U.S. at 293.

[135] *Id.* at 297.

[136] *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272–74 (1979) (holding that disparate impact, even when the effects are predictable, is not an equal protection violation absent intent); *Davis*, 426 U.S. at 239 (noting that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact"); *see also* United States v. Armstrong, 517 U.S. 456, 465 (1996) (stating that the "requirements for a selective-prosecution claim draw on ordinary equal protection standards" and that "[t]he claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose" (citation and internal quotation marks omitted)).

[137] *Chavez*, 251 F.3d. at 636.

[138] *See* Pildes, *supra* note 53 ("Although not framed in precisely this language, disparate-impact analysis plays a key role throughout all aspects of the VRA, and thus [the Supreme Court's 2009 Title VII disparate impact decision in *Ricci*] has direct implications for the VRA—some obvious, some more speculative."); *see also* James McConnell & Lucienne Pierre, *Reverse Discrimination, Equal Protection Clause, Title VII, Disparate Impact, Civil Rights Act of 1964*, LEGAL INFO. INST., http://www.law.cornell.edu/supct/cert/07-1428 (last visited Mar. 11, 2013) ("Employers who must comply with anti-discrimination statutes in rela-

ments in employment discrimination law indicate a narrowing standard for statute-based disparate impact claims, even when Congress's enforcement powers buttress the statutes.[139] For those who have tracked Justice Anthony Kennedy's opinions doubting the Equal Protection Clause's congruence with the VRA,[140] this development is of little surprise. Nonetheless, the extent to which *Ricci v. DeStefano* has limited Title VII's capacity to redress disparate impact discrimination and what, if any, applicability the decision holds beyond the employment discrimination context is still an open question. When considered in the context of ever-constricting voting rights claims and within the larger context of the Court's posture toward disparate impact claims, it is impossible not to draw parallels to the VRA.[141]

1. *Ricci v. DeStefano* and the VRA

In *Ricci*, a majority of the Supreme Court positioned Title VII's disparate impact standard[142] squarely in tension with the Equal Protection Clause.[143] *Ricci* centered on the tension between protecting one

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tion to the Voting Rights Act, the Fair Housing Act, and even No Child Left Behind may all be affected by the court's decision, because their race-neutral practices with race-related goals may be constitutionally suspect." (internal quotation marks omitted)); *cf.* GIRARDEAU A. SPANN, THE LAW OF AFFIRMATIVE ACTION: TWENTY-FIVE YEARS OF SUPREME COURT DECISIONS ON RACE AND REMEDIES 159–63 (2000) (analyzing the Supreme Court's fractured affirmative action decisions).

[139] *Ricci*, 557 U.S. at 593.

[140] *See, e.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 435 (2006); Miller v. Johnson, 515 U.S. 900, 911–14 (1995).

[141] Pildes, *supra* note 53 (recognizing that although Title VII and the VRA are different statutes, "it would be foolish to think that the kinds of views and responses of the Court in *Ricci* concerning Title VII's disparate-impact standard will not find their way into the same Court's treatment of disparate-impact issues under the VRA").

[142] The centerpiece of the Civil Rights Act of 1964, Title VII makes it illegal for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race," among other protected characteristics. 42 U.S.C. § 2000e-2(a)(1) (2006). Moreover, an employer may not "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race," among other factors. *Id.* § 2000e-2(a)(2). Employers also may not "adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race" and other protected characteristics for promotion decisions. *Id.* § 2000e-2(*l*).

[143] *See Ricci*, 557 U.S. at 593 (refraining from deciding the equal protection claim because the petitioners were entitled to summary judgment on their Title VII claim); *id.* at 594 (Scalia, J., concurring) (observing that the majority's failure to address the equal protection claim has postponed the question of "[w]hether, or to what extent, are the disparate-impact provisions of Title VII . . . consistent with the Constitution's guarantee of equal

group from the negative effects of racially disproportionate exam results, and denying the benefits of the same exam results to another group.[144] The case involved racially disparate results on tests that the City of New Haven used to promote its firefighters to lieutenant and captain positions.[145] The first round of test results revealed that the pass rate of black candidates was approximately half the pass rate of white candidates.[146] Because promotions were awarded only to the top three highest scoring candidates, no blacks would be promoted based on these tests.[147] Public hearings were held on the tests' disparate impact, and the city's Civil Service Board, deadlocked on whether to certify the list of eligible candidates for promotion, ultimately did not certify the eligibility of any candidates.[148] Firefighters who were eligible for immediate promotion brought suit against New Haven's mayor, John DeStefano, and other city officials under Title VII and the Equal Protection Clause.[149] The city defended its actions on the ground that if the results were certified, minority firefighters would have brought a disparate impact action under Title VII.[150]

Justice Kennedy, writing for the Court, concluded that "race-based action like the City's in this case is impermissible under Title VII unless the employer can demonstrate *a strong basis in evidence* that, had it not taken the action, it would have been liable under the disparate-impact statute."[151] According to the *Ricci* majority, the city's remedial efforts presumptively violated Title VII's disparate treatment prohibition absent a valid defense.[152] Implicit in the *Ricci* decision is the notion that remedial race consciousness is the equivalent of racial discrimination.

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protection"). This tension between disparate impact and the disparate treatment standard has existed at least since the Supreme Court first recognized disparate impact claims in 1971, in *Griggs v. Duke Power Co.*, and later recognized reverse discrimination disparate treatment claims by white employees in 1976, in *McDonald v. Santa Fe Trail Transportation Co. See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (1976); Griggs v. Duke Power Co., 401 U.S. 424, 435 (1971).

[144] *See Ricci*, 557 U.S. at 561–63.

[145] *Id.* at 561–64. The tests were comprised of written assessments accounting for sixty percent of the overall score and an oral assessment accounting for forty percent of the overall score. *Id.*

[146] *Id.* at 566.

[147] *Id.* at 564.

[148] *Id.* at 574. Minority firefighters threatened a Title VII suit if the test results were not thrown out. *Id.* at 562–63.

[149] *Id.* at 575.

[150] *Ricci*, 557 U.S. at 563.

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

[152] *Id.* at 585. Notably, the Court did not in fact engage in a disparate treatment analysis concerning the white firefighters. *Id.*

Ricci further suggests that choosing a policy or practice with a less discriminatory impact on minorities is intentionally discriminatory toward another population. This false equivalence[153] forms the premise of the Court's determination that preventive race-conscious measures are almost always illegal.[154] Disparate treatment is not, however, the flipside of a disparate impact remedy, as the Court suggests. Nor is remedial race consciousness the legal equivalent of disparate treatment or reverse discrimination as the Court presumes.[155] First, the motive underlying each of these concepts is not the same. Second, there is no legally cognizable, historical context of discrimination toward whites as a group. Indeed, the basis for New Haven's rejection of its test was not the majority's reductionist determination that the higher scorers were white; rather, the high concentration of white scorers signaled that the test itself might be biased, and, at a minimum, warranted further investigation.[156]

The Supreme Court's current reticence toward disparate impact claims in employment is not limited to race. In its 2005 decision in *Smith v. City of Jackson, Mississippi*, and its 2008 decision in *Meacham v. Knolls Atomic Power Laboratory*, the Court held that the Age Discrimination in Employment Act of 1967 ("ADEA") does not require employers to prove that their actions creating a disparate impact on the basis of age are based on a business necessity.[157] Instead, they need only prove that the practice is based on "reasonable factors other than age"

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[153] *See* Cheryl I. Harris & Kimberly West-Faulcon, *Reading* Ricci*: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. Rev. 73, 81 (2010) (arguing that "*Ricci* reflects a doctrinal move towards converting efforts to rectify racial inequality into white racial injury" and that this results in the "racing" of fairness whereby long-standing, race-neutral best practices are viewed, unjustly, with suspicion as racial preferences).

[154] This holding is the end result of a slow erosion of Title VII disparate impact jurisprudence following the Court's well-conceived and detailed treatment of disparate impact claims in *Griggs* and other cases beginning in the 1970s. *See Griggs*, 401 U.S. at 436; *see also, e.g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 310 (1977) (holding that an overwhelming showing of statistical evidence of disparate impact in an employment setting met the government's burden to prove disparate impact).

[155] *See* Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 Iowa L. Rev. 837, 860 (2011) ("[T]he Court's shift in *Ricci* from a 'good faith' standard to a 'strong basis in evidence' standard is a momentous change in Title VII law, signaling that defendants' voluntary compliance efforts, which raise reverse-discrimination claims under the disparate-treatment provisions of the statute, are presumptively impermissible.").

[156] *Ricci*, 557 U.S. at 586–87.

[157] Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 102 (2008); Smith v. City of Jackson, Miss., 544 U.S. 228, 242 (2005); *see* Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006 & Supp. III 2010).

("RFOA").[158] The Court acknowledged that defendants can establish an RFOA defense more easily than proving business necessity.[159] This signals the Court's unwillingness to impose stricter burdens of proof on defendants to rebut disparate impact findings.

Ricci (and, less directly, the ADEA cases) raises two important and related questions with respect to future disparate impact claims: (1) what is the extent of the state's ability to exercise remedial power to counter the effects of historical discrimination, and (2) what is the standard of proof to support a disparate impact remedy? One scholar has referred to *Ricci*'s requirement of proof beyond a racially adverse impact—no matter how compelling the impact—as "disparate impact 'plus.'"[160] Despite its references to legitimate policy justifications, however, the Court has not specified what evidence beyond impact alone would suffice.[161]

2. *Ricci*'s Lessons for Disparate Vote Denial

Whether *Ricci* will have far-reaching effects on disparate impact jurisprudence remains to be seen. What is certain is that disparities alone will not suffice to support a challenge to government action that produces a corresponding racial effect.[162] Less clear are situations where remedying a disparity to the benefit of racial minorities causes no corresponding disparate effect on whites.

Although the Court has held that disparities alone cannot justify a remedy under the VRA,[163] it has failed to address directly whether there would be a different outcome in circumstances where there is no harm to another group. The Court's holdings in this regard are rooted in its redistricting jurisprudence, which presents a different set of concerns,

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[158] *Meacham*, 554 U.S. at 91. The ADEA's provision stating that it "shall not be unlawful for an employer . . . to take any action otherwise prohibited . . . where the differentiation is based on [RFOA]" superseded the business necessity justification that normally applies under the disparate impact burden-shifting framework, placing the burden of persuasion as to RFOA on the employer. *See* 29 U.S.C. § 623(f)(1) (2006 & Supp. II 2008); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

[159] *See Meacham*, 554 U.S. at 97.

[160] *See* Richard H. Pildes, *Voting Rights: The Next Generation*, *in* Race, Reform, and Regulation of the Electoral Process: Recurring Puzzles in the American Democracy 17, 26 (Guy-Uriel E. Charles et al. eds., 2011).

[161] *See Ricci*, 557 U.S. at 580.

[162] *See supra* notes 152–159 and accompanying text.

[163] *See Smith*, 109 F.3d at 595.

more similar to the employment context than vote denial.[164] Indeed, the factual and policy contexts of *Ricci* and the 2010 Supreme Court case, *Lewis v. City of Chicago,* differ significantly from those in vote denial challenges.[165] In the context of redistricting, like employment, the potential zero-sum calculation predominates, and few, if any, decisions stand alone without some consequence on other groups of voters.[166] For example, drawing voters into one district versus another may potentially impact the electability of one group's preferred candidate versus another group's. By contrast, in a disparate vote denial context—for example, invalidating a discriminatory voter ID provision or a felon disenfranchisement law, or preventing a voter purge that yields disparate racial results based on unsubstantiated criteria—the disparate impact claim will not visit negative consequences on any racial group. Unlike in the employment context, vote denial challenges do not involve the allocation of a limited resource; rather, the right to vote can be extended to countless individuals without denying others access to that right.[167]

To be sure, the individual and collective right to vote can be adversely impacted when the franchise is extended impermissibly. Voting power is diluted when unlawful votes are cast. With respect to modern vote denial measures such as voter ID laws and excessive voter purge practices, however, proof of unlawful voting is negligible or nonexistent.[168] Felon disenfranchisement, though recognized in the U.S. Constitution,[169] may nonetheless be held unconstitutional for inten-

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[164] *See, e.g.*, Shaw v. Reno, 509 U.S. 630, 657 (1993).

[165] 130 S. Ct. at 2195–96; *Ricci*, 557 U.S. at 580.

[166] *Cf.* Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1342 (2010) (arguing that Title VII "requires employers and public officials to classify the workforce into racial categories and then allocate social goods on the basis of that classification"). Professor Richard Primus has noted that disparate impact doctrine could avoid unconstitutionality by adopting a "visible-victims reading" of disparate impact law. *See id.* at 1369 (asserting that, as long as a race-conscious measure does not "visibly burden specific innocent parties," it is less likely to produce a divisive social meaning and be found unconstitutional). By this measure, Section 2's application to most voting restrictions would be constitutionally sound, as there are no identifiable "victims" in restoring or protecting the franchise.

[167] Certainly, the partisan dimensions of vote denial cannot be ignored and may be as significant a force in the design and enforcement of these practices as any other. *See* ROGOWSKI & COHEN, *supra* note 2, at 3. Regardless of the motivation behind vote denial laws and practices, however, if the effect is to visit disenfranchisement disproportionately upon minority voters, such laws may nonetheless violate the VRA.

[168] *See generally* LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD (2010) (arguing that incidents of deliberate voter fraud are rare).

[169] *See* U.S. CONST. amend XIV, § 2; Richardson v. Ramirez, 418 U.S. 24, 41–53 (1974) (discussing Section 2 of the Fourteenth Amendment's allowance of vote denial based on a felony conviction).

tional racial discrimination and other constitutional violations without an adverse impact on non-felons' right to vote.[170] Accordingly, remedying the disparate impact of many modern vote denial practices imposes no harm on other voters.[171]

Nonetheless, the potential conflict between the Constitution and Title VII's disparate impact standards that *Ricci* signals cannot be ignored. Indeed, the Court has issued the same warning with respect to the VRA.[172] The Court's trajectory on both fronts suggests an outlook that laws that prohibit disparate impact "are constitutional only if those impacts can be shown to reflect a racially-discriminatory purpose."[173] At a minimum, *Ricci* suggests that the Court will construe statutory disparate impact provisions more narrowly to evade constitutional conflicts unless it can identify a satisfactory causal link between the challenged conduct and the disparate harm. The causal context test proposed below would enable plaintiffs to establish this link under Section 2.

II. The "Causal Context": A Disparate Vote Denial Test

The inherent challenge in litigating disparate vote denial claims is reconciling the U.S. Supreme Court's mandate that such claims be proved with evidence beyond disparate impact, with Section 2's clear exclusion of an intent requirement. Determining what plaintiffs must show to succeed on a disparate vote denial claim therefore forces a deeper examination of the Senate factors and their purpose, while vigilantly protecting against the reinsertion of an intent requirement. As

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[170] *See* Hunter v. Underwood, 471 U.S. 222, 233 (1978) (holding that a facially neutral law disenfranchising persons convicted of crimes involving moral turpitude violated Equal Protection because the law was motivated by a desire to discriminate against minorities); *see also* NAACP, Defending Democracy, *supra* note 111, at 12, 25–27 (explaining that these restrictions will have a disproportionate burden on minorities because African Americans and Latinos suffer disproportionate rates of criminal conviction). *See generally* Janai S. Nelson, *The First Amendment, Equal Protection and Felon Disenfranchisement: A New Viewpoint*, 65 Fla. L. Rev. 111 (2013) (engaging the equality principles of the First Amendment and the Equal Protection Clause to reconsider the constitutionality of felon disenfranchisement as a form of viewpoint discrimination).

[171] *But see* Roger Clegg, *The Future of the Voting Rights Act After* Bartlett *and* NAMUDNO, 2008–2009 Cato Sup. Ct. Rev. 35, 39 (arguing that "whenever the government bans actions (public or private) that merely have racially disparate impact, ... actions that are perfectly legitimate will be abandoned," or "surreptitious—or not so surreptitious—racial quotas will be adopted so that the action is no longer racially disparate in its impact").

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

[173] Pildes, *supra* note 53 ("[I]t would be unconstitutional for Congress to make disparate impacts illegal if they cannot be shown to reflect an underlying discriminatory purpose. That is, impact can be looked to . . . as evidence of purpose. . . . But impact alone cannot be a constitutional basis for making a state law/practice illegal.").

noted above, the text of Section 2 and its legislative history provide important guidelines for formulating a test for disparate vote denial.[174] By prohibiting voting qualifications and other election practices that "result[] in a denial or abridgement of the right . . . to vote on account of race or color, or [status as a language minority],"[175] Section 2 not only makes clear on its face that it applies equally to vote denial claims, but also establishes that the focus of the inquiry is on the *result* of the challenged law's application and not its cause or intent.[176] Neither the text nor the legislative history of Section 2, however, provides specific directives for litigating vote denial claims.[177] Accordingly, against a backdrop of ambitious academic proposals and judicial skepticism concerning disparate impact, I propose the causal context test as a new formulation for evaluating disparate vote denial claims.

A. *Existing Proposals for Disparate Vote Denial Tests*

Over time, there has been a battery of proposals for Section 2 vote denial tests derived from Section 2 cases, the language of the statute, and evidentiary considerations.[178] One detailed treatment of these proposals identifies two categories of tests— "causation and impact-plus"[179] and "inverse relation"[180]—and introduces an additional one, which I refer to as "prerequisites and burden-shifting."[181] The causation

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[174] *See supra* notes 82–102 and accompanying text.

[175] *See* 42 U.S.C. § 1973(a) (2006).

[176] *See id.*; *see also* Tokaji, *supra* note 53, at 709 ("The language of Section 2 indicates that the results standard applies to vote denial claims as well as vote dilution claims."). There was never any question that Section 2's totality of the circumstances analysis applied to vote denial claims. The application became dubious, however, when vote dilution standards were awkwardly grafted onto vote denial claims. *Id.*

[177] Tokaji, *supra* note 53, at 709 ("The legislative history of the 1982 amendments . . . provides little guidance on *how* Section 2 should apply to practices resulting in the disproportionate denial of minority votes. That is mainly because Congress, especially the Senate, focused so intently on representation rather than participation.").

[178] *See id.* at 718–23 (discussing previously proposed Section 2 vote denial tests).

[179] *Id.* at 722 (labeling cases that require more than just disparate impact as "causation and impact-plus tests").

[180] *See* Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 LOY. L.A. L. REV. 1171, 1197 & n.109 (2001) (collecting fair housing cases and scholarly opinions that the author considers "highly instructive" for VRA disparate impact analysis).

[181] Specifically, the prerequisites and burden-shifting test operates as follows:

> [A] plaintiff should be required to show *both* (1) that the practice challenged results in the disproportionate denial of minority votes (i.e., that it has a disparate impact on minority voters); and (2) that this disparate impact is traceable to the challenged practice's interaction with social and historical condi-

and impact-plus test is "a sort of under-the-table balancing of the government's interest in the challenged practice against its vote-denying impact" that "allow[s] judges to consider the justifications the government proffers for adopting or keeping the voting practice in question."[182] This test is also referred to as "disparate impact-plus," and tacitly relies on proximate cause to justify a finding of liability.

The inverse relation test borrows from Fair Housing Act jurisprudence, and proposes that vote denial claims be determined as follows: "The more severe the racial disparity of voting access that results from a challenged practice, the more tenuous the justification should be seen to be, even if that justification is asserted to have nothing to do with race."[183] This proposal modifies the "causation and impact-plus" test by squarely establishing an inverse relationship between the tenuousness of the justification and the racial disparity that the challenged practice causes.[184]

In the case of the prerequisites and burden-shifting test—the most compelling of these tests—the burden shifts to the defendant once disparate impact has been established, on the theory that state actors "are in the best position to explain why they believe vote-denying practices are necessary to achieve some vital interest."[185] The test also incorporates certain standards from the equal protection jurisprudence developed in jury discrimination cases.[186] In particular, it relies on the burden-shifting model in jury selection cases as further support for incorporating this framework in disparate vote denial cases.[187]

> tions. These might be thought of as "preconditions" to Section 2 vote denial claims, analogous to the three *Gingles* preconditions for Section 2 vote dilution claims. . . .
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> . . . .
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> Once the plaintiff[] make[s] a prima facie disparate-impact case by producing evidence of the[se] two elements . . . the burden should shift to the defendant to justify the challenged practice. . . .
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> . . . [T]he government should be required to show the challenged practice is narrowly tailored to a compelling government interest.

Tokaji, *supra* note 53, at 724–26 (footnote omitted).

[182] *Id.* at 722.

[183] Pershing, *supra* note 180, at 1199.

[184] *See id.* at 1197 & n.109.

[185] Tokaji, *supra* note 53, at 725 (citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

[186] *Id.*

[187] *Id.*

Like the causation and impact-plus and inverse relation tests, the prerequisites and burden-shifting test invites the wrong query. First, if an electoral practice does not directly cause a disparate impact, it is less relevant whether the law is narrowly tailored.[188] The argument is not that the state could apply a particular election law in a manner that is less discriminatory. Rather, the argument is that the law, which may be narrowly tailored to serve a compelling governmental interest, combines with social conditions external to voting to produce an unlawful discriminatory result. The result is discriminatory because the disparate impact would not have occurred but for the race of the voter. Put another way, if the voters were of a different race, the denial would not have occurred to the extent that it has, and there would be no (or perhaps less) disparate impact.

Second, although the state's burden to proffer a compelling interest is high, the state is likely to meet this burden in certain disparate vote denial contexts. For example, in the case of felon disenfranchisement, courts are likely to find the state's interest compelling in light of the Supreme Court's unwavering reliance on Section 2 of the Fourteenth Amendment of the U.S. Constitution as support for states' ability to deny the right to vote based on felon status.[189] A similar, but less certain, argument could be made with respect to voter ID statutes in light of the Supreme Court's 2008 holding, in *Crawford v. Marion County Election Board*, that states have a right to protect against fraud in elections even when the only proof of fraud originated from outside the state.[190] Accordingly, the muscle of the prerequisites and burden-shifting test may be undermined with respect to certain categories of vote denial claims, and potentially all vote denial claims in light of states' broad constitutional authority to regulate the time, place, and manner of elections.[191]

Third, by minimizing plaintiffs' burden of proof through the use of prerequisites, the test leaves plaintiffs in a substantially weaker position in presenting proof to counterbalance the state's interest. Even with the highest scrutiny applied to defendants' justifications, plaintiffs

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[188] The tenuousness of the state's policy for the challenged practice, however, is relevant. *See infra* notes 248–263 and accompanying text. The narrow tailoring of a law could be relevant to the evaluation of its tenuousness.

[189] *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (holding that the disenfranchisement of convicted felons did not deny equal protection); *see also* Dillenburg v. Kramer, 469 F.2d 1222, 1226 (9th Cir. 1972) (casting doubt on the policy justifications for felon disfranchisement statutes).

[190] *See* 553 U.S. 181, 202 (2008).

[191] *See* U.S. CONST. art. I, § 4, cl. 1.

presenting evidence limited to (1) disparate impact, or (2) traceability to a social condition external to the electoral process, will not have availed themselves of the full breadth of the totality of the circumstances analysis. As one scholar has noted with respect to the strict scrutiny applied to the state's justifications, this "high standard tracks that of constitutional race discrimination claims."[192] Thus, the test threatens to import an intent standard by permitting states to offer justifications for discriminatory impact rather than requiring states to demonstrate that the resulting disparate impact is not on account of race—by showing, for example, that race merely correlates with, but does not cause, the disparate impact.

Moreover, the prerequisites and burden-shifting test leaves unanswered the question of how to prove discrimination external to voting in a manner that satisfies Section 2. If plaintiffs make too cursory a showing of Senate factor five as a prerequisite, they risk having inadequate evidentiary support for their claims. The test's burden-shifting and strict scrutiny standard tempers this result.[193] The *Crawford* Court, however, dismissed strict scrutiny in connection with equal protection claims in a decision postdating this proposal.[194] *Crawford* virtually eliminates any prospect of the Court adopting this standard in connection with Section 2.

Finally, similar to the causation and impact-plus and inverse relation tests, the narrow focus on disparate impact and Senate factor five diminishes the importance of other potentially relevant Senate factors, such as the tenuousness of the state's policy and other contextual factors.[195] Moreover, each of the tests predate the Supreme Court's 2009 decision in *Ricci v. DeStefano* and the U.S. Court of Appeals for the Ninth Circuit's 2010 decision in *Farrakhan v. Gregoire* (*Farrakhan IV*)—both of which greatly temper expectations of the Court's willingness to impose significant burdens of proof on the states.[196]

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[192] Tokaji, *supra* note 53, at 726.

[193] *See supra* notes 178–192 and accompanying text.

[194] *Crawford*, 553 U.S. at 188. Indeed, the Court's apparent readiness to disregard the significance of the other Senate factors as pertinent only to vote dilution and not to vote denial claims concedes too much. *See id.* It denies plaintiffs the opportunity to prove the larger context of bias in which these facially neutral practices operate, so that overarching concerns of fairness and bias can be taken into account.

[195] Tokaji, *supra* note 53, at 725 (suggesting that "[u]nlike most of the other Senate factors, [Senate factor B] seems quite germane to vote denial cases because of its focus on 'qualification[s]' and 'prerequisite[s]' to voting, among other things").

[196] *See* Ricci v. DeStefano, 557 U.S. 557, 593 (2009); Farrakhan v. Gregoire (*Farrakhan IV*), 590 F.3d 989, 1016 (9th Cir.), *aff'd in part, overruled in part en banc*, 623 F.3d 990 (9th Cir. 2010) (*Farrakhan V*). Although *Ricci*'s reach beyond the employment context is still

More recently, however, one scholar has introduced a Section 2 analysis that relies on proof of a "significant likelihood" of race-biased decision making by majority-group actors that results in denying minority voters an equal opportunity to elect their candidates of choice.[197] On the strength of Section 2's legislative history and constitutional context, this proposal states that: (1) Section 2 provides causes of action against both participation and dilution injuries; (2) an injury within the meaning of Section 2 arises only when political inequalities are due to race-biased decision making; and (3) plaintiffs, although not required to prove race-biased decision making by a preponderance of the evidence, must nonetheless show "to a significant likelihood" that the injury of which they complain resulted from race-biased decisions.[198] In brief, the significant likelihood test investigates the role that race plays in one's ability to cast a vote. If a voter were white, would he or she face the same barriers to the same degree? If the answer is no, then it would appear that the voter has succeeded in showing "to a significant likelihood" that the injury of which he or she complained resulted from race-biased decisions.[199] The significant likelihood test endeavors to strike a different evidentiary balance than the other tests and largely succeeds. However, the test still requires some showing of racial bias which threatens to read intent back into Section 2 even if the standard of proof is less burdensome.

B. *The Theory of Causal Context*

The tests and proposals referenced above are a certain improvement upon the general ambiguity that surrounds vote denial claims involving statistical disparities and evidence of bias. However, what I have termed the "causal context" test—not to be confused with the causal

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unknown, it provides some indication of the Court's waning receptivity to disparate impact claims based on race. *Ricci*, 557 U.S. at 593. Accordingly, since the prerequisites and burden-shifting test relies in part on the Title VII burden-shifting framework, it is important to note that although the test is still valid, *Ricci* may undermine the soundness of its reliance on Title VII jurisprudence. *See id.*; Tokaji, *supra* note 53, at 725 ("Just as employers in Title VII cases must show that a challenged employment practice is justified by a 'business necessity,' state and local election officials would have to show that a challenged voting practice is justified by an 'electoral necessity' once a prima facie disparate-impact case has been made.").

[197] *See* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 417, 425–29 (2012).

[198] *Id.* at 417.

[199] *See id.*; *see also* Foster, *supra* note 7, at 1474 (using disparate impact as a proxy for intent to determine "whether an adverse decision or outcome more likely than not resulted from the influence of indicia historically associated with status-based discrimination").

connection standard, which simulates proximate cause[200]—demands a "softer" causal link than causal connection and continues to consider racial bias external to voting as envisioned by the Senate factors. Indeed, the causal context test proposed here recognizes that modern-day voting discrimination is contextual if nothing else. Causal context recognizes that a neutral voting practice or procedure can exist within a context of racial inequality and implicit bias that produces a discriminatory result in the electoral arena. The fact that the causal context does not require direct causation also recognizes that the nexus between the harm and the instrument is not necessarily linear. Rather, the causal context threads together coexisting and mutually reinforcing factors that transport racial inequality in society into the election arena. Put another way, when racial disparities in voting cannot be explained in race-neutral terms, there is a potential VRA violation. The familiar air of this test to those well-acquainted with Section 2 is not coincidental. Causal context derives from the Senate factors and the core values they reflect, and updates Section 2's totality of the circumstances test by expressly including a broader range of evidence of discrimination—namely, implicit bias.[201]

For example, an electoral practice denies or abridges the right to vote on account of race in violation of Section 2 if it produces a disparate impact because of racial inequality outside the electoral arena that interacts with the practice to reproduce racial disparities within the electoral arena.[202] This differs procedurally from the current standard

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[200] Before an en banc decision ultimately vacated the judgment in *Farrakhan IV*, a panel of the Ninth Circuit defined the causal connection standard for Section 2 claims challenging felon disenfranchisement as a but-for connection between the election law and the disparate impact that results from intentional discrimination in the criminal justice system. *See* Farrakhan v. Washington (*Farrakhan II*), 338 F.3d 1009, 1019 (9th Cir. 2003). This definition was based on the district court's holding that evidence "that African, Hispanic and Native Americans are targeted for prosecution of serious crimes and . . . overrepresented in prison populations" may "establish a causal connection between Washington's disenfranchisement scheme and the denial of voting rights to racial minorities." *See* Farrakhan v. Locke (*Farrakhan I*), 987 F. Supp. 1304, 1312 (E.D. Wash. 1997); *see also* Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 309–10 (3d Cir. 1994) (relying on a causal connection analysis to hold that purging statutes allowing the removal of inactive voters from registration lists did not violate the Voting Rights Act).

[201] *See supra* notes 58–81 and accompanying text.

[202] The impact must be statistically significant. *See* Tokaji, *supra* note 53, at 725 n.251 (proposing that "where the differential impact of a voting procedure is relatively slight," courts may "requir[e] that any disparities be statistically significant and . . . impos[e] a lower burden of justification on the state where the racial disparity is *de minimis*"). This requirement is inherent in the finding of a disparate, as opposed to a different, impact. To

by recognizing that proof of disparate impact may serve as a threshold showing, effectively replacing the prerequisites in vote dilution cases established by the Supreme Court's 1986 decision in *Thornburg v. Gingles*.[203] This inquiry is analytically distinct from an inquiry into whether the policy itself is race neutral or whether the state's justifications are insufficient. Instead, plaintiffs must offer proof to permit the court to make an independent finding that racial inequality has permeated the electoral arena. Inequality that is transported into elections is potentially discriminatory and cannot be explained in terms other than race, regardless of whether the bias is implicit or explicit.

Unlike the other tests, causal context follows the existing precedent that Section 2 requires more than statistical proof of disparate impact,[204] yet it does not upend the totality of the circumstances analysis, replace it with a balancing test, or overvalue the tenuousness factor. Rather, causal context recognizes the relevance of Senate factor five without overstating its weight or displacing the potential relevance of other factors.[205] Other Senate factors and considerations may be relevant in disparate vote denial cases, and courts should consider each factor in light of the unique circumstances of the case. Likewise, consistent with Section 2's totality of the circumstances analysis, compelling evidence of one Senate factor could prove outcome-determinative.[206] For example, if plaintiffs proffer compelling evidence that a law or system of laws results in the racially discriminatory deprivation of minorities' right to vote, that abridgment suffices to prove the claim. Other, or additional, evidence supporting alternative factors that are of less relevance to the plaintiffs' claim are superfluous.

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ensure that the impact is indeed measurable and meaningful, however, I have included a requirement of statistical significance.

[203] *See supra* notes 58–81 and accompanying text (discussing the *Gingles* prerequisites).

[204] *See, e.g.*, Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997); Irby v. Va. State Bd. of Elections, 889 F.2d 1352, 1358–59 (4th Cir. 1989).

[205] *See Farrakhan IV*, 590 F.3d at 1004.

> Although the district court was required to consider the "totality of the circumstances," not all of the Senate Factors were equally relevant, or even necessary, to that analysis in this case. Some Senate Factors may be relevant as circumstantial evidence with respect to certain vote denial claims, but proof of those Factors was not required where, under Factor 5, Plaintiffs provided strong, indeed "compelling," direct evidence of the alleged violation.

Id.

[206] *See id.*

1. The Role of Implicit Bias

Some of the potentially relevant evidence in the causal context analysis is proof of implicit bias. As noted above, the Senate factors reveal that evidence of implicit bias can be used to prove racial discrimination both within and outside the electoral arena for purposes of establishing disparate vote denial.[207] Implicit bias refers to discrimination that occurs unintentionally based on assumptions and prejudices that operate beneath the actor's radar of cognition.[208] As commentators have noted, implicit bias acknowledges that "'[m]any mental processes function implicitly, or outside conscious attentional focus,' including attitudes and stereotypes."[209] Recent studies of implicit bias within the law, and the electoral process in particular, may prove to be a game changer for disparate impact claims in voting and beyond.[210] Implicit bias evidence provides an important window into the pernicious vestiges of de jure discrimination that can easily fall off the legal radar.

In 2006, in the vote dilution case, *League of United Latin American Citizens v. Perry* (*LULAC*), the Supreme Court gave a nod to the evidentiary potential of implicit bias in the electoral arena.[211] Writing for the majority, Justice Anthony Kennedy cited as potential proof of discrimination the contextual evidence that new rules were enacted just as minority voters were gaining sufficient political power to potentially influence the outcome of elections.[212] Justice Kennedy noted, with suspicion, that when the Latino community in Texas's District 23 was poised to exercise the newfound political power that its increased population had fueled, the State sought to redraw the district to decrease the number of

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[207] *See supra* notes 82–102 and accompanying text.

[208] *See* Lawrence, *supra* note 30, at 319.

[209] Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 Mo. L. Rev. 83, 102 (2008) (quoting Greenwald & Krieger, *supra* note 31, at 947–48). Professor Ivan Bodensteiner defines "attitude" as "an 'evaluative disposition,' such as a 'tendency to like or dislike,'" and notes that "one's implicit attitudes may differ from 'explicit attitudes' toward the same subject." *Id.*

[210] *See supra* note 30. Despite the recency of many implicit bias studies, the application of implicit bias is not anachronistic in Section 2 analyses. As this Subsection of the Article explains, certain Senate factors are premised on the concept of implicit or unconscious bias. To be sure, there is certainly more work to be done in understanding the potential role of implicit bias in disparate impact claims generally and Section 2 claims specifically as courts are increasingly skeptical about claims of general societal discrimination. Importantly, the implicit biases recognized by the Senate factors are rooted in a particular context and carefully connect to specific racial disparities.

[211] *See* 548 U.S. 399, 442 (2006).

[212] *Id.* at 440.

Latinos in it.[213] Texas's redrawing of District 23's boundaries, which excluded sizeable portions of its Latino community, took "away the Latinos' opportunity because Latinos were about to exercise it."[214] One scholar has argued that Justice Kennedy's analysis in *LULAC* may not hinge upon racial discrimination per se and has suggested instead that "the State may have intentionally discriminated in a way that is constitutionally actionable because it intended to deprive the group of an electoral opportunity. The intent that matters is the intent to cause a particular effect: the intent to burden."[215] This view focuses on "representational rights," such as the right to vote and burdens on political participation, as opposed to racial discrimination.[216] Indeed, it appears that Justice Kennedy may have been intimating a broader concern about state infringement on group political power when race looms prominently in the background.[217]

Alternatively, *LULAC* may simply be rereading intent into Section 2 by equating the state's actions with proof of intentional discrimination—the intent to burden.[218] The causal context analysis suggests, however, that without expressly characterizing it as such, the Court effectively determined that the contextual evidence of Texas's redistricting was proof of Senate factor B, which evaluates the tenuousness of the state policy.[219] This would be perfectly consistent with the Court's holding that Texas violated Section 2, and it reflects a more expansive consideration of the context in which discriminatory state action occurs.

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[213] *Id.*

[214] *Id.* ("This bears the mark of intentional discrimination that could give rise to an equal protection violation.").

[215] Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 Ohio St. L.J. 1185, 1208 (2007).

[216] *See id.* at 1196–1202. The notion of representational rights derives in part from Justice Kennedy's concurrence in the Supreme Court's 2004 decision in *Vieth v. Jubelirer*, where, in discussing the relevance of the First Amendment in the political gerrymandering context, he noted that "[t]he inquiry is not whether political classifications were used[,] . . . . [but] instead is whether political classifications were used to burden a group's representational rights." *See* 541 U.S. 267, 315 (2004) (Kennedy, J., concurring in the judgment); *see also* Charles, *supra* note 215, at 1201 ("In constitutional law there are types of State justifications that cannot justify certain types of burdens upon groups or individuals; these impermissible justifications are sometimes referred to as exclusionary reasons.") (citing Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 Hastings L.J. 711, 712 (1994) (arguing that courts rely on a qualitative process to balance incommensurable concepts such as individual rights and state interests)).

[217] *See* Charles, *supra* note 215, at 1200–02.

[218] *See id.* at 1207–08.

[219] *See LULAC*, 548 U.S. at 442; *supra* note 69 and accompanying text (discussing Senate factor B).

Had the Court employed a causal context analysis in *LULAC*, it would have stated expressly that the evidence of burgeoning Latino political power and the lack of credible justifications for reconfiguring the district's population were not merely coincidental factors, but instead reflected an implicit bias against the representational rights of Latino citizens. The Court also would have made clear that these factors, along with evidence of historical discrimination against Latinos in Texas, caused the State's politically neutral justification to result in discrimination in violation of Section 2. Instead, the Court was ambiguous about its specific valuation of the state's actions in light of growing Latino political power.[220]

Depending on the circumstances, the actor exhibiting implicit bias can be: (1) the state—for example, legislators who adopt the challenged voting practice or the discriminatory measure; (2) citizens—for example, voters who engage in racially polarized voting; or (3) quasi-state actors—for example, political parties that pursue laws and practices both for their disproportionate impact on minority voters and for partisan interests. In each of these cases, implicit, as opposed to explicit, bias might be the driving force behind the challenged action. Moreover, at least three of the Senate factors relevant to vote denial claims invite evidence of implicit bias: racially polarized voting (factor two), subtle racial appeals (factor six), and the tenuousness of the state's policy (factor B).[221]

Evidence of racially polarized voting does not ascribe intent to majority-group voters who vote as a bloc to thwart the ability of minority voters to elect candidates of their choice.[222] Racially polarized voting "means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates."[223] Nonetheless, courts have repeatedly determined that evidence of racially polarized voting reveals a subtext of racial discrimi-

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[220] Charles, *supra* note 215, at 1211; *see LULAC*, 548 U.S. at 442.

[221] *See supra* notes 68–69 and accompanying text.

[222] *See* Thornburg v. Gingles, 478 U.S. 30, 62 (1986) (plurality opinion) (holding that the legal concept of racially polarized voting incorporates neither causation nor intent).

[223] 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, 1393 (2010) (quoting *Gingles*, 478 U.S. at 62 (plurality opinion)); *see also Gingles*, 478 U.S. at 53 n.21 (majority opinion) (quoting political scientist Bernard Grofman's definition of racial polarization as "a consistent relationship between [the] race of the voter and the way in which the voter votes, . . . [or when] black voters and white voters vote differently" (first alteration in original)).

nation.[224] Indeed, the Supreme Court has expressed internal conflict over the extent to which the cause of racially polarized voting is relevant to the Section 2 inquiry.[225] White voters may vote against minority voters' candidate of choice intentionally to discriminate[226] because of implicit bias against minority candidates or minority voters, or with no intent or bias at all.[227] The resulting disparate impact on the right to

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[224] *See, e.g.*, League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 850 (5th Cir. 1993) (en banc) (expressly rejecting the district court's conclusion that to prove racially polarized voting, "plaintiffs need only demonstrate that whites and blacks generally support different candidates to establish legally significant white bloc voting"); Salas v. Sw. Tex. Junior Coll. Dist., 964 F.2d 1542, 1554 (5th Cir. 1992) (noting that the inquiry into racially polarized voting "aims at determining whether it is racial voting patterns, along with other objective factors, rather than some other set of causes, that explain the lack of electoral success of voters within the protected class"). Indeed, the U.S. Court of Appeals for the Fifth Circuit requires "an inquiry into the causal relationship between the challenged practice and the lack of electoral success by the protected class voters." *See Salas*, 964 F.2d at 1554; *see also* Katz et al., *supra* note 73, at 670–71 (surveying courts' applications of the three *Gingles* prerequisites, including racially polarized voting); Randolph M. Scott-McLaughlin, *The Voting Rights Act and the "New and Improved" Intent Test: Old Wine in New Bottles*, 16 Touro L. Rev. 943, 960–77 (2000) (exploring various judicial interpretations of *Gingles*'s conflicting opinions).

[225] In her concurrence in *Gingles*, Justice Sandra Day O'Connor noted that "[e]vidence that a candidate preferred by the minority group . . . was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates." *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring in the judgment). Justice O'Connor argued that this view did not require a rejection of the majority approach, however, and instead agreed that factors other than race caused the divergence in minority voting patterns. *See id.* Justice O'Connor further noted that:

> Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I agree that defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters.

Id.

[226] By recognizing that implicit bias can fuel racially polarized voting, the casual context analysis would not read an intent requirement back into Section 2. *See generally* Elizabeth M. Ryan, Note, *Causation or Correlation? The Impact of* LULAC v. Clements *on Section 2 Lawsuits in the Fifth Circuit*, 107 Mich. L. Rev. 675 (2009) (critiquing the inclusion of a causation requirement in racially polarized voting analyses as a direct contravention of the 1982 VRA amendments). Rather, causal context recognizes that the correlation that racially polarized voting seeks to establish may represent bias in the electoral process that is otherwise undetectable but equally pernicious.

[227] As two scholars have noted, "The implicit cognitive processes might heavily influence the final choice of a voter who does not otherwise clearly embrace one candidate over another." Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 Fla. St. U. L. Rev. 659, 684 (2010).

vote—either in the form of vote denial or vote dilution—should nonetheless be actionable if the surrounding racial context suggests that race determines electability in whole or in part.

Likewise, evidence of "*subtle* racial appeals" under Senate factor six may result from intentional discrimination or implicit bias that fuels discrimination against minority voters' candidates of choice.[228] The Senate Report's distinction between "overt" and "subtle" racial appeals in the Senate factors invites this nuance.[229] Similarly, by seeking evidence of the "tenuousness" of state policy, Senate factor B not only triggers a qualitative analysis of the state's justifications for purposes of evaluating the legitimacy of an election law and its purported goals, but also permits courts to attribute a pretext of discrimination to state action when the justifications are insufficient.[230] This finding of pretext does not necessarily result from explicit bias, but may well be the result of implicit bias that the weakness of the state's justifications reveals. Indeed, tenu-

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[228] *See* S. Rep. No. 97-417, at 29 (1982) (emphasis added), *reprinted in* 1982 U.S.C.C.A.N. 177, 206; Katz et al., *supra* note 73, at 707–17 (summarizing the various types of evidence that constitute racial appeals, including ones that could be characterized as implicit bias, such as in-group and out-group references, discussion of racially charged issues, photo manipulation, and candidate intimidation).

[229] *See* S. Rep. No. 97-417, at 29. The distinction between overt and subtle appeals is often blurred. At least two scholars have noted that some explicit racial appeals can nevertheless mask conscious discrimination. *See* Leland Ware & David C. Wilson, *Jim Crow on the "Down Low": Subtle Racial Appeals in Presidential Campaigns*, 24 St. John's J. Legal Comment. 299, 300 n.4 (2009) (charactering as "subtle racial appeals" those campaign appeals that "allow individuals to attribute their attitudes to ostensibly non-racial information and to justify their behavior in race-neutral terms").

[230] *See* Terrazas v. Clements, 581 F. Supp. 1329, 1345 n.24 (N.D. Tex. 1984) (stating that "[t]he principal probative weight of a tenuous state policy is its propensity to show pretext"). *But see* United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1571 (11th Cir. 1984) (stating that the *Zimmer* factor of a nontenuous state policy (Senate factor B) is among the least important of the factors for determining vote dilution); Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What Is the Intent of the Results Test?*, 36 Emory L.J. 1, 23 (1987) (noting that, although some courts have continued to rely on tenuousness as a relevant factor after the 1982 amendments, others have found that it lacks probative value). The conclusion that tenuousness is less relevant to the Section 2 results inquiry than to the intent inquiry ignores the probative value of context. By demonstrating a lack of justification for the state policy, courts can discern implicit bias in the policy's incoherence. *See, e.g.*, League of United Latin Am. Citizens v. Clements, 986 F.2d 728, 753 (5th Cir.) (stating that the tenuousness of state policy was evidence of discriminatory results, but the existence of a legitimate state policy did not preclude a finding of vote dilution), *rev'd en banc*, 999 F.2d 831 (5th Cir. 1993); Westwego Citizens for Better Gov't v. City of Westwego, 872 F.2d 1201, 1201–11 (5th Cir. 1989) (same); McMillan v. Escambia Cnty., Fla., 748 F.2d 1037, 1045 (5th Cir. 1984) (noting that tenuousness is circumstantial evidence of an election system's discriminatory results); *Marengo Cnty. Comm'n*, 731 F.2d at 1571 (same); Houston v. Haley, 663 F. Supp. 346, 355–56 (N.D. Miss. 1987) (same), *aff'd*, 859 F.2d 341 (5th Cir. 1988), *and vacated* 869 F.2d 807 (5th Cir. 1989).

ousness is "relevant insofar as intent is relevant to [the] result: evidence that a voting device was intended to discriminate is circumstantial evidence that the device has a discriminatory result. Moreover, the tenuousness of the justification for a state policy may indicate that the policy is unfair."[231] Finally, the breadth of Senate factor five's exploration of the interaction of societal discrimination with election laws is another potential entry point for implicit bias evidence. Implicit bias can result in discrimination outside the electoral arena and interact with race-neutral election laws to cause discrimination in elections.

The common thread among these Senate factors is that they reveal discrimination and bias through action and choices that the actor may or may not acknowledge or of which the actor may or may not be cognizant. If bias motivates the result, it taints the electoral process regardless of the actor's intent. Notably, implicit bias may be closer to the evidentiary standard that the Court envisioned than to pure, statistically based disparate impact. Indeed, the Court's rejection of evidence of statistical disparity as the sole basis of a Section 2 claim and Congress's clear exclusion of an intent requirement under Section 2 leaves the door open for implicit bias evidence to provide a direct causal link between state action and vote denial.

The role of implicit bias in election law deserves more extensive treatment than can be provided here. For now, it suffices to acknowledge that, conceptually, implicit bias is not new to the Section 2 analysis and, most certainly, infects a wide array of election administration practices that fall within the scope of the VRA.[232] Importantly, however, recognizing the role of evidence of the electoral arena's implicit bias in the Section 2 analysis should not undermine the results standard and its concomitant ban on intent. Without care, permitting evidence of implicit bias can become a backdoor reentry of the intent standard by weaving a search for intent or purpose into the Section 2 analysis. Such a result would compromise the core values, legislative history, and plain language of Section 2.

As these cases and examples indicate, implicit bias evidence, although not a new concept, is still a developing evidentiary standard. Nonetheless, the resurgence and expansion of studies on how implicit

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[231] *Marengo Cnty. Comm'n*, 731 F.2d at 1571 (citation omitted).

[232] For a discussion of implicit bias in elections, see LeRoy, *supra* note 30, at 1592–95 (discussing how partisan elections may cause judges to distribute justice based on political contributions); Page & Pitts, *supra* note 30, at 22 (discussing how unconscious bias may play a role in the interaction between poll workers and prospective voters, and suggesting means of mitigating its impact).

bias affects different spheres of law holds promise in voting rights litigation. As part of the causal context analysis, implicit bias provides an additional source of information regarding whether a given election law is operating in a climate of inequality and discrimination and transmitting those effects to the electoral arena. Finally, evidence of implicit bias fits squarely within the Supreme Court's constricted reading of the VRA in seminal cases such as *Shaw v. Reno*,[233] *Miller v. Johnson*,[234] and *Shaw v. Hunt*.[235] Implicit bias provides the missing link between external factors and internal impact that has been the source of consternation for the Court. The causal context analysis of Section 2 is instead a more expansive method of linking modern vote denial practices to current social and historical climates of discrimination.

2. The Standard of Proof for External Discrimination

Another looming question is whether the evidence of discrimination external to voting that Senate factor five solicits must demonstrate intent, whether statistical disparities can prove it, or whether it is subject to some other standard. Initially, the *Farrakhan IV* court determined that there was compelling evidence of discrimination based on evidence of statistical disparities, as well as a qualitative analysis by qualified experts who determined that the disparities were not race neutral.[236] This is neither direct proof of intent nor evidence of statistical disparities; rather, this proof constituted circumstantial evidence of discrimination in Washington State's criminal justice system and a narrative of inequality.[237] Nonetheless, sitting en banc, the Ninth Circuit jettisoned the plaintiffs' Section 2 claim on the ground that they did not prove that the discrimination in the state's criminal justice system was intentional.[238]

To require evidence of intentional discrimination with respect to any of the Senate factors is problematic for several reasons. First, it would require Section 2 plaintiffs to prove a case of intentional discrimination within a Section 2 case in order to sustain a claim. Not only is this approach inconsistent with Section 2's application to date, but it imposes a burden on plaintiffs that Section 2 does not require, and,

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[233] 509 U.S. 630, 657 (1993).

[234] 515 U.S. 900, 919 (1995).

[235] 517 U.S. 899, 912 (1996).

[236] *Farrakhan IV*, 590 F.3d at 997.

[237] *Id.* at 1004.

[238] *Farrakhan V*, 623 F.3d at 993 (affirming that felon disenfranchisement laws may be challenged under Section 2 of the VRA).

indeed, runs directly counter to Section 2.[239] Importantly, the concern regarding the level of proof of discrimination required is not based solely on the notion that a stringent proof standard would reintroduce an intent standard into Section 2. Indeed, contrary to the assertion of many Section 2 supporters, requiring that intent be proved is not a backdoor reinsertion of an intent standard because requiring that intent be proved *external to* voting is not the same as requiring that it is proved *with respect to* voting. Instead, the problem with requiring proof of intent in the discrimination external to voting is that it fundamentally misses the point of Section 2 (and indeed the VRA as a whole), which is to recognize that electoral practices do not operate in a vacuum. Rather, they interact with social conditions, including state policies and practices infused with bias, and at times, even intentional discrimination, to compromise the integrity of the electoral process as a neutral, "race-free zone" or a sphere of society that race minimally impacts. This approach is consistent with the standard of proof applied to date to Senate factor five and to other Senate factors.[240]

It is easy to conflate the *Farrakhan IV* holding that statistical disparities in voting are insufficient by themselves to prove a Section 2 violation with the notion that statistical disparities are insufficient to establish proof of Senate factor five. That conflation distorts the purpose of the Section 2 inquiry and contradicts the Court's historical treatment of discrimination external to voting.[241] For example, the Supreme Court has held that Congress has the authority to prohibit literacy tests because such tests import discrimination from the education system into the political process.[242] Similarly, in considering other Senate factors, such as the use of racial appeals in elections (Senate factor six) or inadequate responsiveness on the part of government officials (Senate factor A),

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[239] *See* Ryan P. Haygood, *Disregarding the Results: Examining the Ninth Circuit's Heightened Section 2 "Intentional Discrimination" Standard in* Farrakhan v. Gregoire, 111 COLUM. L. REV. SIDEBAR 51, 57 (2011), http://www.columbialawreview.org/wp-content/uploads/2011/05/51_Haygood.pdf (critiquing the Ninth Circuit's en banc decision in which it held that plaintiffs must prove that the state's criminal justice system was "infected by intentional discrimination"(quoting *Farrakhan V*, 623 F.3d at 993)).

[240] *See Farrakhan IV*, 590 F.3d at 1005.

[241] *See* Tokaji, *supra* note 53, at 722 (arguing that to require proof of intentional discrimination "makes little sense . . . if the results test is supposed to serve as a prophylactic against voting practices . . . adopted or retained due to intentional discrimination that would be difficult to prove in court," and that "[s]uch intent may exist whether or not there has been intentional discrimination external to the voting process.").

[242] Oregon v. Mitchell, 400 U.S. 112, 117, 133 (1970) (unanimous decision) (holding that Congress has the power to ban literacy tests based in part on the record of "substantial if not overwhelming" racial discrimination in education).

Section 2 does not require that these factors be proved according to the legal standard befitting an independent legal claim on that basis. Likewise, with respect to Senate factor five, it is not necessary to offer proof of external discrimination that would satisfy an independent claim sufficient to sustain a remedy for that discrimination itself.

Because plaintiffs are not seeking relief for the external discrimination itself, they should not be required to prove the existence of that external discrimination in the same way that they would if they were directly seeking relief for the discrimination. Instead, Section 2's causal context analysis permits plaintiffs to prove discrimination sufficient to dispose of the argument that the disparate impact of the electoral practice is entirely race neutral.[243] To the extent that racial disparities exist and are inexplicable in race-neutral terms, the direct cause of those disparities should be found unlawful, or at least, as in the case of the remedy provided for by the VRA, suspended until the disparity is cured or race-neutral justifications prevail.[244]

The extensive evidence of unconscious bias in society and its resulting disparate impact on the electoral process challenge the Supreme Court's now-entrenched rejection of disparate impact proof as independently sufficient to prove a claim.[245] The traditional understanding of disparate impact before such proof became relevant was that disparate impact is the result of natural forces—that the externalities were too varied and far-reaching to discern any measurable animus that might justify a remedy based on race.[246] Implicit bias research turns this presumption on its head, giving even the most ardent "intent-based" defenders something to hang their hats on.[247] Indeed, racial animus is racial animus, even if it is unintended or unconscious.

3. Tenuousness of the State Policy

In addition to evidence of external discrimination, evidence of tenuousness contributes to the totality of the circumstances inquiry by

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[243] This approach might be called "process of elimination" discrimination, whereby one rules out all legitimate bases for existing racial disparities and is left with racial bias—unconscious or conscious—as the only likely explanation. *See, e.g.*, Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 Conn. L. Rev. 979, 986 (2008) ("Because people rarely admit to taking race into account, conscious discrimination is often covert or hidden from view. Proving discrimination therefore comes down to a process of elimination. The key is to rule out other explanations.").

[244] 42 U.S.C. § 1973a(b) (2006).

[245] *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

[246] *See* Foster, *supra* note 7, at 1472.

[247] *See supra* note 30 and accompanying text.

either eliminating or establishing pretext surrounding the challenged practice.[248] Whether the justifications for a challenged electoral practice are tenuous helps to establish pretext for and supports an inference of discrimination—including unintentional discrimination—sufficient to establish that the disparate impact has occurred on account of race. The Senate Report's framing of the evaluation of the state's justification supports this construction of Section 2.[249] By employing the term "tenuousness," which by definition refers to "flims[iness]," "weak[ness]," or "having little substance,"[250] the Senate directed courts' analysis toward determining whether the policy underlying the challenged practice is suspect. In so doing, the Senate indicated an interest in revealing pretext and bias, rather than determining the legitimacy of the practice for its own sake. A policy that is tenuous is thus treated as suspect within the totality of the circumstances analysis under Section 2.

Interpreting the tenuousness factor too broadly inevitably skews the analysis of the challenged practice. A rational and legitimate policy supporting a state action, in contrast to an action that is arbitrary and irrational, may be presumed to be free of bias. Section 2, however, does not compel that inquiry. Instead, courts are asked to evaluate whether there is evidence of tenuousness, not whether there is evidence of legitimacy. The state's legitimate interest in maintaining a challenged policy cannot override a racially disparate impact, as evidenced by the existence or extent of one or more Senate factors.[251] Indeed, the purpose of Section 2 is to root out racial discrimination—by intent or effect—in the electoral process; it is not to permit such discrimination so long as the state has a good non-racial reason for the policy.[252]

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[248] *See* S. Rep. No. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205.

[249] *Id.* ("[W]hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.").

[250] Merriam-Webster Collegiate Dictionary 1211 (9th ed. 1991).

[251] One way to improve the inverse relation test—and to ensure against this result—would be to require that tenuousness bear an inverse relationship not only to disparate impact, but also to the evidence of external discrimination. *See supra* note 183 and accompanying text. Expanding the inverse relation test to include external discrimination brings us closer to the robust totality of the circumstances test that Section 2 requires, and isolates the factors that are likely to be most relevant in a disparate vote denial case. Nevertheless, the danger in isolating and weighting any single factor or subset of factors in the totality of the circumstances remains.

[252] 42 U.S.C. § 1973(b) (2006) (stating that a violation of Section 2 exists if "it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)"). This raises a fundamental proof question: can absence of a Senate factor be a defense? Because the Senate factors are a non-exhaustive list of relevant considerations and the U.S. Supreme Court has made clear that no one factor makes or breaks a claim, permit-

Moreover, to the extent that the state burdens the right to vote beyond what is necessary to achieve the race-neutral policy goal, the policy is tenuous.[253] This interpretation of the tenuousness factor is consistent with the framing of the other Senate factors. Each of the factors directs courts to determine the role of race in a challenged practice based on direct or circumstantial evidence.[254] For example, the factors examining "[t]he extent of any history of official discrimination,"[255] "[t]he extent to which voting in the elections of the state or political subdivision is racially polarized,"[256] "[t]he extent to which the state or political subdivision has used *unusually* large election districts . . . that may enhance the opportunity for discrimination against the minority group,"[257] and "[w]hether political campaigns have been characterized by overt or subtle racial appeals"[258] (factors one, two, three, and six, respectively) permit the court to infer that a disparate impact occurred on account of race based on the existence and extent of one or more factors. The casual context test would also permit plaintiffs to establish tenuousness by examining whether government actors have minimized the racial impact of an electoral practice.

The U.S. Equal Employment Opportunity Commission's (EEOC) administrative guidance for age discrimination claims is instructive on this point.[259] In response to the Supreme Court's shifting standard from

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ting the absence of Senate factors to establish a defense would undermine the totality of the circumstances principle. *See Gingles*, 478 U.S. at 45. Instead, courts are to weigh the presence, absence, strength, and weakness of individual factors in the totality of the circumstances analysis to determine whether the disparate impact that the challenged practice causes is on account of race. *See supra* note 71 and accompanying text.

[253] *See* Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 Ohio St. J. Crim. L. 19, 19 (2007) (arguing that requiring racial impact statements prior to enacting law enforcement regulations "would enable legislators and the public to anticipate any unwarranted racial disparities and to consider alternative policies that could accomplish the goals of the legislation without causing undue racial effects").

[254] S. Rep. No. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 269.

[255] *Id.* at 29.

[256] *Id.*

[257] *Id* (emphasis added).

[258] *Id.*

[259] *EEOC Questions & Answers*, *supra* note 35. Recent election law scholarship has acknowledged the potentially transformative role of administrative law and agencies in the future enforcement of voting rights and election administration. *See, e.g.*, Pildes, *supra* note 160, at 17, 26. The EEOC's role in preserving and defining a relevant space for disparate impact claims in the employment context is a worthy example of how institutions and agencies can balance and even temper the judicial response to such claims. *See, e.g.*, 29 C.F.R. § 1607.4(D) (2012) (EEOC Title VII regulation) (defining criteria for a showing of disparate impact). For example, the EEOC has issued guidance on what determines whether an employment practice is based on RFOA—the lesser standard that supplanted business necessity.

business necessity to the less potent "reasonable factors other than age" (RFOA) standard in age discrimination suits,[260] the EEOC offered the following guidance concerning the evidentiary support for such claims:

> If a police department decided to require applicants for patrol positions to pass a physical fitness test to be sure that the officers were physically able to pursue and apprehend suspects, it should know that such a test might exclude older workers more than younger ones. Nevertheless, the department's actions would likely be based on an RFOA if it reasonably believed that the test measured the speed and strength appropriate to the job, and if it did not know, or should not have known, of steps that it could have taken to reduce harm to older workers without unduly burdening the department.[261]

These guidelines can be distilled into what I term the "ARC" analysis: (1) *awareness* of the law's impact; (2) *reasonable* belief in its necessity; and (3) cognizable harm reduction and balancing. The EEOC guidelines further instruct that "[t]he rule emphasizes the need for an individualized consideration of the facts and circumstances surrounding the particular situation."[262]

See EEOC Questions & Answers, *supra* note 35. The factors are instructive to the VRA analysis: "An employment practice is based on an RFOA when it was reasonably designed and administered to achieve a legitimate business purpose in light of the circumstances, including its potential harm to older workers." *Id.* The electoral arena, however, has yet to have the benefit of an administrative agency with the authority, consistency, and relevance of the EEOC.

[260] *See* Smith v. City of Jackson, Miss., 544 U.S. 228, 239 (2005).

[261] *EEOC Questions & Answers*, *supra* note 35.

[262] *Id.* Considerations relevant to assessing reasonableness include the following:

> (i) The extent to which the factor is related to the employer's **stated business purpose;**
> (ii) The extent to which the employer **defined the factor accurately** and **applied the factor fairly and accurately,** including the extent to which managers and supervisors were **given guidance or training** about how to apply the factor and avoid discrimination;
> (iii) The extent to which the employer **limited supervisors' discretion** to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
> (iv) The extent to which the employer **assessed the adverse impact** of its employment practice on older workers; and
> (v) The **degree of the harm to individuals within the protected age group,** in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the employer **took steps to reduce the harm,** in light of the burden of undertaking such steps.

29 C.F.R. § 1625.7(c)(2) (emphasis added).

Repurposed for vote denial claims, the EEOC's RFOA standard can be transformed to reasonable factors other than race ("RFOR"). In particular, RFOR could be used to determine the tenuousness of the state policy (Senate factor five), or, in other words, the reasonableness of the state's belief in the need for the electoral law or practice. Accordingly, RFOR for vote denial claims would evaluate:

- The extent to which the factor—for example, voter ID, felon status, or consistent registration data—is related to the state's stated election administration purpose;
- The extent to which the state defined the factor accurately and applied the factor fairly and accurately, including the extent to which election officials and other state actors were given guidance or training about how to apply the factor and avoid discrimination;
- The extent to which the state limited election officials' discretion to assess voters subjectively, particularly where the criteria that the state actors were asked to evaluate are known to be subject to negative race-based stereotypes;
- The extent to which the state assessed the adverse impact of its election law on racial minorities; and
- The degree of the harm to individuals within the minority group, in terms of both the extent of injury and the numbers of persons adversely affected, and the extent to which the state took steps to reduce the harm, in light of the burden of undertaking such steps.[263]

These factors would incentivize states to take specific actions to avoid potential liability. First, the state must become aware of the law's impact. It would no longer be sufficient to enact a law affecting elections without assessing the impact of the potential vote abridgement it may cause. Second, there must be a substantial threat to the integrity of elections to make the state's belief in the necessity of the electoral law reasonable. The bulleted factors above help guide an analysis of reasonableness. Third, there must be an identifiable harm of which the state was not, and should not have been, aware, that could be addressed without burdening the right to vote to such an extent.

Unlike the prerequisites and burden-shifting test, however, the plaintiff would bear the affirmative burden of establishing tenuousness by using the ARC principles or other proof. In applying the ARC prin-

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[263] *See EEOC Questions & Answers*, *supra* note 35. These RFOR factors are adapted from the EEOC's guidelines regarding RFOA.

ciples, the causal context test permits a discomfiting recounting of the effects of systemic and vestigial racism on the quotidian existence of racial minorities and their electoral participation. Indeed, this is the causal context at its core. The overarching narrative traces the impact of racial inequality within and outside of the electoral arena on the electoral participation of minorities. Section 2 jurisprudence, the VRA's congressional record, and the plain text of Section 2 provide helpful guideposts toward the key elements of a successful narrative. Thus, framed in the narrative of causal context, Section 2's totality of the circumstances test is flexible enough to account for historical context and adapt to shifting conceptions of racial discrimination while fending off constitutional attack.

III. Applying the Causal Context Test to Modern Vote Denial

A workable disparate vote denial test requires certain fixed and definable elements. First, there must be vote denial or other infringement on the right to vote. In the case of voter ID, restrictive voting periods, felon disfranchisement, and other practices resulting in modern vote denial, this threshold requirement is easy to satisfy by direct reference to the challenged statute that denies or burdens the right to vote based on a particular act or classification—for example, failure to produce valid identification, felon status, or, in the case of voter purges, incorrect or inconsistent registration information.[264] In voter ID cases, this threshold could be met with proof that certain voters are unable to meet or are disproportionately burdened by the voter ID requirements, and are, therefore, more likely to be unable to cast a ballot on Election Day. Second, plaintiffs must prove that the denial or burden is on account of race. Indeed, the disparate impact itself offers some potential proof of a race-based voting burden.[265] When coupled with evidence of how the race-neutral law interacts with external social conditions, the tenuousness of the policy (including the ARC principles), and the surrounding electoral context, the disparate impact will become either more or less explicable in terms of race.[266]

In lieu of burden shifting, plaintiffs bear responsibility for the affirmative case in its entirety.[267] Plaintiffs may utilize all Senate factors at

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[264] *See supra* notes 103–125 and accompanying text.

[265] *See supra* notes 95–96 and accompanying text.

[266] *See supra* notes 248–263 and accompanying text.

[267] To be sure, the prerequisites and burden-shifting test predates the U.S. Supreme Court's 2009 decision in *Ricci v. DeStefano*, and the U.S. Court of Appeals for the Ninth Circuit's 2010 decision in *Farrakhan v. Gregoire* (*Farrakhan IV*), which bear upon what a legally

their disposal to place the disparate impact in a broader context—the causal context.[268] At bottom, it is enough to use circumstantial evidence to eliminate race-neutral causes for disparate vote denial from the range of possible explanations. Here, "race neutral" should be understood in its most literal sense: if a law is neutral as to race, then the race of the voter should not be predictive of the likelihood that he or she will experience vote denial. This is not a back-end means of proving a Section 2 claim solely by statistical disparities; rather, it forces the trier of fact to consider the vote denial claim in the absence of proof of intent as the 1982 VRA amendments require.[269] The fact that race plays a determining role in who gets to vote and who does not is sufficient to satisfy Section 2. This vigilance in preventing the insertion of race into the electoral sphere is consistent with the intent and purpose of the VRA.[270]

No matter the formulation of the test, however, the crucial question of its constitutionality remains. The constitutionality of the VRA has been the subject of a steady stream of legal challenges since its inception and has been successfully affirmed each time.[271] Indeed, as is often cited in its defense, the VRA is an exemplar of congressional power at its zenith.[272] Nevertheless, the scope of Congress's authority is

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viable test for new vote denial claims—especially felon disfranchisement claims—would be. *See* Ricci v. DeStefano, 557 U.S. 557, 593 (2009); Farrakhan v. Gregoire (*Farrakhan IV*), 590 F.3d 989, 1004 (9th Cir.), *aff'd in part, overruled in part en banc*, 623 F.3d 990 (9th Cir. 2010) (*Farrakhan V*); *supra* notes 185–196 and accompanying text (explaining the "prerequisites and burden-shifting" test).

[268] This approach is also consistent with vote dilution claims. Indeed, even the prerequisites established by the Supreme Court in *Thornburg v. Gingles* do not create a burden-shifting mechanism, and leave the onus on plaintiffs to affirmatively prove disparate impact. Thornburg v. Gingles, 478 U.S. 30, 46 (1986).

[269] *See supra* notes 60–61 and accompanying text.

[270] *See supra* notes 67–73 and accompanying text.

[271] *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 173 (1980); South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966). The U.S. District Court for the District of Columbia has upheld the constitutionality of Section 5 of the VRA twice since it was reauthorized in 2006. *See* LaRoque v. Holder, 831 F. Supp. 2d 183, 238 (D.D.C. 2011); Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 508 (D.D.C. 2011) (upholding Section 5's "preclearance" provision in a challenge by the city of Calera, Alabama, which enacted a discriminatory redistricting plan without seeking preclearance, resulting in a loss by the city's only African American councilman), *aff'd*, 679 F.3d 848, 884 (D.C. Cir.), *cert. granted*, 81 U.S.L.W. 3064 (U.S. Nov. 9, 2012) (No. 12-96).

[272] *See South Carolina*, 383 U.S. at 309 (noting that the unique historical period of the VRA's enactment justifies the Act's expansive powers); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 177 (2007) (explaining that Congress "acted at the apex of its power to enforce the guarantees of the post-Civil War Amendments" when it enacted the VRA).

under scrutiny in light of the U.S. Supreme Court's 1997 decision in *City of Boerne v. Flores*[273] and other cases. Moreover, a different Court in a different socio-historical moment is vetting current challenges to the VRA's constitutionality.[274] Accordingly, the Court's continued recognition of the VRA's constitutionality is hardly a foregone conclusion.[275]

The arguments supporting and challenging the VRA's constitutionality have been thoughtfully laid out in an array of scholarship and are not repeated here.[276] Instead, I focus on certain factors unique to

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[273] *See* 521 U.S. 507, 520 (1997) (holding that remedial legislation can prohibit conduct that does not violate the Fourteenth Amendment, but "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end"); *see also* Tennessee v. Lane, 541 U.S. 509, 533–34 (2004) (holding that Title II of the Americans with Disabilities Act is valid under the Fourteenth Amendment); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738–39 (2003) (holding that Congress acted within its authority under the Fourteenth Amendment in abrogating the states' immunity under the Family and Medical Leave Act). To the extent that the VRA is primarily Fifteenth Amendment remedial legislation, *City of Boerne*'s congruence and proportionality test does not apply.

[274] *See* Luis Fuentes-Rohwer, *Is This the Beginning of the End of the Second Reconstruction?*, Fed. Law., June 2012, at 54, 58 ("The country's constitutional culture is clearly different today than it was at the time the Court decided [Katzenbach v. Morgan, 384 U.S. 631 (1966)]. The Court is far more assertive and muscular than it used to be, and the political question doctrine seems to be largely a relic of our constitutional past.").

[275] *See, e.g.*, Shelby Cnty., Ala. v. Holder, 679 F.3d 848, 884 (D.C. Cir.) (holding that Congress did not exceed its powers under the Fifteenth Amendment in authorizing the preclearance requirement of the VRA), *cert. granted*, 81 U.S.L.W. 3064 (U.S. Nov. 9, 2012) (No. 12-96); Texas v. Holder, No. 12-cv-128, 2012 WL 3743676, at *4 (D.D.C. Aug. 30, 2012) (considering the plaintiff's argument that Section 5 of the VRA "exceeds the enumerated powers of Congress and conflicts with Article IV of the Constitution and the Tenth Amendment"); *see also* Nw. Austin Mun. Dist. No. One v. Holder, 557 U.S. 193, 204–05 (2009) (upholding Section 5 under a congruence and proportionality standard).

[276] *See, e.g.*, Ansolabehere et al., *supra* note 223, at 1388; Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 Stan. L. Rev. 1, 15 (1965); Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 Fla. St. U. L. Rev. 697, 701 (2009); Michael Halberstam, *The Myth of "Conquered Provinces": Probing the Extent of the VRA's Encroachment on State and Local Autonomy*, 62 Hastings L.J. 923, 927 (2011); Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After* Tennessee v. Lane, 66 Ohio St. L.J. 177, 178–81 (2005); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 Hous. L. Rev. 1, 3–4 (2007); Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L. Rev. 725, 731–41 (1998); Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 Mich. L. Rev. 2341, 2361 (2003); Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 Vt. L. Rev. 39, 47–48 (2006); Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. Ill. U. L. Rev. 185, 187–88 (2005); Jennifer G. Presto, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After* City of Boerne, 59 N.Y.U. Ann. Surv. Am. L. 609, 614 (2004); Franita Tolson,

Section 2 and the causal context test that insulate it from constitutional challenge. In particular, Section 2 brings external discrimination into the remedial ambit of election law.[277] In turn, this produces outcomes that are seemingly incongruent as a normative matter—the identification of racial harm without a legal remedy for that harm—and yet perfectly congruent as a legal one. This juxtaposition illuminates a sensible limit of the VRA's remedial power and Section 2's constitutional prowess. Indeed, the limits imposed on remedies available under Section 2 underscore its genius.

Section 2 remedies do not necessarily impose a permanent ban on the challenged electoral practice.[278] Instead, Section 2 discontinues the use of an otherwise lawful electoral practice so long as it continues to result in vote denial or dilution on account of race. If the causal context of race discrimination is eliminated, then the practice, presumably, would be valid. In the context of felon disfranchisement laws, for example, if rates of conviction begin to approximate rates of criminal activity across all racial groups, then felon disfranchisement provisions would not be challengeable under Section 2—absent evidence of intentional discrimination—even if a disparate impact on voting rights occurred. Under established Section 2 jurisprudence, if in fact blacks commit crimes at a higher rate than whites, and are therefore convicted of crimes at a correspondingly higher rate, resulting in a loss of voting rights at a correspondingly higher rate, then the practice would presumptively be valid under Section 2 despite its disparate impact. Consequently, no Section 2 claim could be established.

There is indeed a peculiarity in challenging the *symptom* of discriminatory vote denial resulting from the *problem* of racial discrimination in society, while leaving the problem ostensibly unremediated. This outcome is a function of the surgical nature of the VRA's remedies, which consequently preserves the VRA's constitutionality. For example, in the case of felon disfranchisement, discrimination in the criminal justice system that is not legally cognizable under the Supreme Court's 1987 decision in *McCleskey v. Kemp* can nonetheless form the basis of a

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Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act, 65 Vand. L. Rev. 1195, 1202 (2012).

[277] *See* S. Rep. No. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205.

[278] Although Section 2 itself is a "permanent" provision of the VRA, a Section 2 violation is unlike a violation of the VRA's other provisions in that it may be cured by the passage of time. *See* 42 U.S.C. §§ 1973aa, 1973b(b) (2006) (implementing a permanent, nationwide ban on literacy tests).

disparate impact claim under the causal context analysis.[279] This seemingly incongruent result is consistent with the VRA's mandate to prevent racial discrimination—either purposeful or by effect—from compromising the integrity of our democracy. Section 2's constitutionality is preserved because discrimination external to the electoral process that informs a disparate vote denial claim is not actionable under the VRA. That is, the VRA's narrow but penetrating purpose of protecting elections from the effects of external discrimination and not prosecuting that discrimination directly distances the VRA from the constitutional concerns that surround other disparate impact claims.[280]

The presumption of discrimination that Section 2 establishes satisfies congruence and proportionality for several reasons. The remedy sought in Section 2 vote denial challenges is in effect only temporary. Conditions external to the process of voting that presumably can be corrected provide the rationale for the remedy, and the remedy is no longer appropriate once those conditions cease to create a disparate impact. The remedy is not a referendum on the policy and practice of voter ID, early voting, felon disfranchisement, voter purges, or similar modern vote denial practices; rather, it is a referendum on the racially disparate results that these laws produce in the electoral arena and the consequent effect on democracy. Because of the power of the vote in our democracy—because the right to vote secures all others[281]—Congress has determined that discrimination may not infect voting or limit it on account of race, even if such discrimination is not purposeful.

As a practical matter, how can the causal context test be used to combat modern vote denial practices that threaten to roll back the historic minority voter registration of the 2008 and 2012 elections, as well as the history of progress and transformation that is the VRA's ongoing legacy? In the following Sections, I take three persistent threats to robust minority voter participation—voter ID, felon disfranchisement, and voter purges—and outline briefly how the causal context test would apply to each.

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[279] *See* McCleskey v. Kemp, 481 U.S. 279, 291 (1987); *supra* notes 126–135 and accompanying text.

[280] *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. & POL'Y 125, 142 (2010) (arguing that the political ideologies of Supreme Court justices, and, more importantly, their proclivity toward policy making, are likely to play a consequential role in determining the VRA's constitutionality).

[281] *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (noting that "the political franchise of voting" is a "fundamental political right, because preservative of all rights").

A. *Voter ID*

Since 2008, state governments across the country have enacted a plethora of laws that encumber the right to vote. Of the array of voting barriers, including decreased opportunities for early voting,[282] retrenchment from reforms aimed at enfranchising citizens with felony convictions,[283] and more stringent voter registration regulations,[284] voter ID laws stand out as among the most suspicious. Like most of these new voting restrictions, voter ID laws disproportionately burden the voting rights of young, minority, and low-income voters, as well as persons with disabilities.[285] Nationally, twenty-five percent of black voting-age citizens, as compared to only nine percent of white voting-age citizens, lack a government-issued photo identification.[286] Although many causes factor into this disparity, a disproportionate lack of a driver's license, high residential mobility, and lack of access to necessary documentation play significant roles.[287]

As discussed above, many recent challenges to voter ID laws have been brought under Section 5 of the VRA.[288] This is due to the Supreme Court's 2008 holding in *Crawford v. Marion County Election Board* that a legitimate state interest in preventing voter fraud, modernizing elections, and safeguarding voter confidence outweighs the burden placed on voters to produce voter IDs to exercise their right to vote.[289]

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[282] *See* Weiser & Norden, *supra* note 2, at 29–33 (reporting that nine states have introduced bills to reduce their early voting periods, and that Florida, Georgia, and Ohio have cut their early voting periods in half).

[283] *See id.* at 34–36; *see also* NAACP, Defending Democracy, *supra* note 111, at 26 (explaining that there are now four states that permanently deprive individuals of the right to vote after they have been convicted of a felony); *id.* at 12, 25–27 (explaining that these restrictions will have a disproportionate burden on minorities because African Americans and Latinos suffer disproportionate rates of criminal conviction).

[284] *See* Rogowski & Cohen, *supra* note 2, at 2–3; Weiser & Norden, *supra* note 2, at 19–28.

[285] At least one report estimated that these new laws "could make it significantly harder for more than five million eligible voters to cast ballots in 2012." Weiser & Norden, *supra* note 2, at 1 (analyzing nineteen laws and two executive actions that passed in fourteen states).

[286] *See* Rogowski & Cohen, *supra* note 2, at 4.

[287] *Id.* at 2.

[288] *See supra* notes 103–125 and accompanying text.

[289] *See* 553 U.S. 181, 191–200 (2008). Justice John Paul Stevens provided the following reasoning in his opinion for the 6–3 majority:

> [T]he photo identification cards issued by Indiana's BMV are . . . free. For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does

The causal context test allows Section 2 to potentially address voter ID laws by permitting plaintiffs to prove that there is a broader context of inequality that creates the disparity in possession of certain forms of voter ID. For example, implicit bias surrounding voter ID laws might be inferred from the demographics of the states that have sought to impose such laws, the likely effect that those laws will have on minority communities in those states, and the impact that such laws will have on the ability of minority voters to elect the candidate of their choice.[290] Moreover, the lack of evidence of voter fraud to justify the imposition of the laws in light of the disparate impact that results could prove Senate factor five, the tenuousness of the state policy.[291] The ARC principles would call into question the state's awareness of the impact of the voter ID laws (1) whether there is a reasonable belief that the laws are necessary to achieve a legitimate election administration goal, and (2) whether there is another way of achieving the state's goal that would reduce the potential harm to minority voters.[292] Enforcing these principles would significantly retard the proliferating efforts to impose voter ID laws absent any state justification based on evidence of fraud.

> not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.
>
> Both evidence in the record and facts of which we may take judicial notice, however, indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of state, who may have difficulty obtaining a birth certificate[, etc.] . . . .
>
> The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.

Id. at 198–200 (footnotes omitted). Notably, in Pennsylvania, plaintiffs were successful in bringing a non-VRA challenge that resulted in a court postponing the implementation of voter ID laws until after the upcoming general election. Applewhite v. Pennsylvania, No. 330 M.D. 2012, 2012 WL 4497211, at *8 (Pa. Commw. Ct. Oct. 2, 2012).

[290] *See, e.g.*, Sonne v. Bd. of Trs. of Suffern, 887 N.Y.S.2d 145, 155 (App. Div. 2009) (recognizing the plaintiff's argument for disparate treatment because the village building code was selectively enforced in violation of the plaintiff's constitutional rights).

[291] *See* S. REP. NO. 97-417, at 29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205.

[292] *See supra* note 262 and accompanying text.

B. *Felon Disfranchisement*

The underlying theory premising felon disfranchisement challenges under Section 2 is that the effects of discrimination in the criminal justice system are replicated in the electoral process because of laws that deny or abridge the right of persons convicted of a felony to vote.[293] These challenges sharply demonstrate how the Senate factors can be used to reveal racial discrimination in various contexts external to elections, such as the criminal justice system, in order to sustain a remedy under the VRA. The expanding number of such challenges in the past decade is a testament to the broad impact of felon disfranchisement laws on communities of color throughout the United States.

Putting aside the question of whether Section 2 can reach felon disfranchisement laws,[294] felon disfranchisement cases raise difficult

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[293] Most courts entertaining challenges to felon disfranchisement laws have been hostile to such claims. Namely, the U.S. Courts of Appeals for the First, Second, and Eleventh Circuits have held that the VRA does not apply to felon disfranchisement laws. *See, e.g.*, Simmons v. Galvin, 575 F.3d 24, 42 (1st Cir. 2009) (holding that the VRA does not apply to Massachusetts's felon disfranchisement laws); Hayden v. Pataki, 449 F.3d 305, 329 (2d Cir. 2006) (en banc) (holding that the VRA does not apply to New York's felon disfranchisement laws); Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005) (holding that the VRA does not apply to Florida's felon disfranchisement laws). Another group of federal appellate courts have assumed, without holding, that the VRA applies, but have held that there was no sufficient nexus between the challenged vote denial and the alleged racial effects. *See* Howard v. Gilmore, No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000) (assuming without deciding that the VRA applies to Virginia's laws, but holding that there was no Section 2 violation); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (assuming without deciding that the VRA applies to Tennessee's laws, but holding that there was no Section 2 violation). The one federal appellate court that initially determined that there was a Section 2 violation later reversed itself en banc. *See Farrakhan V*, 623 F.3d at 993–94 (reversing a panel opinion that held that the discrimination in Washington's criminal justice system so infected the electoral process through its otherwise legitimate felon disfranchisement laws that those laws violated the VRA).

[294] For reasons deserving more attention than is devoted here, I believe that felon disfranchisement statutes fall squarely within the ambit of Section 2. To suggest otherwise would mean that an intentionally racially discriminatory statute denying persons convicted of felonies the right to vote could not be brought under Section 2. *See* Farrakhan v. Washington (*Farrakhan III*), 359 F.3d 1116, 1121–24 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) ("Intentional discrimination in the criminal justice system, if it interacts with a standard, practice or procedure with respect to voting, could amount to illegal vote denial on account of race.") (citing Johnson v. Governor of Fla., 353 F.3d 1287 (11th Cir. 2003), *vacated en banc*, 337 F.3d 1163 (11th Cir. 2004)). The absurdity of this result makes finding that Section 2 applies equally to felon disfranchisement statutes that are not intended to discriminate on account of race but, nonetheless, have the effect of doing so more comprehensible as a textual matter. In addition, these laws may be constitutionally vulnerable on other grounds. *See generally* Nelson, *supra* note 170 (examining the constitutionality of felon disenfranchisement with respect to the First Amendment and the Equal Protection Clause); David Zetlin-Jones, Note, *Right to Remain Silent?: What the*

questions regarding how to prove discrimination through evidence of disparate impact as a touchstone rather than as the sole evidentiary support. A separate but related implication of felon disfranchisement challenges is that they are an indirect "adjudication" of racial discrimination within the criminal justice system and in other non-electoral contexts. In other words, the Senate factors allow for a showing of discrimination that may or may not give rise to an independent cause of action to remedy that discrimination. Like voter ID challenges, felon disfranchisement cases require courts to determine that there is societal discrimination in the criminal justice system, and provide a remedy that has no direct relation to correcting that discrimination.

In the 2010 case, *Farrakhan IV*, the U.S. Court of Appeals for the Ninth Circuit utilized a test much like the causal context test outlined here.[295] In later denying the plaintiffs' Section 2 claim, the en banc court held that the plaintiffs had failed to proffer evidence of a "causal connection" between the compelling evidence of discrimination in Washington's criminal justice system and the racially disparate vote denial that the state's felon disfranchisement statutes effect.[296] For example, in addition to proof of substantial disparate impact, the plaintiffs proffered uncontroverted evidence of statistical disparities at every stage of the criminal justice system, as well as a qualitative assessment of the data by sociology and law enforcement experts, who opined that the outcomes of the criminal justice system resulted from practices that could not be explained in race-neutral terms.[297] Put another way, the experts testified that the statistical disparities were produced on account of race.[298] Controlling for rates of criminal activity, blacks are convicted of crimes at rates disproportionately higher than whites.[299] Assuming that the goal of law enforcement is to identify and prosecute perpetrators of illegal activity, the racial demographics of those prosecuted should approximate those of the perpetrators absent some valid, race-neutral explanation for the disparity. Here, the uncontroverted evidence showed that racial groups are not represented among the population of convicted felons in rates that reflect their criminal activ-

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Voting Rights Act Can and Should Say About Felony Disenfranchisement, 47 B.C. L. Rev. 411 (2006) (assessing the shortcomings of challenges to felony disenfranchisement statutes under the VRA and proposing constitutional alternatives).

[295] *See* 590 F.3d at 1005.

[296] *Farrakhan V*, 623 F.3d at 993–94.

[297] *Farrakhan IV*, 590 F.3d at 1012–13.

[298] *Id.*

[299] *Id.*

ity.[300] That is the statistical disparity. The evidence also showed, however, that apparent race-neutral explanations for the disparity were not credible.[301] This significant disparity, coupled with the absence of a race-neutral policy that explains the disparity, supports a conclusion of discrimination in the criminal justice system.[302]

The plaintiffs in *Farrakhan IV* offered uncontroverted proof of the disparate impact of Washington's felon disfranchisement laws on minority voters and of racial disparities at every point of contact with the state's criminal justice system.[303] The majority acknowledged this evidence of disparate impact without ascribing a specific value to it or categorizing it as a prerequisite factor in a balancing test.[304] Rather, the panel majority set out to discern whether the disparate impact was created in part because of discrimination external to voting, and held that, indeed, it was.[305] Specifically, the court relied on expert analyses of the disparity to conclude that the disparity could not be explained in race-neutral terms.[306]

Despite the controversial policy rationales underlying felon disfranchisement laws and the challenges to them, these statutes provide a useful lens through which to examine the full reach and application of Section 2 of the VRA in vote denial claims. The presumed constitutionality of the practice of felon disfranchisement[307] should not thwart the opportunity to better understand congressional power, the largesse of the VRA as an antidiscrimination tool, and the state of disparate impact jurisprudence.

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[300] *Id.*

[301] *Id.*

[302] *See id.* In *Wesley v. Collins*,

> [t]he court of appeals did not specifically affirm, or even mention, the trial court's holding that "while intent need not be shown [under Section 2], the ultimate conclusion that a violation has occurred must be tied to a finding that the scheme unfairly impacts on the minority group—not necessarily purposefully, but *at least for reasons deemed more culpable than neutral*."

Pershing, *supra* note 180, at 1191 (emphasis added) (quoting Wesley v. Collins, 605 F. Supp. 802, 810 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986)).

[303] *Farrakhan IV*, 590 F.3d at 1012–13.

[304] *Id.*

[305] *Id.* at 1014.

[306] *Id.*

[307] *See supra* note 293 and accompanying text.

C. *Voter Purges*

In the months leading up to the 2012 general election, some states purged their rolls of registered voters in ways that alarmed interest groups and triggered allegations of voter suppression.[308] Florida, whose voter purge preceding the 2000 elections became the subject of post-election lawsuits,[309] pursued a controversial voter purge that the U.S. Department of Justice (DOJ) and many civil rights groups opposed in advance of the 2012 general elections. Like many recent claims of voter fraud, those that the State of Florida articulated were de minimis in number—particularly so when compared to the number of false purges and the amount of proven fraud among Florida's eleven million-plus registered voters.[310] Florida justified the purges as based on an alleged need to remove noncitizens from its voter registration rolls to ensure the integrity of its absentee ballot process.[311] Of the ninety-five cases brought by the DOJ's Ballot Access and Voting Integrity Initiative between October 2002 and September 2005, however, "none of the crimes prosecuted in this period could possibly have been prevented by requiring photo identification at the polls."[312] Under the causal context analysis, the unfounded perception of certain Florida elected officials that the voting rolls contained a significant number of noncitizens could be evidence of implicit (or even explicit) bias. As with voter ID challenges, plaintiffs challenging similar purges under the causal context analysis would be able to proffer evidence of disparate impact and evidence supporting the Senate factors, including evidence of the tenuousness of the State's policy. For example, the ARC analysis allows plaintiffs to show that the disparate impact is caused by reasonable factors other than race.

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[308] *See* NAACP, Defending Democracy, *supra* note 111, at 28–29 (describing examples of voter purging in Florida and Mississippi).

[309] *See, e.g.*, Second Amended Complaint at 2, 14–15, NAACP v. Harris, No. 01-0120 (S.D. Fla. Mar. 18, 2002), 2002 WL 32961275.

[310] *See* NAACP, Defending Democracy, *supra* note 111, at 28–29. A news account suggested that among those purged from Florida's voter rolls were over ninety World War II veterans. *See* Robbie Brown, *Florida's Approach to Purging Voter Rolls of Noncitizens Prompts Federal Lawsuit*, N.Y. Times, June 13, 2012, at A17.

[311] *See* NAACP, Defending Democracy, *supra* note 111, at 29.

[312] Justin Levitt, Brennan Ctr. for Justice, The Truth About Voter Fraud 41–42 n.146 (2007), *available at* http://brennan.3cdn.net/c176576c0065a7eb84_gxm6ib0hl.pdf.

Conclusion

The VRA is not a panacea for all that ails our democracy. Rather, through expansive provisions like Section 2, the VRA answers a discrete and compelling question in our multiethnic, multiracial political system: how can law protect the electoral process from racial inequality? By taking account of the contextual factors that cause disparate vote denial, Section 2 challenges to modern voting practices such as voter ID requirements, felon disfranchisement, and voter purges can reveal areas where racial discrimination has infected the electoral sphere, and thus preserve the integrity of the democratic enterprise. The causal context test is an effort to realign Section 2 jurisprudence with the provision's "core values," to consider racial context as a cause of disparate vote denial, and to recognize implicit bias as evidence of discrimination within and outside the electoral arena. Indeed, Section 2 provides heightened protection in the electoral arena, even when the underlying discrimination that results in vote denial is not legally cognizable. This paradox is a byproduct of the VRA's overarching purpose to ensure an inclusive democracy where race does not determine participation, while confining its reach to the electoral arena.

The narrowing construct of race discrimination claims outside the electoral arena ignores substantial racial disparities resulting from state action on the premise that discrimination occurs, and is thus actionable, only when it is intentional or explicit. Accepting contextual evidence of racial discrimination, including implicit bias, is a more accurate, middle-ground approach that recognizes societal discrimination without ascribing blame or intent. As our democracy aims to transcend its discriminatory past, the causal context analysis thoughtfully navigates its nuanced, race-conscious present toward a stronger, more honest democratic vision.