DISPARATE IMPACT AND VOTING RIGHTS: HOW OBJECTIONS TO IMPACT-BASED CLAIMS PREVENT PLAINTIFFS FROM PREVAILING IN CASES CHALLENGING NEW FORMS OF DISENFRANCHISEMENT

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I. INTRODUCTION

Congress passed the Voting Rights Act of 1965[1] to give full effect to the mandates of the Fifteenth Amendment, enacted to remove racial barriers to the right to vote.[2] Ratified close to a century before the enactment of the Voting Rights Act, the Amendment had proved a hollow promise and offered little legal protection for Blacks who fought violence and intimidation when effectuating their right to vote.[3] Central to the purposes of the Act was the notion that by ensuring and protecting access to the ballot, minorities would

1. Section 2 of the Voting Rights Act states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
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> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C.A § 10301 (2012). Claims brought pursuant to Section 2 may be based on vote denial or vote dilution.

2. *See, e.g.*, Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1969) ("[T]he Act implemented Congress' firm intention to rid the country of racial discrimination in voting.").

3. *See* DAVID T. CANNON, RACE REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 61-62 (1999) ("When federal troops withdrew and the Republican Party abandoned the South, blacks were almost completely disenfranchised through the imposition of residency requirements, poll taxes, literacy tests, the 'grandfather clause', physical intimidation, other forms of disqualification, and later the white primary.").

be able to effectively exercise their right to vote, participate unencumbered by racial discrimination as full members of the electorate, and ultimately achieve political equality.[4]

The Voting Rights Act proved effective in removing "first-generation barriers"[5] to voting and Blacks began to register in staggering numbers.[6] These successes were not without setbacks, however, because as "[b]lacks began to register and vote in increasing numbers, their electoral expectations were frustrated by political institutions that were well-insulated from challenge."[7] To challenge these political institutions, plaintiffs targeted electoral systems and practices with dilutionary effects on minority voting strength.[8] These particular challenges, known as vote dilution claims, focused on challenging electoral systems and structures that diluted the voting strength of minority voters vis-à-vis non-minority voters.[9] The advent of these "second-generation barriers"[10] to the ballot signaled a shift from explicit exclusionary practices to dilutive electoral devices by state and local subdivisions.[11] That in turn shifted the focus from questions of whether a

4. *See, e.g.*, Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838 (1992) ("The forces behind the Voting Rights Act assumed that curbing black disenfranchisement would lead inevitably to the right to full political equality, including the election of the representatives of choice of the black community.").

5. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH L. REV. 1077, 1093 (1991); Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 210 ("Instances of the complete exclusion of entire classes of people from the franchise propelled what has been termed the 'first generation' of voting rights cases.").

6. *See* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7, 21 (Bernard Grofman & Chandler Davidson, eds., 1992).

7. Issacharoff, *supra* note 4, at 1839.

8. *Id.*

9. *Id.*

10. Guinier, *supra* note 5, at 1093.

11. *See id.* (citations omitted) ("Initially, blacks focused primarily on first generation, direct impediments to electoral participation, such as registration and voting barriers. Once these obstacles were surmounted, however, the focus shifted to second generation, indirect structural barriers such as at large, vote-diluting elections."). One conservative commentator offers a similar view. *See* ABIGAIL THERNSTROM, VOTING RIGHTS AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS 2-3 (2009) ("But in the racist South, it soon became clear, that equality could not be achieved—as originally hoped—simply by giving blacks the vote. Merely providing access to the ballot was insufficient after centuries of slavery,

particular voting standard, practice or procedure outright denied minorities access to the ballot, to whether the particular policy impaired the effectiveness of that right to vote.[12]

Comprehensive voting rights laws have once again become necessary to protect the voting rights of minority groups and to ensure these groups equal opportunity to participate in the political process.[13] New forms of vote denial directly implicate access to the ballot.[14] Like their predecessors, the new vote denial[15] claims involve "practices that disproportionately exclude minority voters from participating in the electoral process at all."[16] Similar to the earliest forms of race-based disenfranchisement, the most recent wave of vote denial claims directly "implicate the value of participation."[17] These types of claims can be distinguished from vote dilution cases that "involve 'practices that diminish minorities' political influence,' such as at-large elections and

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another century of segregation, ongoing white racism, and persistent resistance to black political power. More aggressive measures were needed.").

12. Guinier, *supra* note 5, at 1093.

13. *See, e.g.*, Andres A. Gonzales, *Creating a More Perfect Union: How Congress Can Rebuild the Voting Rights Act*, 27 BERKELEY LA RAZA L.J. 65, 86-7 (2017) (arguing that revitalization of Section 2 of the VRA's protections need to be reinstated, but the current political landscape makes that unlikely); *see also* Ari Berman, *Rep. John Lewis: 'The Voting Rights Act is Needed Now Like Never Before'*, NATION (July 17, 2013), https://www.thenation.com/article/rep-john-lewis-voting-rights-act-needed-now-never/.

14. *See* Burton v. City of Belle Glade, 178 F.3d 1175, 1197-98 (11th Cir. 1999) (citing 42 U.S.C. § 1973 (a), now 52 U.S.C. § 10301 (a)) ("Vote denial occurs when a state . . . employs a 'standard, practice, or procedure' that results in the denial of the right to vote on account of race."); *see also* Simmons v. Galvin, 575 F.3d 24, 29 (1st Cir. 2009) (citation omitted) ("'[V]ote denial' refers to practices that prevent people from voting or having their votes counted.").

15. I borrow this term from Prof. Tokaji. *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691-92 (2006) ("The application of the VRA to practices such as felon disenfranchisement, voting machines, and voter ID laws represents a new generation of VRA enforcement. This article collectively refers to these practices as the 'new vote denial.'").

16. *Id.* at 719.

17. *Id.* at 718; *see also* Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349, 351 (2006) ("In using the term 'participation,' I mean to draw a distinction with representation—between voting and having one's vote counted on the one hand and being fairly represented in federal, state, and local political bodies on the other.").

redistricting plans that either weaken or keep minorities' voting strength weak."[18]

The new forms of vote denial include practices adopted by jurisdictions that either intentionally or unintentionally restrict access to the ballot.[19] Although there is some evidence that the newest forms of vote denial were adopted with the express intent of reducing minority voter turnout,[20] "smoking gun" evidence demonstrating explicitly discriminatory intent is few and far between.[21] Yet, illicit discrimination may still be present within electoral systems. Recognizing that there were forms of racial discrimination that might not be captured through the intent-based standard of liability,[22]

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18. Simmons v. Galvin, 575 F.3d 24, 29 (1st Cir. 2009) (citing Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans*, in VOTING RIGHTS AND REDISTRICTING 121, 122 (M.E. Rush, ed., 1998)).

19. Denise Liberman, *Barriers to the Ballot Box New Restrictions Underscore the Need for Voting Enforcement,* ABA HUM. RTS. MAG., Vol. 39 (2012), available at https://www.americanbar.org/publications/humanrightsmagazinehome/2012vol39_/winter_2012_vote/barriers_to_the_ballotboxnewrestrictionsunderscoretheneedforvoti.html.

20. *See* Scott Keyes, et al., *Voter Suppression 101: How Conservatives Are Conspiring to Disenfranchise Millions of Americans*, CTR. AM. PROGRESS, http://www.americanprogress.org/issues/progressivemovement/report/2012/04/04/11380/voter-suppression-101/ (Apr. 4, 2012).

21. *See, e.g.*, Veasey v. Perry, 71 F. Supp. 3d 627, 702 (S.D. Tex. 2014) ("There are no "smoking guns" in the form of an SB 14 sponsor making an anti-African-American or anti-Hispanic statement with respect to the incentive behind the bill. However, the 2011 legislative session was a racially charged environment."), *aff'd in part, vacated in part, remanded sub nom.* Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015), on reh'g en banc, 830 F.3d 216 (5th Cir. 2016), and *aff'd in part, vacated in part, rev'd in part sub nom*. Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016). *But see* Christopher Ingraham, *Study Finds Strong Evidence for Discriminatory Intent Behind Voter ID Laws*, WASH. POST, (June 3, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/06/03/study-finds-strong-evidence-for-discriminatory-intent-behindvoteridlaws/?utm_term=.06dbed1595eb.

22. As the Supreme Court stated in *Gingles*:

> The intent test was repudiated for three principal reasons—it is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities," it places an "inordinately difficult" burden of proof on plaintiffs, and it "asks the wrong question." The "right" question, as the Report emphasizes repeatedly, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."

Congress revised Section 2 of the Voting Rights Act in 1982 to incorporate a results test that, pursuant to the totality of the circumstances,[23] would enable plaintiffs to present circumstantial evidence[24] that would permit the factfinder to draw the inference of racial discrimination, even when evidence of explicit discriminatory intent was lacking.[25] On the whole, the results test enables plaintiffs to demonstrate that a policy with a disproportionate racial impact,

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Thornburg v. Gingles, 478 U.S. 30, 44 (1986) (quoting the Senate Report to the 1982 Amendments) (footnote omitted).

23. *See* 52 U.S.C. 10301(b) (2012).

24. Circumstantial evidence that would permit the factfinder to draw the inference of discriminatory intent includes, but is not limited to, those factors outlined in the Senate Report to the 1982 Amendments, which the Supreme Court summarized in *Gingles*:

> The Senate Report specifies factors which typically may be relevant to a § 2 claim: the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction. The Report notes also that evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous may have probative value. The Report stresses, however, that this list of typical factors is neither comprehensive nor exclusive. While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered.

Gingles, 478 U.S. at 44-45 (1986) (footnotes omitted) (citations omitted).

25. *Id.*

when coupled with other social and historical factors,[26] is a denial or abridgement of the right to vote on account of race. In this way, the results test can be characterized as a type of disparate "impact-plus" standard.

In recent years, courts deciding vote denial cases under Section 2 have scaled back the disparate impact-plus standard, demonstrating an increasing reluctance to accept circumstantial evidence of discriminatory intent.[27] Stated differently, these courts have declined to draw the inference that the challenged electoral policy or practice, when combined with historical and social factors, deprive minority individuals of the right to vote on account of race, and in some cases have required an evidentiary showing amounting to express discriminatory intent.[28] This article will demonstrate how these courts' discomfort with disparate impact-like claims in the vote dilution context have increased the evidentiary burden for plaintiffs in Section 2 cases challenging vote denial—a separate and distinct prong of the Voting Rights Act involving issues of access to the ballot.[29] Such heightened standards increase the burdens minority plaintiffs face in challenging newer forms of vote denial, such as voter identification laws, proof of citizenship requirements, and reductions in early voting days, which have sprung up in state legislatures across the country.[30]

As this article will show, the reluctance of courts to accept evidence of "impact plus" stems in part from a concern that the remedies required by impact-based claims under Section 2 of the Voting Rights Act will involve essentialism and an affront to individual dignity. These concerns are animated in the vote dilution context where, in cases challenging the dilution

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26. *See Gingles*, 478 U.S. at 47 ("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.").

27. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 448 (2015).

28. *Id.* at 451.

29. *See, e.g.*, Burton v. City of Belle Glade, 178 F.3d 1175, 1196 (11th Cir. 1999) ("Specifically, two distinct types of discriminatory practices and procedures are covered under section 2: those that result in 'vote denial' and those that result in 'vote dilution.'").

30. *See generally* Ryan P. Haygood, *The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections*, 64 RUTGERS L. REV. 1019, 1028-1059 (2012) (discussing recent voter suppression efforts); BRENNAN CENTER FOR JUSTICE, BALLOT SECURITY AND VOTER SUPPRESSION: WHAT IT IS AND WHAT THE LAW SAYS (Aug. 29, 2012), https://www.brennancenter.org/publication/ballot-security-and-voter-suppression (documenting ballot security and voter suppression measures).

of the minority vote, and not involving intentional vote dilution, objections have centered on the notion that Section 2's results test requires courts to make essentialist claims regarding minority and non-minority voting patterns and election choices.[31] Such objections are misplaced in the vote denial context, however, and as will be demonstrated below, the spillover effects from the consternation over impact-based vote dilution in the vote denial context have impeded the ability of plaintiffs to prevail on these challenges in court.

Part I of the article will provide an overview of the arguments challenging vote dilution claims on both constitutional and statutory grounds. In particular, the section will explore the objections to impact-based vote dilution claims on the ground that these claims promote essentialism and require what has been construed as the impermissible remedy of proportional racial representation. Part II will demonstrate how these objections to vote dilution claims are misplaced in the vote denial context. Part III will demonstrate how critiques in the vote dilution context have been imported into the vote denial context and how judicial aversion to disparate impact tests have limited the ability of plaintiffs to obtain relief for new forms of vote suppression. In particular, the section will describe how judicial consternation over the constitutionality of claims based in part on disparate impact—given express constitutional and statutory mandates against entitlements to proportional racial representation—have increased the plaintiff's burden by heightening the evidentiary showing even under Section 2's more lenient results-based test. Part IV will offer grounds for resolving the challenges faced by plaintiffs challenging new forms of vote denial.

II. ANTI-ESSENTIALISM, PROPORTIONAL REPRESENTATION, AND OBJECTIONS TO IMPACT-BASED CLAIMS

Vote denial claims, to the extent that there is no direct or explicit evidence of intentional race discrimination motivating the adoption of the particular policy denying access to the ballot,[32] are based in part on disparate

31. *See* Holder v. Hall, 512 U.S. 874, 903 (1994).

32. Although this development is a welcome sign of racial progress, such a reality makes it difficult to justify the sweeping prophylactic protections of the Voting Rights Act, such as the preclearance requirements of Section 5. *See e.g.*, Tokaji, *supra* note 17, at 350 ("The obvious difficulty is that there is nowhere near the level of intentional race discrimination in voting in 2006 that there was in 1965.").

impact—or, the disproportionate racial impact of a particular voting practice or procedure on a minority group.[33] As such, vote denial claims are intimately tied to impact-based claims.[34] For example, voter qualifications, such as felon disenfranchisement statutes, voter identification laws, or proof of citizenship requirements, may have the effect of disenfranchising sizable swaths of the electorate in a particular jurisdiction, thereby denying these voters the right to vote outright.[35] If the particular qualification has a disproportionate racial impact, such that minority voters are disqualified at higher rates compared to non-minority voters, and is enacted in a jurisdiction with, for example, a history of racial discrimination in voting, under Section 2 plaintiffs may seek to challenge the qualification on the ground that it denies the rights of minority voters to participate equally in the political process and elect the representatives of their choice.[36]

Vote denial claims may also include those practices that may not outright deny minorities the right to vote, but function to effectively abridge that right. As the Supreme Court has stated, claims alleging that the right to vote has been abridged, as the term itself denotes, implies a comparative assessment.[37] In assessing these claims, courts must determine whether the challenged practice places minorities in certain jurisdictions at higher risk of vote denial than non-minorities.[38] Claims challenging elections administration, and in particular the error-prone voting equipment known as punch card systems, are examples of this type of vote denial claim.[39]

When Congress amended the Voting Rights Act in 1982, it specifically recognized the existence of subtle forms of discrimination and revised the Act to ensure that courts could not dismiss claims for relief in instances where there was no direct evidence of intentional race-based discrimination.[40] As interpreted by the Supreme Court in *Thornburg v. Gingles*,[41] once the

33. *See id.* at 351, 368.

34. *See id.* at 369-70.

35. *Id.* at 369.

36. *See* Tokaji, *supra* note 15, at 704.

37. *See* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 333 (2000) (discussing Section 2 in the context of a Section 5 analysis).

38. *Id.* at 334.

39. *See, e.g.*, Stewart v. Blackwell, 444 F.3d 843, 878 (6th Cir. 2006), *superseded on mootness grounds*, 473 F.3d 692 (6th Cir. 2007).

40. *See, e.g.*, United States v. Berks County, 277 F. Supp. 2d 570, 580 (E.D. Pa. 2003) (citing S. REP. NO. 97-417, at 28 (1982)) ("Section 2 ensures that minority voters are free from any election practice 'which operate[s], designedly or otherwise' to deny them the same opportunity to participate in all phases of the political process as other citizens.").

41. Thornburg v. Gingles, 478 U.S. 30, 98-99 (1986).

plaintiff established that that electoral practice or policy caused the disproportionate racial impact, circumstantial evidence, as captured in the totality of the circumstances test,[42] could provide the basis for the inference of discriminatory intent.

Yet, not long after the adoption of the 1982 Amendments to the Voting Rights Act, legal scholars began to identify tensions between the statute's disparate impact provisions—incorporated into the results test of Section 2—and antidiscrimination norms or principles.[43] These legal scholars proposed arguments of various kinds in examining this tension, but one in particular will serve as the focal point for this discussion. That argument relates to the precise scope of what is termed as the "antidiscrimination" or "nondiscrimination" principle of equality.[44] The antidiscrimination principle embodies the "general principle disfavoring classifications and other decisions and practices that depend on the race (or ethnic origin) of the parties affected."[45] Constitutional scrutiny embedded within the equal protection requirements of the Fourteenth Amendment is in part premised on the antidiscrimination principle and the notion that racial classifications are inherently suspect and therefore must be closely scrutinized by reviewing courts.[46]

Pursuant to this theory, some scholars have argued that the disparate impact-like provisions of the Voting Rights Act are not based on any coherent theory of nondiscrimination because neutral policies with disproportionate impact are not policies that discriminate *on the basis of race*.[47] That view is

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42. *See*, *e.g.*, Michael A. Wahlander, Comment, *Constitutional Coexistence: Preserving Felon Disenfranchisement Litigation Under Section Two of the Voting Rights Act*, 48 SANTA CLARA L. REV. 181, 185 (2008) ("This provision, known as 'the totality of circumstances test,' states that a violation of Section 2 of the Voting Rights Act is established if, based on the totality of the circumstances, it is shown that members of protected minority groups have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.").

43. *See id.* at 199.

44. *See* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1 (1976).

45. *Id.*

46. *See id.*

47. James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 634, 641 (1983).

most clearly expounded in an article by Professor James Blumenstein, where he argues:

> Legitimate and neutral legislation can have consequences that disadvantage a group with a disproportional racial composition. Nevertheless, such legislation does not necessarily "discriminate" on the basis of race. The norm of nondiscrimination is at bottom one of procedural regularity. . . . Therefore, discrimination occurs only when decisions are impermissibly based on racial criteria.
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> . . . Because only purposefully discriminatory conduct can violate the principle of nondiscrimination, disproportional racial impact by itself merely highlights the existence of racial disadvantage. If society considers such disadvantage undesirable because of independent principles of distributive justice, it can use the evidence of disproportional impact as a basis for some form of relief. Such relief furthers the independent, affirmative value of improving the political influence of blacks and necessarily encompasses some notion of race-based entitlements to political influence or representation; such relief does not, however, rest on the nondiscrimination norm embodied in the fourteenth and fifteenth amendments.[48]

In essence, these scholars argued that the Section 2 results-based test did not constitute discrimination on the basis of race, but instead prohibited conduct outside of the realm of equality-based constitutional prohibitions.[49]

A related outgrowth of this argument is the anti-essentialism view, which maintains that the Government may not only not classify individuals on the basis of race, but it also may not segregate individuals into racial groups and make claims about the individuals within these groups based on race-based assumptions and stereotypes.[50] Justice Thomas's concurrence in *Holder v. Hall* presents a comprehensive account of the anti-essentialism view within the voting rights case law.[51] In *Hall*, the Supreme Court addressed the

48. *Id.* at 634-36.

49. In *LULAC v. Perry*, for example, Chief Justice Roberts dissented from the majority's holding that, under Section 2's "totality of the circumstances" test, Texas's congressional redistricting plan constituted impermissible vote dilution. The Chief Justice ultimately concluded that, "[w]hatever the majority believes it is fighting with its holding, it is not vote dilution on the basis of race or ethnicity." League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 511 (2006).

50. *Hall*, 512 U.S. at 905, 907-08.

51. *Id.* at 903, 907.

question of whether the size of a political governing body could be challenged by plaintiffs as vote dilution.[52] Black plaintiffs from Bleckley County brought suit to challenge the "single-commissioner"[53] voting scheme whereby one commissioner, responsible for carrying out the managerial duties for the County, was elected pursuant to an at-large electoral scheme.[54] The Black voters, who comprised about one-fifth of the eligible voting age population,[55] challenged the single-commissioner scheme on the grounds that it "was enacted or maintained with an intent to exclude or to limit the political influence of the county's black community. . . ."[56]

The plaintiffs challenged the single commissioner scheme on both constitutional and statutory grounds.[57] With respect to their statutory claims, the plaintiffs argued that the single-commissioner scheme violated Section 2 of the Voting Rights Act as impermissible vote dilution.[58] On this ground, the Supreme Court held that the plaintiffs failed to state a claim based on a challenge to the size of the governing body.[59] The Court reasoned that the plaintiffs could not articulate any "reasonable alternative benchmarks"[60] by which the Court could use to distinguish the undiluted vote. Without such a benchmark, the choices available with respect to the size of the governing body were "inherently standardless,"[61] and in conflict with Supreme Court precedent requiring a reasonable benchmark by which to measure vote dilution.[62]

Justice Thomas, in an oft-cited concurring opinion joined by Justice Scalia, announced his view that the text of Voting Rights Act did not encompass impact-based vote dilution challenges and that the Court should

52. *Id.* at 884-85.
53. *Id.* at 876.
54. *Id.* at 874.
55. *See id.* at 876.
56. *Id.* at 877.
57. *Id.* at 877-78.
58. *See id.*
59. *Id.* at 885.
60. *Id.*
61. *Id.*
62. *See id.* at 880 (citation omitted) ("In a § 2 vote dilution suit, along with determining whether the *Gingles* preconditions are met and whether the totality of the circumstances supports a finding of liability, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting *practice*.").

no longer permit such challenges.[63] Justice Thomas's opinion set forth several arguments for why impact-based vote dilution claims exceeded the scope of constitutional prohibitions against race discrimination as well as the scope of the Act.[64] The opinion's focus on voting strength illustrates one challenge. Justice Thomas contended that determinations of voting strengths are not only without standards, but effectively linked to entitlements to proportional representation by minority groups.[65] Central to his argument is the conception of "voting strength" and the correlative criteria that inform statutory-based conceptions of vote dilution.[66] It is within this conception of voting strength that Justice Thomas argued that the Court's voting rights jurisprudence had gone awry.[67] To this point, the opinion states: "In construing the Act to cover claims of vote dilution, we have converted the Act into a device for regulating, rationing, and apportioning political power among racial and ethnic groups."[68]

The shift from access to impact and voting strength made the effectiveness of the vote a crucial component of the Court's inquiry into vote dilution claims.[69] However, as the argument continued, in making determinations of vote dilution, courts have immersed themselves in determinations of voting strength, based in large part on the respective voting power of minority groups vis–à–vis majority voters and with a clear focus on the outcome of particular electoral policies and practices.[70] Given this, Justice Thomas's opinion challenged what he identified as the impermissible benchmark by which to judge the effectiveness of the vote—namely, the electoral result or control of the governing body.[71] The concurrence questioned the appropriate benchmark in the Court's assessment of vote dilution claims given concerns about what constitutes an effective exercise of the right to vote.[72] The discussion regarding the Court's preference for single-member districts over at-large districting schemes reflects this concern:

63. *Id.* at 891.
64. *Id.* at 893.
65. *Id.* at 903.
66. *Id.* at 912.
67. *Id.* at 913.
68. *Id.* at 893.
69. *Id.* at 902.
70. *Id.* at 898.
71. *Id.*
72. *Id.*

> The obvious advantage the Court has perceived in single-member districts, of course, is there [sic] tendency to enhance the ability of any numerical minority in the electorate to gain control of seats in a representative body. But in choosing single-member districting as a benchmark electoral plan on that basis the Court has made a political decision and, indeed a decision that itself depends on a prior political choice . . . .[73]

Embedded in this critique is a challenge to what Justice Thomas, joined by Justice Scalia, identified as the standard for measuring *undiluted* voting strength—proportional racial representation:

> But "how many" is the critical issue. Once one accepts the proposition that the effectiveness of votes is measured in terms of the control of seats, the core of any vote dilution claim is an assertion that the group in question is unable to control the "proper" number of seats—that is, the number of seats that the minority's percentage of the population would enable it to control in the benchmark "fair" system. The claim is inherently based on ratios between the numbers of the minority in the population and the numbers of seats controlled.[74]

Justice Thomas contends that the remedy for impact-based vote dilution claims would invariably involve a resort to proportional racial representation, as well as essentialist views regarding minority and non-minority voters and their voting choices.[75] Justice Thomas argued that the underlying assumption of vote dilution claims, which were based on the notion that the undiluted vote mandates proportional representation, was therefore inflicted with the taint of classifications based on race.[76] Because proportional race representation embodied the assumption that all members from a particular minority group think and vote alike, the remedy for impact-based vote dilution claims presented a direct affront to the anti-classification norms

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73. *Id.* The influence versus control debate is largely reflected in Justice Kennedy's opinion in *Georgia v. Ashcroft*, discussed in greater detail below. Congress, however, rejected this view, in the 2006 Amendments to the Voting Rights Act.

74. *Id.* at 902.

75. *Id.* at 903.

76. *Id.* at 907.

embedded within the Equal Protection Clause and an affront to individual dignity.[77] Furthermore, as the argument goes, to determine voting strength, voters must be assigned to either the minority group or the majority group and this proves disruptive in an increasingly diverse society by creating fractures along racial lines.[78] In their quest to determine the statutory protections afforded to minorities voters in terms of their voting strength, Justice Thomas maintained, courts had segregated voters and contributed to the "racial 'balkaniz[ation]' of the Nation."[79]

The *Ricci v. DeStefano* case provides a more recent and in-depth analysis of how disputes and consternation over disparate impact analysis play out in the courts.[80] In *Ricci,* white firefighters filed suit challenging the city of New Haven's decision to discard the test scores for a promotional exam.[81] New Haven defended its actions on the grounds that the failure to do so would have exposed it to disparate impact liability under Title VII.[82] In a 5-4 opinion, the Court held that the city of New Haven violated Title VII of the Civil Rights Act of 1964 by throwing out the test scores for the white firefighters because the City lacked a "strong basis in evidence" [83] that its failure to act would have violated the disparate impact provisions of Title VII. Without meeting that heightened showing, the actions by the City in discarding those test scores constituted disparate treatment.[84]

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77. *Id.* at 904.
78. *Id.* at 905.
79. *Id.* at 892.
80. Ricci v. DeStefano, 557 U.S. 557, 557 (2009).
81. *Id.* at 562.
82. *See id.* at 563. This disparate impact provision of Title VII of the Civil Rights Act of 1964 reads as follows:

> (1) (A) An unlawful employment practice based on disparate impact is established under this title only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C.A. § 2000e-2 (2012).
83. *Ricci,* 557 U.S. at 584.
84. *Id.* at 593.

The Supreme Court's opinion *Ricci* incited a flurry of responses from the legal academy.[85] Of particular focus here is Justice Scalia's widely discussed concurrence where he states in formidable fashion that there is tension between Title VII's disparate impact provisions and the Equal Protection Clause of the Fourteenth Amendment.[86] Although the case was decided pursuant to Title VII, the tension between disparate impact and equal protection is one that may have direct consequences in the area of voting rights, as some scholars have already noted.[87]

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85. *See, e.g.*, Michelle Adams, *Is Integration A Discriminatory Purpose?*, 96 IOWA L. REV. 837, 837-84 (2011); Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 955-1006 (2012); Mark S. Brodin, *Ricci v. Destefano: The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161, 161-232 (2011); Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 73-165 (2010); Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008-09 CATO SUP. CT. REV. 53, 53-83; Michael Selmi, *Understanding Discrimination in a "Post-Racial" World*, 32 CARDOZO L. REV. 833, 833-55 (2011); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L. J. 1278, 1278-1366 (2011); Richard Primus, *The Future of Disparate Impact*, 108 MICH. L. REV. 1341, 1341-1387 (2010); Michael J. Zimmer, *Ricci's "Color-Blind" Standard in A Race Conscious Society: A Case of Unintended Consequences?*, 2010 B.Y.U. L. REV. 1257, 1257-1307 (2010).

86. *Ricci*, 557 U.S. at 594 (Scalia, J., concurring).

87. *See, e.g.*, Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 586-88 (2013); Michael C. Dorf, *Federal Governmental Power: The Voting Rights Act*, 26 TOURO L. REV. 505, 512 (2010) ("According to Justice Scalia's concurrence in the Ricci case, not only do constitutional equality norms permit disparate impact without discriminatory purpose, the prohibition of disparate impact may itself be unconstitutional."); Michael K. Grimaldi, *Disparate Impact After Ricci and Lewis*, 14 SCHOLAR 165, 214-15 (2011) (noting that statutes incorporating disparate impact provisions, such as Voting Rights Act, would be called into question after *Ricci*); Roger Klegg, *The Future of the Voting Rights Act after Bartlett and NAMUDNO*, 2008-09 CATO SUP. CT. REV. 35, 39 (noting constitutional issues raised by disparate impact provisions under Voting Rights Act and prohibitions on race-based actions only under the Fifteenth Amendment); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 496 n.15 (2003) ("The recognition that disparate impact standards are constitutionally problematic would destabilize a range of federal laws besides Title VII, including . . . the Voting Rights Act . . . .").

Justice Scalia frames his concurrence as centered on 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 protection?"[88] In addressing this question, Justice Scalia first argued that "'remedial' race-based"[89] actions may constitute disparate treatment not only when a disparate impact violation under Title VII would not result, but when the statute "permits but affirmatively *requires*"[90] such an action where a disparate impact violation could be established. Embedded within Justice Scalia's concurrence are critiques based on the anti-classification principle of equal protection.[91] When the government acts based on the racial outcomes of its programs or policies,[92] the government is effectively classifying citizens on the basis of race and making assumptions about individuals in those groups in a process that facilitates and encourages essentialization of minority and non-minority citizens alike and therefore presents an affront to the dignity of the individual.[93]

As will be explained in greater detail below, *Ricci* and *Hall* are situated within a larger context—namely, courts increasing discomfort with the use of forms of disparate impact liability, such as the results test under the Voting Rights Act, as a mechanism for both identifying, or smoking out, illicit forms of intentional racial discrimination operating within political, social, and economic systems. However, most troubling is the fact that courts are demonstrating a reluctance to draw the inference of discriminatory intent even when disproportionate racial impact is accompanied by circumstantial evidence of discrimination. In the vote dilution context, as stated above, this reluctance is due in part to the notion that such claims seem to require courts to engage in *ad hoc* determinations of the voting behaviors of minority and non-minority groups. Yet, as will be explained below in greater detail, these concerns over essentialism are not present in cases challenging the more recent forms of vote denial.

88. *Ricci*, 557 U.S. at 594.
89. *Id.*
90. *Id.*
91. *Id.* at 594-95.
92. *See id.*at 594 ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes.").
93. *Id.*

III. WHY OBJECTIONS TO IMPACT-BASED CLAIMS ARE MISPLACED IN CASES CHALLENGING THE NEW FORMS OF VOTE DENIAL

The tense disputes over vote dilution challenges center on the content of the claim (*e.g.*, what exactly is the harm that vote dilution protects against), the nature of the right (*e.g.*, is the right an individual one or group-based), and the scope of protections to remedy violations of that right (*e.g.*, results-based tests, or totality of the circumstances).[94] As will be argued below, the most recent set of vote denial challenges present a distinct set of issues that have not been adequately explored by the courts, although some voting rights scholars have acknowledged and explored this point.[95] Before exploring the differences in the issues at stake in vote denial claims as compared to impact-based vote dilution claims, it is important to first outline the objections to vote dilution challenges. Although scholars have noted that the objections to Section 2 vote dilution claims do not apply to more recent versions of voter qualifications and elections policies that restrict access to the ballot—the so-called new vote denial—[96] there is little in-depth discussion on precisely *why* these challenges are unsuitable in the vote denial context. Yet, for the reasons discussed below, ordinary disparate impact analysis and the critiques it engenders in the vote dilution context is ill suited in the vote denial context.

Two points merit mention at the onset. First, vote dilution claims are a necessary outgrowth of the successes made in eradicating the first-generation barriers to the right to vote based on acts of intentional racism and violence. These claims involve challenges to uphold the representational rights of minority groups to participate in the political process and elect the candidates of their choice.[97] As voting rights scholars have argued, there is little (long-term) value in granting access to the ballot without the corresponding right to convert that vote into mobilization opportunities for groups around candidates, issue areas, policy concerns, and community needs, to name a few interests.[98] In this way, the validity and import of these types of claims

94. *See, e.g.*, Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1293 (2011) (arguing that the new forms of vote denial implicate individual rights as opposed to structural interests); Tokaji, *supra* note 15, at 691 (distinguishing vote denial from vote dilution claims).

95. *See, e.g.*, Fishkin, *supra* note 94, at 1293; Tokaji, *supra* note 15, at 691.

96. Tokaji, *supra* note 27, at 443.

97. *Id.*

98. *See, e.g.*, Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1712-13 (1993) ("The primary function of voting, however, is not simply to delineate the boundaries of the political community.

cannot be understated: vote dilution claims are an essential tool in the arsenal of voting rights advocates concerned with democratic inclusion and participation.

Second, it should be noted that the objections to vote dilution claims under Section 2, for the most part, are focused on those claims construed as challenging the *impact* of a particular election policy or practice[99]—for example, a challenge based on the weight a minority vote is given under an at-large election scheme as compared to the weight of a non-minority vote—and not necessarily those claims challenging dilutionary policies adopted with express discriminatory intent. Similarly, vote denial challenges can be based either on intentional discrimination (for example, if a jurisdiction adopted a voter ID law because it desired to reduce minority voting in its district) or disproportional racial impact (for example, if a jurisdiction enacted a proof of citizenship requirement to voting that had a disproportional racial impact on a minority group and, when combined with social and historical factors, would establish an inference of discrimination).[100] Vote denial challenges can incorporate direct evidence of intentional vote denial, but by and large these challenges have been brought—through the mechanism of Section 2's results test—to capture forms of intentional racial discrimination that might seep into the electoral process undetected.[101]

The most ardent critiques have attacked the results-based test under Section 2 on the ground that Congress exceeded its authority under the Section 5 of the Fourteenth Amendment and Section 2 of Fifteenth Amendment by prohibiting more than intentional race-based discrimination,[102] or permitted race-based entitlements.[103] There is, however, extensive work by legal scholars to defend the constitutionality of Section 2—and, in particular, vote dilution challenges—as well as results-based

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Rather it is to combine individual preferences to reach some collective decision, such as the selection of representatives. Voting therefore involves aggregation, and each voter has an interest in the adoption of aggregation rules that enable her to elect the candidate of her choice.").

99. Tokaji, *supra* note 27, at 444.

100. *Id.* at 466.

101. Tokaji, *supra* note 15, at 701.

102. *See, e.g.*, Klegg, *supra* note 87, at 39; Jennifer G. Presto, Note, *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, 630 (2004) (discussing constitutional tensions with Section 2 after *Boerne*).

103. *See generally* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT 453 (1987); THERNSTROM, VOTING RIGHTS—AND WRONGS: THE ELUSIVE QUEST FOR RACIALLY FAIR ELECTIONS, *supra* note 11, 2-3.

claims.[104] The vast majority of the scholarship focuses on ways to conceptualize vote dilution claims.[105] These defenses of Section 2 emphasize the rights of minorities within the American model of majoritarian, winner-take all politics.[106]

Despite the extensive scholarship proposing frameworks for conceptualizing vote dilution claims, the Supreme Court has yet to articulate an opinion on the precise injury that vote dilution protects against, prompting one scholar to propose a test for removing "vote dilution" as a concept from

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104. Tokaji, *supra* note 27, at 455.

105. *See, e.g.*, Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666-67 (2001) ("This Article therefore offers a new conceptual framework for understanding what makes dilution claims special and for adapting traditional doctrinal structures to such claims. It does so by identifying and closely analyzing the special nature of the injury in question. What makes dilution claims unusual is that the individual injury at issue cannot be proved without reference to the status of the group as a whole; no individual can assert that her vote has been diluted unless she can prove that other members of her group have been distributed unfairly within the districting scheme. Because all of these features stem from the unique injury underlying dilution claims—in which individual injury arises from the aggregate treatment of group members—I call rights that share these characteristics 'aggregate rights.'"); Lani Guinier, *(E)racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 113 (1994) ("The goals of the Act can and should be defended by framing them philosophically within a theory of group representation. The premise of such an approach is that group representation, as a matter of democratic theory, is not about race but about democratic political community. Because of the confluence of historical discrimination and contemporary exclusion, racial and language minority groups enjoy an exclusive right under the Act to establish a legal violation. Once a violation has been proved, however, the most acceptable way to empower the particular plaintiff class would be to move to a broader conception of group representation based on interests rather than race."); Karlan, *supra* note 98, at 1740 (The Supreme Court often speaks as if there were a single framework for assessing voting rights claims. I show, however, that the Court's cases reflect three discrete, yet ultimately linked, conceptions of voting. First, voting involves participation: the formal ability of individuals to enter into the electoral process by casting a ballot. Second, voting involves aggregation: the choice among rules for tallying individual votes to determine election outcomes. Finally, voting involves governance: It serves a key role in determining how decision-making by elected representatives will take place.).

106. *See* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1592-94 (1993).

the ambit of Section 2 entirely.[107] As such, the critiques of Section 2 remain a prominent feature of conservative popular commentary.[108] Moreover, the constitutional challenges levied against impact-based vote dilution challenges are a serious concern and require a reformulation of these claims by courts lest the constitutional challenges prevail.[109]

That said, closer analysis of the interests at stake in vote denial challenges reveal that the objections to impact-based vote dilution are misplaced in challenges involving access to the ballot, even if disproportionate racial impact forms an essential component of the vote denial claim. Stated differently, whatever concerns are animating critiques of disparate impact-like claims in the vote dilution context, they are simply not convincing in the vote denial context. This section will discuss each of the objections to vote dilution challenges in turn by focusing on the constitutional and statutory-based challenges to these types of claims and demonstrate how the basis for the objections in the vote dilution context cannot be properly applied to the new forms of vote denial.

A. Objections Pursuant to the Equal Protection Clause

Theoretical challenges to impact-based vote dilution claims based on the Equal Protection Clause are grounded in two main claims: First, jurisdictions seeking to avoid vote dilution challenges and meet their statutory obligations under the Voting Rights Act are required to engage in unjustified forms of race-based decision-making, focused on the racial outcomes of elections, but lacking a compelling state interest[110]; and second, vote dilution claims classify voters on the basis of race and represent an affront to individual dignity.[111]

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107. *See, e.g.*, Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 381-84 (2012).

108. *See, e.g.*, ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT?, *supra* note 103; ABIGAIL M. THERNSTROM, VOTING RIGHTS – AND WRONGS, *supra* note 11; Klegg, *supra* note 87, at 35-51; Presto, *supra* note 102, at 609-631.

109. *See, e.g.*, Elmendorf, *Making Sense of Section 2*, *supra* note 109, at 379-83 (discussing constitutional disputes involving vote dilution challenges under Section 2); Gerken, *supra* note 105, at 1665 (noting that the Supreme Court's "highly individualist notion of rights in *Shaw v. Hunt* portends a serious constitutional battle").

110. Elmendorf, *supra* note 109, at 388.

111. *Id.* at 404.

With respect to the first challenge, critics argue that vote dilution claims at most require—or at least encourage—unjustifiable race-based decision-making in that the claims are oriented towards the racialized outcomes, or race-based predictions, of electoral systems and procedures.[112] For example, in *Bartlett*, officials from Pender County, North Carolina challenged the action by the North Carolina General Assembly to split the county into two state House districts, violating the "Whole County Provision" of the North Carolina State Constitution that prevented "the General Assembly from dividing counties when drawing legislative districts for the State House and Senate."[113] The state officials raised Section 2 as a defense and the district court held for the defendants on the grounds that, "although African-Americans were not a majority of the voting-age population in District 18, the district was a 'de facto' majority-minority district because African-Americans could get enough support from crossover majority voters to elect their preferred candidate."[114] In other words, although the minority plaintiffs did not constitute a numerical majority of the jurisdiction, a precondition under the *Gingles* test, these voters could align themselves with crossover majority voters to elect the candidate of their choice. On appeal, the North Carolina Supreme Court reversed, and the Supreme Court affirmed.[115] In reaching its conclusion that a numerical majority was required to satisfy the first prong of the *Gingles* factors for vote dilution claims, the court reasoned as follows:

> Determining whether a § 2 claim would lie—i.e., determining whether potential districts could function as crossover districts—would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions. . . There is an underlying principle of fundamental importance: We must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions. The statutory mandate petitioners urge us to find in § 2 raise serious constitutional questions.[116]

112. *Id.*
113. Bartlett v. Strickland, 556 U.S. 1, 7 (2009).
114. *Id.*
115. *Id.* at 1.
116. *Id.* at 17-18.

The majority's opinion reveals a clear aversion to vote dilution claims to the extent that these claims require race-based decision-making centered on assumptions regarding the political behaviors of minority and non-minority voters. At the same time, although the Court's holding was limited to the precise question of whether minority voters could assert a vote dilution claim without constituting a majority of the jurisdiction,[117] there is nothing to suggest that implications for vote dilution or other types of impact-based claims are similarly limited to the facts of that case. For one, Justices Scalia and Thomas concurred in the opinion to reiterate their view from the *Hall* case that impact-based vote dilution claims were not authorized under Section 2—a concurrence that not only challenged dilution claims based on statutory interpretation and legislative history, but also included the constitutional challenge that these vote dilution suits require or permit race-based decision-making by jurisdictions in determining the appropriate means for allocating political power among racial groups.[118] Second, Justice Scalia's concurrence in *Ricci* offers a similar version of this critique in the Title VII context.[119] In the vote dilution context, aversion to vote dilution claims is in part based on the conception of these claims as placing the proverbial thumb on the scale to determine the racial impact of the particular election policy or practice on the election outcome—namely, the composition of the governing body.[120] Although the facts change and the contexts differ, the common thread in these critiques is that disparate impact-like claims, including vote dilution, may require or encourage unjustified race-based decision making.

In a similar vein, some critics of vote dilution claims have argued that such claims trample upon the dignity of the individual by classifying or categorizing voters into racial groups.[121] According to the argument, the harm

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117. *Id.* at 17-18.

118. *See Hall*, 512 U.S. at 905 ("As a result, *Gingles*' requirement of proof of political cohesiveness, as practically applied, has proved little different from a working assumption that racial groups can be conceived of largely as political interest groups. And operating under that assumption, we have assigned federal courts the task of ensuring that minorities are assured their 'just' share of seats in elected bodies throughout the Nation.").

119. *Ricci*, 557 U.S. at 594-96.

120. Versions of this argument appear within Section 5 case law as well. *See, e.g.*, Shelby County v. Holder, 679 F.3d 848, 887 (D.C. Cir. 2012) (Williams, J., dissenting) ("The amended § 5 thus not only mandates race-conscious decision making, but a particular brand of it. In doing so, the new § 5 aggravates both the federal-state tension with which Northwest Austin was concerned and the tension between § 5 and the Reconstruction Amendments' commitment to nondiscrimination.").

121. *Id.*

befalls minorities and non-minorities alike in that it balkanizes[122] the nation along racial lines, and moves the polity "toward racially separate electorates," despite the fact that "progress toward political integration is substantial."[123]

However, the new forms of vote denial do not affront principles affirming individual dignity because these claims do not require courts to engage in *ad hoc* race-based decision-making or race-based predictions and, more to the point, do not incite essentialist views on how minority groups and non-minority groups will or will not vote in upcoming elections. For instance, imagine that plaintiffs in a jurisdiction want to challenge a voter ID law that requires voters to show photographic proof of identity. Plaintiffs challenging a voter ID law under Section 2 would have to show that minority voters are disproportionately (and adversely) affected by this requirement, or more specifically, that these voters are disproportionately unable to procure the required forms of identification. The inability to procure the necessary forms of identification could be attributed to the inability to afford the required documents establishing identity in order to obtain the official state identification, which is itself attributable to the disparities in purchasing power in the community that might be a product of racialized poverty patterns within the jurisdiction.[124] In the end, the challenged policy has resulted in an increased likelihood of disenfranchisement—or, an unequal opportunity to participate in the political process—for these minority voters. In support of their claim, the plaintiffs would not need to show that the minority voters voted a certain way or for a particular candidate or for a particular set of issues. Rather, the plaintiffs would have to show that minority voters were disproportionately rendered ineligible—disenfranchised—at higher rates that non-minority voters, resulting in lower voter turnout on election day and that

122. *See Shaw*, 509 U.S. at 657.

123. Timothy G. O'Rourke, *The 1982 Amendments and the Voting Rights Paradox*, *in* CONTROVERSIES IN MINORITY VOTING 85, 108 (Bernard Grofman & Chandler Davidson, eds., 1992).

124. For another version of the same type of legal challenge, see Tokaji, *supra* note 17, at 360-61 ("The argument would go something like this: (1) de jure discrimination in public education, along with discrimination by public employers, led to unequal access to job opportunities; (2) those unequal job opportunities in turn led to lower rates of automobile ownership among blacks, which persist to this day; (3) because black citizens are less likely to drive, they are less likely to possess a driver's license than white citizens; and (4) given that blacks are less likely to have a driver's license, the most common form of government-issued photo ID, they will be affected more severely by laws that condition voting on possession of such identification.").

the disenfranchisement can be accurately attributed to the voter ID law. Furthermore, provided that the plaintiffs meet their showing under Section 2, a reviewing court in deciding the remedy would be required to determine whether there are reasonable justifications for the policy to be offered by the jurisdiction and, if not, must determine whether the policy should be modified or repealed. At no point is the court required to engage in race-based assumptions or essentialism and at no point is the remedy of proportional racial representation even a consideration.

Although challenges to the new forms of vote denial make reference to the disproportional racial impact of certain voting qualifications and policies on certain protected *groups*, the core of injury is the denial of the *individual* voter's right to vote in a manner than may evince racially discriminatory intent.[125] This is not to suggest, however, that these newer forms of vote denial must be assessed by either focusing exclusively on either the individual's right to vote or the minority group's right to representation, because the two frameworks operate in tandem. The right to vote involves both the individual right to vote as well as the right of voters to aggregate their collective votes to pursue and achieve political goals:

> In reframing the conception of the right to vote, liberals should also build upon the emerging recognition that the fundamental right to vote, while it is an important symbol of an individual's full membership in our political community, is a structural/aggregative right as well as an individual one. Voting is instrumental: It determines how political power gets allocated. If punitive offender disenfranchisement statutes bar over one million African Americans from voting, their disenfranchisement is not just their own business: It deprives the black community as a whole of political power and can skew election results sharply to the right, creating legislative bodies hostile to civil rights and economic justice for the franchised and disenfranchised alike.[126]

That said, emphasizing the salience of the individual right at stake in these new forms of vote denial shifts the frame through which these claims are assessed by re-affirming "that the individual right to vote matters, in significant part, for reasons that are not reducible to structural values . . . [and] that the individual right to vote is valuable for reasons that cannot be fully

125. *See* O'Rourke, *supra* note 123, at 85, 108.

126. Pamela S. Karlan, *The Reconstruction of Voting Rights*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 34, 41 (Guy-Uriel E. Charles et al., eds. 2011).

captured by broader, structural variables such as the overall level of participation, representativeness, democratic accountability . . . ."[127]

B. Consternation Over Proportional Representation as the Remedy

The Supreme Court first recognized vote dilution claims as actionable under the Voting Rights Act in *Allen v. State Board of Elections*.[128] The question then became: by what standards should courts use to measure or compare the diluted vote with the undiluted vote?[129] Following *Allen*, the Supreme Court began to elaborate on the standard by which plaintiffs could establish vote dilution claims under the Equal Protection Clause.[130] In the cases that followed, the Court was clear to announce that electoral schemes producing a disparate racial impact, whether at-large or multimember, were not *per se* unconstitutional.[131] Instead the Court stated that the plaintiffs would have to demonstrate that the scheme, "designedly or otherwise . . . operate[d] to minimize or cancel out the voting strength of racial or political elements of the voting population."[132]

Further elaborating on the plaintiff's showing for constitutional dilution claims, the Court emphasized in *Whitcomb v. Chavis* that the aim of the Reconstruction Amendments was to combat "purposeful devices to further racial discrimination" and that in the present case the plaintiffs had failed to demonstrate that the challenged devices "were conceived or operated as purposeful devices to further racial or economic discrimination."[133] In *Whitcomb*, the plaintiffs had specifically challenged Indiana's multimember districting scheme on the grounds that it impermissibly diluted the vote of African Americans residing in urban enclaves, or "ghetto[s]."[134] Reversing the district court's finding of vote dilution, the Court articulated the following as the plaintiff's required showing:

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127. Fishkin, *supra* note 94, at 1296.

128. Allen v. State Bd. Elections, 393 U.S. 544, 569-71 (1969).

129. David P. Van Knapp, *Diluting Effect Of Minorities' Votes by Adoption of Particular Election Plan, or Gerrymandering of Election District, as Violation of Equal Protection Clause of Federal Constitution*, 27 A.L.R FED. 29, *2b (originally published in 1976).

130. *See* Whitcomb v. Chavis, 403 U.S. 124, 142-44 (1971).

131. *See id.* at 142.

132. Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

133. *Whitcomb*, 403 U.S. at 148-49.

134. *Id.* at 128-29.

> Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had *less opportunity* than did other Marion County residents to *participate in the political processes and to elect legislators of their choice*.[135]

This passage from the Court's opinion is particularly important for two reasons: first, a portion of the passage forms the basis by which plaintiffs can now prove a violation under Section 2;[136] and second, it articulated the earliest and most emphatic rejections of impact only claims—that is, a claim based on the fact that the percentage of minority voters in the jurisdiction is disproportionate to the percentage of minority elected officials—on the grounds that recognizing such claims would effectively require entitlements to proportional representation.[137] Without evidence of something more than disproportional racial impact, a factfinder could not draw the inference of discriminatory intent.[138] The references in *Whitcomb v. Chavis*,[139] and later in *Connor v. Finch*,[140] reflect early concerns about the use of proportional representation as a benchmark for measuring and remedying vote dilution claims.

In *White v. Regester*, the Court upheld the district court's adoption of a "totality of the circumstances" test as guide for judges in assessing vote

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135. *Id.* at 149 (emphasis added).

136. 52 U.S.C. § 10301(b) (2012).

137. *See, e.g.*, Davidson, *supra* note 6, at 32 ("[W]as the absence of minorities from legislative bodies the result of racial discrimination as such, or did it stem from such extraneous factors as the unpopularity of Democratic candidates in a Republican stronghold? If it were the latter, then to require a remedy that guaranteed safe seats to blacks, as the trial court had ordered, might be taken to imply that any group whose interests were unrepresented in a legislative assembly had a constitutional claim to proportional representation.").

138. *Id.* at 32-33.

139. *Whitcomb*, 403 U.S. at 148-49 ("Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice.").

140. Connor v. Finch, 431 U.S. 407, 427-28 (1977) (citing *Whitcomb*, 403 U.S. at 149-55) ("But I do not think that the plan improperly dilutes black voting strength just because it fails to provide proportional representation.").

dilution claims.[141] Specifically, the assessment would allow courts to determine social and historical factors, including the challenged electoral procedure or device, which contributed to minorities having "less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[142] The Court provided little guidance on what factors would comprise the totality of the circumstances test other than noting the "cultural and economic realities"—but lower courts, including most notably the Fifth Circuit in *Zimmer v. McKeithen*, provided a comprehensive list of factors that could inform the courts totality of the circumstances analysis.[143] After *White v. Regester*, the number of challenges to vote dilution schemes brought by minority plaintiffs increased, encouraged in part by the breadth of evidence permissible under *White*'s totality of circumstances approach.[144]

By the time the Supreme Court decided *City of Mobile v. Bolden*[145], the concern that proportionate representation would serve as the benchmark for impact-based vote dilution claims had become explicit. In *Bolden*, the Court scaled back the test for vote dilution, limiting the scope of protections under the Fifteenth Amendment—and Section 2 of the Voting Rights Act, which tracked its language—to intentional race discrimination.[146] In reaching its conclusion, the Court emphasized that it had never suggested that the Constitution supported a guarantee to proportional representation[147] or that claims based on the "discriminatory impact of the statute"[148] were sufficient to state a vote dilution claim.

Outraged by the heightened evidentiary burden the intent showing would impose on plaintiffs, the civil rights community launched a lobbying campaign to amend Section 2 to incorporate a new test that would undo the impact of *Bolden*, thereby setting the stage for a political battle with the newly

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141. White v. Regester, 412 U.S. 755, 769 (1973) ("Based on the totality of the circumstances, the District Court evolved its ultimate assessment of the multimember district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county.").

142. *Id.* at 766 (citing *Whitcomb*, 403 U.S. at 149-50).

143. Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973).

144. *See* Davidson, *supra* note 6, at 37.

145. *Id.* at 32, 37-38.

146. *See* City of Mobile v. Bolden, 446 U.S. 55, 60-62 (1980).

147. *See id.* at 79.

148. *Id.* at 99.

elected President Reagan and his conservative cabinet.[149] Thus, it was not surprising that Congress's focus in the months leading up to the 1982 authorization was on vote dilution. Tense debates on the question of whether and how to ensure that the "results test" did not confer a right to proportional racial representation threatened to derail the efforts to amend Section 2 to incorporate a test not based on a showing of intentional discrimination.[150] In the end, a compromise, orchestrated by Senator Bob Dole, was struck, repudiating any entitlement to proportional racial representation.[151] The Dole Compromise did not, however, resolve the tension between discriminatory impacts or discriminatory effects and the entitlement to proportional racial representation as a remedy.[152] As one jurist noted, "the tension between an impact-based test of lawfulness and a rejection of a right to proportional representation defies easy resolution."[153]

Similarly, the plurality opinion in *Thornburg v. Gingles*[154]—the first Supreme Court case to construe the 1982 Amendments to the Voting Rights Act—also did little to resolve the tension between the impact-based results test as a basis for liability and the rejection of the remedy of proportional representation. Despite clear statements by Justice Brennan, writing for a plurality, that the Court's new test for vote dilution claims did not create such an entitlement, [155] the problematic specter of "proportionate representation" did indeed arise again. Since *Gingles*, several Justices have presumed this

149. *See* Davidson, *supra* note 6, at 38. One commentator has noted that the effect of *Bolden* was "dramatic." Because of the plaintiff's onerous burden of proof, litigation challenging discriminatory voting practices under the Constitution and Section 2 dried up. *See* Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation, in* CONTROVERSIES IN MINORITY VOTING 67 (Bernard Grofman & Chandler Davidson, eds., 1992).

150. Thomas M. Boyd and Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1392 (1983).

151. *See* 52 U.S.C.A. § 10301(b) (2012) ("[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.").

152. *See* Boyd and Markman, *supra* note 150, at 1414-15.

153. Velasquez v. City of Abilene, 725 F.2d 1017, 1024 (5th Cir. 1984) (Higginbotham, J., concurring).

154. *See Gingles*, 478 U.S. at 30.

155. *See id.* at 46 (citations omitted) ("[T]he conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation.").

baseline in vote dilution claims and by doing so have called into question the entire constitutionality of Section 2.[156]

In her concurrence in *Gingles*, Justice O'Connor argued that the plurality's test[157] for vote dilution claims under Section 2 effectively sanctioned—and affirmatively required—proportionate representation for minority groups.[158] This was now the adopted standard by which, the concurring justices argued, vote dilution claims were to be measured.[159] Justice O'Connor grounded her opinion in the tension that although "Congress intended to allow vote dilution claims to be brought under §2 . . . Congress did not intent to create a right to proportional representation for minority voters."[160] Because the plurality in *Gingles* tied the standard by which to measure vote dilution claims—that is, the undiluted vote—to the ability to elect candidates of the minority group's choosing, the plurality had

156. *See Hall*, 512 U.S. at 902-03 (Thomas, J., concurring in part).

157. In *Gingles*, the Court set forth the showing for vote dilution claims under Section 2:

> These circumstances are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice for the following reasons. First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. . . Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. . .. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . to defeat the minority's preferred candidate. . .. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.

Gingles, 478 U.S. at 50-51 (citations omitted).

158. *Id.* at 87-88.

159. *Id.*

160. *Id.* at 84.

in effect established an entitlement to proportional representation. Justice O'Connor summarized her argument as follows:

> The Court's statement of the elements of a vote dilution claim also supplies an answer to another question posed above: *how much* of an impairment of undiluted minority voting strength is necessary to prove vote dilution. The Court requires the minority group that satisfies the threshold requirements of size and cohesiveness to prove that it will usually be *unable* to elect as many representatives of its choice under the challenged districting scheme as its undiluted voting strength would permit. This requirement, then, constitutes the true test of vote dilution. Again, no reason appears why this test would not be applicable to a vote dilution claim challenging single-member as well as multimember districts.
>
> This measure of vote dilution, taken in conjunction with the Court's standard for measuring undiluted minority voting strength, creates what amounts to a right to *usual, roughly* proportional representation on the part of sizable, compact, cohesive minority groups. If, under a particular multimember or single-member district plan, qualified minority groups usually cannot elect the representatives they would be likely to elect under the most favorable single-member districting plan, then § 2 is violated. Unless minority success under the challenged electoral system regularly approximates this rough version of proportional representation, that system dilutes minority voting strength and violates § 2.[161]

In his concurrence in *Holder v. Hall*, Justice Thomas reiterated similar concerns, arguing that "the [*Gingles*] Court had adopted a rule of roughly proportional representation . . .."[162] Legal scholarship and popular commentary have similarly supported this view, setting the stage for later critiques challenging the constitutionality of Section 2 as a whole given this formulation.[163] In a similar vein, some scholars have argued that the remedies for vote dilution in practice require racial quotas.[164]

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161. *Id.* at 91.

162. *Hall*, 512 U.S. at 903.

163. *See, e.g.*, Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 657-59 (1993).

164. *See* Klegg, *supra* note 87, at 39 ("Second, if the action is valuable enough, then surreptitious—or not so surreptitious—racial quotas will be adopted so that the

However, challenges based on the notion that impact-based vote dilution claims require or permit proportional representation as a baseline for measuring the injury and as a basis for relief are inapplicable in the vote denial context. First, vote denial claims implicate individual denials of the right to vote—participation harms plain and simple—and can be assessed without reference to race-based assumptions or predictions about the voting choices of minority groups.[165] Second, the remedy for the vote denial is the repeal of the discriminatory policy.[166] As such, there is no dispute over the baseline or appropriate standard for determining whether and how the denial should be remedied. Third, vote denial claims do not implicate proportional representation concerns regarding the composition of *governing* bodies, but rather participation by the electorate.

Given that the concerns and objections to disparate impact analysis in the vote dilution context read very differently in the vote denial context, how are courts assessing these claims? As the following sections will demonstrate, the objections to disparate impact analysis in the vote dilution context have spilled over into the vote denial context revealing inconsistencies in the ways courts evaluate these claims, and most importantly, demonstrating the barriers to plaintiffs challenging these newer forms of vote denial.

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action is no longer racially disparate in its impact."). *See also* Tokaji, *supra* note 11, at 705 (citation omitted) ("Future Chief Justice John Roberts, then a lawyer in the Justice Department, also made this argument in a memorandum asserting that the results test 'would establish essentially a quota system for electoral politics.'").

165. *See, e.g.*, Fishkin, *supra* note 94, at 1309-10 ("The most basic argument against the anti-fraud measures is that they disenfranchise legitimate voters by burdening or violating their individual right to vote. Of course, groups also have an interest in protecting their members from disenfranchisement; the polity as a whole has an interest in safeguarding the rights of its members. But these interests are derivative of the individual voters' interests. As individuals attempt to vote, they succeed or fail one by one. Their right to vote does not rise or fall with the treatment of the group (or the polity as a whole), nor is it unindividuated among members of the group (or the polity).").

166. Department of Justice, *About Section 5 of the Voting Rights Act: The Shelby County Decision*, https://www.justice.gov/crt/about-section-5-voting-rights-act (Aug 8, 2015).

IV. HEIGHTENED EVIDENTIARY STANDARDS IN SECTION 2 VOTE DENIAL CASES

This section will demonstrate that efforts to apply vote dilution tests to vote denial claims obscure the complexity of issues presented in present day voting rights challenges. It will describe how disputes regarding the constitutionality of disparate impact-like claims in the vote dilution context have prevented the recognition of vote denial claims that are permitted by the text of the statute as well as relief for plaintiffs under that provision. Versions of the critiques presented in the vote dilution context—critiques of which implicate disparate impact theory more generally—appear in the vote denial context. In some cases, courts are reluctant to recognize vote denial claims based in part on disproportionate racial impact and reject these claims, citing objections from the vote dilution context.[167]

The spillover effects of the debates and critiques from the vote dilution context have direct consequences for plaintiffs pursuing claims alleging vote denial.[168] In cases where courts have failed to recognize such claims, three distinct barriers to relief emerge: (1) the characterization of such claims as "impact only" by reviewing courts; (2) the heightened causal showing required of plaintiffs bringing vote denial claims; and (3) the inability of courts to develop standards for determining whether race-based disparities are significant.[169]

A. "Impact Only" Claims and the Looming Presence of Proportional Representation

After the Supreme Court's ruling in *Bolden*, Congress amended Section 2 to incorporate a results test.[170] By so doing, Congress removed the

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167. *See* Brown v. Detzner, 895 F. Supp. 2d 1236, 1249-1250 (M.D. Fla. 2012).

168. Section 2 vote denial claims are filed much less frequently than vote dilution claims and the vast majority of Section 2 claims allege vote dilution. *See Detzner*, 895 F. Supp. 2d at 1249 (2012) (noting that vote denial cases are frequent); Smith v. Commonwealth of Virginia, No. CIV.A. 3:08CV800, 2009 WL 2175759 at *6 (E.D. Va. July 16, 2009) (noting that the majority of Section 2 claims are vote dilution claims).

169. *See, e.g.*, *Gonzalez*, 624 F.3d 1162 at 1192-94.

170. *See* 52 U.S.C. § 10301(a) (2012) ("No voting qualification . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .").

requirement that plaintiffs prove intentional discrimination and allowed plaintiffs to meet their showing by demonstrating that the challenged practice resulted in discriminatory effects.[171] Although Congress did not specify whether Section 2 vote dilution claims incorporated a results test that required "something more than effect,"[172] since the 1982 Amendments courts have consistently read the results test requirement to require something more than a statistical showing of disparate impact.[173] Lower courts reasoned that Congress's decision to restore the meaning of Section 2 to the pre-*Bolden* case law meant that the Supreme Court's interpretation of Section 2, decided in the context of vote dilution cases, controlled.[174] In vote dilution cases decided pre-*Bolden*, courts required *something more than* disparate impact to establish a claim.[175] Following the 1982 Amendments, in *Gingles* the Court interpreted Section 2 to require that the plaintiff show something more than disproportionate racial impact and the existence of the alleged dilutionary scheme—the plaintiff had to prove that the scheme caused the disproportionate impact and when coupled with historical and social

171. *See, e.g.*, Johnson v. Governor of State of Florida, 405 F.3d 1214, 1227 (11th Cir. 2005) (citing Chisom v. Roemer, 501 U.S. 380, 383-84 (1991)) (footnotes omitted) ("Recognizing the subtle ways that states often denied racial minorities the right to vote, in 1982, Congress amended Section 2 of the Voting Rights Act so that a plaintiff could establish a violation without proving discriminatory intent. Thus, it is well-settled that a plaintiff can challenge voting qualifications under a 'results' test.").

172. *See, e.g.*, Roger Clegg, George T. Conway III, Kenneth K. Lee, *The Case Against Felon Voting*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 1, 9 (2008) ("There is absolutely no indication in the legislative history of the 1982 amendments of the Voting Rights Act that the introduction of the word 'results' was intended to create a simple disparate impact test."). *But see Johnson*, 405 F.3d at 1241 n.2 (11th Cir. 2005) (Wilson, J., concurring in part and dissenting in part) ("Congress could have specified in § 2 that some of the White factors were strongly probative of intent, and that proof of 'something more than effect' was the *sine qua non* of a § 2 claim, regardless of whether the proof was direct or indirect.").

173. *See* Detzner, 895 F. Supp.2d at 1249 n.14.

174. *See, e.g.*, *Johnson*, 405 F.3d at 1237 (Tjoflat, J. concurring) (citing 1982 U.S.C.C.A.N at 192) ("The proposed amendment to Section 2 of the Voting Rights Act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in Bolden."). Furthermore, Congress incorporated into its revised Section 2 language directly from a Supreme Court vote dilution case. *Regester*, 412 U.S. at 755.

175. *See* 52 U.S.C. § 10301(a) (2012).

conditions interacted with the electoral system to result in unequal opportunity for minority voters.[176]

Although courts have construed the results test as requiring impact-plus in vote dilution cases where direct evidence of discriminatory intent is lacking, courts have long been unwilling to recognize vote denial claims based on a showing of simple disparate impact.[177] This is true despite the fact that the question of whether impact alone may constitute a claim under Section 2 remains unsettled.[178] Not surprisingly, plaintiffs in earlier Section 2 vote denial cases fared better in challenges to election procedures and policies with racially disparate impacts, in cases where the policies were selectively (and discriminatorily) enforced, or where there was extensive evidence of explicit racial hostility towards minorities.[179] *Shelby County*'s

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176. *See Gingles*, 478 U.S. 30, 46 (1986) ("First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.") (citations omitted).

177. *See, e.g.*, Texas Supporters of Workers World Party Presidential Candidates v. Strake, 511 F. Supp. 149, 155 (S.D. Tex. 1981) ("Plaintiffs allege that certain blacks and Mexican-Americans have been denied full pardons solely because of their race or national origin, and thus they are unable to vote. They seem to contend that this discriminatory denial is a violation of . . . the Voting Rights Act . . .. These three plaintiffs do not fall within the class of persons [the Act] was designed to protect.").

178. *See, e.g.*, *Simmons*, 575 F.3d at 35 n.10 ("Whether a claim of mere disproportionality alone supports a 'resulting' claim is not clear under § 2 and is a difficult question we need not reach."); *Johnson*, 405 F.3d at 1229 n.30 ("[T]he deep division among eminent judicial minds on this issue demonstrates that the text of Section 2 is unclear."); *Detzner*, 895 F. Supp. 2d. at 1249 ("However, despite this lack of clarity, it appears that in the Eleventh Circuit a plaintiff must demonstrate something more than disproportionate impact to establish a Section 2 violation.").

179. *See, e.g.*, United States v. Saint Landry Par. Sch. Bd., 601 F.2d 859, 866-67 (5th Cir. 1979) (reversing district court's dismissal of section 2 violation where the Fifth Circuit found the deceptive practices of poll workers assisting black voters and preventing them from selecting the candidates of their choice constituted a violation under the Voting Rights Act even where vote denial was not specifically alleged in the complaint); Toney v. White, 488 F.2d 310, 312 (5th Cir. 1973) (upholding district court's finding of Section 2 violation based on disproportionate voter purge of African American voters); Roberts v. Wamser, 679 F. Supp. 1513, 1532 (E.D. Mo. 1987), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989) (challenging Board's failure to review the rejected ballots of black voters); Coal. for

rejection of past discrimination as a basis for congressional prophylactic measures certainly places Section 2 in the Supreme Court's constitutional crosshairs.[180] That said, the *heightened* impact plus requirement in the vote denial context appears linked to debates from the vote dilution context and, in particular, reveal judicial reluctance to grant relief for claims perceived as conferring entitlements to proportionate racial representation.[181]

In a number of the new vote denial cases, claims classified as impact only were arguably *not impact only claims*. Disagreement over the interpretation of evidentiary standards under Section 2 vote denial claims has led courts to re-characterize evidence of disparities inside the political process, and external to it, as impact only claims.[182] Impact only claims are often characterized as such because courts reject alleged causal relationships, for example, between the challenged policy and the disparity in the political system,[183] or decline to infer a causal relationship or link between disparities in the political sphere and the racial disparities outside of it..[184] Moreover, the totality of the circumstances test, which is the vehicle by which plaintiffs

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Educ. Dist. One v. Bd. Elections of City of N.Y., 370 F. Supp. 42, 49 (S.D.N.Y. 1974) *aff'd*, 495 F.2d 1090 (2d Cir. 1974) (citing evidence of racial hostility to Black, Puerto Rican, and Chinese parents along with disparate impact).

180. *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2629 (2013) ("To serve that purpose, Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past. We made that clear in Northwest Austin, and we make it clear again today.")

181. *See, e.g., Johnson*, 405 F.3d at 1237-38 (citation omitted) (Tjoflat, J., concurring) ("Consistent with that intent, we have, as Judge Barkett suggests in her dissent, applied section 2 in the vote denial context. Dismissing the vote-denial claim in a cursory manner in that case, however, we did not pause to establish the minimum requirements of a prima facie vote-denial claim under section 2, and the case is thus of dubious precedential value, especially in support of the proposition that mere disparate impact is sufficient to establish such a claim. . . . In short, nothing in Burton requires us to return this case to the district court simply because Florida's felon-disenfranchisement law disadvantages minorities out of proportion to their makeup of the general population of the State."). Judge Tjoflat went on to argue that additional support for his position could be found in 42 U.S.C. § 1973 (b), which expressly denied members of a protected class entitlement to proportionate representation. *Id.* at 1238 n.6.

182. *See, e.g.*, Gonzalez v. Arizona, 677 F.3d 383, 405-06 (9th Cir. 2012).

183. *Id.* at 406.

184. *See generally* Farrakhan v. Gregoire (*Farrakhan III*), 623 F.3d 990 (9th Cir. 2010).

establish violations of Section 2, does not specify the required evidentiary showing sufficient to permit the factfinder to draw the interference of causation.[185] Courts must weigh the factors under that test, but there is no statement of what weight each factor must be given. Similarly, the Supreme Court's articulation of the requirements in *Gingles*, requiring that the plaintiff demonstrate how social and historical conditions interact with the challenged voting qualification or election procedure to deny the right to vote,[186] provides little guidance to courts on what can be considered enough of an interaction to constitute causation.

Cases involving challenges to felon disenfranchisement laws present an illuminating case study. In a series of cases, plaintiffs have challenged felon disenfranchisement laws as impermissible vote denial under Section 2 of the Voting Rights Act.[187] Section 2 claims challenging these laws are premised on the disproportionate impact that these voting eligibility exclusions have on minorities.[188] These state laws violate Section 2, the argument goes, because the laws disproportionately disenfranchise racial minorities who are convicted and sentenced at higher rates than non-minorities.[189]

In *Farrakhan v. Gregoire*,[190] the Ninth Circuit retreated from its earlier decision[191] recognizing Section 2 challenges to felon disenfranchisement laws. The Ninth Circuit held that plaintiffs asserting Section 2 challenges to these laws "must at least show that the criminal justice system is infected by *intentional* discrimination or that the felon disenfranchisement law was enacted with such intent."[192] Because they could not demonstrate "that the law was enacted for the purpose of denying minorities the right to vote" or that "their convictions and resulting disenfranchisement resulted from

185. *See, e.g.*, Farrakhan v. Locke, 987 F. Supp. 1304, 1312 (E.D. Wash. 1997), (commenting that there is little guidance in court precedent on what factors are most salient in a Section 2 claim that challenges a felon disenfranchisement statute).

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

187. Felon disenfranchisement laws have also been challenged on the grounds that such laws impermissibly diluted the votes of African Americans as a group. *See, e.g.*, Wesley v. Collins, 791 F.2d 1255, 1257 (6th Cir. 1986).

188. *See, e.g.*, *Wesley*, 791 F.2d at 1260.

189. *See Farrakhan*, 987 F. Supp. at 1307 ("The Complaint alleges that minorities are disproportionately prosecuted and sentenced, resulting in their disproportionate representation among the persons disenfranchised under the Washington Constitution.").

190. Farrakhan v. Gregoire (*Farrakhan III*), 623 F.3d 990 (9th Cir. 2010).

191. Farrakhan v. Gregoire (*Farrakhan II*), 590 F.3d 989 (9th Cir. 2010), *on reh'g en banc*, 623 F.3d 990 (9th Cir. 2010).

192. *Farrakhan III*, 623 F.3d at 993.

intentional racial discrimination in the operation of the state's criminal justice system,"[193] the plaintiffs failed to state a claim.[194] In reaching its conclusion, the Ninth Circuit was clear to note that statistical evidence of racial disparities in the state's criminal justice system was not sufficient on its own.[195]

Judge Kozinski made this point in an earlier dissent to a denial of rehearing in the *Farrakhan I*[196] case. In his dissent, Judge Kozinski argued that the court has relied on evidence of mere statistical disparities in finding that the plaintiffs had established a Section 2 claim.[197] Under this view, the claim presented was characterized as an impact only claim and, as such, insufficient to state a claim.[198] However, the evidence presented by the plaintiffs was not mere statistical data illustrating the disparities in the criminal justice system.[199] The plaintiffs presented extensive evidence of racial bias operating in the criminal justice system in the state of Washington.[200] Given that the plaintiffs did not present mere statistical data, the dispute between Judge Kozinski and the panel seems to be based on the appropriate evidentiary showing. For example, Judge Kozinski states:

> In *Salt River*, we held that statistical disparities were *not* enough to establish vote denial under section 2. We explained that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry" because causation cannot be inferred from impact alone. . .. We upheld a land-owner voting system against a section 2 challenge because it did not result in discrimination "on account of race or color[]" . . . even though whites were more likely to have a vote under that system because their rate of home ownership was much higher than that of blacks . . . Evidence of racial disparities in the rate of land ownership, which were then mapped directly onto the voter registration rolls, could not

193. *Id.* at 992.

194. *Id.* at 994.

195. *Id.* at 992-94.

196. Farrakhan v. Washington (*Farrahkan I*), 338 F.3d 1009 (9th Cir. 2003).

197. Farrakhan v. Washington, 359 F.3d 1116, 1117 (9th Cir. 2004) (Kozinski, J, dissenting).

198. *Id.* at 1125-26.

199. *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, 63-65 (2011).

200. *See generally* Farrakhan v. Locke, 987 F. Supp. 1304, 1307 (E.D. Wash. 1997).

> support a violation of the VRA. *Salt River* therefore stands for the principle that plaintiffs cannot prove a section 2 violation without substantial evidence other than a statistical disparity in some area unrelated to voting. There is nothing in the record here beyond statistical disparities, and the facts are settled. Summary judgment for Washington is therefore the only possible outcome.[201]

Judge Kozinski would have rejected the plaintiffs' claim because it was not sufficient to allow the court to draw the inference of discrimination at play in the political process.[202] However, *Salt River* is distinguishable from the *Farrakhan* case on one important ground: the *Salt River* plaintiffs conceded that they were not being denied access to the ballot on account of race.[203] As such, because the plaintiffs stipulated that race was not the cause of the disparities, *all* the evidence the plaintiffs produced had to be construed as simply evidence of the disparity between black and white ownership rates.[204] Thus, once the plaintiffs stipulated that there was no denial of access to the ballot on account of race, the court in *Salt River* had no grounds by which to draw the inference of discrimination.[205] Similarly, three other cases

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201. Farrakhan v. Washington, 359 F.3d 1116, 1118 (9th Cir. 2004) (Kozinski, J, dissenting).

202. *Id.* at 1117.

203. Smith v. Salt River Project Agric. Imp. & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997).

204. The Ninth Circuit made this exact point in *Farrakhan I*:

> Instead, we considered the external factors, but ultimately concluded that the statistics evidencing the disproportionate percentage of white landownership did not reflect racial discrimination and so failed to satisfy the "on account of race" requirement of the results test. As we noted, this conclusion was dictated by the Salt River plaintiffs' admission that there was no evidence of discrimination as measured by the Senate Report factors, and their stipulation to "the nonexistence of virtually every circumstance which might indicate that landowner-only voting results in racial discrimination," leaving only a bare statistical showing of disparate impact to support their Section 2 claim.

Farrakhan I, 338 F.3d at 1018 (internal citations omitted); *see also* Haygood, *supra* note 198, at 63 ("Significantly, the court noted that the plaintiffs stipulated to 'the nonexistence of virtually every circumstance which might indicate that landowner-only voting results in racial discrimination,' leaving only a bare statistical showing of disparate impact to support their section 2 claim.").

205. *Smith*, 109 F.3d at 586.

that Judge Kozinski relied on could not accurately be classified as impact only. These cases instead reflect disputes over the appropriate evidentiary standard to apply—specifically, whether the defendants rebutted the plaintiff's claim by establishing that the disparities could be explained by something *other than race.*[206]

The Ninth Circuit's departure from the *Farrakhan I* and *Farrakhan II* cases demonstrates additional inconsistencies among courts in applying evidentiary requirements. In *Farrakhan I*, the panel emphasized that the district court misconstrued the evidentiary requirement by failing to adequately consider the disparate impact of racial bias in the criminal justice system.[207] The panel would have more accurately described the plaintiff's evidentiary showing in the following way:

> This factor underscores Congress's intent to provide courts with a means of identifying voting practices that have the effect of shifting racial inequality from the surrounding social circumstances into the political process. To the extent that racial bias and discrimination in the criminal justice system contribute to the conviction of minorities for "infamous crimes," such discrimination would clearly hinder the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic. Thus, racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section 2, rendering it simply another relevant social and historical condition to be considered where appropriate.[208]

According to this evidentiary standard, the plaintiff may prevail upon

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206. *See, e.g.*, Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (denying vote dilution claim on the grounds that denial was due to the choice to commit a crime and not race); Irby v. Va. State Bd. Elections, 889 F.2d 1352, 1358-59 (4th Cir. 1989) (apathy); Ortiz v. City of Philadelphia Office City Comm'rs Voter Registration Div., 824 F. Supp. 514, 539 (E.D. Pa. 1993), *aff'd*, 28 F.3d 306, 307 (3d Cir. 1994) (low voter turnout).

207. *Farrakhan I*, 338 F.3d at 1016, 1019 ("We hold that . . . district court misconstrued the causation requirement of a Section 2 analysis. . . . [T]he 1982 Amendments and subsequent case law make clear that factors outside the election system can contribute to a particular voting practice's disparate impact when those factors involve race discrimination.").

208. *Id.* at 1020.

showing both that the racial bias in one external system—for example, the criminal justice system—"contributes" to disparities in that system *and* that the racial bias operating in that system creates a barrier to political participation for minorities within the electoral sphere.[209] Furthermore, the evidentiary standard articulated in *Farrakhan I* explicitly rejected a showing that would have required "that the practice . . . 'by itself,' cause the discriminatory result."[210] Instead, the court would have required the plaintiff to produce evidence for the factfinder to "determine whether a challenged voting practice interacts with surrounding racial discrimination in a meaningful way or whether the practice is better explained by other factors independent of race."[211]

Here, the panel did not characterize the claims as impact only because, as noted above, there *was* evidence presented to permit the court to draw the inference of racial bias in the criminal justice system.[212] Rather, the panel held that evidence of disparities in the criminal justice system, if established at trial, may be sufficient to allow the fact-finder to draw the inference of discriminatory effects in the political sphere under the totality of the circumstances assessment, given the interaction between the disparities in one system and the bias in another.[213] The Ninth Circuit reiterated this evidentiary showing in *Farrakhan II* and in doing so distinguished the plaintiffs' evidence from impact only claims:

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209. *See id.*

210. *Id.* at 1018. *But see Ortiz*, 824 F. Supp. at 539 ("While it is clear that these factors may contribute to decreased minority political participation rates, plaintiffs' evidence simply does not justify the conclusion that the purge law is the dispositive force depriving minority voters of equal access to the political process in violation of § 2.").

211. *Farrakhan I*, 338 F.3d at 1018.

212. *See id.* at 1020.

213. *See id.* at 1019 ("Certainly, plaintiffs must prove that the challenged voter qualification denies or abridges their right to vote on account of race, but the 1982 Amendments and subsequent case law make clear that factors outside the election system can contribute to a particular voting practice's disparate impact when those factors involve race discrimination."). *But see Johnson*, 353 F.3d 1287, 1318 n.16 (11th Cir. 2003) (Kravitch, J., dissenting), vacated, *Johnson*, 377 F.3d 1163 (11th Cir. 2004) ("Even if we assume that the Voting Rights Act applies to Florida's provision, the plaintiffs still must demonstrate that specific racial biases in society cause minorities to be convicted of felonies at a higher rate than whites. . . . Without such an initial showing, the plaintiffs do not allege a sufficiently specific nexus between racial discrimination and the felon disenfranchisement rule.").

> Plaintiffs have introduced expert testimony demonstrating that the statistical disparity and disproportionality evident in Washington's criminal justice system arises from discrimination, and the State has failed to refute that showing. . .. If Plaintiffs in this case demonstrated *only that African Americans, Latinos, and Native Americans are disproportionately affected* by Washington's disenfranchisement law, that clearly would not be enough under *Salt River*. Unlike in *Salt River*, however, Plaintiffs have produced evidence that Washington's criminal justice system is infected with racial bias. The experts' conclusions are not "statistical disparity alone," but rather speak to a durable, sustained difference in treatment faced by minorities in Washington's criminal justice system-systemic disparities which cannot be explained by "factors independent of race."
>
> Plaintiffs here have introduced evidence demonstrating what the *Salt River* plaintiffs could not. Plaintiffs have demonstrated that police practices, searches, arrests, detention practices, and plea bargaining practices lead to a greater burden on minorities that cannot be explained in race-neutral ways. The emphasis on crack cocaine and street drug trafficking is not proportional to its harm to the community or its share of the drug trade. The proportion of African Americans and Latinos arrested for drug possession bears no correlation the proportion of users among the races. Searching African Americans and Latinos at higher rates than Whites even though searches of African Americans and Latinos yield less seizures makes little sense in non-racial terms. Detaining minority defendants in disproportionate numbers to Whites even after accounting for differences among defendants in the severity of their crimes, prior criminal records, ties to the community, and the prosecuting attorney's recommendation, cannot be understood as race neutral.[214]

By the time the Ninth Circuit decided *Farrakhan III*, it was clear that there was some discomfort with allowing the claim to proceed based on a claim that the court now characterized as simple disparate impact.[215] The Ninth Circuit eventually rejected the standard articulated in *Farrakhan I* and *II* for a heighted causal showing that would effectively require plaintiffs

214. *Farrakhan II*, 590 F.3d at 1012 (emphasis added).

215. *See Farrakhan III*, 623 F.3d at 992-94.

challenging felon disenfranchisement laws to demonstrate intentional race discrimination.[216]

In a concurring opinion, Judge Thomas noted his reluctance to permit such claims by explicitly acknowledging that the disproportionate racial composition of prisons, even when accompanied by (what the court disregarded as) circumstantial evidence of racial discrimination operating within the criminal justice system, did not raise an inference of discriminatory intent.[217] Judge Thomas characterized the plaintiff's evidence as mere disparate impact and from that position concluded that a Section 2 violation could not be established on a showing of impact alone:

> If it did, then enforceability of felon disenfranchisement laws simply would depend on whether prison populations mirrored general population demographics. Using that logic, if the prison population deviated from the norm in a statistically significant way, then felon disenfranchisement would be enjoined; if the prison population returned to normal distributions, the injunction would be lifted. That is not the foundation of a § 2 violation. Indeed, Congress rejected this reasoning when it provided elsewhere in the statute that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[218]

Such judicial construction of Section 2 vote denial claims is the product of debates in the vote dilution context, where the avoidance of "impact only" claims made sense given Congress's express prohibition against proportional representation, eliminating entitlements based on the fact that the elected bodies failed to reflect the racial demographics of the jurisdiction.[219] To ensure that vote dilution claims could survive both constitutional scrutiny and effectuate congressional will, the aim of the *Gingles* test was to provide three preconditions that, when coupled with the objective factors drawn from the

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216. *Id.* In *Farrakhan III*, the Ninth Circuit's analysis focused less on the causal showing for vote denial claims based on disparate impacts and more on the constitutional grounds for protecting the rights of states to disqualify voters on the basis of felony convictions, as well as the lack of legislative intent to incorporate felon disenfranchisement laws under Section 2's protections.

217. *Id*. at 994-96.

218. *Id.* at 996 (citing 42 U.S.C. § 1973(b)).

219. *See also* 52 U.S.C. § 10301(b) (2012) (stating that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

1982 Senate Report, adopted a "totality of the circumstances" assessment to ensure that Section 2 vote dilution claims were not based on disparate impact alone, and that the benchmark by which to measure the disparity was not proportionate representation.[220] Such a test ensured that the challenged voting practice "result[ed] in a denial or abridgement of the right . . . to vote *on account of race or color*."[221] Whether the *Gingles* test was successful in achieving that aim was challenged from the day it was announced, so the tension between vote dilution claims and proportionate representation on elected governing bodies remains.[222]

In the vote denial context, however, judicial consternation over claims to proportional racial representation may be misplaced. First, it should be emphasized again that what is at stake in these claims is access to the ballot and the right to participate on equal footing in the political process, as opposed to the "aggregate right"[223] of the group to select the candidate of its choice. Stated differently, the concern over proportional racial representation, which focused on minority group entitlements to elected officials of their choice,[224] is not directly relevant. In fact, one court has suggested that the aversion to, and denial of, impact only claims based on a repudiation of proportional racial representation is not applicable in the vote denial context.[225] Second, instead of introducing impermissible claims to

220. *See Gingles*, 478 U.S. at 46.

221. 42 U.S.C. § 1973(a).

222. *See* CANNON, *supra* note 3, at 62 ("While the *Gingles* prongs do not require proportional representation, officials in the DOJ responsible for enforcing the VRA under its preclearance provisions and the state legislatures that drew the new district lines interested these actions as a mandate to create minority-majority districts. . . . [T]he DOJ seemed to be imposing proportional representation on the states.").

223. Karlan, *Some Pessimism About Formalism*, *supra* note 98, at 1708.

224. Bruce E. Cain, *Voting Rights and Democratic Theory: Toward a Color-Blind Society?, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 261, 262 (Bernard Grofman & Chandler Davidson, eds., 1992).

225. *See Simmons*, 575 F.3d at 41 ("Congress was fundamentally concerned with remedying discrimination in voting, rather than guaranteeing proportionality in political representation. Plaintiffs' claim, which is based on mere disproportionality in the prison population from felon disenfranchisement, does not implicate these concerns."). Given that, it is conceivable that vote denial claims do not conflict with the proportional representation proviso of Section 2, although plaintiffs would have a difficult time claiming an entitlement to proportional racial demographics to the extent that such claims would implicate anti-classification concerns or conflict with

proportionate racial representation in governing bodies, the impact only claims in vote denial cases may serve to smoke out impermissible forms of race discrimination operating either within the electoral system, the legislature adopting the particular policies, or other institutional structures, like the criminal justice system. [226] Within this context, rejection of what courts have construed as impact only claims seems particularly misguided, prohibiting plaintiffs from challenging legitimate barriers to their political and civic engagement.[227]

Challenges to the constitutionality of impact only claims are grounded in part in the Supreme Court's equal protection jurisprudence.[228] Moreover, to establish a voting rights claim under the Fifteenth Amendment, plaintiffs must still prove intentional race-based discrimination under *Bolden*.[229] Furthermore, proponents challenging the constitutionality of the results test under Section 2 have argued that by permitting claims based on impact only, Congress exceeded its enforcement power under the test the Supreme Court

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the states' constitutional rights to establish voting requirements under the Constitution. Impact only claims would also expose Section 2 to further constitutional scrutiny.

226. *See, e.g.*, George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2328 (2006) ("No matter how effective in eliminating such obvious forms of discrimination, prohibitions against intentional discrimination could not address the more subtle forms of discrimination that grew up in their place. The theory of disparate impact initially played an important role in 'smoking out' these hidden forms of discrimination . . . ."); Tokaji, *The New Vote Denial*, *supra* note 11, at 719-20 ("Furthermore, '[e]ven if one agrees . . . that the only core value underlying Section 2 is the eradication of intentional discrimination, it does not follow that Section 2 plaintiffs should be required to prove intentional discrimination in order to make out a claim . . . [a]n impact-based test may serve as a prophylactic against intentional discrimination that might otherwise seep into the voting process undetected.'").

227. *See, e.g.*, Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L.J. 1, 54 (2006) ("Be this as it may, it is undeniable that the racial gap in lost votes represents a significant threat to the integrity of the democratic process. Not only is it an overt form of vote denial that is related to the history of discrimination in the fields of education and employment, but it also has the effect of blocking equal participation in the electoral process on the basis of race."); Tokaji, *supra* note 17, at 351 ("The most important point I press here is that the Fourteenth Amendment provides greater protection in cases involving participation (or vote denial) than it does in cases involving only representation (or vote dilution).").

228. *See* McCleskey v. Kemp, 481 U.S. 279 (1987); Pers. Adm'r Mass. v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

229. *See, e.g.*, Baker v. Pataki, 85 F.3d 919, 926 (2d Cir. 1996).

established in *City of Boerne v. Flores*.[230] In his vigorous dissent contesting the denial of rehearing en banc in *Farrakhan I*, Judge Kozinski chastised the court for "adopting a constitutionally questionable interpretation of the Act," and "lay[ing] the groundwork for the dismantling of the most important piece of civil rights legislation since Reconstruction."[231] The panel, Judge Kozinski argued, misinterpreted the Voting Rights Act and compromised its constitutionality by permitting plaintiffs to meet their evidentiary showing by presenting a case "based entirely on statistical disparities."[232] By not requiring plaintiffs to demonstrate *something more than impact*, the panel had compromised the constitutionality of Section 2 by interpreting the statute to encompass statistical disparities unrelated to discrimination on the basis of race.[233] As Judge Kozinski argued, such a construction would render Congress's remedial interventions in Section 2 completely incongruent and disproportionate to the constitutional violation at issue.[234]

It is plausible that the felon disenfranchisement line of cases is unique. Felon disenfranchisement laws, at least as the *Farrakhan III* court concluded in reaching its holding, were "affirmative[ly] sanctioned in Section 2 of the Fourteenth Amendment."[235] Moreover, most of these cases reference an

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230. *See* Presto, *supra* note 102. Some have argued that the congruent and proportional requirement of *Boerne* does not apply to the Fifteenth Amendment. The Supreme Court has not ruled on this precise question. *See generally* Evan T. Lee, *The Trouble with City of Boerne, and Why It Matters for the Voting Rights Act As Well*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2170578 (proposing a new test for determining the scope of Congressional enforcement powers under the Fifteenth Amendment).

231. *Farrakhan v. Washington*, 359 F.3d at 1116-17 (9th Cir. 2004) (Kozinski, J., dissenting).

232. *Id.* at 1117.

233. *Id*. at 1119.

234. *See id.* at 1116 ("Section 2 is therefore a more congruent and proportional remedy if plaintiffs are required to produce evidence of intentional discrimination in an area external to voting which interacts with a voting practice to result in the denial of the right to vote on account of race. By allowing plaintiffs to survive summary judgment on a settled record containing nothing but disparities in the criminal justice system, and absolutely no evidence of intentional discrimination, the panel destroys section 2's congruence and proportionality as a remedy for the kind of constitutional violations recognized in *Hunter*.).

235. *Id.* at 993. This proposition is debatable. *See, e.g.*, Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir. 2005) (arguing that there is no constitutional tension between Section 2 of the Fourteenth Amendment and Section 2 challenges to felon disenfranchisement based on discriminatory effects).

extensive history of such laws in the United States; state felon disenfranchisement laws stretch back all the way to the Reconstruction era.[236] That being said, these cases help to reveal an explicit aversion towards impact-based tests in a manner reminiscent of debates in the vote dilution context.

Yet, outside of the felon disenfranchisement context, similar reservations mark opinions rejecting Section 2 vote denial claims based in part on disparate impact.[237] In these cases, even circumstantial evidence did not suffice to establish a basis to support a finding for plaintiffs under Section 2.[238] For example, one court recently declined to recognize findings of discriminatory purpose or effect even when changes to voting policies were accompanied by procedural irregularities and racially charged statements by contemporary lawmakers.[239] Here again, impact-based claims have been pegged as entitlements to proportionate racial representation and, without demonstrating intent, plaintiffs attempting to establish vote denial claims solely based on what judges *characterize* as disparate impact will likely fail to establish a claim under Section 2. This holds true even in cases such as *Farrakhan III*, where circumstantial evidence is provided pursuant to the results test of Section 2 that could support an inference of discriminatory intent.

Furthermore, outside of the felon disenfranchisement context, conflicting interpretations of evidentiary standards under Section 2 vote denial claims have also led courts to re-characterize evidence of disparities both inside the political process and external to it as impact only claims.[240] In *Ortiz*, African American and Latino plaintiffs challenged a Pennsylvania voter purge law on the grounds that "[these] voters [we]re purged from the voter registration rolls at significantly higher rates than white voters."[241] The

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236. *Id*. at 1220

237. Common Cause/Georgia v. Billups, 406 F.Supp.2d 1326, 1375 (N.D. Ga. 2005)

238. *Id.*

239. *Detzner*, 2012 WL 4356839, at **15; *see also* N. Carolina State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320 (M.D.N.C.), *rev'd and remanded sub nom.* N. Carolina State Conference of NAACP v. McCrory, 831 F.3d 204 223 (4th Cir. 2016) (finding district court's finding that there was little evidence of official discrimination since 1980 to be clearly erroneous). In Arlington Heights v. Metro Housing Court, 429 U.S. 252 (1977), the Supreme Court identified a list of factors comprising circumstantial evidence that might enable the factfinder to draw the inference of discriminatory intent. *Id.* at 267-68.

240. Ortiz v. Phila. Office of City Comm'rs Voter Registration Div., 824 F.Supp 514 (E.D. Pa. 1993)

241. *Ortiz*, 824 F. Supp. 514 at 516.

district court concluded that there was no Section 2 violation after applying the totality of the circumstances assessment.[242]

On appeal, the dispute centered on the district court's conclusion that Ortiz failed to show a causal relationship between the policy and the disparities in participation rates, which Ortiz alleged denied minorities equal access to the ballot.[243] The Third Circuit upheld the district court's finding that the disparities in minority participation rates could be explained by factors other than the Pennsylvania voter purge law (i.e. low minority turn-out rates).[244] In reaching its conclusion, the Court devised a test that would require plaintiffs to show that the voter purge law was the but-for cause of the disparities in participation rates.[245] The court noted: "It is true that in certain years minority voters have turned out in proportionately lower numbers than have non-minority voters. But the purge statute did not cause the statistical disparities which form the basis of Ortiz's complaint. We agree with the Fifth Circuit that 'a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote.'"[246]

Here again, the court opinion indicates the court's reluctance to find a Section 2 violation where the evidence of racial disparities put forth by plaintiffs a characterized as only evidence of disparate impact and where the corresponding relief is framed as an entitlement to proportionally racial representation (i.e. minority turnout rates must be equal to that of whites). Although the Third Circuit noted that "[t]he 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,"[247] it applied that test in a different way than the dissent. Judge Lewis in dissent concluded that the purge law had a disparate impact on African American and Latino voters in Philadelphia, and, specifically, that there was evidence of a "'clear and consistent pattern' of systematically purging black and Latino voters at

242. *See id.* at 539.

243. *See Ortiz*, 28 F.3d at 310.

244. *Id.* at 220.

245. *Id.*

246. *Ortiz*, 28 F.3d at 314 (quoting Salas v. Southwest Texas Junior College District, 964 F.2d 1542, 1556 (5th Cir. 1992)). *Salas* involved a vote dilution challenge to an at-large election scheme brought by Latino voters.

247. *Id.* at 310. *See also* Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012) (where the majority and the dissent applied the "totality of the circumstances" test, but relied on different causal standards).

significantly greater rates than whites."[248] Furthermore, the dissent emphasized the district court's conclusion that the "substantial socioeconomic disparities among African-American, Latino, and white residents of the City of Philadelphia . . . affect the ability of these minority groups to participate in the political process and to elect candidates of their choice," and that the "conclusion was further supported by statistical evidence demonstrating that minority voters in Philadelphia do not exercise their right to vote to the same extent as white voters, which in part may be attributable to discrimination and the overall socioeconomic status of minorities in Philadelphia."[249] Thus, according to the dissent, the facts were sufficient to establish a vote denial claim under Section 2.[250] Furthermore, the dissent argued that the majority applied the wrong causal standard:

> I agree that § 2 plaintiffs must show a causal connection between the voting practice they challenge and the deprivation of equal political opportunity they allege. . . The language of the Voting Rights Act, the legislative history of the 1982 amendments, and controlling precedent all foreclose any argument that a voting practice can violate § 2 without resulting in, or playing some part in causing, the abridgement of citizens' voting rights. The majority, however, actually requires something more than and different from the causal connection it initially describes.[251]

In reaching its conclusion, the majority intimated that mere disparities were insufficient without a heightened causal showing, because without such a showing, the disparities in the turnout rate between minority voters and non-minority voters could not be attributed to the voter purge law.[252] The dissent disagreed, declining to characterize the plaintiff's claims as evidence of only statistical disparities:

> The non-voting purge has a substantially disparate impact on black and Latino Philadelphians. The uncontroverted statistical evidence presented at trial, which the district court credited, showed that each year, greater percentages of black and Latino voters were slated for purging than were white voters. The evidence further showed that white voters were reinstated at higher rates than blacks

248. *Id.* at 320 (Lewis, J., dissenting).
249. *Id.* at 321.
250. *Id.*
251. *Id.* at 322-23.
252. *See id.* at 311.

> and Latinos, thus increasing the adverse disparate impact on these minority groups as a result of the non-voting purge.
>
> The record thus shows that Pennsylvania's non-voting purge law operates to remove blacks and Latinos from Philadelphia registration rolls at substantially higher rates than whites. In addition, it establishes that black and Latino Philadelphians suffer disadvantages and discrimination in various socioeconomic categories.
>
> On two occasions, the district court stated that the plaintiffs had not proven a violation of § 2 because they had failed to demonstrate that "the purge law is the dispositive force in depriving minority voters of equal access to the political process . . . That is not the proper legal standard. Section 2 does not require plaintiffs to prove that a challenged voting practice or procedure is "the dispositive force," or the only cause, or even the principal cause, of unequal political opportunity. Neither the statute, nor its legislative history, nor the relevant case law supports such a reading. To the contrary, that authority requires us to determine whether a challenged law interacts with other, external conditions to limit the political opportunities available to members of protected classes.[253]

Such disputes are not confined to the earlier vote denial cases decided soon after *Gingles*; disagreements over the appropriate evidentiary standard to apply are also reflected in more recent cases in which plaintiffs have alleged vote denial.[254]

B. Heightening the Bar to Establishing a Causal Relationship

Disputes over evidentiary showings may explain why some claims are characterized as impact only. Part of the reasoning behind the rejection of some vote denial claims is that courts characterize some of these claims as

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253. *Id.* at 320-21, 323 (internal citations omitted).

254. *Compare Gonzalez*, 677 F.3d at 406 (upholding the district court's finding that the plaintiff failed to demonstrate both that the challenged proof-of-citizenship requirement had a discriminatory impact on Latinos in the political system and that the challenged requirement interacted with "the social and historical climate of discrimination" to produce disparities in political participation) with *Gonzalez*, 677 F.3d at 442-44 (Pregerson, J., dissenting) (disputing the majority's conclusion and applying a causal showing akin to correlation).

impact only, even when additional circumstantial evidence is presented. Furthermore, impact only claims based on statistical disparities[255] are perceived as such in part due to judicial consternation over minority claims to proportionate representation. This is so even when the provision against such claims directly implicates only governing bodies, not participation by the electorate. Once claims are characterized in this way, it is difficult for plaintiffs to state a Section 2 claim without establishing either an explicit intent to discriminate on the part of the legislature enacting the challenged policy or that the external system—in the cases of felon disenfranchisement and the criminal justice system—is infected with intentional race-based discrimination.

Heightened causation requirements have presented another barrier to vote denial claims. Causation is an essential component of Section 2 vote denial and vote dilution claims.[256] However, Congress never specified the causation standard for Section 2 claims. By its explicit terms, Section 2 of the Voting Rights Act requires that a plaintiff prevail only if "'based on the totality of the circumstances . . . the challenged voting practice results in discrimination on account of race.'"[257] Requiring plaintiffs to show a causal link or connection between the challenged practice and the denial or abridgment of the right to vote, resulting in minority voters having "less opportunity than other members of the electorate to participate in the political process,"[258] helps to ensure that the challenged practice results in a denial "on account of race."[259] This is certainly the case in vote dilution cases where causation is established by meeting the three *Gingles* preconditions and weighing the Senate factors under the totality of the circumstances inquiry. Such a showing demonstrates that but-for[260] the challenged electoral system—for example, at large or single member districts—minorities would be able to elect the representative of their choice. In vote dilution cases, the

255. *See Simmons*, 575 F.3d at 42 n.23 (citing *Ricci* for the claim that reliance on mere statistical disparities is not "strong evidence of disparate impact").

256. *Gonzalez*, 677 F.3d at 405.

257. *Gonzalez*, 677 F.3d at 405 (citing Farrakhan v. Washington, 338 F.3d 1009, 1017 (9th Cir. 2003)).

258. 52 U.S.C. § 10301(a) (2012).

259. 52 U.S.C. § 10301(b) (2012).

260. *See* Bartlett v. Strickland, 556 U.S. 1, 15 (2009) (citations omitted) (internal quotes omitted) ("In setting out the first requirement for § 2 claims, the *Gingles* Court explained that '[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.' . . . Without such a showing, "there neither has been a wrong nor can be a remedy.").

burden is on the plaintiff to show that the challenged practice, not merely their fewer numbers at the ballot, is the reason that minority groups have been unsuccessful in electing the candidate of their choice.[261]

Yet, because Congress never specified the causation standard for vote denial claims and subsequent Supreme Court case law has provided little guidance,[262] causation standards for these types of claims are all over the map. Courts deciding vote denial claims based on evidence of disproportionate racial impact have articulated causal showings based on the following: but-for causation;[263] causation inferred from statistical disparity, given the interaction between the challenged practice and social and historical conditions evincing racial bias;[264] correlation between the challenged practice and disparate impact in the political process;[265] disproportionate risk or

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261. *See, e.g.*, John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 164 n.4 (1984) ("The aversion to proportional representation *in this sense* is readily understandable: Because the winner-take-all electoral system is heavily biased toward over-representation of the majority, it is unlikely that any minority, racial or political, will be represented in proportion to its size. So a lack of proportionality of outcome is not in and of itself symptomatic of discrimination.").

262. *See* Farrakhan v. Locke, 987 F. Supp. 1304, 1312 (E.D. Wash. 1997) ("In determining whether Plaintiffs have alleged circumstances that could prove a causal relationship between Washington's felon disenfranchisement law and the denial of votes to racial minorities, precedent provides little guidance as to which factors should be considered salient. Consequently, the Court's assessment of Plaintiffs' complaint is focused on any circumstances alleged by Plaintiffs that would tend to establish that Washington's felon disenfranchisement law operates with social and historical conditions such that it causes individuals to be denied access to voting privileges on the basis of race.").

263. *See, e.g.*, Ortiz 28 F.3d at 324.

264. *See, e.g.*, Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1264 (N.D. Miss. 1987), *aff'd sub nom.* Miss. State Chapter, Operation Push, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991).

265. *See, e.g.*, Stewart v. Blackwell, 444 F.3d 843, 878-79 (6th Cir. 2006), *superseded by* 473 F.3d 692 (6th Cir. 2007) ("On remand, the district court will consider the voluminous amount of the plaintiffs' evidence, including the regression analysis showing the correlation between overvoting and the percentage of African-American voters in a given precinct."); United States v. Berks Cty., 277 F. Supp. 2d 570, 581 (E.D. Pa. 2003).

likelihood of disenfranchisement;[266] and simple disparate impact.[267] Despite the wide variance, few have applied the less rigorous causal requirement—for example, a causal showing similar to correlation or one requiring the plaintiffs to demonstrate disproportionate risk of disenfranchisement.[268]

An analysis of the Section 2 vote denial case law suggests that courts require plaintiffs to demonstrate a heightened causal showing. Courts have required plaintiffs to demonstrate that the challenged policy caused the disparities in participation rates *and* show that the underlying historical and social conditions caused the disparities in participation rates.[269] Requiring

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266. *See*, *e.g.*, Black v. McGuffage, 209 F. Supp. 2d 889, 897 (N.D. Ill. 2002) ("Under the facts alleged in the first amended complaint, the disparate rates of undervotes indicates that Plaintiffs, as voters residing in predominantly Latino and African American precincts where punch card machines are utilized, bear a greater risk that their votes will not be counted than do other voters. As such, Plaintiffs' participation in the political process could be significantly diminished. Accepting Plaintiffs' facts as true we find Plaintiffs' Section 2 allegations sufficient to state a claim.").

267. *See*, *e.g.*, Goodloe v. Madison Cty. Bd. Election Comm'rs, 610 F. Supp. 240, 243 (S.D. Miss. 1985) (upholding the challenge to the invalidation of 250 absentee ballots by the Elections Commissioner based on improper notarization, where the majority of which were cast by African American voters).

268. *But see Stewart*, 444 F.3d at 878, vacated as moot, 473 F.3d 692 (6th Cir. 2007); *McGuffage*, 209 F. Supp. 2d at 897 ("Because the African-American plaintiffs claim that they are disproportionately denied the right to have their ballots counted properly, the district court erred in concluding that the plaintiffs did not state a claim for a violation of the right to vote under the Voting Rights Act."); *McGuffage*, 209 F. Supp. 2d at 897 ("Under the facts alleged in the first amended complaint, the disparate rates of undervotes indicates that Plaintiffs, as voters residing in predominantly Latino and African American precincts where punch card machines are utilized, bear a greater risk that their votes will not be counted than do other voters. As such, Plaintiffs' participation in the political process could be significantly diminished. Accepting Plaintiffs' facts as true we find Plaintiffs' Section 2 allegations sufficient to state a claim.").

269. For example, in *Ortiz* the court concluded:

> Plaintiffs have failed to demonstrate that the purge law interacts with social and historical conditions to deny minority voters equal access to the political process and to elect their preferred representatives, particularly since it is undisputed that the purge procedure is administered fairly and that there is ample opportunity for purged voters to re-register to vote. Although it is clear that the operation of the purge law removes African–American and Latino voters from the voter registration rolls at higher rates than white voters, this disproportionate impact does not rise to the level of

plaintiffs to demonstrate that the challenged practice or policy, standing alone, is the cause of the observed racial disparity, amounts to a heightened causal showing, as one court has noted:

> [D]emanding "by itself" causation would defeat the interactive and contextual totality of the circumstances analysis repeatedly applied by our sister circuits in Section 2 cases, as they also require a broad, functionally-focused review of the evidence to determine whether a challenged voting practice interacts with surrounding racial discrimination in a meaningful way or whether the practice's disparate impact "is better explained by other factors independent of race."

> a *per se* violation of § 2, even when considered in light of the court's findings of the existence of racially polarized voting, socioeconomic disparities in education, employment and health, racial appeals in some elections, and the failure of the City in some instances to address the needs of minority citizens. While it is clear that these factors may contribute to decreased minority political participation rates, plaintiffs' evidence simply does not justify the conclusion that the purge law is the dispositive force in depriving minority voters of equal access to the political process in violation of § 2.

Ortiz, 28 F.3d at 313 (quoting Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div., 824 F. Supp 514, 539 (E.D. Pa. 1993)).; *Compare* Gonzalez v. Arizona, 677 F.3d 383, 406 (9th Cir. 2012) *with Gonzalez*, 677 F.3d at 444 (Pregerson, J., concurring in part and dissenting in part).

In *Gonzalez v. Arizona*, a case involving, among other claims, a challenge to Proposition 200's proof of citizenship requirement under Section 2, the disagreement between the majority and one of the dissenting judges centered on the appropriate causation standard. *Compare Gonzalez*, 677 F.3d at 406 ("The district court noted that not a single expert testified to a causal connection between Proposition 200's requirements and the observed difference in the voting rates of Latinos and that Gonzalez had failed to explain how Proposition 200's requirements interact with the social and historical climate of discrimination to impact Latino voting in Arizona.") *with Gonzalez*, 677 F.3d at 444 (Pregerson, J., concurring in part and dissenting in part) ("In my view, statistics showing that Proposition 200's polling place provision disparately impact Latino voters, when coupled with Arizona's long history of discrimination against Latinos, current socioeconomic disparities between Latinos and whites in Arizona, and racially polarized voting in Arizona, establish that Proposition 200's polling place provision results in discrimination on account of race.").

> Moreover, the district court's "by itself" causation standard would effectively read an intent requirement back into the VRA, in direct contradiction of the clear command of the 1982 Amendments to Section 2. A facially neutral voting qualification, even one that results in substantial discriminatory effects, would only be discriminatory "by itself" if its purpose was to achieve those discriminatory effects. Instead, courts must be able to consider whether voting practices "accommodate or amplify the effect that . . . discrimination has on the voting process," absent proof that the challenged practice was adopted or maintained out of overt, intentional racial animus, its disproportionate effect on minority voters could only ever be "on account of race" through its interaction with racial discrimination "outside of the challenged voting mechanism."[270]

However, not long after this decision the Ninth Circuit adopted a more rigorous causal showing. In every case challenging a felon disenfranchisement law under Section 2, courts have embraced a more rigorous causal standard.[271] Courts adopting a heightened causal requirement have required plaintiffs to demonstrate race-based intent.[272]

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270. *Farrakhan I*, 338 F.3d at 1018-19 (internal citations omitted).

271. Two courts explicitly retreated from decisions recognizing Section 2 vote denial violations based on felon disenfranchisement. *See, e.g.*, Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005); Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010). In the prior cases, courts had not only recognized felon disenfranchisement claims as within the ambit of Section 2, but had also found that the plaintiff could meet its showing by demonstrating that the challenged voting qualification interacted with other historical, economic, or social factors to produce racially discriminatory results in the political process. *See* Farrakhan I, 338 F.3d at 1020; Johnson v. Governor of Fla., 353 F.3d 1287, 1306 (11th Cir. 2003), *declined to follow*, 405 F.3d 1214 (11th Cir. 2005) ("This factor underscores Congress's intent to provide courts with a means of identifying voting practices that have the effect of shifting racial inequality from the surrounding social circumstances into the political process."); *Johnson*, 353 F.3d at 1306 ("When taken in the light most favorable to the Plaintiffs, a fact-finder could conclude that under the totality of the circumstances test, this evidence demonstrates intentional racial discrimination behind Florida's felon disenfranchisement as well as a nexus between disenfranchisement and racial bias in other areas, such as the criminal justice system, in violation of the Voting Rights Act.").

272. Legal scholars have recognized that the effect of such heightened causation requirements effectively requires the plaintiff to prove discriminatory intent. *See*, *e.g.*, Haygood, *supra* note 198, at 52; Moke & Saphire, *supra* note 226,

C. Failure of Courts to Establish What Level of Disparity is Significant

The re-characterization of vote denial claims based on disproportionate racial impact as "impact only" given the lack of consistent evidentiary standards governing the causal showing required for when an observed disparities can accurately be attributed to a voter qualification or election practice, are not the only barriers facing plaintiffs. Despite acknowledging that the right to vote is fundamental,[273] courts have yet to establish what level of disparity—for example, as between the minority voting rate and non-minority voting rate—is significant. For example, in one challenge to the use of the punch-card voting system, minority voters sought injunctive relief to prevent the use of such ballots in California's then-pending recall election.[274] In denying the motion for preliminary injunction, the district court noted that the plaintiffs did not argue that punch card systems were *only* used in minority precincts (i.e. enforced in a discriminatory fashion), or that the error rate resulting from these punch card systems was so high that the result was consistent denial of minority voters' right to participate equally in the political process.[275] In addition, the district court emphasized that the plaintiffs did not claim that the challenged practice, combined with the lingering effects of discrimination, resulted in a disproportionate racial impact, and concluded that the plaintiff presented evidence to demonstrate only one Senate factor.[276] Finally, the district court concluded that, on the whole, the disparities were not that significant:

> In sum, Plaintiffs suggest a Voting Rights Act violation based exclusively upon the alleged error rate of machines that poll "majority" as well as minority voters, and are used in counties containing nearly one-half of California's voters. They contend that some 40,000 votes may be lost as a result of higher error rates (many if not most of which votes will be cast by non-minority voters) in a

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at 51 ("The flaw in this approach is that the strict causation test is tantamount to a requirement of intentional discrimination, even in the face of a congressional decision in favor of an effects test.").

273. Reynolds v. Sims, 377 U.S. 533, 562 (1964) (citing Yick Wo. v. Hopkins, 118 U.S. 356, 370 (1886)).

274. *See* Sw. Voter Registration Educ. Project v. Shelley, 278 F. Supp. 2d 1131, 1134 (C.D. Cal. 2003), *rev'd*, 344 F.3d 882 (9th Cir. 2003), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003), *aff'd*, 344 F.3d 914 (9th Cir. 2003).

275. *Id*. at 1142.

276. *See id.*

> state of nearly eight million voters. Accordingly, there is, at best, a slim chance that Plaintiffs will be able to prove that punch-card machines in California "interact[] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[277]

The Ninth Circuit upheld the district court's decision denying injunctive relief, citing the required causal showing, and concluded that the plaintiffs had failed to demonstrate a strong likelihood of success on the merits, due in part to the district court's finding that the disparities were not significant:

> In a nutshell, plaintiffs argue that the alleged disparate impact of punch-card ballots on minority voters violated Section 2 . . . Plaintiffs allege that minority voters disproportionately reside in punch-card counties and that, even within those counties, punch-card machines discard minority votes at a higher rate. To establish a Section 2 violation, plaintiffs need only demonstrate "a causal connection between the challenged voting practice and [a] prohibited discriminatory result." There is significant dispute in the record, however, as to the degree and significance of the disparity. Thus, although plaintiffs have shown a possibility of success on the merits, we cannot say that at this stage they have shown a strong likelihood.[278]

The Ninth Circuit's limited and deferential review of the district court's conclusion, given the procedural posture of the case, may explain the decision to a certain degree.[279] At the same time, the opinion does little to suggest what causal showing would be required for these types of claims.

Similarly, in *Mark Wandering Medicine v. McCulloch*,[280] Native Americans living on Indian Reservations challenged the defendant jurisdiction's failure to locate satellite polling places at a convenient distance from the Indian Reservations, which reduced the ability of these voters to register late and submit in-person absentee ballots.[281] In reaching its conclusion denying the motion for preliminary injunction, the district court

277. *Shelley*, 278 F. Supp. 2d at 1143 (internal citations omitted).

278. *Shelley*, 344 F.3d at 918-19 (internal citations omitted).

279. *See id.* at 918.

280. Mark Wandering Med. v. McCulloch, 906 F. Supp. 2d 1083 (D. Mont. 2012), *order vacated sub nom*. Mark Wandering Med. v. McCulloch, 544 F. App'x 699 (9th Cir. 2013).

281. *Id*. at 1086.

emphasized that, absent intentional discrimination, even where it "[wa]s well-established that there has been a history of official discrimination in Montana that has touched the right of Native Americans to participate in the democratic process,"[282] the plaintiffs had not demonstrated that the electoral procedures resulted in both a denial of access to the political process and the inability of the minority voters to elect the candidate of their choice.[283]

First, the district court emphasized that some of the county commissions challenged in the action were comprised primarily of Democratic Party members—some of whom were members of local tribes or received support from the tribal council—and that because Native Americans voted primarily for Democrats, this provided evidence that these voters were successful in electing the candidate of their choice.[284] Second, the court emphasized that there were no real barriers to access to the ballot, as the plaintiffs had other reasonable means of voting—notwithstanding evidence that "poverty, unemployment, and limited access to vehicles render it difficult for residents of the three reservations to travel to the county seats to register late and cast in-person absentee ballots."[285] Instead, the court noted that:

> [T]estimony at the hearing established that it is relatively simple for Native American voters in Montana to register to vote without driving to the county elections office. In addition to registration by mail, there was testimony that various organizations had organized voter registration drives on the reservation where applicants filled out voter registration cards that were delivered to election officials. A person who registers by mail or as part of a registration drive could either request an absentee ballot by mail or vote at local polling places on election day.[286]

Although the Native American plaintiffs might have had less of an opportunity to elect the candidates of their choice, due to the failure to place satellite offices in more conveniently located jurisdictions, the district court viewed the challenged policy as an inconvenience that did not create a substantial barrier to access to the ballot and did not prevent the plaintiffs

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282. *Id.* at 1089 (citing Old Person v. Cooney, 230 F.3d 1113, 1129 (9th Cir. 2000)) (footnotes omitted).

283. *Id*. at 1090-91.

284. *Id.* at 1090.

285. *Id*. at 1089.

286. *Id*. at 1091.

from electing the candidates of their choice.[287] What the court's analysis misses is the fact that a challenged practice could generate disparities in opportunity without yet registering in the composition of the elected governing body. Second, the court's analysis fails to suggest what level of inconvenience amounts to less of an opportunity on account of race. In effect, the court's analysis suggests that if a challenged policy is viewed as an inconvenience or slight burden, an inquiry into whether the challenged policy leads to less of an opportunity for minorities to elect the candidates of their choice is halted:

> In the only case the parties or the Court could find that addressed early voting locations, the federal court in the Middle District of Florida noted that [w]hile it may be true that having to drive to an early voting site and having to wait in line may cause people to be inconvenienced, inconvenience does not result in a denial of "meaningful access to the political process ... [n]or does the Court have the authority to order the opening of additional sites based merely on the convenience of voters."
>
> There being no evidence of discriminatory intent, no showing that Plaintiffs are unable to elect representatives of their choice, and no authority for Plaintiffs' request, the Court must conclude Plaintiffs are unlikely to succeed on the merits of any of their claims.[288]

A court's classification of a claim as inconvenient may be akin to the classification of other types of claims as impact only. Inconvenience suggests that, despite clear evidence that the challenged practice may interact with social and historical factors to influence registration rates and voter turnout, these burdens are not significant enough to establish a vote denial claim. Furthermore, even an inconvenience that impacts a disproportionate number of minorities functions effectively as an evidentiary bar in cases where courts

287. *Id*. at 1092.

288. *Id.* at 1091 (footnote omitted) (citation omitted); *see also* Jacksonville Coalition For Voter Protection v. Hood, 351 F. Supp. 2d 1326, 1335 (M.D. Fl. 2010) (finding that plaintiffs failed to demonstrate substantial likelihood of success in a challenge to the jurisdiction's provision of only one early voting site in a predominantly African American county where there was a documented history of disproportionate disenfranchisement of African American voters in Florida following the 2000 election).

decline to draw an inference of discriminatory effect from the current policy where there is evidence of electoral success within the jurisdiction.

Without a more searching inquiry, courts have essentially made *ad hoc* judgments about which burdens are significant and which burdens are inconveniences that protected groups can overcome.[289] Moreover, although the current composition of governing bodies might suggest that minorities have been able to overcome the barriers that they allege the challenged practice has caused, it is not the case that the composition of these governing bodies will remain. In fact, guaranteed electoral outcomes is explicitly not protected under the Act—although in *Mark Wandering Medicine*, electoral success functioned as a barrier to demonstrating a probability of success on the merits.[290]

V. DEVISING A NEW TEST FOR VOTE DENIAL CHALLENGES UNDER SECTION 2

While not directly resolving all the objections noted above, recent cases involving challenges to voter identification laws have effectively tried to limit purported constitutional tensions created by impact-based claims in the voting rights context, particularly when access to the ballot is at stake.[291] This subpart seeks to answer the following questions: first, how have these courts grappled with the tensions articulated by critiques of results-based tests?; second, what are some judicially imposed limiting or "mediating

289. For example, in Spirit Lake Tribe v. Benson County, N.D., the district court found that the mail-in procedure that the jurisdiction adopted as a cost-saving measure, after it closed seven out of eight of its polling places was not simply an inconvenience; the plaintiffs had demonstrated a fair chance of success on the merits of their Section 2 claim, given the disparate impact of the policy on Native American voters and social and economic factors. *See* Spirit Lake Tribe v. Benson County, N.D., No. 2:10-CV-095, 2010 WL 4226614, at *3 (D.N.D. Oct. 21, 2010). The court stated its findings as follows: "[T]he County asserts that the mail-in procedure actually solves the transportation problems and will increase voter participation. While such an argument is tenable in communities with stable housing arrangements, poverty and transience on the Reservation makes mail balloting more difficult for tribal members. . . . The evidence suggests that Native American are more likely to have not received a ballot application, which when coupled with a decreased ability to vote in person, creates a disparate impact." *Id.* at 3.

290. *See* Wandering Med., 906 F. Supp. 2d at 1088.

291. *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 303 (5th Cir. 2016).

principles"[292] that may permit Section 2 challenges to move forward without offending equal protection principles identified?

A. Problems with Disparate Impact Tests for the New Vote Denial Claims

Today, voter suppression tactics look very different than they did in 1965. As one scholar famously put it, "Bull Connor is dead."[293] Such a statement captures the idea that evidence of overt forms of voter disenfranchisement based on race are typically few and far between. Congress understood this when it incorporated a results test in Section 2 as part of the 1982 Amendments to the Voting Rights Act. However, prophylactic remedies do not cease to have value simply because they prove successful in curbing the violations they set out to prevent.

Current litigation in the area of vote denial under Section 2 demonstrates the extent to which the terms of the debate, and more concretely, the recognition or acceptance of claims brought by minority plaintiffs, are constrained by the politics of disparate impact.[294] As noted, vote denial and vote dilution are different. Vote denial implicates outright access to the ballot, or the right to have one's vote counted, whereas vote dilution involves the

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292. *See* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1282 n.8 (2011) (describing mediating principles as "interpret[ing] a clause purposively to vindicate one particular understanding of the concept or value the clause expressly guarantees, here the equal protection of the laws.").

293. *See* 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, 179 (2005) ("In 1965 and even in 1982, when Congress reenacted Section Five's preclearance through 2007, Congress could point to significant acts of intentional racial discrimination by covered states to support preclearance provisions. Today, Congress would be hard-pressed to find widespread evidence of such discrimination. I refer to this issue as the 'Bull Connor is Dead' problem."). *See also* Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 3 (2009) ("Any discussion of voting-related discrimination must frankly acknowledge that intentional discrimination still exists, but even the most ardent supporter of the modern civil rights movement would have to admit—at least as it relates to the casting of ballots in polling places—that such obvious, intentional discrimination in voting is likely to have less impact than it has had in the past.").

294. *See generally* Tigrett v. Cooper, 855 F. Supp. 2d 733 (W.D. Tenn. 2012); Ga. State Conf. NAACP v. Fayette Cnty. Bd. Comm'rs, 950 F. Supp. 2d 1294 (N.D. Ga. 2013); Farrakhan v. Gregoire, 590 F.3d 989 (9th Cir. 2010).

weight that attaches to one's vote as a member of a minority group.[295] Thus, the substantive difference between Section 2 vote denial claims and vote dilution claims is an important one from a conceptual and constitutional standpoint, because vote denial claims directly affect the ability of voters to participate in the political process. Even so, the debates that have divided courts in the vote dilution context implicate claims in the vote denial context,[296] making more urgent the call to either Congress or the courts to articulate a clear test for deciding these distinct claims.[297]

The two claims—dilution and denial—brought pursuant to Section 2 must be bifurcated through the articulation of effective standards by which judges can determine whether a viable Section 2 vote denial claim has been made. There are three reasons why this bifurcation is necessary. First, proving intentional discrimination becomes increasingly difficult in a world where evidence of overt racism is uncommon and evidence of intentional acts of racism by institutional or individual actors is rare.[298] Second, the evidentiary

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295. *See* 52 U.S.C. § 10301 (2012). *See also*, Tokaji, *supra* note 15, at 691.

296. Tokaji, *The New Vote Denial*, *supra* note 11, at 719-20.

297. *See generally* Tokaji, *The New Vote Denial*, *supra* note 11. The Supreme Court has yet to establish a test to determine exactly when a Section 2 claim has been made. Although a few lower courts have noted that the test for vote denial claims should be distinct from the vote dilution test under *Gingles*. *See, e.g.*, Ortiz 824 F. Supp. at 523; *Common Cause*, 213 F. Supp. 2d at 1110. All of the cases reviewed apply the totality of the circumstances test. In the circuits that have identified vote denial claims as distinct and explicitly articulated a vote denial test, all have adopted the totality of the circumstances test. *See* Smith v. Commonwealth, No. CIV.A. 3:08CV800, 2009 WL 2175759 (E.D. Va. July 16, 2009), *aff'd sub nom*; Smith v. Virginia, 353 F. App'x 790 (4th Cir. 2009); Stewart v. Blackwell, 444 F.3d 843, 878 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007); Farrakhan v. Washington, 338 F.3d 1009, 1017 (9th Cir. 2003); Roberts v. Wamser, 679 F. Supp. 1513, 1529 (E.D. Mo. 1987), *rev'd*, 883 F.2d 617 (8th Cir. 1989), *rev'd on other grounds*, Roberts v. Wamser, 883 F.2d 617 (8th Cir. 1989).

298. The role of unconscious racism as a feature of American society, supported by implicit bias empirical research, supports this contention. *See generally* Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989). One study looked at how implicit bias affected elections administration by examining the unconscious biases of poll workers:

> But racial bias in election administration—more specifically, in the

showings that arise in the impact-based vote dilution context that have long-troubled jurists—concerns stemming from objections to essentialism and the remedy of proportional racial representation—are different in vote denial cases. [299] Third, as the discussion above elucidates, disagreement over the appropriate benchmarks and standards in the vote dilution case law have restricted the ability of courts to recognize the aspects of Section 2 vote denial challenges that include impact-based claims and increased the evidentiary burden for plaintiffs.

Although judges have recognized the need to bifurcate the test for vote denial from vote dilution, most, if not all, have adopted a version of the totality of the circumstances test.[300] However, the totality of the circumstances test does not prevent courts from re-characterizing claims as impact only or provide any guidance to courts on the correct causal standard to apply. A disparate impact test, similar to the Title VII burden-shifting framework, may address this problem. Most scholars who have addressed the need for a distinct vote denial test have proposed some version of the

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> interaction between poll workers and prospective voters at a polling place on election day—can be unintentional as well. Massive amounts of research support the notion that people engage in unconscious or implicit discrimination—that "good people often discriminate and they often discriminate without being aware of it…" Unconscious bias, however, may not just have implications for the specific electoral choices made by voters when they step behind the curtain and into the privacy of the voting booth. Indeed, unconscious bias may prevent a voter from getting into the voting booth and casting a ballot in the first place.

See Page & Pitts, *supra* note 292, at 3-4. Courts' inability to acknowledge implicit biases and unconscious racism in legal doctrine has serious hindered the ability of plaintiffs to find remedies for such latent forms of discrimination. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) ("First, the present doctrine, by requiring proof that the defendant was aware of his animus against blacks, severely limits the number of individual cases in which the courts will acknowledge and remedy racial discrimination.").

299. *See* Tokaji, *supra* note 11, at 720-21 ("In vote dilution cases, it is essential that the court examine this sort of circumstantial evidence in assessing whether a particular electoral scheme diminishes minorities' voting strength compared to other feasible alternatives. A court does not need to rely on such circumstantial evidence, however, when there is direct evidence that an electoral practice has the result of disproportionately denying minority votes.").

300. *See supra* note 221 and accompanying text.

disparate impact, burden-shifting model.[301] A version of the disparate impact, burden-shifting model looks something like this:

> Plaintiff must show that:
>
> (1) the challenged practice results in the disproportionate denial of minority votes (i.e., that it has a disparate impact on minority voters);
>
> (2) that the disparate impact is traceable to the challenged practice's interaction with social and historical conditions
>
> (3) Once the plaintiff makes this showing, the burden should shift to the defendant to justify the challenged practice. Various proposals exists for the defendants showing once the plaintiff makes its prima facie case, ranging from "show[ing that] the challenged practice is narrowly tailored to a compelling government interest,[302] to "clear and convincing evidence that the burden on voting is outweighed by the state interests in the challenged standard, practice, or procedure."[303]

However, there are some limitations with this test. First, the disparate impact test still requires that the plaintiff connect or link the disparity, which

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301. *See, e.g.*, Jason Rathod, *A Post-Racial Voting Rights Act*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 139, 144 (2011) ("Congress should provide a comprehensive framework for evaluating such claims by codifying the same burden-shifting framework as courts apply in disparate impact employment discrimination cases."); Jonathan Sgro, Note, *Intentional Discrimination in Farrakhan v. Gregoire: The Ninth Circuit's Voting Rights Act Standard "Results in" the New Jim Crow*, 57 VILL. L. REV. 139, 172-73 (2012) (footnotes omitted) ("Under such a test, the plaintiffs would have the burden of showing 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.' The test would require plaintiffs to show both a disparate impact on minority voters and a causal connection with social and historical conditions. The appropriate causal connection would be a contributing cause, not a dispositive force."); Tokaji, *supra* note 11, at 724-26.

302. Tokaji, *supra* note 11, at 724-26.

303. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. REV. 439, 473-74. (2015) [hereinafter Tokaji, *Applying Section 2*].

is external to political process, with the disproportionate disenfranchisement in the political sphere.[304] The connection or link between the two systems is a version of the interaction standard, and, like that test, it does not provide guidance to courts on what is the appropriate level of causation—ranging from but-for causation to correlation—that must be demonstrated. Second, courts may be reluctant to recognize impact-based claims as an element of the test, or might re-characterize these claims as impact only claims.[305] Third, where impact-claims, particularly in those cases where there is no evidence of discriminatory purpose in the implementation of the law, incorporating a modified disparate impact test without more into the vote denial context does not solve the problem of determining the appropriate weight of the state's interest in imposing voting requirements and designing or managing election procedures. Unless courts are willing to characterize the burden on voting as a particularly severe or burdensome restriction, and require the defendant jurisdiction to demonstrate a narrowly tailored compelling interest,[306] the plaintiff's claim will typically be rebutted. If the policy is viewed as a "reasonable, non-discriminatory restriction," then the state's justification will be subject to a lower burden of proof.[307] Thus, the modified disparate impact model may be insufficient particularly where courts are reluctant to accept impact-based claims as probative of discriminatory burdens in the electoral system even when linked to social and historical conditions.

B. A More Robust Test for the New Vote Denial

A more robust test for vote denial would enable plaintiffs to successfully challenge qualifications and procedures that disproportionately exclude minority groups. Like simple disparate impact tests, such a test should ensure that minority groups remain active participants in an increasingly diverse electorate. It should also "serve as a prophylactic against intentional discrimination that might otherwise seep into the voting rights process

304. *See id.* at 717.

305. *See Gingles*, 478 U.S. at 47.

306. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.').

307. *See id.* ("But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.").

undetected."[308] This section suggests several ways to strengthen these proposed tests for new vote denial claims.

In the test I propose, and similar to the tests outlined above, the plaintiff must first establish that the challenged standard, practice, or procedure is correlated[309] with disparities in registration or participation rates for minorities. The first prong is also satisfied by showing that the challenged standard, practice, or procedure enacts eligibility requirements that are minority voters are less likely to meet or repeals a practice or procedure that minority voters are more like to use.[310] Next, and also as the tests described above suggest, the plaintiff must demonstrate that the disparate racial impact are correlated with "social and historical conditions" external to the electoral system. This would serve as the evidentiary showing required to link the challenged standard, practice, or procedure with the racial disparity in for example, political access and participation, and provide a basis by which the factfinder can infer causality.[311] For example, when a challenged voting qualification—such as a proof of citizenship requirement which results in Latino voters having their votes not counted at disproportionately higher rates due to insufficient documentation, showing that the inability to procure the required forms of identification is correlated with social, economic and/or historical discrimination, this should be sufficient to state a claim.

Once the court determines that the plaintiff's data and analysis are both reliable and statistically significant, the court must determine the required showing in the defendant's jurisdiction to rebut the claim. The defendant's subsequent rebuttal is pegged to the level of minority exclusion from the

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308. Tokaji, *supra* note 11, at 720.

309. Under this test, Plaintiffs would be required of course to show disparities that are statistically significant to meet their burden. In the disparate impact analysis, courts should also assess the practical significance of the statistical finding. *See generally* Note, Kevin Tobia, *Disparate Statistics*, 126 YALE L. J. 2394-2397 (2017) (discussing practical significance in disparate impact analysis for cases alleging employment discrimination). Practical significance includes a magnitude inquiry and a confidence inquiry. "[A] 'magnitude inquiry' [is] an analysis of the magnitude of the result supported by statistical evidence [and] a 'confidence inquiry' [is] an analysis of the strength of the inference drawn between the statistical evidence and the conclusion on draws from it about the real world." *Id.* at 2394.

310. *See* Tokaji, *Applying Section 2*, *supra* note 303, at 475.

311. Correlation can be demonstrated through statistical techniques, such as regression analysis. *See generally* Alan O. Sykes, *Inaugural Coase Lecture: Introduction to Regression Analysis* (December 1, 1992), http://www.law.uchicago .edu/files/files/20.Sykes_.Regression_0.pdf.

political process within a particular jurisdiction. If the plaintiff demonstrates that the proportion of register voters adversely affected by the new law is "significant" in that they comprise (a) approximately 5% of the registered voters in a district,[312] or (b) that more than 50% of registered minority voters[313] disproportionately use the standard, practice, or procedure that the jurisdiction aims to alter or eliminate, the jurisdiction must demonstrate that the practice is narrowly drawn to serve a compelling state interest.[314] Beneath this threshold, the presumption that the law is impermissible would not

312. *See, e.g.*, *Veasey*, 71 F. Supp. 3d at 659 ("Based on the testimony and numerous statistical analyses provided at trial, this Court finds that approximately 608,470 registered voters in Texas, representing approximately 4.5% of all registered voters, lack qualified SB 14 ID and of these, 534,512 voters do not qualify for a disability exemption. Moreover, a disproportionate number of African–Americans and Hispanics populate that group of potentially disenfranchised voters."); *Frank v. Walker*, 17 F. Supp. 3d 837, 854 (E.D. Wis.) (finding that approximately 300,000 registered voters in Wisconsin or roughly 9% of registered voters in Wisconsin lacked a qualifying ID), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

313. *See, e.g.*, *McCrory*, 831 F.3d at 216 (discussing trial evidence which showed that "60.36% and 64.01% of African Americans voted early in 2008 and 2012, respectively, compared to 44.47% and 49.39% of whites"); *Ohio State Conference of N.A.A.C.P. v. Husted*, 43 F. Supp. 3d 808, 830 (S.D. Ohio) ("[I]n the 2012 General Election, 19.55% of blacks reported voting EIP absentee ballots in Ohio, whereas 8.91% of whites in the state reported they voted EIP absentee ballots. The statistically significant results indicate that black voters were more likely to cast EIP absentee ballots in the 2012 General Election than white voters." (alteration in the original)), *aff'd*, 768 F.3d 524 (6th Cir. 2014), *vacated sub nom. Ohio State Conference of The Nat. Ass'n For The Advancement of Colored People v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014), and *vacated sub nom. Ohio State Conference of The Nat. Ass'n For The Advancement of Colored People v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

314. A similar test has been proposed for constitutional challenges to voting requirements and qualifications. *See* Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for A Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L. Q. 643, 675 (2008) ("Instead of asking whether the requirements at issue make voting excessively difficult for the plaintiff-voters (the individual rights approach); or about the reasons for their enactment, the reasonableness of their tailoring, or the presence or absence of key provisions (the agnostic approaches); the courts would ask whether the requirements cause the number or distribution of participating voters to deteriorate by more than a given amount (*x*%). If so, the requirements would be deemed presumptively impermissible, and would face strict scrutiny. If not, the requirements would be deemed presumptively permissible, and reviewed very leniently.").

apply,[315] but the defendant jurisdiction would instead be required to demonstrate that the state interests in the law outweigh the burden on voters by a preponderance of the evidence.[316]

This formulation attempts to provide the factfinder with guidance for how to weigh evidence of racially disparate impacts and apply the causation standard, without resorting to vague terms like "traceable" and "contributing cause." Rather, the formulation mitigates the causation problem by requiring the plaintiff to make a prima facie showing of correlation[317]—or, that there is a statistically significant relationship between the observed disparities in participation and the challenged practice, as well as the disparities in political participation and social or historical factors external to the political system—which is sufficient to meet the showing under Section 2.

Most importantly, the test enhances the focus on the disproportionate and *systematic* exclusion of racial minorities from the political process based on procedures or qualifications that correlate with race.[318] A facially race-

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315. This model draws from the equal protection context adopting the sliding scale based on the level of exclusion rather than the challenged practice's burden on the right to vote. *See* Burdick, 504 U.S. at 428; Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 324-25 (2007) ("This is in fact what the Supreme Court's Burdick jurisprudence is largely about: a judicial endeavor to create and then to heed relatively simple and objective indicators for whether something is seriously amiss with the democratic process.").

316. This component of the test is adapted from Prof. Tokaji's test. *See* Tokaji, *Applying Section 2*, *supra* note 27, at 485.

317. Correlation sufficed to meet the causal showing in *Gingles*, particularly as it related to racially polarized voting: "For the purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. It 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." *Gingles*, 478 U.S. at 62.

318. *See* SPENCER OVERTON, STEALING DEMOCRACY THE NEW POLITICS OF VOTER SUPPRESSION 85-86 (2006) ("[I]t is illogical to ignore the correlation between race and politics and profess that they exist in two artificial and distinct boxes—racial animus and direct but tolerable politics. . . Our current discussion of race and politics is counterproductive in that it encourages civil-rights advocates to attempt to prove that political strategists are "racists" in order to justify the continued existence of voting-rights protections. It also prompts conventionally labeled political 'opponents' of racial communities to dismiss real harms that stem from exclusion along racial lines. Practices that suppress voters of color, even when undertaken or tolerated for partisan purposes, facilitate racial inequality.").

neutral qualification that interacts with existing structural inequalities to exclude minorities from participating in the political process constitutes participation harms that Section 2—as well as the Fourteenth Amendment—aim to rectify.[319] The test above seeks to lessen the plaintiff's burden by defining "interacts" as correlation because, in some cases, correlation could provide statistical grounds for inferring discriminatory intent. Lessening the plaintiff's burden is justifiable on two grounds. First, lessening the burden captures the new generation of voting qualifications or procedures that target factors that may be considered proxies for race. In this way, lowering the plaintiff's burden would allow groups to challenge practices that may allow race discrimination, from systems external to the electoral one, to seep into the political process undetected. In fact, the recent wave of voter ID laws and other restrictive initiatives have been linked to attempts to reduce minority voter turnout.[320] Such actions may constitute race-based intent, but might not be challenged if the motives of the legislature cannot be ascertained and proven. Lowering the plaintiff's burden would enable minority plaintiffs to target these practices.

Second, the test recognizes the government's interest within the appropriate, localized, social context.[321] The difficulty in developing tests for new forms of vote denial is that the mere presence of these policies does not necessarily connote the presence of race-based intentional discrimination. Stated differently, the existence of the newest forms of vote denial coupled with evidence of disproportionate racial impacts, both within the political process and external to it, does not automatically permit the factfinder to draw

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319. *See* Elmendorf, *supra* note 107, at 419-420; *see also* Michael J. Pitts & Matthew D. Neumann, *Documenting Disfranchisement: Voter Identification During Indiana's 2008 General Election*, 25 J.L. & POL. 329, 330 (2009) ("At its most foundational level, the debate surrounding photo identification requirements can be resolved by balancing a photo identification requirement's ability to preserve the integrity of elections by preventing in-person voter fraud against the extent to which such a law limits access to democracy by preventing legitimate voters from casting countable ballots.").

320. *See* Haygood, *supra* note 30 and accompanying text.

321. *See, e.g.*, Nelson, *supra* note 87, at 586 ("Reduced to their simplest terms, Section 2's core values are that (1) racial context matters and (2) implicit bias counts. 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." (footnotes omitted)); Tokaji, *Applying Section 2*, *supra* note 303, at 483 ("[I]t is very important that courts consider how the practice fits in (or does not fit in) with the body of election rules and practices in the state.").

the inference of discrimination. This is especially true to the extent that judges concerned about the basis for inferring racial discrimination based on disproportionate impact believe that state actors enacting voting procedures or requirements that inflict disproportionate burdens on minority groups should not be presumed to be enacting policies that are racially discriminatory.

This presumption is fair to the extent one believes that race-based action is confined to individual bad actors. It says nothing, however, about the ways in which institutions—made up of individual actors, making subjective decisions—operate, on the whole, to both facilitate exclusion based on racial bias and perpetuate racial bias through exclusion. To protect against these ills, the new test for vote denial must find a way to recognize and incorporate institutional responsibility and mechanisms for reform.

Third, the new test recognizes these interests while at the same time recognizing the role of structural forms of racism in American society.[322] By structuring the test to allow plaintiffs to meet the evidentiary showing through correlation, —and thereby, establish the inference of discrimination—the test allows plaintiffs to challenge facially race-neutral policies with disproportional participation harms to minorities. Yet, by linking the government's standard for rebuttal to the level of exclusion, the government's burden will depend on the level of racial exclusion its policy generates; less exclusion requires demonstrating rational government interests, and more exclusion requires a narrowly tailored compelling interest. Structuring the government's burden in this way might incentivize government actors to adopt policies that do not have vastly disparate impacts between minorities and non-minorities. It also focuses the inquiry on the test for violations of Section 2—whether the challenged policy or practice results in unequal access to, or participation in, the political process—and moves the discussion away from disputes involving impact-based claims and disagreement over the appropriate level of causation.

Fourth, the formulation above, requiring the plaintiff to demonstrate correlation, is not just consistent with the results test, which requires that plaintiffs establish a violation by showing that the political process is not equally open to protected classes under Section 2, but is a congruent and

322. Congress stated explicitly that its motivation behind amending Section 2 to eliminate the requirement of intent-based discrimination for liability was that the analysis as then construed focused too much of the inquiry on individual actions rather that the structural forces causing the exclusion. *See, e.g.*, *Ortiz*, 824 F. Supp. at 520 (citing Senate Report to the 1982 Amendments).

proportional remedy to redress infringements on the right to vote. A correlation standard would allow the factfinder to infer discrimination in jurisdictions where "plaintiff's lack of electoral opportunity owes to race-based decision-making by majority-group actors."[323] Even though Section 2 does not require a showing of intent-based discrimination, as noted above Congress likely intended—and avoiding constitutional issues would require—a showing of something more than mere disparate impact. In some cases, that something more could be race-based decision-making.[324] Today, for Section 2 claims, race-based decision-making could encompass practices that are adopted or maintained because of racially discriminatory reasons, such as an awareness of the racial impact[325] of certain policies and procedures.[326] Here, the inquiry is not focused on a "smoking gun" that links individual actors to discrete acts of discrimination, but rather focused on holding institutions responsible for enacting policies with known discriminatory effects. For example, in a concurring opinion, Judge Calabresi argued that a future legislature's awareness of the racial impact of the 100-to-1, crack-to-cocaine sentencing disparity may constitute an Equal Protection violation.[327] Judge Calabresi argued the following:

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323. Elmendorf, *supra* note 107, at 421 (describing scope of injury under Section 2). Professor Elmendorf's article focuses on conceptualizing vote dilution claims under Section 2.

324. *See id.* at 384 ("A race-biased decision, as I shall use the term, is one that would have been different had the race of the persons considered by the decisionmaker been different.").

325. The awareness of the disparities inquiry could be incorporated into the proposed Section 2 vote denial test as well. On rebuttal, plaintiffs may attempt to refute the state's justification for its exclusionary policy by arguing that the state was aware of the disparities and racial impacts of the particular qualification when it chose to enact the law. This model would encourage legislatures to become aware of the discriminatory impact of their policies and to keep records or documentation of research into these disparities to avoid liability, providing additional grounds for institutional accountability and even reform through informed decision-making. *See* Gilda R. Daniels, *A Vote Delayed is a Vote Denied: A Preemptive Approach to Eliminated Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 57-59 (2008) (arguing for voter impact statements).

326. For Equal Protection claims, this argument would be foreclosed by the Supreme Court's holding in Washington v. Davis, 426 U.S. 229 (1976) and Personnel Admin. Mass. v. Feeney, 442 U.S. 256 (1979). *But see* United States v. Then, 56 F.3d 464, 468 (2d Cir. 1995) (Calabresi, J., concurring).

327. *Then*, 56 F.3d at 469 (Calabresi, J., concurring).

> If Congress, for example, though it was made aware of both the dramatically disparate impact among minority groups of enhanced crack penalties and of the limited evidence supporting such enhanced penalties, were nevertheless to act affirmatively and negate the Commission's proposed amendments to the Sentencing Guidelines (or perhaps were even just to allow the 100–to–1 ratio to persist in mandatory minimum sentences), subsequent equal protection challenges based on claims of discriminatory purpose might well lie. And such challenges would not be precluded by prior holdings that Congress and the Sentencing Commission had not originally acted with discriminatory intent. As the Supreme Court has pointed out, facially-neutral legislation violates equal protection if there is evidence that the legislature has "selected *or reaffirmed* a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[328]

Although it is perhaps not sufficient to state an Equal Protection claim, the point is that, in some cases, awareness of dramatic racial disparities resulting from the imposition of a voter qualification or election policy could be sufficient to meet the plaintiff's burden under Section 2.

Finally, vote denial claims, unlike vote dilution claims, directly implicate access to the ballot and/or the right to cast a ballot and have that vote counted fairly. Qualifications that amount to vote denial and policies or procedures that create unequal access to the political process for minorities directly implicate anti-caste principles under the Fourteenth Amendment:

> [T]his principle states that the concept of discrimination should include not only intentional acts of disparate treatment but also policies that "turn[] highly visible but morally irrelevant differences into a basis for second-class citizenship." Because punch card voting technology yields a racial gap in lost votes, it saddles minority groups with social disadvantages that relegate them to the status of a subject race and discourages them from participating in core political activities, here the franchise itself. The implied social message is that it is legitimate for the disproportionate risk of lost votes to fall on black shoulders, whereas such risks may be regarded

328. *Id.* at 468 (Calabresi, J., concurring) (emphasis in original) (citing *Feeney*, 442 U.S. at 279).

as intolerable if they had a similar effect on whites.[329]

Viewed through this lens, policies implicating access to the ballot or the right to participate on equal footing in the political process by having one's vote counted may confer Congress with greater latitude in protecting minority voters from these forms of vote denial.[330]

VI. CONCLUSION

> Assuredly, much progress has been made since the enactment of the Voting Rights Act in 1965. But in spite of the contributions the majority quite properly credits with eradicating many of the most glaring forms of discrimination in voting, the law has yet to ensure that members of minority groups will have an equal opportunity to participate in the political process. We cannot pretend . . . that the discrimination prohibited by the Voting Rights Act has been relegated to an unfortunate but closed chapter of American history. Discrimination and its effects remain a part of our present reality. If we deny the continued existence of this problem, we not only lose our ability to recognize and remedy present instances of unlawful inequality; we also guarantee that discrimination and the damage it does to the integrity and effectiveness of democratic government will be a more prevalent and intractable feature of our country's future.[331]

The statements by Judge Lewis ring true in an era characterized by new forms of vote denial. In the realm of voting rights, racial progress in America is reflected not only in the election of the first African American president, but also in the increased participation rates of historically underrepresented

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329. Moke & Saphire, *supra* note 226, at 55 (citing Cass R. Sunstein, *The Anti-Caste Principle*, 92 MICH. L. REV. 2410, 2445, 2449-51 (1994)). These new forms of vote denial should trouble those concerned with preserving majoritarian values and encouraging extensive participation in civic institutions by all groups. *See, e.g.*, Rathod, *supra* note 300, at 205.

330. *See* Tokaji, *Intent and Its Alternatives*, *supra* note 17, at 370 ("*Katzenbach v. Morgan* provides further support for the idea that Congress may have greater latitude under the Fourteenth Amendment in protecting rights of participation, as compared with rights of representation.").

331. *Ortiz*, 28 F.3d at 319 (Lewis, J., dissenting).

groups.[332] However, although progress in the realm of voting rights has certainly been made, empirical research shows that race still plays a significant role in American politics.[333] Importantly, the vestiges of structural racism remain, as evidenced by such social and economic indicators as mass incarceration,[334] wealth inequalities,[335] home foreclosure disparities,[336] and the educational inequities.[337] Thus, although the nature of the harms might have changed, America still needs the Voting Rights Act.

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332. The Voting Rights Act contributed to a rise in the number of minorities elected to public office. *See, e.g.*, Davison, *supra* note 6, at 43 ("The number of Black elected officials increased from fewer than 100 in 1965 in the seven targeted states to 3, 265 in 1989. In 1989 blacks in these states comprised 9.8 percent of all elected officials as compared with about 23 percent of the voting age population. While no estimates for Hispanic officeholders in 1965 are available, their numbers in six states with especially large Hispanic concentrations—Arizona, California, Florida, New Mexico, New York, and Texas—increased from 1,280 in 1973 to 3,592 in 1990. Hispanic officials thus constitute about 4 percent of the elected officials in those states, as compared with the Hispanic voting-age population of approximately 17 percent."); Haygood, *supra* note 30, at 1025-26 (citing data on increased participation rates).

333. *See* 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, 1387 (2010) ("The exit polls and election returns suggest that the 2008 election did not represent a fundamental shift in national patterns of race and vote choice. However, these national patterns mask great variation at the state and county level. In particular, Obama's relative success among white voters, as compared to John Kerry four years earlier, varied greatly by region. In the Deep South, Obama actually did worse than Kerry among white voters. . . . We view these findings as principally a response to the charges that the 2008 election represented a fundamental transformation in voting patterns relevant to the VRA.").

334. *See generally* Michelle Alexander, THE NEW JIM CROW (2010).

335. *See, e.g.*, Rakesh Kochhar, et al., *Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics*, PEW RESEARCH CENTER: SOCIAL AND DEMOGRAPHIC TRENDS, July 26, 2011, *available at* http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf.

336. *See, e.g.*, Debbie G. Bocian, *Foreclosures by Race and Ethnicity: The Demographics of a Crisis*, CENTER FOR RESPONSIBLE LENDING STUDY, June 18, 2011, *available at* http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf.

337. *See, e.g.*, Lyndsey Layton, *U.S. Students Make Gains in Math But Stalls in Reading*, WASH. POST (Nov. 1, 2011). The achievement gap between minority and non-minority students has even prompted some states to adopt performances measures linked to the race of the student. *See, e.g.*, Claudio Sanchez, *Firestorm Erupts Over Virginia's Education Goals*, NPR (Nov. 12, 2012).

The tension between disparate impact and Equal Protection articulated in *Ricci* is a variation of the same concerns highlighted in the impact-based vote dilution context. Although it remains to be seen what this means for disparate impact provisions under the Voting Rights Act, there is reason to believe that these provisions might be similarly threatened. However, these concerns are animated from disputes regarding the representation rights of minority groups within a majoritarian democratic system, and, as such, they bear little resemblance to the vote denial claims directly implicating access to the ballot or reconstructing barriers to equal participation in the political process. This article has highlighted the ways in which disputes surrounding impact-based claims, such as vote dilution, have spilled over into the vote denial context and hindered the ability of claimants to challenge an outright exclusion from the political system and other forms of inequality. As the article demonstrates, the reluctance of courts to accept evidence of "impact plus" stems in part from concerns that the remedies required by impact-based claims under Section 2 of the Voting Rights Act will involve essentialism, an affront to individual dignity, and require proportional racial representation as a remedy. Although such objections are misplaced in the vote denial context, the debates in this doctrine have exerted considerable influence in the vote denial context and have impeded the ability of plaintiffs to prevail on these challenges in court. The proposed test for vote denial claims builds on previous tests, but addresses the concerns animating judicial discomfort with impact-based claims while providing plaintiffs with an effective remedy for challenging both exclusion from and disproportionate burdens in the political system in a manner that affords due recognition to the state interests. By enabling plaintiffs to challenge new forms of exclusion and inequality in the political process, this article establishes a framework to aid plaintiffs in challenging discriminatory policies and practices that threaten to forestall or rollback the progress made under the Voting Rights Act in a post-*Shelby County* world.