

SECTION 2 OF THE VOTING RIGHTS ACT, SPECIAL CIRCUMSTANCES, AND EVIDENCE OF EQUALITY

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Vote dilution doctrine under Section 2 of the Voting Rights Act directs courts to look to evidence of election results to determine if all voters have equal opportunity to elect representatives of their choice. However, not every election in which a minority-preferred candidate prevails is necessarily evidence of equality. Those elections that courts judge to be illusory evidence of equality are said to be characterized by “special circumstances.” When a court recognizes special circumstances surrounding an election, it discounts the evidentiary value of that election, typically to the benefit of vote dilution plaintiffs. To date, no judicial opinion or scholarly work has proposed a comprehensive framework to explain the circumstances courts already recognize or point out the circumstances they ought to recognize. Drawing on the seminal Supreme Court precedent of Thornburg v. Gingles, the Voting Rights Act itself, and over thirty years of lower-court practice, this Note proposes a test. If the circumstances of an election are such that a victory for a minority-preferred candidate belie an ongoing, structural burden on the right to vote, that election is characterized by special circumstances. This Note uses a familiar tripartite framework of the “rights to vote” as an analytical lens for drawing lessons from past decisions and suggesting where the doctrine should go in the future. By recognizing the wider universe of burdens on voting rights, including those typically beyond the reach of judicial remedies, special circumstances doctrine can ensure vote dilution remedies are available where they are needed.

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INTRODUCTION

In December 2014, the NAACP of Missouri sued the Ferguson, Missouri, school district for violating Section 2 of the Voting Rights Act (VRA).¹ The NAACP brought suit just a few months after the tragic killing of Michael Brown in Ferguson, amid a local and national reckoning with racism in policing.² The lawsuit challenged another manifestation of racial bias in Ferguson: racial vote dilution. The NAACP claimed the district's at-large elections denied equal opportunity to Black voters to elect representatives of their choice.³ At-large elections are frequent targets of such claims because all seats are elected by all voters in a jurisdiction, rather than by geographic subdivisions such as wards. Therefore, a majority group voting as a bloc can deny *any* representation to a minority group that prefers different candidates.

¹ Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist., 201 F. Supp. 3d 1006, 1015 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018), *cert. denied*, 139 S. Ct. 826 (2019).

² See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 5, 62–63 (2015) (concluding that public outcry in response to Michael Brown's death was rooted in Ferguson Police's "unnecessarily aggressive" approach to law enforcement).

³ *Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d at 1015.

To illustrate, suppose seven seats are chosen in at-large elections in a town in which Group *A* comprises fifty-five percent of the electorate, and Group *B*, forty-five percent. The groups are each politically cohesive, but they almost always prefer different candidates than each other. Even though Group *A* is not that much larger, it can theoretically cast more votes for every seat than Group *B* can. If Group *A* votes cohesively, it can elect its preferred candidates to all seven seats, leaving Group *B* with no representation. If Groups *A* and *B* are defined by race or ethnicity, this may violate the VRA. One remedy is to draw single-member districts to create at least some districts in which the minority has the opportunity to elect their preferred candidates.⁴ Imagine dividing the hypothetical district above into seven single-member wards. Depending on the district's political geography, one might reasonably expect a more equal four-to-three split.

⁴ There are other available remedies that may be better suited to certain jurisdictions, including in Ferguson, where the district court ordered the remedy of cumulative voting. See Rachel Lippman & Camille Phillips, *Court Orders Cumulative Voting in Ferguson-Florissant School Board Elections*, ST. LOUIS PUB. RADIO (Nov. 21, 2016), <https://news.stpublicradio.org/post/court-orders-cumulative-voting-ferguson-florissant-school-board-elections> (citing Remedial Order, Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist., 201 F. Supp. 3d 1006 (E.D. Mo. 2016) (No. 4:14 CV 2077 RWS)). After the district exhausted its appeals in 2019, the new system went into effect for the April elections. Tony Rothert, *Black Voters in Ferguson-Florissant School District Will Be Heard*, ST. LOUIS POST-DISPATCH (Mar. 21, 2019), https://www.stltoday.com/opinion/columnists/black-voters-in-ferguson-florissant-school-district-will-be-heard/article_6603f5ab-da5a-5312-a004-5b73ff39f1cd.html. But see Sandra Jordan, *Cumulative Voting in Ferg-Flor, School Board Diversity Unchanged as Black Challenge Unseats Black Incumbent*, ST. LOUIS AM. (Apr. 3, 2019), http://www.stlamerican.com/news/local_news/cumulative-voting-in-ferg-flor-school-board-diversity-unchanged-as/article_3e7bc958-5642-11e9-9d7a-77058f2e1260.html (noting that cumulative voting did not swing the outcome of the first school board election in which it was used, though as the Missouri ACLU director noted that does not mean it did not or will not have an impact). These remedies typically take the form of alternative voting schemes. The effects of alternative voting systems are functionally equivalent to redistricting for the purposes of this Note, in the sense that they both are designed to achieve something closer to equality in representation. For example, in a typical multi-seat election, each voter can cast votes for as many candidates as there are seats up for election, but they cannot vote multiple times for a single candidate. See *infra* Section I.B.3 (discussing and illustrating the effect of these typical voting schemes and the incentive to engage in “bullet voting” to mitigate the negative effects). If a jurisdiction has a good reason to prefer at-large elections to redistricting, but some vote dilution remedy is nonetheless needed, courts may impose remedies such as limited voting—limiting each voter to casting only one vote, regardless of the number of seats up for election—or cumulative voting—allowing voters to cast multiple votes for a single candidate. See, e.g., *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 755–71 (N.D. Ohio 2009) (explaining both limited voting and cumulative voting proposals and ultimately deciding on a remedy of limited voting). See generally Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 242 (providing more background on alternative voting systems, “includ[ing] cumulative voting, limited voting, and preference (or single-transferable) voting,” and evaluating their utility as vote dilution remedies relative to redistricting remedies).

To prevail on the racial vote dilution claim, the NAACP had to prove three prerequisites, articulated by the Supreme Court in *Thornburg v. Gingles*.⁵ The first two were easily met. First, the NAACP showed that the Black population of Ferguson is large and geographically “compact” enough that Black voters could constitute a majority in a hypothetical single-member district.⁶ Second, the NAACP showed that voting in Ferguson was “racially polarized,” meaning voters of different races tend to prefer different candidates.⁷

The NAACP’s third prerequisite showing was that white voters usually elect their preferred candidates and defeat the preferred candidates of Black voters “in the absence of special circumstances.”⁸ Between 2011 and 2014, six of the last seven candidates elected to the board were the preferred choices of white voters; only one was the choice of Black voters.⁹ In 2015, however, Dr. Courtney Graves was elected as the preferred candidate of Black voters.¹⁰ Her election was unusual. Voters and candidates deviated from historical patterns in 2015 to the benefit of Black voters’ preferred candidates.¹¹ The court inferred that the shifts were driven by the swell of activism in the city.¹² So the court faced a conundrum. On one hand, Dr. Graves’s election looks like evidence that equal electoral opportunity already exists and that no judicial remedy is needed. On the other, the 2015 election is just one, unusual data point that might not be replicable. Should Dr. Graves’s election really count against the NAACP?

Perhaps not. To establish vote dilution and win a remedy like redrawing district lines to promote more equal representation, plaintiffs must prove that “minority-preferred” candidates “usually” lose.¹³ However, the *Gingles* court included a caveat: They must usually lose

⁵ *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (Brennan, J.) (plurality opinion).

⁶ *Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d at 1015, 1030.

⁷ *Id.* at 1060. Racial polarization does not necessarily mean that voters prefer candidates of the same race. *See Gingles*, 478 U.S. at 67–70 (“Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.”); Christopher S. Elmendorf et al., *Racially Polarized Voting*, 83 U. CHI. L. REV. 587, 590, 612 (2016) (noting the understanding that judges are not to engage in “racially essentialist” assumptions that people think a certain way because of their race). *But see Gingles*, 478 U.S. at 83 (White, J., concurring in part and dissenting in part) (“Under [the plurality’s] test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. . . . This is interest-group politics rather than a rule hedging against racial discrimination.”).

⁸ *Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d at 1015–16.

⁹ *Id.* at 1058–60.

¹⁰ *Id.* at 1058.

¹¹ *Id.* at 1056–57.

¹² *See id.*

¹³ *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) (plurality opinion).

“in the absence of special circumstances.”¹⁴ Courts have developed the “special circumstances” doctrine for vote dilution cases from that hook, and the doctrine gives courts flexibility to attend to the context of election outcomes, rather than simply counting wins and losses. Ordinarily, an election like Dr. Graves’s, in which the minority-preferred candidate wins, is evidence of equality, weighing against the plaintiffs in a vote dilution challenge. But if an election is won under “special circumstances,” a court may discount that election as evidence weighing against the plaintiffs in analyzing the third prong of the *Gingles* test.¹⁵ The *Ferguson* court did just that. The court found Dr. Graves’s election partially resulted from special circumstances, giving it “slightly less weight” as evidence against the plaintiffs, and ruled in their favor.¹⁶

Still, no court has offered a systematic approach to determining what circumstances are “special.”¹⁷ This has caused two main problems. First, as a descriptive matter, courts apply the doctrine inconsistently. There is a well-recognized core set of special circumstances, drawn from an illustrative list in *Gingles*, which are discussed in Part I.¹⁸ But even as to those, applications vary widely among and within circuits, in part because they are untethered from any underlying framework. Second, as a normative matter, courts apply the doctrine too narrowly. Even though the *Gingles* list was explicitly illustrative, not exhaustive, only a few courts, in a few cases, have ventured beyond that core set. Thus, courts have erected improper barriers to relief under the VRA.

This Note takes up the project of articulating a comprehensive framework of special circumstances. In brief, this Note argues that special circumstances are present when the conditions of an election temporarily mask an ongoing, unequal burden on the right to vote.¹⁹

¹⁴ *Id.*

¹⁵ *Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d at 1054, 1057–58 (according those elections “slightly less weight”).

¹⁶ *Id.* at 1057–58.

¹⁷ For a catalog of special circumstances cases, see ELLEN KATZ ET AL., DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982, at 19–20 & 74–77 nn.178–200 (2005). Some of the cases mentioned fall outside the scope of this Note. This Note makes a further contribution by updating that catalog, providing a normative framework, and suggesting expansion of the doctrine.

¹⁸ *Gingles*, 478 U.S. at 57 & n.26 (listing “absence of an opponent, incumbency, and the utilization of bullet voting” as an illustrative list of special circumstances).

¹⁹ *Cf.* *Pope v. County of Albany*, 94 F. Supp. 3d 302, 340 (N.D.N.Y. 2015) (framing special circumstances as “not necessarily probative of a larger pattern of minority-preferred candidate success”); *Aldasoro v. Kennerson*, 922 F. Supp. 339, 376 (S.D. Cal. 1995) (framing special circumstances as denoting elections that are “unrepresentative”); Randall Thomas Kim, “*Special Circumstances*” and *Section 2 of the Voting Rights Act*:

Those elections should be discounted because they are illusory evidence of equality. This novel framing is consistent with the VRA, with *Gingles*, and with many lower courts' practices. The descriptive aspect of this Note might help courts be more consistent and systematic in the future. Continuing down the fraught path courts have followed to date risks premature withdrawal of protection of voting rights²⁰ or unnecessarily extending race-conscious districting, which has been called the "politics of the second best"²¹ and the "sordid business [of] divvying us up by race."²²

This Note also advances a normative argument. Courts should apply this framework to new applications of special circumstances, building upon current practice. Vote dilution doctrine under the VRA presents many difficulties for courts, but it is at least judicially enforceable, while other burdens on voting rights are less amenable to judicial redress.²³ Through special circumstances, courts can take notice of those burdens *within* the confines of vote dilution, when a community experiences several burdens on their voting rights at once. Courts can recognize when an election result belies another burden on the right to vote—even one that is not vote dilution, and even one that is not independently actionable—and discount it as evidence against plaintiffs in a vote dilution lawsuit.

For example, Black voters in Ferguson have experienced both vote dilution in the form of at-large elections and voter suppression in the form of a variety of mechanisms that limit access to actually turn out and vote.²⁴ Perhaps absent voter suppression—also called "vote

Defining a Standard, 28 COLUM. HUM. RTS. L. REV. 605, 626–27 (1997) (“[T]he establishment that a circumstance existed and voting behavior changed should create a strong presumption that the minority-preferred candidate’s election was due to special circumstances and is therefore of minimal probative value in determining whether racially polarized voting exists.”).

²⁰ Cf. *Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) (“Throwing out preclearance when it has worked . . . is like throwing away your umbrella in a rainstorm because you are not getting wet.”).

²¹ *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (quoting BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 136 (1992)).

²² *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting).

²³ Compare Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2158 (2016) (arguing Section 2 is not “toothless”), and Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666 (2001) (characterizing vote dilution claims as “one of the most important weapons in the civil rights arsenal”), with *infra* Sections II.A, III.A.

²⁴ See *infra* notes 123–26 and accompanying text.

denial”²⁵—at-large elections would not be a problem, but we cannot assume away vote denial. While courts cannot remedy many forms of vote denial under current doctrine, courts can remedy vote dilution. Moreover, they can recognize when the candidate preferred by Black voters has won an election despite vote denial and because of special circumstances. They can recognize that one peculiar election does not signal that all barriers to equal voting rights have been cleared away. If the vote dilution claim is successful and all voters begin to see equal representation, those barriers may actually start to fall. The typical remedy of breaking up or redrawing districts is imperfect; it is intrusive and does not address underlying inequality.²⁶ But it offers a foothold of representation for groups to whom it has been systematically denied. That is a good in itself, and there is evidence that such a foothold promotes remediation of other forms of inequality that courts cannot reach directly.²⁷

The remainder of this Note is organized around three categories of burdens on voting rights that may give rise to special circumstances. One can think of a right to vote with three parts, or of three “rights to vote”—participation, representation, and choice—each of which is part of the VRA’s guarantee of equal opportunity “to *participate* in the political process and to elect *representatives* of their *choice*.”²⁸

²⁵ See, e.g., Elmendorf et al., *supra* note 7, at 690 & n.395.

²⁶ Cf. Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 395–97, 397 n.97 (2012) (discussing worries over vote dilution’s “unintended consequences”).

²⁷ See *id.* at 397–98, 397 n.97 (discussing research demonstrating the “depolarization” effects of representation by out-group officeholders and the potential for reduced bias and negative stereotyping); *id.* at 395–96, 395–96 n.89 (noting that the VRA aims to “hasten the waning of racism in American politics” (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994))). In a recent book, Robert Tsai argues that lawyers and non-lawyer reformers ought to adopt an approach of “practical equality.” See generally ROBERT L. TSAI, PRACTICAL EQUALITY (2018). Such an approach serves as “a form of pragmatism to protect our progress on equality and to find other ways of doing justice when we have trouble agreeing to do it explicitly”—perhaps because of concern over “degeneration of a social good, stigmatization [of those deemed to have perpetrated an injury to equality, or] political blowback”—which ought to help avoid “tragic precedents” like *Plessy* that condone obvious, gross inequality over fear of the consequences of the first-best alternative. *Id.* at 25–27, 37.

²⁸ 52 U.S.C. § 10301(b) (2012) (emphasis added); see also Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 248–51 (characterizing the right to vote as three separate “rights to vote”). Professor Karlan’s trichotomy discussed participation, representation, and governance. *Id.* The Supreme Court has held that certain categories of governance claims are not cognizable under the VRA. See *Presley v. Etowah Cty.* Comm’n, 502 U.S. 491, 506 (1992). This Note argues that choice is both another facet of the broader right of governance and nonetheless a cognizable injury under the VRA.

Part I discusses representation, or the right to see one's vote translated into the election of one's chosen candidate. "Vote dilution" is the label for any device that abridges the right of representation. Section I.A expands on the above outline of vote dilution doctrine and the role of special circumstances. In *Gingles*, the Supreme Court provided an illustrative list of special circumstances, which operate specifically on vote dilution. Section I.B critiques lower court attempts to elaborate on that list. Some decisions go too far, finding special circumstances mechanically without a firm normative basis, while others take an overly narrow view of the scope of those circumstances. The rest of the Note then argues for carrying the reasoning of *Gingles* further to embrace more special circumstances and be more protective of voting rights.

Part II discusses participation, or the right to cast a ballot. Abridgement of this right is called "vote denial." Section II.A begins with an overview of the vote denial doctrines, paying particular attention to gaps in their coverage that allow vote denial to persist in many jurisdictions. Section II.B discusses cases recognizing special circumstances that belie the persistence of vote denial in a particular election. Persistent vote denial as such is not a special circumstance. The special circumstances are things like surges in turnout that result in a single victory for a group that is typically subject to both vote denial and vote dilution, like in *Ferguson*. These cases recognize that courts cannot directly remedy all vote denial but that they should nonetheless recognize it and ensure remedies remain available for vote dilution. Courts should assume this role more, so efforts to overcome vote denial do not hamper vote dilution remedies that could facilitate political redress of the underlying burden on voter participation.

Finally, Part III discusses choice, or the right to an opportunity to elect a representative that reflects a voter's preferences. The right to an opportunity to elect not only one's top choice from a given ballot, but a true representative of one's political goals, is essential to meaningful equality of representation, of the kind that has visible governance implications. Burdens on governance are generally characterized by "the severance of the vote from its central function of ensuring that all members of our political community are accorded equal concern by policymakers."²⁹ Equalizing voters' freedom of choice is one component of ensuring all are accorded equal concern. The right of choice is limited, similar to the right of representation, in that no voter has a right to elect any candidate, much less their first choice, only to

²⁹ Daniel P. Tokaji, *Vote Dissociation*, 127 *YALE L.J.F.* 761, 763 (2018) (citing Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 *U.S.F. L. REV.* 1, 3-4 (1987)).

equality of opportunity. Every choice is constrained, and all candidates are chosen by compromise. But as Section III.A discusses, when one group systematically compromises more, they may elect candidates they vote for and yet see themselves represented less faithfully or vigorously in government. They may receive less than equal concern in governance decisionmaking by elected bodies.³⁰ When that group is defined by race or ethnicity, the unequal burden on their right of choice should be a cognizable injury redressable under the VRA.³¹ There is no “typical” remedy for this injury yet, because courts have rightly never attempted to regulate choice directly, nor should they start now. But courts can recognize when choices are too unequally constrained to say that an election is evidence of equality. They can label that a special circumstance and ensure that it does not thwart an otherwise meritorious vote dilution lawsuit. Even if courts only recognize the most extreme burdens on choice as special circumstances, this is a call for a dramatic shift, but Section III.A makes the case that this shift is warranted. Section III.B discusses cases and commentary that suggest the viability of this idea and illustrate the potential for expansion.

I

REPRESENTATION, VOTE DILUTION, AND VOTER PREFERENCES

The right to representation is at the heart of Section 2 of the VRA.³² This right is sometimes called “aggregation,” because it requires “the ability to join our votes together with like-minded others, to elect our preferred candidates.”³³ Vote “dilution” is so named because it works by mixing a number of like-minded voters with a larger number of voters who oppose their preferences as a bloc, frustrating representation.³⁴ Today, Section 2 mainly addresses the way districts group voters together.³⁵ At-large elections and multi-

³⁰ See Karlan, *supra* note 28, at 251 (explaining that the complaint of those affected by the aggregated voting districts is the dilution of their vote at the post election stage of official decisionmaking).

³¹ *Presley*, 502 U.S. at 503–04, in which the Supreme Court ruled that certain burdens on governance are not actionable under the VRA, is distinguishable, as discussed in Section III.A *infra*.

³² See 52 U.S.C. § 10301(b) (guaranteeing equal opportunity “to elect representatives of [one’s] choice”).

³³ Tokaji, *supra* note 29, at 764 & n.19 (citing Karlan, *supra* note 28, at 249).

³⁴ See Gerken, *supra* note 23, at 1666.

³⁵ Historically, several tactics have come under that heading, such as voter fraud and malapportionment. See, e.g., *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (characterizing various forms of fraud as vote dilution); *United States v. Saylor*, 322 U.S. 385, 386 (1944) (same); *United States v. Classic*, 313 U.S. 299, 333 (1941) (Douglas, J., dissenting) (same);

member districts get the most scrutiny, because they combine large groups of voters, tending to submerge the votes of a minority in the majority. Single-member districts can achieve the same result if none of the districts provide actual electoral opportunity to people of color.

Even if vote dilution has historically afflicted a jurisdiction, there are many reasons why it might not prove decisive in a given election. Voters of different races might genuinely come to prefer the same candidates—that is, racially polarized voting may depolarize. In that case, there is good reason to deny a vote dilution claim, as remedies like race-conscious districting appear unnecessary. But in other cases, one may not be so sanguine. An unusual condition might cause white voters temporarily to prefer the minority-preferred candidate, or voters might vote strategically in a way that is not durable. These are just a few examples of special circumstances. Section I.A briefly outlines *Gingles* and the role of the special circumstances doctrine. Section I.B critiques lower court attempts to elaborate upon this doctrine.

A. *Vote Dilution Doctrine and the Gingles Test*

Vote dilution doctrine walks a difficult line: A democratic system must protect both the rights of majorities to govern and of minority groups to have a voice and live free from discrimination.³⁶ So courts “have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates”³⁷ A difficult question thus arises

see also Reynolds v. Sims, 377 U.S. 533, 555 (1964) (characterizing malapportionment as a “dilution of the weight of a citizen’s vote”); Baker v. Carr, 369 U.S. 186, 206 (1962) (analogizing the malapportionment injury to *Classic* and *Saylor*). While those claims have not disappeared, voter fraud is negligible today, and malapportionment is dealt with through other doctrines. *See* JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 7 (2007) (debunking myths about the prevalence of voter fraud); Sean Morales-Doyle & Rebecca Ayala, *There’s Good Reason to Question Texas’ Voter Fraud Claims*, BRENNAN CTR. FOR JUST.: BLOG (Jan. 29, 2019), <https://www.brennancenter.org/blog/theres-good-reason-question-texas-voter-fraud-claims> (detailing why recent voter fraud claims in Texas were misleading or false).

³⁶ *See* Gerken, *supra* note 23, at 1680–81 (explaining that a fundamental assumption of dilution theory is that minority groups should have an opportunity to aggregate their votes effectively). *See generally* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (listing potential justifications for weakening the presumption of constitutionality of democratically enacted laws, including “restrictions upon the right to vote . . . interferences with political organizations . . . [and] prejudice against discrete and insular minorities”); SAMUEL ISSACHAROFF, PAMELA S. KARLAN, RICHARD H. PILDES & NATHANIEL PERSILY, THE LAW OF DEMOCRACY 611 (5th ed. 2016) (“[O]ne of the most difficult [issues] in political and constitutional theory [is] how to design political institutions that both reflect the right of ‘the people’ to be self-governing and that also ensure appropriate integration of, and respect for, the interests of political minorities.”).

³⁷ Whitcomb v. Chavis, 403 U.S. 124, 153 (1971).

as to the content of the right to an “undiluted” vote.³⁸ The current prevailing answer is embodied in the 1982 VRA, in which Congress made two main choices.³⁹ First, the VRA implemented a “results test” for voting rights claims that places a lower burden on challenges than the requirement of proving discriminatory intent in direct constitutional challenges under the Equal Protection Clause.⁴⁰ Section 2 looks to the totality of the circumstances to see if a voting law “*results* in a denial or abridgement of the right [to vote].”⁴¹ The Senate Report accompanying the bill provides a long list of factors as grist for this analysis, focusing on the past and present manifestations and effects of racial discrimination.⁴² Second, the VRA defined the right (or “rights”) in question as equal “opportunity . . . to *participate* in the political process and to *elect* representatives of their *choice*.”⁴³

The Supreme Court gave additional structure to this “totality of the circumstances” test in *Thornburg v. Gingles*.⁴⁴ There are now

³⁸ See generally Elmendorf, *supra* note 26, at 395–97 (discussing the normative and constitutional difficulties inherent in Section 2); Elmendorf & Spencer, *supra* note 23 (discussing administrative challenges of Section 2 and proposing solutions); Gerken, *supra* note 23, at 1665–66 (wrestling with this question and the difficulty of fitting an “aggregate right” to representation in traditional individual rights frameworks).

³⁹ 52 U.S.C. § 10301(a) (2012) (“No voting . . . procedure shall be imposed or applied . . . 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 . . .”).

⁴⁰ At first, in *Chavis* and *White v. Regester*, 412 U.S. 755 (1973), the Court was ambiguous about the relevance of intent. The Court affirmed an intent requirement for Equal Protection claims in *Washington v. Davis*, 426 U.S. 229, 240 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977). The Court then extended that requirement to vote dilution in *City of Mobile v. Bolden*, 446 U.S. 55, 67 (1980). One immediately animating purpose of the 1982 VRA amendments was to legislatively overrule *City of Mobile*. However, racial gerrymandering claims under the Equal Protection Clause are still available. See *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (striking down racial gerrymandering under the Fifteenth Amendment); see also *Shaw v. Reno*, 509 U.S. 630, 643–44, 653–54 (1993) (applying racial gerrymandering doctrine to limit race-conscious districting aimed at boosting representation of people of color or complying with the VRA).

⁴¹ § 10301(a) (emphasis added).

⁴² S. REP. NO. 97-417, at 28–29 (1982). These factors draw heavily on case law leading up to 1982, including *Rogers v. Lodge*, 458 U.S. 613 (1982), and the so-called *Zimmer* factors, as they were catalogued in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (*per curiam*).

⁴³ § 10301(b) (emphasis added); see also *White*, 412 U.S. at 766 (providing that it is the plaintiff’s burden to “produce evidence to support findings that the political processes leading to the nomination and election were not equally open to participation by the group” (citing *Chavis*, 403 U.S. at 149)).

⁴⁴ *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (plurality opinion). This is starkly similar to the test rejected in *Chavis* that “any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district.” 403 U.S. at 156. Like the Fifteenth Amendment, Section 2 does not protect just

three prerequisites that often prove dispositive.⁴⁵ First, it must be feasible to draw a majority-minority district in light of the size and geographical distribution of the minority population.⁴⁶ Second, the minority group must be “politically cohesive.”⁴⁷ Third, “the white majority [must] vote[] sufficiently as a bloc . . . in the absence of special circumstances . . . usually to defeat the minority’s preferred candidate.”⁴⁸ The second and third prerequisites together require “racial polarization.”⁴⁹ In practice, lower courts make the findings *Gingles* requires by looking to precinct-level election returns, census tract-level demographic data, and election results.⁵⁰ If a court finds racial polarization, along with a lack of success for minority-preferred candidates, which could be remedied by creating one or more majority-minority districts, then the court will look to the “totality of the circumstances,” using the factors in the Senate Report as a guide.⁵¹

Special circumstances doctrine plays a key role in operationalizing this test. *Gingles* made the amorphous Section 2 test more administrable and consistent. However, in privileging certain factors as prerequisites, *Gingles* might have introduced a bug. No matter what else is true about racial equality or inequality in a jurisdiction, if minority-preferred candidates have been successful enough times in the past, the claim will fail on the third *Gingles* prong.⁵² If that test took no account of whether that evidence from the past were predictive of the future, a court might miss the reasons why apparent equality of opportunity to elect is actually illusory. Special circumstances relieves some of this pressure. The doctrine empowers courts

any group, only those defined by “race or color.” 52 U.S.C. § 10301(a); *see also Chavis*, 403 U.S. at 180 (Douglas, J., concurring in part and dissenting in part) (“Our Constitution has a special thrust when it comes to voting; the Fifteenth Amendment says the right of citizens to vote shall not be ‘abridged’ on account of ‘race, color, or previous condition of servitude.’” (quoting U.S. CONST. amend. XV)).

⁴⁵ *See Johnson v. De Grandy*, 512 U.S. 997, 1011–12 (1994) (affirming that the prerequisites are not always dispositive of the “totality of the circumstances”).

⁴⁶ *Gingles*, 478 U.S. at 50; *see also Gerken, supra* note 23, at 1674.

⁴⁷ *Gingles*, 478 U.S. at 50.

⁴⁸ *Id.* at 50–51; *see also Gerken, supra* note 23, at 1674 (describing the three prerequisites set forth in *Gingles*).

⁴⁹ *Gingles*, 478 U.S. at 52, 53 n.21.

⁵⁰ *See, e.g., Wright v. Sumter Cty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1305 (M.D. Ga. 2018) (“The data for Dr. McBride’s analysis consisted of precinct election returns and racial turnout data”); *Williams v. City of Texarkana*, 861 F. Supp. 756, 761–63 (W.D. Ark. 1992) (discussing expert testimony on the correlation between the demographic makeup of a precinct and the votes of the precinct, as well as the outcomes that resulted).

⁵¹ *Gingles*, 478 U.S. at 48.

⁵² *Id.* at 102 (O’Connor, J., concurring) (“[C]onsistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation.”).

to ask the question that a pure numerical test obscures: Are the election results evidence of equality? The doctrine allows fine-tuning of the inquiry and adjustments to the evidentiary weights of some results. Sometimes that means throwing the elections under consideration out entirely; sometimes only a partial “discount” is appropriate.⁵³ Before it can work, however, the threshold question remains: What circumstances are special?

B. Special Circumstances that Operate on Vote Dilution

The *Gingles* Court’s guidance on special circumstances is brief. The opinion alludes to the role they ought to play and why, but as to their scope, the Court offers only an illustrative list: “[A]bsence of an opponent, incumbency, or the utilization of bullet voting.”⁵⁴ These circumstances have several common characteristics. First, they each operate by masking the role of vote dilution, rather than another injury to the right to vote. That common thread may explain their placement in the opinion but that is not the only commonality and ought not to be a limiting factor. Each of these illustrations also signals elections in which observed success is either unsustainable or sustainable only at an unequal cost—simply put, elections that are not evidence of equality. In that light, the Court’s reasoning behind special circumstances doctrine embraces those operating on vote denial and voter choice as well. Several courts have already moved in those directions, and Parts II and III make the case for all courts to take a more comprehensive look at special circumstances. Before getting there, this Section addresses those circumstances expressly listed in *Gingles*. Each subsection that follows addresses lower courts’ elaboration of one of those categories. The Court’s terse listing of these circumstances leaves room for interpretation, and courts have applied them inconsistently. This Section uses this Note’s broader framework to clarify their proper scope.

⁵³ See, e.g., *Ruiz v. City of Santa Maria*, 160 F.3d 543, 558 (9th Cir. 1998) (“At trial, if Plaintiffs prove that unusual circumstances surrounded that election, the district court must discount the election results in its *Gingles* prong three analysis.”); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997); *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1057–58, 1061 (E.D. Mo. 2016) (discussing whether and how much to discount elections because of special circumstances).

⁵⁴ *Gingles*, 478 U.S. at 57 & n.26.

1. *Absence of an (Effective) Opponent and Other Exceptional Circumstances*

The easiest special circumstances to recognize are those that are simply unlikely to recur. Rarity is not necessary, but it is often sufficient. If a minority-preferred candidate's success was simply lucky, that election is not evidence of equality. For example, *Gingles* lists "the minority candidate running unopposed," as a special circumstance,⁵⁵ but circuits are split on how literally to take that example. In *Harvell v. Blytheville School District No. 5*, the Eighth Circuit automatically discounted unopposed elections, arguing that "[e]ven in an extreme case of total vote dilution a candidate running in the face of no opposition is ensured success."⁵⁶

The automatic approach is overbroad because it fails to ask the obvious next question: If voters of different races prefer different candidates—a prerequisite for vote dilution⁵⁷—why was the minority-preferred candidate unopposed? An unopposed election could be evidence that voting is not actually polarized. If that were so, then it is properly considered evidence against the plaintiffs, not a special circumstance. The Tenth Circuit asked that question in *Sanchez v. Bond*.⁵⁸ In examining an unopposed election, the court found that the trial court did not err in inferring "that if an Hispanic is unopposed, he is, indeed, supported by Anglos."⁵⁹ Courts ought to be open to the possibility of genuine depolarization of preferences, lest they order race-conscious districting unnecessarily. Or, as the *Harvell* dissent forcefully put it, a rule that ignores that possibility "presupposes the inevitability of electoral apartheid" and "that only a racially balkanized election system" can satisfy the VRA.⁶⁰

Unopposed elections are more accurately described as unusual outcomes that may or may not be caused by special circumstances. Assuming that courts look under the hood, what are they looking for? Courts have identified at least two conditions that suggest that an election featured a special circumstance: scandal and effective disqual-

⁵⁵ *Id.* at 51, 57; Kim, *supra* note 19, at 608–15.

⁵⁶ 71 F.3d 1382, 1389 (8th Cir. 1995).

⁵⁷ *Gingles*, 478 U.S. at 56 ("[P]olitical cohesiveness [is] necessary to a vote dilution claim.").

⁵⁸ 875 F.2d 1488 (10th Cir. 1989).

⁵⁹ *Id.* at 1494; see also *Harvell*, 71 F.3d at 1395 (Loken, J., dissenting) (arguing that a candidate's "prior victories and standing in the at-large community" might have won voters over, belying racial polarization (citing *Sanchez*, 875 F.2d at 1493)).

⁶⁰ *Harvell*, 71 F.3d at 1395 (Loken, J., dissenting) (quoting *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1016 (2d Cir. 1995)).

ification of a majority-preferred candidate;⁶¹ or the pendency of a vote dilution lawsuit.⁶² These are “special” because they likely do not signal depolarization of preferences among voters of different races, which might signal the true end to vote dilution. More likely, they signal recognition by white voters or politicians “that the support of a Black candidate would be politically expedient.”⁶³ For elections taking place while vote dilution suits are pending, the pendency of that litigation could “make the outcome of the election aberrant.”⁶⁴

Under this logic, courts taking this approach should not require that the minority-preferred candidate be literally unopposed. In *Milwaukee Branch of NAACP v. Thompson*, the Seventh Circuit illustrated this point with a hypothetical, in which the candidates preferred by Black voters won only when majority-preferred candidates were manifestly unqualified or embroiled in scandal.⁶⁵ The court proposed discounting on special circumstances grounds those races that were not “genuinely contested.”⁶⁶ Of course, there will be difficult cases on the margins, but the *Thompson* court recognized that special circumstances could be more flexible than all-or-nothing, applying a partial discount to certain elections.⁶⁷

⁶¹ See, e.g., *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (suggesting that a hypothetical election in which “one white candidate was brought down by revelations of ethical improprieties” would not be a “genuinely contested race[.]”); *Martin v. Allain*, 658 F. Supp. 1183, 1193 (S.D. Miss. 1987) (discounting evidence from the election of an indicted candidate in analysis of racial polarization).

⁶² See, e.g., *Solomon v. Liberty Cty. Comm’rs*, 166 F.3d 1135, 1143–44 (11th Cir. 1999) (discussing weight of authority that elections during the pendency of a lawsuit are not probative, whether or not there is proof of intentional manipulation by the white majority), *vacated and reh’g granted*, 206 F.3d 1054 (11th Cir. 2000); *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (suggesting that politicians might support a Black candidate precisely in order to defeat a vote dilution claim); *Gingles v. Edmisten*, 590 F. Supp. 345, 367 n.27 (E.D.N.C. 1984) (finding it plausible that “the pendency of this very litigation worked a one-time advantage for Black candidates in the form of unusual organized political support by white leaders”), *aff’d in part, rev’d in part sub nom.* *Thornburg v. Gingles*, 478 U.S. 30 (1986); see also *Kim*, *supra* note 19, at 609 & nn.23–25, 614 & n.57, 615 (1997) (discussing various instances of courts recognizing these conditions as potential special circumstances).

⁶³ *Zimmer*, 485 F.2d at 1307.

⁶⁴ However, courts need not and should not ask whether the majority’s failure to run or support a viable candidate was an intentional attempt to thwart a VRA lawsuit. *Kim*, *supra* note 19, at 619–25, 621 n.90.

⁶⁵ 116 F.3d at 1199.

⁶⁶ *Id.*

⁶⁷ *Id.*

2. Incumbency

Incumbency has been called the “least special” special circumstance because so many elections involve an incumbent.⁶⁸ Courts broadly agree that discounting *every* such election is overinclusive.⁶⁹ But where should courts prune back? Recalling the limits on unopposed elections provides a workable limit: Courts should ask whether or not the unexpected election outcome arises out of true depolarization of voter preferences. Applying that test to incumbency, an incumbent’s reelection is characterized by special circumstances when their victory is owed to the fact of their incumbency, rather than their simply winning over voters of all races.⁷⁰ A candidate’s cross-racial appeal may manifest most starkly in their running unopposed in an otherwise polarized district, but those popular candidates are also likely to be incumbents.

Again, the automatic approach is overbroad, and courts ought to dig deeper. In particular, courts should ask to what extent an election is owed to an identifiable incumbency “advantage” versus voters’ appraisal of their “merit.”⁷¹ Political science research suggests the incumbency advantage could work as a limit on special circumstances, as it lends itself to statistical measurement and it is driven by intrinsic benefits of actually holding office.⁷²

⁶⁸ Cottier v. City of Martin, 604 F.3d 553, 561 n.5 (8th Cir. 2010) (quoting Harvell v. Blytheville Sch. Dist. No. 5, 71 F.3d 1382, 1389 n.7 (8th Cir. 1995)).

⁶⁹ See Nipper v. Smith (*Nipper II*), 39 F.3d 1494, 1539 (11th Cir. 1994) (en banc) (cautioning that incumbency should not “be viewed as a talisman by courts”); see also Clarke v. City of Cincinnati, 40 F.3d 807, 813–14 (6th Cir. 1994).

⁷⁰ See *supra* notes 56–60 and accompanying text.

⁷¹ “Merit” here refers broadly to qualities that voters desire in a candidate that are not based in bias or animus. This definition excludes some aspects of the incumbency advantage, which are not rooted in the qualities of candidates at all. This definition surely includes some problematic factors at the margins, however, as the very idea of “merit” and the qualities of “good” candidates are themselves socially constructed—mostly by the white majority—and may be difficult to distinguish from stereotypes and implicit biases. See generally Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCHOL. SCI. 474, 479 (2005). Uhlmann and Cohen conclude in the analogous context of employment discrimination that “[b]ias in the construction of job criteria allows evaluators both to discriminate and to maintain a personal illusion of objectivity,” convincing themselves that “they had chosen the right man for the job, when in fact they had chosen the right job criteria for the man.” *Id.*

⁷² See Andrew Gelman & Gary King, *Estimating Incumbency Advantage Without Bias*, 34 AM. J. POL. SCI. 1142 (1990) (discussing measurement of the incumbency advantage in social science); Dan Hopkins, *Being an Incumbent Isn’t as Fun as It Used to Be*, FIFTYEIGHT (Oct. 29, 2014), <https://fivethirtyeight.com/features/being-an-incumbent-isnt-as-fun-as-it-used-to-be> (same); see also, e.g., Pope v. County of Albany, 94 F. Supp. 3d 302, 322 (N.D.N.Y. 2015) (noting that the incumbency advantage is “widely accepted” in political science).

No circuit has formulated the inquiry just so, but several use approaches that come close. A panel of the Eleventh Circuit was on the right track in *Nipper v. Smith*, in an opinion later vacated by the court sitting en banc.⁷³ The first *Nipper* court did not discount the reelection of an incumbent with particularly short tenure in office as a special circumstance.⁷⁴ The court implicitly acknowledged the connection between tenure in office and incumbency advantage.⁷⁵ The Fifth Circuit similarly did not discount two Black incumbents' reelections within two years of appointment, in high-profile elections, against well-known white candidates.⁷⁶ There, the court implicitly acknowledged that the incumbents' advantage was likely relatively small because of their short tenure in office, and any name-recognition advantage incumbents usually reap was not present when their opponents were independently well-known to the electorate.⁷⁷

The Sixth Circuit takes a different approach, only treating incumbency as a special circumstance when it "play[s] an unusually important role in the election at issue" beyond "its usual role in American politics."⁷⁸ This approach underprotects minority voting rights because assuming there is such thing as an incumbency advantage, then logically its usual role is to entrench those already in power. Furthermore, in *Clarke*, this framing got the inquiry exactly backward. The court looked at the success of Black candidates as *challengers*, noting that three of the eight successful Black candidates were first elected as challengers, not incumbents.⁷⁹ That may independently be some evidence of equality, depending on whether those challengers

⁷³ *Nipper v. Smith (Nipper I)*, 1 F.3d 1171, 1181 (11th Cir. 1993), *vacated*, *Nipper II*, 39 F.3d 1494.

⁷⁴ *Nipper I*, 1 F.3d at 1181. The court considered the second incumbent weak because of their qualifications, but I would not factor that into my analysis of special circumstances, since it goes to voter preferences. If an unqualified candidate won as an incumbent, either the incumbency advantage is very strong or voters do not care about their qualifications, which I would not second guess. As discussed in Part III, however, there may be a place for considering candidate quality *on the voters' own terms*, as it related to the possible presence of racial double standards. See *infra* Part III.

⁷⁵ *Nipper I*, 1 F.3d at 1181. Incumbency advantage varies by jurisdiction, office (though perhaps less than expected), and era. See generally STEPHEN ANSOLABEHRE & JAMES M. SNYDER, JR., MIT DEP'T OF POLITICAL SCI. & ECON., THE INCUMBENCY ADVANTAGE IN U.S. ELECTIONS: AN ANALYSIS OF STATE AND FEDERAL OFFICES, 1942–2000 (2001), <http://economics.mit.edu/files/1205>. But the sources of the advantage are generally thought to include constituency service in some measure. Cf. Hopkins, *supra* note 72 ("[T]he incumbency advantage isn't limited to legislative offices doing lots of constituent services.").

⁷⁶ *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993).

⁷⁷ *Id.*

⁷⁸ *Clarke v. City of Cincinnati*, 40 F.3d 807, 813–14 (6th Cir. 1994).

⁷⁹ *Id.* at 814.

benefit from special circumstances. But it tells us nothing about whether incumbency acted as a special circumstance in later campaigns.

The critical questions for courts to answer in determining whether incumbency acted as a special circumstance are: First, what is the magnitude of the incumbency advantage attending a particular office? And second, would a given incumbent have won reelection but for the incumbency advantage? If an incumbent won by substantially the same margin as she had as a challenger, or if an incumbent narrowly won but retained her office because of her demonstrated qualifications and appeal to the electorate, then perhaps incumbency is not doing much work. But if those challengers narrowly won and later narrowly hung on as an incumbent, the evidence might show they won reelection because of the incumbency advantage and that would be a special circumstance.⁸⁰

The en banc Eleventh Circuit in *Nipper II* showed how this analysis might play out differently for incumbents who took office via a merit appointment system.⁸¹ The appeals court threw out a special circumstances finding, criticizing the district court for wielding incumbency as a “talisman” without sufficient analysis.⁸² The court further concluded that the incumbency advantage enjoyed by appointed judges merely showed “that qualifications are significant to the electo-

⁸⁰ See Alexandra Raphael, *The Financial Incumbency Advantage: Causes and Consequences*, JOURNALIST'S RESOURCE (June 18, 2014), <https://journalistsresource.org/studies/politics/finance-lobbying/financial-incumbency-advantage-causes-consequences> (discussing a study examining the incumbency advantage by looking at the financial benefits reaped by candidates who narrowly won reelection).

⁸¹ *Nipper II*, 39 F.3d 1494, 1539 (11th Cir. 1994) (en banc). Such systems are common features of judicial selection systems. *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., <http://judicialselectionmap.brennancenter.org> (last visited Sept. 21, 2019).

⁸² *Nipper II*, 39 F.3d at 1539. *But see* *Meek v. Metro. Dade Cty.*, 805 F. Supp. 967, 978 (S.D. Fla. 1992) (summarily discounting elections in which a Black appointed incumbent won as the product of special circumstances), *aff'd in part, rev'd in part*, 985 F.2d 1471 (11th Cir. 1993). The *Nipper* court also faced the question of whether incumbency should work symmetrically, that is, whether majority-preferred incumbents' reelections should also be discounted as evidence for plaintiffs. The panel would have ruled that the answer was categorically no. *Nipper I*, 1 F.3d 1171, 1181 (11th Cir. 1993), *vacated, Nipper II*, 39 F.3d at 1494. This is consistent with Congress's choice to focus the test for vote dilution on racially disparate *results* and not discriminatory *intent*, as the *Nipper II* approach would discount white candidates' elections because of evidence that voters chose them due to incumbency and not, say, racial bias. See Richard R. Hesp, *Electoral Data in Racial-Bloc Analysis: A Solution for Staleness and Special Circumstances Problems*, 1995 U. CHI. LEGAL F. 409, 431 (criticizing the *Nipper II* court for “subtly reintroducing an intent requirement in the guise of the special circumstances ‘wildcard’”). I do not address the issue of symmetry in depth because it would be moot under my approach, where incumbency is only a special circumstance to the extent it changes the outcome that would otherwise be likely.

rate and that voters generally place confidence in the nominating commission process.”⁸³ If the court is correct, then incumbency would not be a significant factor. If the merit process provides only an informational function (i.e., helping voters make decisions according to their own preferences), those incumbencies would not be special circumstances. In that case, an appropriate challenge would target racial bias in the nomination process—which the *Nipper II* court did not find⁸⁴—which would unequally limit opportunities for certain candidates to become incumbents, win over voters, and win reelection on the “merits.”

Because the opportunity to win over the electorate on the “merits” is itself conditional on incumbency, courts should also not allow a vote dilution claim to be defeated by a single minority-preferred candidate reliably winning reelection.⁸⁵ A few candidates’ sustained success after an initial victory or appointment is *some* evidence that the electorate is not so racially polarized. Still, the political representation of an entire cognizable group should not depend on a few elected officials. Even granting that “consistent and sustained success” for minority-preferred candidates might defeat a vote dilution claim, the required level of sustained success has to be calibrated against a baseline of what equality would look like.⁸⁶ So long as representation consistently falls short of proportionality and voting is racially polarized, the court may still have a role to play in remedying vote dilution.⁸⁷

⁸³ *Nipper II*, 39 F.3d at 1536.

⁸⁴ *See id.* at 1508, 1536 (noting that Black judges had been appointed roughly in proportion to the number of applications and crediting the merit selection system with dramatically increasing diversity on the bench).

⁸⁵ *See* Pope v. County of Albany, 94 F. Supp. 3d 302, 345–46 (N.D.N.Y. 2015) (“The only [minority-preferred] candidate to have uniquely sustained success County-wide is District Attorney David Soares Though the Court will not discount Soares’ historic success . . . the Court also will not interpret one candidate’s sustained success as evidence that minority candidates are now generally able to win County-wide elections.”).

⁸⁶ *Thornburg v. Gingles*, 478 U.S. 30, 103 (1986) (O’Connor, J., concurring).

⁸⁷ *See id.* at 51 (stating that usual predictability of majority success ought to be more significant than occasional losses); *see also* *Collins v. City of Norfolk*, 883 F.2d 1232, 1240–41 (4th Cir. 1989) (noting that Black voters’ ability to consistently elect one of their preferred candidates to office did not preclude a finding of vote dilution because they were unsuccessful—in the absence of special circumstances—in their efforts to elect a second). Some might object to even framing the problem as a lack of proportional representation. *See, e.g., Gingles*, 478 U.S. at 84 (O’Connor, J., concurring, joined by Burger, C.J., Powell and Rehnquist, JJ.) (“§ 2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in the passage of the [1982] amendment.” (citing S. REP. NO. 97-417, at 193–94 (1982))). But that is mostly a semantic objection, because “any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large.” *Id.*

3. *Bullet Voting and Vote Splitting*

The final category of special circumstances mentioned in *Gingles* is bullet voting. Bullet voting is the practice of casting only one vote for an individual's top choice candidate in a multi-seat race, where voting rules allow voters to cast a ballot for more than one candidate.⁸⁸

For example, imagine a hypothetical jurisdiction with four at-large seats up for election on the city council, and voters are permitted (but not required) to cast one vote for each of their top four choices. If voters believe that their top choice candidate is in contention for fourth place, they may worry that casting votes for other candidates could potentially crowd out their first choice. If such voters value electing their top choice more than influencing the choices among the candidates on the slate, they may cast only one vote to maximize their top candidate's chance of winning a seat. That is bullet voting.

To illustrate the impact of bullet voting on vote dilution, imagine that the same hypothetical jurisdiction has 600 white voters and 400 Black voters. Each voter may cast four votes but cannot vote for any candidate more than once (i.e., non-cumulative voting). To start, suppose there are four candidates uniformly preferred by white voters and only one preferred by Black voters, with preferences otherwise randomly distributed. Suppose Black voters do not bullet vote and allocate their second, third, and fourth votes evenly among the white-preferred candidates. If white voters vote one hundred percent cohesively for their candidates, each white-preferred candidate receives 900 votes, and the Black candidate receives 400. Even if some white voters support the Black candidate, that person would only be guaranteed a seat if two-thirds of white voters cast at least one vote for her.⁸⁹ However, if the Black electorate bullet voted, the Black candidate

⁸⁸ See generally Jo Craven, *In Some Elections, the 'Bullet' Rules*, WASH. POST (Nov. 1, 1998), <https://www.washingtonpost.com/archive/local/1998/11/01/in-some-elections-the-bullet-rules/4989c244-c802-4f56-af9e-674c1931ea33> (discussing the potential role of bullet voting in multi-seat local elections).

⁸⁹ The number of crossover voters X out of W white voters required to elect the preferred candidate of a politically cohesive population B of Black voters, under the assumptions above, is given by the following inequality: $B + X > ((3 * B) + (3 * X) + (4 * (W - X))) / 4$. That is, the preferred candidate of Black voters receives one vote from each Black voter and crossover voter, while each preferred candidate of white voters receives one fourth of the sum of three from each Black voter, three from each crossover voter, and four from each non-crossover white voter. Additional variables could be added to generalize the equation to accommodate more configurations of numbers of candidates on each side, but it gets complicated quickly and this is sufficient for current purposes. Substituting in the values assumed above and simplifying yields the following: $400 + X > (1200 + (3 * X) + (4 * (600 - X))) / 4$; which simplifies to the following: $400 + X > (3600 - X) / 4$; then to $1600 + 4 * X > 3600 - X$; and finally, $X > 400$, or two-thirds of 600.

could win a seat even if only about a quarter of white voters cast a vote for her, a result that should still be called “racially polarized.”⁹⁰

Bullet voting gives rise to a special circumstance that operates on vote dilution, but it is different from the other special circumstances in two ways. First, bullet voting does not operate by temporarily altering white voters’ preferences, though it achieves the same result as if it did: fewer total votes for majority-preferred candidates. Second, bullet voting is essentially within the control of voters and therefore is not necessarily a rare occurrence.

Bullet voting is a special circumstance not because it signals unsustainable success and defeat in the future, but rather because it requires people of color to bear an unequal burden in order to achieve electoral victory: They must silence much of their political voice and sacrifice influence they could have had over the choices of the rest of the slate.⁹¹ The key common thread connecting bullet voting with the circumstances discussed in Sections I.B.1 and 2 is that in each case, the equality suggested by an election is illusory.

One way in which courts already routinely go beyond the *Gingles* list of circumstances is in recognizing the mirror image of bullet voting by the minority: vote splitting by the majority. Bullet voting arises in multi-seat elections with a dearth of viable candidates preferred by people of color. Through coordinated bullet voting, voters sacrifice their opportunity to express second- or third-place preferences in order to express a meaningful first-place choice. In contrast, vote splitting typically arises from single-seat elections with a surfeit of candidates preferable to the majority. By voting their first choices without coordination, voters in the majority sacrifice the guaranteed election of a tolerable candidate by expressing their true preference for a candidate who ultimately loses. Like bullet voting, vote splitting effectively takes votes from the majority, as votes are wasted on third-place

⁹⁰ Now, the preferred candidates of white voters receive zero votes from Black voters, who cast all their 400 votes for their preferred candidate and no one else. $400 + X > ((3 * X) + (4 * (600 - X))) / 4$ simplifies to $400 + X > (2400 - X) / 4$; and then to $1600 + 4 * X > 2400 - X$; and finally, $X > 160$, or about 26.7% of 600. In *Lopez v. Abbott*, 339 F. Supp. 3d 589, 609–10 (S.D. Tex. 2018), the district court held that seventy percent of Latinx voters preferring the same candidate satisfied the precondition of political cohesion, and sixty percent voting cohesion against Latinx-preferred candidates by white voters satisfied the bloc voting requirement.

⁹¹ Indeed, alternative voting schemes may be remedies for vote dilution, including limited voting, a system in which all voters are restricted to one vote (i.e., to bullet voting), equalizing the political voice of all voters. *See, e.g., United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 744 (N.D. Ohio 2009) (approving this remedy). Another option is cumulative voting, in which voters can cast several of their votes for one candidate, increasing their voice and effectiveness. *See generally* Pildes & Donoghue, *supra* note 4, at 254 (describing the mechanics and implications of cumulative voting).

(or worse) candidates in a single-seat race, which can result in outcomes which are contrary to majority voters' true preferences. Two factions of voters within the broader majority might agree on many things, including their second-choice candidates, but they could end up with their third choice because of vote splitting. Both groups could have achieved a more preferred outcome with coordination.

Gingles provides further support for treating vote splitting as the mirror image of bullet voting for the purposes of special circumstances. Among the "circumstances that might be probative of a § 2 violation" are both the presence of "anti-single shot provisions"—that is, prohibitions on bullet voting—and "majority vote requirements"—that is, prohibitions on plurality elections, which eliminate the possibility of winning as a result of vote splitting in most cases.⁹² This is consistent with a rule that actually winning because of either bullet voting or vote splitting weighs in favor of finding vote dilution.⁹³ Bullet voting and plurality elections are both exceptional paths to achieve representation amid racial polarization. If *even those* ways are blocked by voting rules enacted by the majority, that is evidence that the political process is not equally open to all. Regardless, the availability of those avenues is not itself any evidence of equality.

Courts have split on whether vote splitting is a special circumstance.⁹⁴ The difficulty arises from the meaning of racial polarization, which requires political cohesion on both sides. Some courts reason that if voters in the majority split their vote, they do not vote as a bloc, as *Gingles* requires as a prerequisite to a vote dilution finding.⁹⁵ That misconceives the meaning of "political cohesion," which connotes

⁹² See *Gingles*, 478 U.S. at 36–37 (quoting S. REP. NO. 97-417, at 28–29 (1982)).

⁹³ *Ruiz v. City of Santa Maria*, 160 F.3d 543, 558 (9th Cir. 1998).

⁹⁴ See, e.g., *League of United Latin Am. Citizens #4552 (LULAC) v. Roscoe Indep. Sch. Dist.*, 123 F.3d 843, 847–48 (5th Cir. 1997) (suggesting that vote splitting would be a special circumstance but affirming as not clearly erroneous the district court's finding that vote splitting was not a but-for cause of one particular election); *Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1213 (5th Cir. 1996) (finding that one of three elections was caused by the special circumstance of vote splitting, but rejecting one on the basis that vote-splitting between a white candidate and a Latinx candidate could not be a special circumstance, improperly assuming that voters prefer candidates of the same race); *Valladolid v. City of National City*, 976 F.2d 1293, 1298 (9th Cir. 1992) (dismissing vote splitting as a special circumstance since so many elections feature multiple white candidates such that splits "do not appear so special at all"); *Jenkins v. Manning*, 116 F.3d 685, 694 (3d Cir. 1997) (finding vote splitting to be a special circumstance in that case); *United States v. Charleston County*, 316 F. Supp. 2d 268, 281 (D.S.C. 2003) (same as *Jenkins*).

⁹⁵ See *Nash v. Blunt*, 797 F. Supp. 1488, 1504 (W.D. Mo. 1992) (noting that the court's "inquiry is not whether the whites are *capable* of voting as a block [sic] to defeat the minority preferred candidate—it is whether they *have done so*" (emphasis in original)).

unity behind a “‘platform’ of common goals and common means.”⁹⁶ Even if two factions are “cohesive” in that sense, they are probably not in agreement on every issue.⁹⁷ It is unlikely—but not impossible—that the differences between several candidates in a given election, who are generally amenable to a usually-coherent faction of voters, nonetheless track salient divisions within that faction, splitting the vote and forming a crack in an otherwise impenetrable wall of white bloc-voting. If an alleged bloc splits their vote in nearly every election, perhaps they are not cohesive enough to sustain a vote dilution claim. Otherwise, vote splitting ought to be considered a special circumstance.

C. *Vote Dilution and Lessons for Special Circumstances*

The special circumstances mentioned in *Gingles*—along with vote splitting—affect election outcomes by mitigating vote dilution. Each of these enumerated special circumstances works by adjusting the effective number of votes for majority-preferred candidates. But that superficial similarity obscures a more important normative justification for recognizing these circumstances as special. In each of the circumstances above, isolated electoral success is unsustainable; the apparent equality is illusory. Sometimes a circumstance signals that past success is not predictive of future successes, such as the absence of an opponent, incumbency, and vote splitting. Other circumstances, like bullet voting, signal success that may be *repeatable* but that requires people of color to bear an unequal burden to achieve electoral parity.

Because the *Gingles* list is illustrative, not exhaustive, the capacious language of Section 2 and the underlying normative rationale of special circumstances support going further than the three examples listed in *Gingles*. Whenever an election result masks injuries to participation or choice, that success may also be unsustainable or unduly burdensome, thus constituting a special circumstance. The next two Parts explore how courts have moved beyond *Gingles* into these areas, and where they should go next.

⁹⁶ *Levy v. Lexington County*, 589 F.3d 708, 720 (4th Cir. 2009) (quoting *Monroe v. City of Woodville*, 881 F.2d 1327, 1332 (5th Cir. 1989)).

⁹⁷ See, e.g., Perry Bacon Jr. & Dhrumil Mehta, *The Diversity of Black Political Views*, FIFETHIRTYEIGHT (Apr. 6, 2018), <https://fivethirtyeight.com/features/the-diversity-of-black-political-views> (noting diversity of political views among Black voters, masked by the fact that nearly ninety percent of Black voters usually vote for Democratic presidential candidates).

II

VOTER PARTICIPATION AND SUPPRESSION

Participation is the first thing the “right to vote” calls to mind: the right to cast a ballot. Myriad laws limit participation, from mundane requirements like voter registration to more contentious ones like voter ID laws and disenfranchisement of individuals with past criminal convictions.⁹⁸ Because participation is fundamental, several doctrines limit restrictions under the heading of vote denial, but this patchwork has significant gaps.⁹⁹ This Part accepts those limitations and does not advocate changing vote denial doctrine *per se*. It only argues that courts can recognize the impact of barriers to participation in the context of vote dilution cases, whether or not they rise to the level of independently actionable vote denial. Courts can extend existing special circumstances doctrine in a principled way to recognize transient turnout increases among groups historically and currently subject to vote denial as a special circumstance that masks that ongoing injury.

Special circumstances doctrine already recognizes both those circumstances that mark an election victory as unsustainable and those that signal an unequal burden borne in winning that victory. Depending on the cause, a turnout increase that temporarily overcomes ongoing vote denial can fall into either category. If it is caused by an unpredictable or unusual event, the resulting success is not sustainable, just like in an unopposed or plurality election.¹⁰⁰ If turnout is driven by active organization and mobilization efforts like a get-out-the-vote drive, that may reflect an unequal cost on people of color in reaching electoral parity, similar to bullet voting.¹⁰¹ In either case, a sudden turnout increase may constitute a special circumstance. By recognizing this, courts can ensure that temporary abatement of one form of inequality—vote denial—will not foreclose remediation of another—vote dilution. And remedies for vote dilution in turn facilitate the diminution over time of vote denial through the political process, by increasing representation of those most affected by it.

This Part proceeds as follows: Section II.A provides a brief history of vote denial and the doctrines that limit it, highlighting gaps in

⁹⁸ See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (“States have enacted comprehensive and . . . complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects . . . the individual’s right to vote and his right to associate with others . . .”); see also *infra* notes 103–10 and accompanying text (outlining various ways in which state governments limit participation by minorities).

⁹⁹ See *infra* notes 111–20 and accompanying text.

¹⁰⁰ See *supra* notes 55, 61–65 and accompanying text.

¹⁰¹ See *supra* note 91 and accompanying text.

coverage that allow vote denial to persist. Section II.B discusses the many vote dilution cases recognizing this phenomenon and the comparatively few cases in which courts have recognized special circumstances as a result.

A. *The Past and Present of Voter Suppression and Vote Denial Doctrine*

More than fifty years after the first VRA, many Americans' votes are suppressed in every election, disproportionately among people of color. While the first VRA in 1965 significantly rolled back massive disenfranchisement, modern tools of voter suppression resemble those that opponents of voting rights have employed since the Civil War.¹⁰²

Citizens with criminal convictions are still disenfranchised in many states, and that facially neutral rule incorporates all of the well-documented racial bias of our criminal justice system.¹⁰³ Voter qualifications have evolved as well, since poll taxes and literacy tests ended in the 1960s.¹⁰⁴ While not nearly on the same scale as pre-1965 disenfranchisement, modern tactics like legal financial obligations,¹⁰⁵ voter

¹⁰² See, e.g., Jennifer Rae Taylor, *Jim Crow's Lasting Legacy at the Ballot Box*, MARSHALL PROJECT (Aug. 20, 2018), <https://www.themarshallproject.org/2018/08/20/jim-crow-s-lasting-legacy-at-the-ballot-box> ("Alabama's 1901 Constitution remains in force today, and felony disenfranchisement schemes with similar origins still shape electorates throughout the country.").

¹⁰³ See *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (approving of felon disenfranchisement laws generally). See generally *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states> (last updated May 31, 2019) (providing an overview of disenfranchisement laws by state).

¹⁰⁴ See U.S. CONST. amend. XXIV (banning poll taxes in federal elections in 1964); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (current version at 52 U.S.C. § 10101(a)(2)(C) (2012)) (banning literacy tests); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding poll taxes in state elections unconstitutional under the Fourteenth Amendment).

¹⁰⁵ See ALLYSON FREDRICKSON & LINNEA LASSITER, ALL. FOR JUST SOC'Y, *DISENFRANCHISED BY DEBT 5* (2016); Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 310 (2017). The most recent and well-publicized example of a disenfranchisement rule came in 2019 in Florida. In 2018, a supermajority of Florida voters approved by referendum a constitutional amendment changing the state's felony disenfranchisement law from automatic lifetime disenfranchisement (absent a rare, discretionary grant of executive clemency) to automatic restoration of voting rights after discharge of one's sentence, including probation and parole. In 2019, the Republican-controlled legislature of Florida passed legislation purporting to interpret the amended provision as requiring payment of all related "fines, fees, and restitution" before voting rights are restored. Because "[t]he state charges people with felony convictions for everything from the court costs to medical care in prison to drug testing upon their release," the likely effect "will be to ensure that large numbers of former felons remain permanently disenfranchised." Katrina Vanden Heuvel, Opinion, *A New Poll Tax Will Suppress Florida's Voting Reform*, WASH. POST (May 14, 2019), <https://www.washingtonpost.com/opinions/2019/05/14/new-poll-tax-will->

ID laws,¹⁰⁶ and voter roll purges¹⁰⁷ disproportionately suppress the votes of people of color. Even absent formal restrictions, going to the polls can be made unpleasant, burdensome, or dangerous for certain voters. Historically, private intimidation and violence reigned. It has diminished but not disappeared in the modern era.¹⁰⁸ Intimidation by state and local governments is also less prevalent, but it persists, for example in aggressive prosecutions of mistaken violations of voting laws.¹⁰⁹ More common today are subtler burdens on populations least

suppress-floridas-voting-reform (citing Mark Joseph Stern, *Florida's Republican Legislature Votes to Nullify Popular Ballot Initiative Enfranchising Former Felons*, SLATE (May 3, 2019), <https://slate.com/news-and-politics/2019/05/florida-republican-senate-rondesantis-amendment-4-felon-voting-rights.html>). Analysis by the Brennan Center for Justice demonstrates the disproportionate impact of these rules on “Black and low-income returning citizens.” Kevin Morris, *Thwarting Amendment 4*, BRENNAN CTR. FOR JUST. (May 9, 2019), <https://www.brennancenter.org/analysis/thwarting-amendment-4>.

¹⁰⁶ See IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, *THE EFFECTS OF REQUIRING DOCUMENTARY PROOF OF CITIZENSHIP* (2017), <https://www.brennancenter.org/analysis/evidence-impact-documentary-proof-citizenship-requirements>; Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 PERSP. ON POL. 1088, 1088 (2013) (finding the motivations of legislatures for such restrictions to be “highly partisan, strategic, and racialized”); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 709–17 (2006) (noting voter ID and felon disenfranchisement as contributing to vote denial).

¹⁰⁷ See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1865 (2018) (Sotomayor, J., dissenting) (noting that the Ohio voter purge plan upheld by the Supreme Court had racially disparate impacts in part due to low turnout and socioeconomic inequality in many forms); JONATHAN BRATER, KEVIN MORRIS, MYRNA PÉREZ & CHRISTOPHER DELUZZIO, BRENNAN CTR. FOR JUSTICE, *PURGES: A GROWING THREAT TO THE RIGHT TO VOTE* 1–2 (2018).

¹⁰⁸ See, e.g., Blake Paterson, *Reports of Voter Intimidation at Polling Places in Texas*, PROPUBLICA (Oct. 26, 2018), <https://www.propublica.org/article/reports-of-voter-intimidation-at-polling-places-in-texas> (describing patterns of voter intimidation at several polling places in Texas in 2018); see also *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1892 (2018) (invalidating a Minnesota law aimed at preventing voter intimidation through political apparel).

¹⁰⁹ See, e.g., Ed Pilkington, *U.S. Voter Suppression: Why This Texas Woman Is Facing Five Years' Prison*, GUARDIAN (Aug. 28, 2018, 1:00 AM), <https://www.theguardian.com/us-news/2018/aug/27/crime-of-voting-texas-woman-crystal-mason-five-years-prison> (reporting on a recent prosecution). While such prosecutions remain relatively rare, some receive significant publicity, and it is likely that awareness of even a very small chance of a multi-year prison sentence deters some voters unsure of their eligibility to vote. In advance of the 2018 midterm elections, President Trump appeared to intentionally stoke this fear via his Twitter account. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 5, 2018, 7:41 AM), <https://twitter.com/realDonaldTrump/status/1059470847751131138> (“Law Enforcement has been strongly notified to watch closely for any ILLEGAL VOTING which may take place in Tuesday’s Election (or Early Voting). Anyone caught will be subject to the Maximum Criminal Penalties allowed by law. Thank you!”).

able to bear them, through policies that cause long wait times or difficulty voting.¹¹⁰

The worst of these denials are regulated by several interrelated legal regimes, all of which have significant gaps. Equal Protection claims require an especially severe burden or elusive proof of discriminatory intent.¹¹¹ The results test of Section 2 is limited in a variety of ways with respect to vote denial.¹¹² These doctrines cannot deal in absolutes because vote denial law must balance the right to vote against other substantive values. The states have a defeasible constitutional prerogative to regulate elections.¹¹³ “Election integrity” can be a pretext for unnecessary—possibly racist—voting restrictions, but it also represents an important value.¹¹⁴ Courts ought to stamp out dis-

¹¹⁰ See, e.g., N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 432 (M.D.N.C. 2016) (discussing racial disparities in access to transportation, healthcare, and other resources that may exacerbate the difficulty of voting or waiting to vote), *rev'd*, 831 F. 3d 204 (4th Cir. 2016); Matt Vasilogambros, *Polling Places in Black Communities Continue to Close Ahead of November Elections*, GOVERNING (Sept. 5, 2018, 9:51 AM), <https://www.governing.com/topics/politics/sl-polling-place-close-ahead-of-november-elections-black-voters.html> (reporting that, “[i]n the five years since the U.S. Supreme Court struck down key parts of the Voting Rights Act, nearly a thousand polling places have been shuttered across the country, many of them in southern black communities,” and noting that “[p]olling places have often been used as political tools to shape the outcome of elections” as “[o]fficials can reduce the voter participation of certain groups by eliminating polling places, and increase participation in other groups by placing precincts in key neighborhoods”).

¹¹¹ See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“A court considering a challenge to a state election law must weigh ‘the character and magnitude of the asserted injury . . .’ against ‘the precise interests put forward by the State . . .,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (affirming the requirement that Equal Protection claims must ultimately be traced to a racially discriminatory purpose); see also N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 226 (4th Cir. 2016) (“[I]n what comes as close to a smoking gun as we are likely to see in modern times, the State’s very justification for a challenged statute hinges *explicitly* on race . . .”), *cert. denied*, 137 S. Ct. 1399 (2017).

¹¹² See generally Elmendorf, *supra* note 26, at 399–403 (discussing constitutional doubts about Section 2 generally); Maya M. Noronha, *New Applications of Section 2 of the Voting Rights Act to Vote Denial Cases*, 18 FEDERALIST SOC’Y REV. 32, 33–35 (2017) (discussing cases limiting Section 2 on vote denial specifically, including with state action barriers, deference to legislatures, and *sub silentio* reintroduction of the intent test abolished by Congress).

¹¹³ U.S. CONST. art. I, § 4 (giving states power over election “Times, Places and Manner” with a congressional override).

¹¹⁴ See *Anderson*, 460 U.S. at 788 (“[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974))); MYRNA PÉREZ, ELECTION INTEGRITY: A PRO-VOTER AGENDA 1, 3 (2017) (discussing the legitimate concerns for election integrity and pro-voter ways to address them, as distinct from fearmongering about voter fraud).

crimination and severe democratic harms,¹¹⁵ but some ground rules of democracy will always be left up to democracy. Some remedies for bias and abuse in that process will be political and social, not judicial.¹¹⁶

For nearly fifty years, judicial remedies were more readily available due to the preclearance regime of Section 5 of the VRA. However, that system did not cover most of the country—indeed, that was its undoing¹¹⁷—but it created strong presumptions and solved several persistent proof problems that limit the impact of other doctrines.¹¹⁸ When the Court gutted Section 5, jurisdictions with the most deplorable racial discrimination in their pasts were free to discriminate again, and many took advantage immediately.¹¹⁹ Section 2 is a weak medicine by comparison, and the result is rampant voter suppression in many places.¹²⁰

¹¹⁵ See generally *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (listing among legislation particularly subject to judicial review “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . [including] restrictions upon the right to vote . . . restraints upon the dissemination of information . . . interferences with political organizations . . . [and] prohibition of peaceable assembly” as well as “statutes directed at particular religious . . . national . . . or racial minorities . . . [and] prejudice against discrete and insular minorities”); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 117, 135 (1980) (advocating for a representation-reinforcing approach to judicial review, elaborating on the categories discussed in footnote four of the *Carolene Products* decision, which includes review in voting rights cases that “involve rights (1) that are essential to the democratic process and (2) whose dimensions cannot safely be left to our elected representatives, who have an obvious vested interest in the status quo,” as well as minority group “representation that lies at the core of our system [and] requires more than a voice and a vote”).

¹¹⁶ Cf. MICHELLE ALEXANDER, *THE NEW JIM CROW* 246 (2010) (decrying the fact that reformers “have been tempted too often by the opportunity for people of color to be included within the political and economic structure as-is,” and quoting Dr. Martin Luther King Jr.’s exhortation to “see the great distinction between a reform movement and a revolutionary movement,” the latter of which is unlikely to be actuated through litigation).

¹¹⁷ See *Shelby County v. Holder*, 570 U.S. 529, 542, 544 (2013) (criticizing the preclearance regime because “despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties),” and such “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets,” which the Court found was not present (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009))).

¹¹⁸ See *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (“Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting . . . After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.”).

¹¹⁹ See *The Effects of Shelby County v. Holder*, BRENNAN CTR. FOR JUST. (Aug. 6, 2018), <https://www.brennancenter.org/analysis/effects-shelby-county-v-holder> (providing examples of restrictive voting laws passed after *Shelby County*).

¹²⁰ See Elmendorf & Spencer, *supra* note 23, at 2145–46 (describing Section 2’s weaknesses and resulting voter suppression laws).

From this starting point of inadequate remedies, recognizing temporary turnout increases amid ongoing voter suppression as special circumstances is a step forward. Many jurisdictions that meet the other vote dilution prerequisites—racially polarized voting, infrequent success for minority-preferred candidates—will likely also feature vote denial. Even if courts cannot get at the root problem of vote denial, they can ensure vote dilution remedies remain available in those jurisdictions. So long as courts recognize when a pattern of lower turnout reflects ongoing vote denial, it is a small leap to conclude that transient deviations from that pattern suggest special circumstances. In the long run, this promotes a more representative democracy disposed to laws that promote rather than suppress democratic participation.

However, not every turnout jump is special, just as not every unopposed election is special. As discussed above, courts should not ignore genuine dissipation of vote dilution caused by sustainable depolarization of voter preferences.¹²¹ Similarly, courts should not ignore genuine dissipation of vote denial as a result of new and better laws facilitating more participation, or gradual remediation of the underlying social conditions that interact with those laws to depress turnout. But when a minority-preferred candidate is successful because of an unsustainable jump in turnout, that is a special circumstance. The *Ferguson* case is not the only one in which a court recognized this insight, but it provides a model for future courts inclined to venture into this new territory.

B. *Special Circumstances that Operate on Vote Denial*

This Section argues that recognizing special circumstances arising from vote denial is a defensible application of precedent to effectuate the text and purpose of the VRA. Only a few cases have made this move to date but many have recognized the underlying rationale. The *Ferguson* court, for example, noted a long line of authority recognizing the role of vote denial in low Black turnout.¹²² In *Ferguson*, depending on the data one uses, the Black voting-age population may be greater than fifty percent of the total voting-age population of the

¹²¹ See *supra* notes 56–60 and accompanying text (discussing the limit on unopposed elections as special circumstances).

¹²² Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist., 201 F. Supp. 3d 1006, 1038 (E.D. Mo. 2016) (“[L]ow voter turnout has often been considered *the result* of the minority’s inability to effectively participate in the political process.” (quoting *United States v. City of Euclid*, 580 F. Supp. 2d 584, 604 (N.D. Ohio 2008)) (emphasis in original)).

district.¹²³ The defendant argued that this would bar their Section 2 claim, but the court disagreed, finding that even if Black voters made up a majority of a voting age population, they might still lack “real electoral opportunity” and experience vote dilution.¹²⁴ The court attributed this vaguely to “functional barriers to electoral participation” and “ongoing socioeconomic effects of discrimination, as well as electoral processes that . . . favor the status quo.”¹²⁵ Thus, the court correctly found that low turnout should not count against the plaintiffs.¹²⁶

The *Ferguson* court departed from the beaten path of precedent, however, in applying this basic insight to special circumstances, and discounting elections characterized by sudden increases in turnout. Turnout increases may be special circumstances for two reasons, both of which were present in *Ferguson*.¹²⁷ First, it may be unsustainable if

¹²³ *Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d at 1032–35 (discussing various population estimates and projections showing a Black voting-age population slightly higher or lower than fifty percent).

¹²⁴ *Id.* at 1037 (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006)) (describing cases that allow vote dilution claims in jurisdictions where Latinx voters constitute a majority); see also KATZ ET AL., *supra* note 17, at 20 & 77 n.200 (identifying cases that held vote dilution may contribute to lower voter turnout).

¹²⁵ *Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d at 1038; see also *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986) (“Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.”); *Westwego Citizens for Better Gov’t v. City of Westwego*, 872 F.2d 1201, 1212 (5th Cir. 1989) (affirming that socioeconomic inequality must be considered in the *Gingles* totality of the circumstances analysis even though it is widespread and entrenched and not likely to be *directly* remedied by a vote dilution remedy).

¹²⁶ *But see Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1555–56 (5th Cir. 1992) (finding that evidence of depressed voter turnout was not persuasive). Some courts treat low turnout as an issue of *causation* that may sink plaintiffs’ case. See *NAACP v. City of Columbia*, 850 F. Supp. 404, 418, 420 (D.S.C. 1993) (advancing this argument). The *Salas* court held that Hispanic voters did not lack equal electoral opportunity; they simply failed to use the opportunity they had. *Salas*, 964 F.2d at 1556 (holding that the district court’s finding that low Hispanic turnout was due to a failure to take advantage of political opportunity was not clearly erroneous). Hispanic voters registered at high rates but turned out roughly seven percent less than white voters, so the court suggested they solve the problem “by simply running candidates and turning out to vote.” *Id.* at 1555. The court discounted historical discrimination because plaintiffs had not “directly link[ed] this low turnout with past official discrimination.” *Id.* at 1556. Perhaps the courts simply required better briefing on that point, but this approach is unnecessarily narrow in its consideration of vote denial. Blaming historically marginalized groups for not voting blinds courts to the role of voter suppression, and the possibility that special circumstances could belie ongoing patterns of vote denial. See also *York v. City of St. Gabriel*, 89 F. Supp. 3d 843, 863 (M.D. La. 2015) (advancing the same argument as *Salas* in a suit brought by white voters in a majority-Black jurisdiction).

¹²⁷ See *supra* notes 55, 61–64, 91 and accompanying text (describing two types of special circumstances).

the increase is connected to an unusual event—for example, the surge of political activism following Michael Brown’s tragic killing. Second, it may impose an unequal burden on people of color—for example, if it follows an additional investment of time, effort, and money, like the get-out-the-vote (GOTV) efforts in Ferguson. GOTV efforts are absolutely legitimate activities and healthy for democracy, but it is not legitimate to impose the burden of such efforts exclusively and unequally on people of color as a prerequisite for electoral parity.

The *Ferguson* court found special circumstances arising from vote denial in two elections. In 2014, they found special circumstances because the election featured an abnormally “high level of interest among African American voters” and “an unprecedented five African American challengers.”¹²⁸ It was reasonable to conclude, as the court did, that this boost was not the product of sustainable social or legal change, but more likely attributable to the controversial suspension and resignation of a popular and respected Black superintendent.¹²⁹

In 2015, the election took place six months after Michael Brown was killed.¹³⁰ The city was roiled by protests, including at least one protest by Ferguson-Florissant School District (FFSD) students, and the schools felt the impact.¹³¹ A month before the election, the Department of Justice released its report on the Ferguson Police Department, detailing extensive racial discrimination in local courts and law enforcement, including inside FFSD schools.¹³² The court noted the surge in “get-out-the-vote efforts in the area that may have caused greater rates of voter turnout than usual.”¹³³

The Fifth Circuit has also recognized turnout increases as a potential special circumstance in *Rodriguez v. Bexar County*.¹³⁴ The district court there found special circumstances in two elections on the basis of elevated voter enthusiasm and turnout.¹³⁵ The causes in those years were the names at the top of the ticket: Governor George Bush in 2000 and a popular Hispanic gubernatorial candidate in 2002.¹³⁶ The Fifth Circuit reversed, but accepted the underlying theory of special circumstances.¹³⁷ While few courts have affirmatively taken this

¹²⁸ Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist., 201 F. Supp. 3d 1006, 1054 (E.D. Mo. 2016).

¹²⁹ *Id.* (describing events leading up to the 2014 election).

¹³⁰ *Id.* at 1056.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 385 F.3d 853, 864–65 (5th Cir. 2004).

¹³⁵ *Id.* at 861.

¹³⁶ *Id.* at 864.

¹³⁷ *Id.* at 856.

step, the Fifth and Eighth Circuits provide a model for others to do more going forward.

C. Vote Denial, Turnout, and Special Circumstances in Context

Temporary turnout increases are special circumstances for the same reason as those listed in *Gingles*: They belie an ongoing structural injury to the right to vote. Rather than vote dilution, sudden jumps in turnout belie the ongoing injury of vote denial, but the same normative justification applies. A turnout increase may be unsustainable and thus not predictive of future success—like an unopposed or plurality election—or it may come at an unequal cost—like an election won because of bullet voting. If elevated participation is caused by an event that galvanizes a community, or unusually popular names at the top of the ticket, the victory of the minority-preferred candidate signals illusory equality that will evaporate when conditions inevitably return to normal. And if a turnout increase reflects additional organizing and mobilization efforts, even legitimate and repeatable efforts like GOTV drives, the achievement of parity is not evidence of equality so long as one group bears an unequal burden. Like the circumstances listed in *Gingles*, turnout increases that occur in these situations mask ongoing injury to voting rights. They mark election success as unsustainable and apparent equality as illusory, and courts should consider them special circumstances.

III

VOTER CHOICE AND THE ROLE OF COMPROMISE

This Part explores special circumstances arising from interference with voters' choice. A meaningful right to representation requires not only an opportunity to see one's chosen candidate win an election, but an opportunity to choose a candidate who reflects one's goals and preferences. No voter or group of voters has an absolute right to choose their ideal elected officials, but Section 2 guarantees voters of all racial and ethnic groups an equal opportunity "to elect representatives of their choice."¹³⁸ Otherwise, voters may see bare electoral success without corresponding responsiveness to their needs and desires in governance. In that way, choice can be understood as a species of the right to governance, that is, the right to influence not just elections

¹³⁸ 52 U.S.C. § 10301(b) (2012) (emphasis added). The Supreme Court has acknowledged voters' right to choice as a First Amendment associational right in the context of ballot-access cases. These cases deal with laws conditioning candidates' appearance on the ballot, which thus "implicate[] basic constitutional rights" of voters because they "limit the field of candidates from which voters might choose." *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

but governmental decisions.¹³⁹ Generally, injuries to governance are characterized by the “severance of the vote from its central function of ensuring that all members of our political community are accorded equal concern by policymakers.”¹⁴⁰ Governance rights depend on more factors than just voter choice, but some examples of where the concepts intersect include racial double standards, compromised candidates, and racist candidate criteria.¹⁴¹

Courts probably cannot regulate injuries to choice directly. These phenomena arise from the routine process of compromise in a pluralistic democracy, and no court can enjoin voters’ consciences to ensure those compromises are free of bias. Courts can enjoin vote dilution, however, and they can use special circumstances to recognize when minority-preferred candidates’ success masks unequal burdens on voter choice. If the preferred candidates of a particular minority group only succeed when they are not perceived as members or representatives of that minority group, that is not evidence of equality. Those elections should count less against vote dilution plaintiffs, to ensure that vote dilution remedies are available where they are needed most.

This is also a principled extension of existing special circumstances doctrine. As with turnout increases that mask vote denial, minority-preferred candidate success at the cost of injury to voter choice may be either unsustainable or a sign of an unequal burden. For example, if white voters impose racist candidate criteria or a racial double-standard, then one minority-preferred candidate’s election might be unsustainable because it does not mean that a similarly qualified candidate in the next election will get a fair shake. And whether voters impose racist criteria or simply exact an unequal compromise, compliance with those demands might impose an unequal burden. Even if the demands are otherwise legitimate and ordinary—such as adopting a certain moderate policy—if only one group is required to compromise and moderate its views in pursuit of an opportunity to elect representatives, that is not evidence of equality.

Embracing this robust conception of special circumstances increases the likelihood of a vote dilution remedy that will increase the opportunity for people of color to elect representatives. Thus, while the court cannot directly stamp out unfair compromises, they can ensure those compromises do not close the door to a remedy for a related injury—vote dilution—that will set the stage for fairer democratic contestation going forward.

¹³⁹ Tokaji, *supra* note 29, at 765 (citing Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1717 (1993)).

¹⁴⁰ *Id.* at 763.

¹⁴¹ See *infra* Section III.B.

The rest of this Part proceeds as follows. Section III.A outlines a right of governance that embraces choice. Section III.B argues that this idea can workably be applied to recognize special circumstances, though few courts have wrestled with this problem to date.

A. *Governance, Burdens on Choice, and the Role of Compromise*

The right of governance is the right to receive equal concern from policymakers, and injuries to that right may take several forms.¹⁴² One may have an unabridged right to representation—that is, equal opportunity to elect one’s chosen candidate—and still suffer abridgement of one’s right to governance to the extent one’s choice at the ballot box cannot or will not represent one’s preferences on equal footing with other voters’ representatives. This can happen in at least two ways. The first is by interference with the powers of an elected official’s office, leading to elected officials stripped of legal authority to achieve their voters’ goals. The Supreme Court held in *Presley v. Etowah County Commission* that this kind of injury is not cognizable under the VRA, after white officials stripped their first Black colleague of the powers of his office.¹⁴³

The second, clearly distinguishable way that voters can receive less than equal concern in governance is through interference with choice, leading to elected officials devoid of practical, political freedom to pursue their constituents’ goals, even though they have not been stripped of their powers. Imagine a tweak to *Presley* in which another preferred candidate of Black voters has all the powers of her office, but she owes her election to financial contributions from moneyed interests, which now demand policies other than those favored by her voters. Or, she promised to pursue policies more amenable to white voters’ preferences to win a majority. Candidates compromise all the time, and compromise *may* have nothing to do with inequality, but *if* minority-preferred candidates must compromise more than their counterparts preferred by the majority, supporters of the minority-preferred candidate will receive less than equal concern in governance. This case is distinguishable from *Presley* because it involves direct interference with voters “opportunity . . . to elect representatives of their choice,” rather than issues that arise only after an election is over.¹⁴⁴ Moreover, examining elections for constraints on choice is more practically feasible for courts than scrutinizing the

¹⁴² See Tokaji, *supra* note 29, at 763.

¹⁴³ 502 U.S. 491, 503–04 (2002).

¹⁴⁴ 52 U.S.C. § 10301(b) (2012); see *Presley*, 502 U.S. at 499.

inner workings of legislatures for subtle power imbalances, as a contrary decision in *Presley* might have required.

Courts are capable of recognizing these circumstances, but should they? If voters can only elect candidates who cannot or will not vigorously represent them, their election is not evidence of equality. But injuries to choice naturally arise from the core democratic process of compromise. Even if compromise is always win-win, if one party repeatedly wins more, inequality deepens over time.¹⁴⁵ So long as political power is unequally distributed along racial lines, racial inequality will persist. Biased candidate criteria are similarly inevitable. Even well-intentioned actors harbor implicit biases. Furthermore, if no voter ever has a truly unencumbered choice, is there a manageable standard for identifying when that choice is unacceptably, not normally, constrained?

Direct judicial intervention in compromise seems objectionable because the remedy—judicial regulation of voters’ choices—is unimaginable. But in the special circumstances context, the remedial problem is less stark, and the line-drawing objection is not compelling on its own. Recognition of special circumstances in burdens on voter choice would only marginally increase the availability of vote dilution remedies by reducing the weight of certain evidence against the plaintiffs. And it would only even go that far when evidence of unequal compromise was stark. In such a situation, courts still would not do anything to change or disrupt voters’ choices—vote dilution and its remedies merely forge a path to representation with greater freedom of choice over representatives. The point is not to absolve any group of the “obligation to pull, haul, and trade to find common political ground.”¹⁴⁶ No group has a right to absolute loyalty from their candidates. The point is only to recognize and account for racial bias that unfairly diminishes the benefits and increases the burdens of compromise on people of color.

The problem of drawing lines between ordinary and extraordinary political compromise is difficult, but Section 2 has been described as a “common law statute,” and this is another area ripe for common-law elaboration, for which courts have both authority and competence.¹⁴⁷ The next Section proposes some guideposts, based on areas tentatively staked out by courts and commentators.

¹⁴⁵ Cf. Richard A. Epstein, *Innovation and Inequality: The Separability Thesis*, 39 HARV. J.L. & PUB. POL’Y 1, 3 (2016) (“[C]onsistent Pareto improvement[s] . . . often occur by increasing inequality.”).

¹⁴⁶ *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

¹⁴⁷ See Elmendorf & Spencer, *supra* note 23, at 2186 (rebutting “two objections” to the authors’ proposal for common-law style elaboration of Section 2, “first, that the courts lack

B. *Unequal Burdens on Voter Choice as Special Circumstances*

This Section explores cases and commentary recognizing special circumstances related to three types of burdens on voter choice: racial double standards, compromised candidates, and racist candidate criteria. These categories are not exhaustive, and they present line-drawing problems at the margins, but the examples that follow suggest that these categories are administrable in at least some cases.

1. *Racial Double Standards*

Racial double standards are difficult to police in part because minority-preferred candidates elected in spite of such double standards are, by definition, exceptional on the “merits.”¹⁴⁸ Several courts have expressed discomfort with discounting a candidate’s success “because the person is qualified and popular.”¹⁴⁹ That argument is superficially appealing for two reasons. First, it aligns with a particular self-image of American politics as a meritocracy.¹⁵⁰ One might think that we hold all of our public officials to high standards, so the election of exceptional people is just evidence that the system is working. Second, it points out a risk of an independent, expressive harm. Special circumstances doctrine should never suggest that successful, qualified minority-preferred candidates are aberrations or otherwise not “real” representatives of the group.¹⁵¹ Courts may say they do not mean to “minimize the[ir] achievement,”¹⁵² but it is undeniably strange to “discount” those exceptional candidates’ successes.

Notwithstanding these legitimate critiques, it is likely worse to throw up our hands, ignore double standards, and sanction a system in

legal authority” to do so and “second, that . . . the courts cannot reasonably be expected to” do so); Elmendorf, *supra* note 26, at 404 (“Section 2 is a delegation of authority to the courts to develop a common law of racially fair elections, guided by certain substantive and evidentiary norms as well as norms about legal change.”).

¹⁴⁸ *But see* Uhlmann & Cohen, *supra* note 71 (discussing the social construction of merit and inherent bias involved).

¹⁴⁹ NAACP v. City of Niagara Falls, 65 F.3d 1002, 1021 n.22 (2d Cir. 1995); *see also* Anthony v. Michigan, 35 F. Supp. 2d 989, 1006 (E.D. Mich. 1999) (noting that name recognition and a strong resume are “ordinary and necessary components of a successful candidacy,” and thus holding that they are not special circumstances).

¹⁵⁰ *Cf.* Marianne Cooper, *The False Promise of Meritocracy*, ATLANTIC (Dec. 1, 2015), <https://www.theatlantic.com/business/archive/2015/12/meritocracy/418074> (“Americans are . . . particularly enthusiastic about the idea of meritocracy, a system that rewards merit (ability + effort) with success. . . . This strong commitment to meritocratic ideals can lead to suspicion of efforts that aim to support particular demographic groups.”).

¹⁵¹ *Cf.* Christopher Cadelago, *Why Kamala Harris Is Glad People Are Asking if She’s Black Enough*, POLITICO (Feb. 12, 2019), <https://www.politico.com/story/2019/02/12/kamala-harris-2020-black-race-1167030> (discussing Harris’s fielding of “questions about the ‘legitimacy of [her] blackness’”).

¹⁵² Pope v. County of Albany, 94 F. Supp. 3d 302, 340 (N.D.N.Y. 2015).

which people of color have the opportunity to elect their candidate only if they are twice as good in some relevant sense.¹⁵³ If a candidate is elected on the belief that they are flawless, that may also impact governance. They may shy away from bold, risky bets, and they may lose support more readily than another in their position would.¹⁵⁴ Alternatively, one successful candidate's popularity may be unsustainable. In *Gunn v. Chickasaw County*, for example, the court treated a former professional athlete's election as a special circumstance.¹⁵⁵ The election of one minority-preferred candidate, who entered the race as a beloved household name, is not evidence of equality, because it is not evidence that less famous but equally qualified minority-preferred candidates will get a fair look in the future. In short, that is a special circumstance. That election should count less against plaintiffs seeking a level playing field for *all* candidates. Courts cannot enforce perfect equality in voter evaluations of candidates, but they can police extremes. By discounting those elections on special circumstances grounds, courts ensure the availability of vote dilution remedies where they are needed.

Inquiry into double standards should not be symmetrical, for several reasons.¹⁵⁶ First, there is no objective measure of candidate quality that is not constructed by the white majority.¹⁵⁷ Inviting scrutiny of all candidates might perpetuate the excuse that election of only white candidates reflects merely "a preference for better-qualified

¹⁵³ See, e.g., Jared Goyette, *What It's Like for Black Candidates Running for Political Office in the Twin Cities*, MINNPOST (Oct. 26, 2017), <https://www.minnpost.com/community-sketchbook/2017/10/what-its-black-candidates-running-political-office-twin-cities> (describing anecdotally double standards imposed on Black candidates); cf. Ta-Nehisi Coates, *Donald Trump Is the First White President*, ATLANTIC (Oct. 2017), <https://www.theatlantic.com/magazine/archive/2017/10/the-first-white-president-ta-nehisi-coates/537909> ("Barack Obama delivered to black people the hoary message that if they work twice as hard as white people, anything is possible. But Trump's counter is persuasive: Work half as hard as black people, and even more is possible.").

¹⁵⁴ See, e.g., Melissa Harris-Perry, *Black President, Double Standard: Why White Liberals Are Abandoning Obama*, NATION (Sept. 21, 2011), <https://www.thenation.com/article/black-president-double-standard-why-white-liberals-are-abandoning-obama> (discussing the negative response among one-time supporters to President Obama's perceived failings that exceeded criticism of President Clinton despite Obama's superior policy and personal track record).

¹⁵⁵ See *Gunn v. Chickasaw County*, No. CIV.A. 1:92CV142–JAD, 1997 WL 33426761, at *4 (N.D. Miss. Oct. 28, 1997).

¹⁵⁶ The reasons that incumbency should not be treated symmetrically as a special circumstance also apply to inquiry into double standards for special circumstances purposes. See *supra* note 82. Discounting the election of majority-preferred candidates whom the court finds "exceptional," like discounting the election of majority-preferred incumbents, "subtly reintroduc[es] an intent requirement in the guise of the special circumstances 'wildcard.'" Hesp, *supra* note 82, at 431.

¹⁵⁷ For a more detailed explication of this idea, see Uhlmann & Cohen, *supra* note 71.

candidates,” a judgment which could not possibly be disentangled from implicit or explicit bias present in the electorate.¹⁵⁸ Second, some metrics of candidate quality are affected by discrimination and inequality in other spheres, such as a campaign’s financing.¹⁵⁹ Courts have recognized that resource disparities result from “the same vestiges of past discrimination that inhibit minority electoral opportunity,” so it would not make sense to count those resource disparities *against* plaintiffs in VRA lawsuits.¹⁶⁰

2. *Racially Unequal Candidate Compromises*

Campaign finance is also a mechanism by which special circumstances arise in the next category: compromised candidates. Candidates can be compromised representatives for many reasons, including commitment to sources of financing and their campaign promises. The impact of money in politics is well-known and empirically documented.¹⁶¹ First Amendment protections for money in politics limit direct judicial *and* legislative remedies for certain burdens on voter choice.¹⁶² Vote dilution litigation and special circumstances, on the other hand, have no such limitations. If people of color can only elect their preferred candidates when they are also the preferred candidates of Wall Street, for example, it would not unconstitutionally limit anyone’s right to political speech or spending if a court found that to be a special circumstance in adjudicating a vote dilution claim.

Compromise may also come from public policy commitments motivated purely by votes, not by money.¹⁶³ For example, in *Brown v. Board of Commissioners*, the issue of the day was busing.¹⁶⁴ The court discounted a Black candidate’s election when he received unusual white support after signaling opposition to the busing program. The

¹⁵⁸ *Wright v. Sumter Cty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1316 (M.D. Ga. 2018) (declining to “scrutinize the qualifications of minority candidates who run for public office in jurisdictions with historically white-only officeholders” (quoting *Ruiz v. City of Santa Maria*, 160 F.3d 543, 558 (9th Cir. 1998))).

¹⁵⁹ For example, incumbency confers a fundraising advantage, and is not distributed equally. Raphael, *supra* note 80.

¹⁶⁰ *Pope v. County of Albany*, 94 F. Supp. 3d 302, 347 (N.D.N.Y. 2015) (citing *Thornburg v. Gingles*, 478 U.S. 30, 70 (1986)).

¹⁶¹ *See, e.g., Tokaji, supra* note 29, at 772 (“A growing body of scholarship demonstrates that well-financed interest groups exercise outsized influence on public policy.”).

¹⁶² *See id.*; *see also Citizens United v. FEC*, 558 U.S. 310, 365 (2010) (“No sufficient government interest justifies limits on the political speech of nonprofit and for-profit corporations.”); *Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (holding that limits to individual spending abridged freedom of speech protections).

¹⁶³ Of course, it may be difficult to tell the difference, but the line between them is irrelevant as both are “special.”

¹⁶⁴ 722 F. Supp. 380, 394 (E.D. Tenn. 1989).

court's implication was that Black voters generally supported busing and white voters generally opposed it. A minority-preferred candidate who thus commits himself to a policy to win an election, different from the position the challenging group would like, is a compromised representative of that group. If those are the only candidates Black voters in Chattanooga can elect, their electoral success is not evidence of equality.

For another example, take Senator Kamala Harris's prosecutorial record, a subject of much progressive scrutiny since she announced her candidacy for President in 2020.¹⁶⁵ Some observers suggest that Senator Harris, as a Black woman, may have felt pressures of racial and gender bias to adopt certain "tough on crime" policies. Prosecutors are overwhelmingly male, and some have argued that Harris was subject to particular "scrutiny and skepticism," based on "racist stereotypes about how black people view law enforcement or sexist views about whether women are 'tough' enough for the job."¹⁶⁶ The criminal justice example is not meant to assume anybody's attitudes toward that issue nor to perpetuate those same racist stereotypes, but if a court finds preferences on a salient issue *are* racially polarized in fact, and candidates only win by embracing the position favored by the white majority, that is not evidence of equality.

3. *Racist Candidate Criteria*

The final category of burdens on the electoral choices of people of color is the imposition of racist criteria on candidates. The *Ferguson* court summed up the extreme of this phenomenon: "An electoral system does not provide equal opportunity if Black voters cannot elect their top candidate(s) of choice and can only elect lesser preferred candidates, and only if they are white."¹⁶⁷ Less extreme injuries to choice might take the form of racial "passing" or "covering" demands.¹⁶⁸ If a candidate "passes," voters would not even

¹⁶⁵ See Cadelago, *supra* note 151; German Lopez, *Kamala Harris's Controversial Record on Criminal Justice, Explained*, Vox (Sept. 12, 2019, 8:58 PM), <https://www.vox.com/future-perfect/2019/1/23/18184192/kamala-harris-president-campaign-criminal-justice-record>.

¹⁶⁶ Lopez, *supra* note 165; see also Li Zhou, *Kamala Harris Has Been Criticized for Her Criminal Justice Record. She's Just Begun to Offer a Response.*, Vox (Jan. 21, 2019, 4:35 PM), <https://www.vox.com/2019/1/21/18191864/kamala-harris-2020-criminal-justice> ("The bottom line is the buck stops with me and I take full responsibility for what my office did.").

¹⁶⁷ *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1047 (E.D. Mo. 2016).

¹⁶⁸ See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* 18 (2006). Yoshino's work articulates a need for a new civil rights paradigm to respond to covering demands, which have gradually replaced demands for conversion and passing, in

know they belong to a particular group some voters might disfavor. Courts have recognized passing demands and treated them as special circumstances. Examples include cases where voters did not know that the incumbent judge they voted for was a Black man,¹⁶⁹ and where Latino candidates benefited with white voters, “in part because of their Anglo surnames.”¹⁷⁰

More common today is covering, or minimizing the visibility of a trait that others find undesirable.¹⁷¹ For example, LGBT people were once expected to completely conceal their identity in some spheres, but even as most people came to accept LGBT identity in the abstract, many still object to public display of that identity.¹⁷² It is easier to sanction passing demands than covering. Compare the employer who treats people badly *because of* their race, gender identity, or sexual orientation, with one who promotes some members of a group, but only those who go out of their way to make their identity palatable to someone biased against that identity group.¹⁷³ This is exacerbated by implicit bias, as decisionmakers may not even know they are demanding covering.¹⁷⁴

One commentator suggested that special circumstances may have contributed to Barack Obama’s 2008 election, including “points of

the context of sexual orientation, race, gender identity, and beyond. He proposes concrete solutions but recognizes the limits of law in this area. *See id.* The VRA is similarly limited, but special circumstances doctrine *may* provide a tool for recognizing subtler injuries to civil rights than would be independently actionable through litigation.

¹⁶⁹ *See* City of Carrollton Branch of the NAACP v. Stallings, 829 F.2d 1547, 1559 (11th Cir. 1987).

¹⁷⁰ *See* Patino v. City of Pasadena, 230 F. Supp. 3d 667, 712 (S.D. Tex. 2017) (“If Latinos in Pasadena can—barely—elect their candidates of choice only if those candidates are incumbents with Anglo surnames, then Latinos in those districts do not have an equal opportunity to elect candidates of their choice.” (citation omitted)); *see also* Benavidez v. City of Irving, 638 F. Supp. 2d 709, 728 (N.D. Tex. 2009) (finding a candidate’s “Anglo name” to be a special circumstance).

¹⁷¹ YOSHINO, *supra* note 168, at 18–19 (distinguishing passing from covering as the former pertaining to visibility of a trait to which others attach a stigma and the latter pertaining to its “obtrusiveness”).

¹⁷² *Id.* at 76 (“In some sectors of America, we can now be gay and out, so long as we do not ‘flaunt.’”).

¹⁷³ *Id.* at 131 (“A racial minority fired for her ancestry or skin color will win her suit in a hot second. But a racial minority fired for refusing to cover a cultural aspect of her identity will generally lose.” (citing *Rogers v. Am. Airlines*, 527 F. Supp. 229 (S.D.N.Y. 1981))). In *Rogers*, the court dismissed a Title VII employment discrimination challenge to a facially race- and gender-neutral airline policy that banned the wearing of “all-braided hairstyle[s],” even though such policy “disproportionately burdened African-American women, with whom cornrows are strongly associated.” *Id.*; *see also* *Rogers*, 527 F. Supp. at 234.

¹⁷⁴ *See* Jenée Desmond-Harris, *Implicit Bias Means We’re All Probably at Least a Little Bit Racist*, VOX (Aug. 15, 2016, 12:00 PM), <https://www.vox.com/2014/12/26/7443979/racism-implicit-racial-bias>.

demarcation” akin to covering that may have “made some white voters more comfortable and willing to support him, despite being less willing to support minority candidates generally.”¹⁷⁵ These include his biracial identity, highlighted by imagery circulated around the election, such as photos of Obama with white family members.¹⁷⁶

This has nothing to do with perceptions of President Obama among other voters *not* inclined to discriminate against him on the basis of race. Even if Obama benefited among some voters who harbored racial biases because of attributes unrelated to his qualifications, that does not diminish the extent to which *he was* the uncompromised choice of millions of voters. The injury to choice is not in Obama’s election, but in the defeat of other candidates who lack the same attributes. Recognizing special circumstances in no way implies that President Obama was not a “real” Black candidate, only that if a Black candidate only wins when a certain subset of voters “d[o] not view him as a traditional Black candidate,” that victory is not evidence of equality.¹⁷⁷

The case of President Obama also illustrates the governance impacts caused by the election of candidates under such circumstances. There were numerous reports early in the Obama years that his Administration went to great lengths to avoid any hint of racial controversy.¹⁷⁸ This may have had wider policy effects as well. For example, the Obama Administration is often portrayed by its opponents as having been “soft” on immigration because of policies like

¹⁷⁵ Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL’Y. REV. 59, 79 (2009). For a deeper discussion of the complicated role of race and racism in Barack Obama’s election and presidency, see Ta-Nehisi Coates, *My President Was Black*, ATLANTIC (Jan. 2017), <https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793>, which describes how the Obamas’ racial identities were perceived by both black and white communities; and Ta-Nehisi Coates, *Fear of a Black President*, ATLANTIC (Sept. 2012) [hereinafter Coates, *Fear of a Black President*], <https://www.theatlantic.com/magazine/archive/2012/09/fear-of-a-black-president/309064>, which discusses how Obama was electable as a Black man because he eschewed explicit racial politics but that he couldn’t escape his blackness once in office.

¹⁷⁶ Clarke, *supra* note 175, at 78.

¹⁷⁷ *Id.* at 79.

¹⁷⁸ See, e.g., Coates, *Fear of a Black President*, *supra* note 175 (discussing the racist double standards applied to President Obama and his consequent perceived avoidance of certain issues of racial justice); Michael Eric Dyson, *Whose President Was He?*, POLITICO MAG., (Jan./Feb. 2016), <https://www.politico.com/magazine/story/2016/01/barack-obama-race-relations-213493> (describing President Obama’s “racial reticence” that may have been “self-defense” to avoid “blowback”); cf. Clarence Lusane, *Racism, Shirley Sherrod, and the Obama White House*, HUFFPOST (Dec. 6, 2017), https://www.huffingtonpost.com/clarence-lusane/racism-shirley-sherrod-an_b_667618.html (describing the incident in which Shirley Sherrod was fired from the Department of Agriculture over false claims from right-wing media that she had made statements evincing racist attitudes against white people).

DACA, when it in fact effectuated unprecedented volumes of deportations.¹⁷⁹ The blowback might have been severe had the Obama Administration effected actually progressive policies on immigration and other issues.

Using “moderate” policy outputs as evidence of special circumstances presents a particular balancing act. Many people say they *like* compromise, though there is evidence that compromise is less popular than one might think and getting less popular.¹⁸⁰ Still, political polarization is often seen as corrosive to democracy,¹⁸¹ so one could argue that law should not encourage voters’ worst impulses. Polarization is a problem that demands its own solution, but it cannot justify ignoring gross power imbalances. Policy comes out of contestation among representatives of various constituencies. In a vote-diluting jurisdiction, people of color by definition hold distinctive interests.¹⁸² If their one or few representatives will not or cannot advocate for their constituents on equal footing with representatives of the majority, those voters will not receive equal concern in governance.

C. *Unequal Burdens on Choice and Special Circumstances in Context*

Ultimately, the question of whether a given burden on voter choice constitutes a special circumstance will be difficult for courts to decide at the margins. Still, with no direct judicial remedy in sight, the burdens on choice and related impacts on governance discussed in this Section call out for some remedy. These burdens may take the form of a racist double standard, a requirement to make unequal bargains for votes, or covering demands of minority-preferred candidates. Whatever other difficulties those injuries present, it is self-evident that

¹⁷⁹ Eric Levitz, *Trump: Obama Was for ‘Open Borders’ – Also, His Immigration Policies Were the Same as Mine*, N.Y. MAG. (June 25, 2018), <http://nymag.com/intelligencer/2018/06/trump-tweet-obama-family-separation-outrage-media-unfair-same-policies.html> (discussing the contradiction between President Obama’s actual immigration policy and popular perception through the lens of President Trump’s criticism).

¹⁸⁰ See, e.g., Clare Malone, *Democrats Don’t Care About Policy Compromise Anymore—Just Like Republicans*, FIVETHIRTYEIGHT (Sept. 11, 2018, 5:58 AM), [https://fivethirtyeight.com/features/forget-details-politics-today-are-all-about-big-ideas; John Sides, Many Americans Say They Want Politicians to Compromise. But Maybe They Don’t., WASH. POST \(Jan. 16, 2019\), https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/16/many-americans-say-they-want-politicians-to-compromise-but-maybe-they-dont](https://fivethirtyeight.com/features/forget-details-politics-today-are-all-about-big-ideas; John Sides, Many Americans Say They Want Politicians to Compromise. But Maybe They Don’t., WASH. POST (Jan. 16, 2019), https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/16/many-americans-say-they-want-politicians-to-compromise-but-maybe-they-dont).

¹⁸¹ See generally Jennifer Lynn McCoy, *Extreme Political Polarization Weakens Democracy—Can the US Avoid That Fate?*, CONVERSATION (Oct. 31, 2018), <https://theconversation.com/extreme-political-polarization-weakens-democracy-can-the-us-avoid-that-fate-105540> (discussing research supporting this idea from democracies around the world).

¹⁸² See *supra* notes 7, 50 and accompanying text (discussing the requirement of “racially polarized voting”).

an election characterized by one or more of those burdens falling on only one racial group is not evidence of equality.

Vote dilution and its remedies may be the best of imperfect options. Special circumstances doctrine is the means by which courts can critically examine newfound or sporadic success for minority-preferred candidates for the hallmarks of unequal burdens on voter choice. In jurisdictions where people of color have traditionally been denied equal representation and equal treatment generally, courts should not lightly deny vote dilution claims. When an election features a clear manifestation of unequal burdens, courts can use special circumstances doctrine to discount those elections, in whole or in part, as evidence against the burdened group. Thus, courts can ensure that hard-won political victories in spite of those burdens do not foreclose further victories in the courtroom. If courts can get out of their own way by embracing a richer conception of special circumstances, Section 2 litigation could pave the way to more equal representation, which in turn could be a step toward a deeper equality in the future.¹⁸³

CONCLUSION

Vote dilution litigation cannot directly address most voting rights injuries, and some may elude judicial scrutiny altogether. Some facially race-neutral limits on participation may be necessary, even if their effects are not always perfectly race neutral. The political process should seek the least harmful versions of those laws, but the role of the courts is limited. And there is no political process without debate and compromise, even compromises that systematically tilt in favor of the powerful. Ideally those compromises would not incorporate racial biases, but courts cannot police every bargain or any voter's private prejudices.

This Note has articulated a special circumstances doctrine that recognizes those limitations and seeks to overcome them. Courts should recognize that any time a minority-preferred candidate prevails under circumstances that belie those seemingly irremediable structural injuries, those are special circumstances and that election should weigh less heavily against the plaintiffs. Thus, courts can ensure that vote dilution remedies are not limited just because courts necessarily lack the power to solve every problem plaguing our democracy all at once.

Courts can recognize when a jump in turnout masks subtle vote denial. They can take notice of a successful candidate subject to the

¹⁸³ See generally Elmendorf, *supra* note 26, at 398 (discussing evidence for this feedback effect of representation).

unfair pressure of an unequal bargain. They can rationalize their approach to more traditional special circumstances by remaining tethered to a normative foundation. Ultimately, the courts can get better at recognizing when electoral success is unsustainable, burdens on voters are unequal, and apparent equality of electoral opportunity is illusory. They can only issue a limited set of remedies for vote dilution, but those remedies offer a path to representation for the unrepresented. In the face of deep and intractable structural inequality, that may be a step toward the kind of political and social change that courts cannot order.