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Barriers to the Ballot Box: Implicit Bias and Voting Rights in the 21st Century

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BARRIERS TO THE BALLOT BOX: IMPLICIT BIAS AND VOTING RIGHTS IN THE 21ST CENTURY

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While much has been written regarding unconscious or "implicit bias" in other areas of law, there is a scarcity of scholarship examining how implicit bias impacts voting rights and how advocates can move courts to recognize evidence of implicit bias within the context of a voting rights claim. This Article aims to address that scarcity. After reviewing research on implicit bias, this Article examines how implicit bias might impact different stages of the electoral process. It then argues that "results test" claims under Section 2 of the Voting Rights Act (VRA) present an opportunity for plaintiffs to introduce evidence regarding implicit bias in the electoral process. In addition, this Article explores policy solutions to reduce the impact of implicit bias in elections.

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INTRODUCTION

This year marks the 50th anniversary of the passage of the Voting Rights Act (VRA),[1] a law that changed the voting rights landscape dramatically. Today the Jim Crow era of literacy tests and total denial of access to the ballot box for minorities is gone. Though participation of minority voters in the electoral process has increased, several states have recently implemented policies that threaten these gains.[2] For example, despite scarce evidence of in-person voter fraud, states continue to pass laws requiring voters to present forms of photo identification in order to vote, which some voters do not have.[3] Many of these laws have a disproportionate impact on minorities, as minorities are less likely than Whites to have acceptable identification.[4]

What makes the protection of voting rights against racial discrimination particularly challenging is that, while Americans today might not intend to discriminate and are less likely than were previous generations to express racial motivations for an action, unconscious biases continue to influence individual and organizational decisions.[5] This Article explores unconscious, or "implicit," bias in the electoral process and examines how research on implicit bias might fit within the current legal framework of voting rights.

The next section of this Article provides a general overview of implicit bias. Part II examines the electoral process and highlights how implicit bias might impact each stage, from the allocation of resources for voting to decisions made by poll workers on Election Day regarding who

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1. 52 U.S.C.A. § 10301 (West 2015).

2. *See* Corey Dade, *Election Study: Black Turnout May Have Surpassed That of Whites*, NAT'L PUB. RADIO (Dec. 27, 2012), http://www.npr.org/blogs/itsallpolitics/2012/12/27/168155895/election-study-black-turnout-may-have-surpassed-whites.

3. As of August 2015, "[a] total of thirty-four states had passed laws requiring voters to show identification" in order to vote, and "32 of these voter identification laws are in force." Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NAT'L CONF. OF ST. LEGISLATURES (Aug. 10, 2015), http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx. Seven of these states have strict photo ID requirements. *Id*.

4. *See, e.g.,* Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis.), *rev'd*, 768 F.3d 744 (7th Cir. 2014); Veasey v. Perry, 71 F. Supp. 3d 627, 658 (S.D. Tex. 2014), *aff'd in part*, *vacated in part*, *remanded sub nom*. Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015); *see also* Forrest Wickman, *Why Do Many Minorities Lack ID?,* SLATE (Aug. 21, 2012), http://www.slate.com/articles/news_and_politics/explainer/2012/08/voter_id_laws_why_do_minorities_lack_id_to_show_at_the_polls_.html (explaining that voter-ID laws disenfranchise minority voters who are less likely to have the most common form of identification, a driver's license, "because they are more likely to be poor and to live in urban areas" where they do not drive).

5. *See* Smith v. Town of Clarkton, N.C., 682 F.2d 1055, 1064 (4th Cir. 1982) ("Municipal officials acting in their official capacities seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate against a racial minority. Even individuals acting from invidious motivations realize the unattractiveness of their prejudices when faced with their perpetuation in the public record . . . so it is rare that these statements can be captured for purposes of proving racial discrimination in a case such as this.").

may vote a regular ballot. Part III discusses the legal framework for voting rights advocacy today. Finally, Part IV argues that the "results test" in Section 2 of the VRA provides an opportunity for courts to consider evidence of implicit bias within the electoral context. In addition, Part IV provides examples of how evidence regarding implicit bias can be incorporated into a "results test" claim and discusses policy reforms to reduce the impact of implicit bias in the voting arena.

I. IMPLICIT BIAS DEFINED

Implicit bias describes the phenomenon by which decisions are impacted by unconscious prejudices held in the brain. Psychological research on implicit bias has gained significance in recent decades,[6] following the 1998 introduction of the implicit association test (IAT).[7] The IAT measures "the strengths of associations among concepts."[8] The IAT operates by showing participants a set of images and words and asking them to classify the images and words into groups as quickly as possible.[9] The speed with which a participant is able to classify these words or images is tracked and used to measure how strongly one implicitly associates those words or images with the general categories (i.e. how strongly one associates African-Americans with negative attributes and European Americans with positive attributes).[10] "The IAT operates on the supposition that when the two concepts are highly associated, the sorting task will be easier and thus require less time than when the concepts are not highly associated."[11] Of the more than two million users who had visited implicit.harvard.edu to take the IAT, sixty- eight percent of them had some level of implicit bias

6. Cheryl Staats et. al., *State of the Science: Implicit Bias Review 2015*, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY 1 (2015), http://kirwaninstitute.osu.edu/wp-content/uploads/2015/05/2015-kirwan-implicit-bias.pdf.

7. *See generally* Anthony G. Greenwald, Debbie E. McGhee & Jordan K.L. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. OF PERS. & SOC. PSYCH. 1464, 1464-80 (1998).

8. Brian A. Nosek, Anthony G. Greenwald & Mahzarin R. Banaji, *The Implicit Association Test at Age 7: A Methodological and Conceptual Review*, AUTOMATIC PROCESSES IN SOCIAL THINKING AND BEHAVIOR 267 (J. A. Bargh, ed. 2007); *see also* PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html (last visited June 27, 2015).

9. PROJECT IMPLICIT, https://www.projectimplicit.net/about.html (last visited May 6, 2015). The test may also start by asking participants a series of questions designed to measure explicitly held beliefs. *See Preliminary Information*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/takeatest.html (last visited June 27, 2015). For example, in a gender-career IAT, the test asks how much the participant associates career and family with males and females. In a race IAT, the test asks participants whether they have a preference for European Americans over African-Americans. *See* UNDERSTANDING PREJUDICE, http://www.understandingprejudice.org/iat/index2.htm (last visited Oct. 13, 2015).

10. Cheryl Staats, *State of the Science: Implicit Bias Review 2013*, KIRWAN INST. FOR THE STUDY OF RACE AND ETHICS 1, 27 (2013), http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf; Nosek et al., *supra* note 8; Project Implicit, *supra* note 8.

11. Staats, *supra* note 10, at 25.

based on race.[12] Furthermore, the time differentials in the IAT sorting tasks "have been found to be statistically significant," i.e., likely not "due to random chance."[13]

As the IAT shows, our brains are wired to take in information and form social "schemas," mental theories about how we expect people and social situations to operate.[14] Schemas are critical to our survival: our brains simply encounter too much information on a day-to-day basis to process it all. Our brains need short cuts to help process the onslaught of information efficiently and to anticipate and prepare us for contingencies.[15] For instance, as children we learn that a snarling dog is a threat. We might learn this through experience (getting bitten by an angry dog) or through other informational sources (an adult telling us to be careful of dogs or a cartoon showing a character getting chased by a dog). Once we learn this, if we see a snarling dog, we automatically rely on a schema of "snarling dog as dangerous" and retreat. Therefore, there is no need to relearn that a snarling dog is dangerous every time we encounter one. Our ability to rely on shortcuts, such as "snarling dog is dangerous," is critical to our survival (and our ability to avoid dog bites!).

Yet, while some schemas are necessary for our survival, other schemas may be based on inaccurate or incomplete information. For instance, the media and societal narratives have trained most people's brains to react to individuals of other races in differing ways.[16] While we might consciously reject racism, impressions learned when young and decades of watching the news, TV shows, or otherwise simply engaging in society engrain stereotypes in our brains and contribute to the development of

12. Brian A. Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. OF SOC. PSYCH. 1, 17 (2007).

13. Staats, *supra* note 10, at 25.

14. *Id*. at 11.

15. The Ninth Circuit has recognized that categorizing information and relying on generalizations play a role in our ability to process information. *See* Chin v. Runnels, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004) (noting that "[t]here is [an] increasing recognition of the natural human tendency to categorize information and engage in generalizations, of which stereotyping is a part, as a means of processing the huge amount of information confronting individuals on a daily basis; these unconscious processes can lead to biased perceptions and decision-making even in the absence of conscious animus or prejudice against any particular group"), *aff'd sub nom.*, Chin v. Carey, 160 F. App'x. 633 (9th Cir. 2005).

16. For instance, as discussed in Section IV.A.2., Whites primed by watching stereotypic "portrayal[s] of African Americans [on television] are later more likely to judge a Black defendant [as] guilty of an assault." UNDERSTANDING PREJUDICE AND DISCRIMINATION 27 (Scott Plous, ed.) (2003) (citing T.E. Ford, *Effects of Stereotypical Television Portrayals of African-Americans on Person Perception*, 60 SOC. PSYCH. Q. 266 (1997)); *see also* Jerry Kang, *Bits of Bias*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 132, 135-39 (Justin D. Levinson & Robert J. Smith, eds., 2012) (discussing stereotypes in media and the neural and emotional responses to viewing those stereotypes).

schemas. The media help create stereotypes,[17] for instance, by frequently portraying Whites as hardworking professionals, while often portraying Blacks as athletes and criminals, Hispanics as illegal immigrants and drug dealers, and Asians as scientific geniuses and classical musicians. Overriding these schemas and stereotypes is possible, but given the pervasiveness of the messages reinforcing racial stereotypes, overriding schemas and stereotypes about a social group requires consistent effort.

In addition to a number of other factors, research shows that implicit bias is most likely to taint our actions when we have more discretion or must make a quick decision. These are situations in which we may unwittingly rely on schematic shortcuts because we do not have guidelines by which to make a decision or time to process new information fully.[18] The following sections take a closer look at how these factors (discretion, time pressures, etc.)—and implicit bias in general—can impact the electoral process.

II. IMPLICIT BIAS IN THE ELECTORAL PROCESS

Superficially, the administration of elections and the voting process seem strictly regulated with little room for election officials to exercise discretion. A closer look, however, reveals multiple points at which election officials make choices,[19] from where to place new voting machines to how to assess a voter's identification to how much assistance to offer a disabled, elderly, or minority voter. With each use of discretion, the risk of implicit bias infecting the electoral process increases.[20] This section analyzes how implicit bias might influence decisions made at various stages of the election process.[21]

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17. Stereotypes are "standardized and simplified belief[s] about the attributes of a social group." Staats, *supra* note 10, at 77. Although stereotypes and schemas are interrelated, they are distinct concepts. *See id*. at 11.

18. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142 (2012). For more information on factors exacerbating implicit bias, see *Strategies to Reduce the Influence of Implicit Bias*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_Strategies_033012.ashx (last visited Mar. 18, 2015).

19. *See* Ariel R. White, Noah L. Nathan & Julie K. Faller, *What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials, American Political Science Review*, 109 AM. PO. SCI. REV. 129, 129 (2014) ("Like other street-level bureaucrats, local election administrators often have considerable discretion in how they manage the election system, operate with little direct oversight from state officials, and are frequently time and resource constrained.").

20. *See* Michelle Wilde Anderson & Victoria C. Plaut, *Property Law: Implicit Bias and the Resilience of Spatial Colorlines*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 25, 30 (Justin D. Levinson & Robert J. Smith eds., 2012).

21. *See generally* IMPLICIT BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012) (discussing implicit bias in many areas of law but not offering an analysis of implicit bias in voting rights or election law). This collection of essays was the inspiration and source of much of the information in this Section.

A. *Resource Allocation*

Although social psychologists have not directly tested decision-making in the allocation of election resources, experiments examining how people make decisions when allocating resources in other areas are instructive. For instance, in a study by Laurie Rudman and Richard Ashmore, researchers asked participants, university students in an introductory psychology class, to make recommendations regarding how to implement a twenty percent budget cut to student groups on campus.[22] The researchers also asked participants to complete a survey measuring their explicit attitudes about people from different racial groups.[23] In addition, the researchers gave the participants an IAT test measuring their implicit attitudes regarding Jews, Asians, and Blacks.[24] The researchers found that "implicit biases predicted economic discrimination toward Jews, Asians, and Blacks, and that the stereotype IAT was either an equal or superior predictor, compared with explicit attitudes."[25] In other words, participants demonstrating higher implicit bias against Jews, Asians, and Blacks on the IAT were more likely to cut the budget of student groups associated with those social identities than their expressed attitudes would have indicated.[26]

Researchers in a different study tested White participants' willingness to place a chemical plant in predominantly minority or White neighborhoods.[27] The researchers surveyed half of the White participants regarding their receptivity to placing a chemical plant in a majority White neighborhood and half of the White participants regarding their receptivity to placing the chemical plant in a majority Black neighborhood.[28] The researchers also provided half of the participants with "local and national housing cost information," and surveyed the participants' perceptions of the neighborhoods, such as the degree to which "power plants and incinerators already existe[d] nearby," the "perceived neighborhood house values," and the "perceived socioeconomic status of residents."[29] The researchers found that, "participants were less likely to oppose the plant when the neighborhood was black than when it was white – regardless of

22. Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Bias Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 363-65 (2007).

23. *Id*. at 365.

24. *Id*.

25. *Id*. at 368.

26. *Id*.; *see also* Justin D. Levinson, *Corporations Law*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 156, 157 (Justin D. Levinson & Robert J. Smith eds., 2012) (describing the Rudman & Ashmore studies and extrapolating the findings to "corporate decisions regarding charitable contributions").

27. Wilde Anderson & Plaut, *supra* note 20, at 35 (discussing Courtney M. Bonam, *Devaluing Black Space: Black Locations as Targets of Housing and Environmental Discrimination* (Aug. 2010) (unpublished Ph.D. dissertation, Stanford University) (on file with Stanford University)).

28. *Id*.

29. *Id*.

housing cost information – even when controlling for participants' perceptions of house values and socioeconomic status, their concern for the environment, and their explicit feelings toward blacks."[30] Participants who believed they treated people from all races equally were still more likely to be comfortable placing a chemical plant in a minority neighborhood rather than in a White neighborhood.[31]

These experiments illustrate how implicit biases can impact decisions regarding resource allocation and can implicate how election resources are distributed. County officials rely on their discretion when deciding how to disburse election resources in a range of situations, from determining where to create new polling locations to deciding which localities receive new voter machines. For example, up to 15,000 people left the polls without voting on Election Day 2004 in Columbus, Ohio,[32] in large part due to decisions by officials about who was likely to vote. Franklin County officials allocated the machines "according to instinct and science."[33] Officials "apparently . . . assumed that in a poor neighborhood, turnout would be low."[34] Their failure to provide additional resources to certain neighborhoods led to long lines, from which many discouraged voters turned away before being able to cast their ballots.[35]

Implicit bias may also impact which polling locations get newer voting machines. A 2003 lawsuit[36] brought by the Southwest Voter Registration Education Project and other groups noted that certain voting devices—which were prone to error at twice the rate of newer voting devices—were still in use in six largely minority counties in California. While eighty-one percent of African-American and sixty-seven percent Latino voters live in counties with "obsolete" machines in California, only fifty-nine percent of White voters live in counties with outdated ma-

30. *Id*.

31. Bonham, *supra* note 27, at 56-62.

32. Adam Cohen, *No One Should Have to Stand in Line for 10 Hours to Vote*, N.Y. TIMES (Aug. 25, 2008), http://www.nytimes.com/2008/08/26/opinion/26tue4.html?_r=0.

33. Michael Powell & Peter Slevin, *Several Factors Contributed to 'Lost' Voters in Ohio*, WASH. POST (Dec. 15, 2004), http://www.washingtonpost.com/wp-dyn/articles/A64737-2004Dec14.html?nav=rss_politics/elections/2004.

34. Sasha Abramsky, *Just Try Voting Here: 11 of America's Worst Places to Cast a Ballot (or Try)*, MOTHER JONES (Oct. 2006), http://www.motherjones.com/politics/2006/09/just-try-voting-here-11-americas-worst-places-cast-ballot-or-try.

35. *See* Powell & Slevin, *supra* note 33. Even though the allocation decisions might have been made in part by African-American election officials, it is important to remember that African-Americans and other minorities can also be susceptible to stereotypes and implicit racial bias. *See FAQs*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/demo/background/faqs.html (last visited July 2, 2015) (noting that Black Americans and other minorities can also be susceptible to stereotypes and implicit racial bias).

36. Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir. 2003).

chines.[37] Although intentional discrimination may still be a factor behind why polling places that serve majority-minority populations end up with older machines, when other, whiter counties receive newer voting machines, experiments regarding how implicit bias can impact resource allocation decisions indicate that unconscious biases could also be playing a role.[38]

B. *Pre-Election Day: Voter Registration and Voter Qualifications*

Election officials may also exercise discretion during voter registration and other steps in the election process requiring individuals to complete forms. Officials processing voter registration applications, absentee ballot requests, and other election related documents must ensure the forms are accurately completed.[39] Although this would appear to entail minimal discretion, these officials must make a number of decisions. For instance, they must ensure that the name and address on each form are legible, so the information can be added to the registrar's database of voters.[40] Similarly, when considering an absentee ballot, the registrar or other staff member must ensure that the information sufficiently matches the data already on file for the voter and, if it does not, the election official may need to determine whether the mistake is cause to invalidate the ballot.[41] Is listing a "street" instead of an "avenue" in one's address a "material" difference and sufficient grounds upon which to reject the application? Is forgetting to include the suffix to one's name—Junior or Senior—a material omission?[42] Although many states provide guidance on

37. John M. Border, *The Nation; The Problem Isn't the Punch-cards. It's the People*, N.Y. TIMES (Sept. 21, 2003), http://www.nytimes.com/2003/09/21/weekinreview/the-nation-the-problem-isn-t-the-punch-cards-it-s-the-people.html.

38. Although election officials making resource decisions might argue that they are simply relying on residential factors, not race, at least one court has recognized that residency may be a proxy for race. *See* Chin v. Runnels, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004) (noting that a "juror's area of residence was not a valid racially-neutral justification for peremptory challenge because court found it to be 'a stereotypical racial reason.' " (quoting United States v. Bishop, 959 F.2d 820, 826–28 (9th Cir. 1992))), *aff'd sub nom.*, Chin v. Carey, 160 F. App'x 633 (9th Cir. 2005).

39. Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, N.Y. TIMES (Oct. 6, 2012), http://www.nytimes.com/2012/10/07/us/politics/as-more-vote-by-mail-faulty-ballots-could-impact-elections.html?_r=0 (discussing election officials' discretion in considering whether a voter's signature on an absentee ballot matches that on file and determining whether to count an absentee ballot); *Voter Verification Without ID Documents*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/voter-verification-without-id-documents.aspx (noting that "[m]any states that require signatures or signed affidavits mandate that elections officials compare these signatures to the signatures on voters' registration forms").

40. Liptak, *supra*, note 39.

41. *Id.*

42. In 2014, Virginia's State Board of Elections considered whether the omission of a generational suffix or street identifier was material, and cause to invalidate an absentee ballot.

some of these questions, officials processing applications must often rely on their own discretion when making more marginal decisions.[43] Research into implicit bias indicates that the risk is high that these seemingly ministerial decisions may be infected by unconscious biases.

Studies show that how an individual reviews a document can be influenced by unconscious biases, even when he or she is not directly interacting with the person who completed the document or form. A 2014 study found that, when grading the same memorandum, law firm partners gave lower grades when the author was a hypothetical Black law student than when the author was a hypothetical White law student.[44] The study found that law firm partners identified more "objective" mistakes (i.e. spelling and grammar mistakes) in the memorandum written by the fictional African-American summer associate and also had more "subjective" critiques (i.e. regarding the overall analysis) than in the memorandum written by the fictional White associate.[45]

Similarly, election officials may unintentionally treat potential voters' registration applications and requests for absentee ballots differently based on the perceived race of the voter. A registrar may identify more "objective" mistakes and give more weight to them when reviewing an election-related document submitted by a minority, rather than when reviewing one submitted by a White person, as was the case with law firm partners reviewing the hypothetical summer associate's memorandum. There is evidence that this has, in fact, occurred. Testimony from *Windy Boy v. Big Horn County*,[46] described how county officials subjected "Native Americans to a more technical and more difficult voter registration process than whites"[47] and that county officials "became hypertechnical . . . and looked for minor errors in [Native American] registration applications and used them as an excuse to refuse to allow registration."[48]

Likewise, a 2012 report on treatment of Native American voters in Arizona found that staff in recorders' offices in Arizona routinely placed

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Material omissions from Federal Write-in Absentee Ballots, 1 VA. ADMIN. CODE §20-45-40 (proposed June 16, 2014), http://www.townhall.virginia.gov/L/ViewXML.cfm?textid=8831.

43. *See* Liptak, *supra* note 39; *see also Florida Is Developing New Rules For Counting Mismarked Ballots*, N.Y. TIMES (Oct. 12, 2001), http://www.nytimes.com/2001/10/12/us/florida-is-developing-new-rules-for-counting-mismarked-ballots.html (discussing the need for rules to help election officials determine a voter's intent in the wake of the Florida election debacle with spoilt ballots in 2000).

44. Arin N. Reeves, *Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills*, NEXIONS, (April 2014), http://www.nextions.com/wp-content/files_mf/14151940752014040114WritteninBlackandWhiteYPS.pdf.

45. *Id*.

46. Windy Boy v. Big Horn Cnty., 647 F. Supp. 1002 (D. Mont. 1986).

47. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J. L. REFORM 643, 687 (2006) (citing *Windy Boy*, 647 F. Supp. at 1008).

48. *Windy Boy*, 647 F. Supp. at 1008.

Native voters on "suspense lists" (similar to inactive lists)[49] when the recorder was not satisfied that an applicant sufficiently clarified his or her address.[50] There are few guidelines on what should constitute an adequate address in Arizona;[51] instead, it is left to the recorder's discretion and may be influenced by implicit bias.[52]

Implicit biases might also influence the degree of assistance that election officials, elected representatives, and political campaigns offer in response to voters' questions in the weeks leading up to an election. A study from the University of Southern California tested the responses of state legislators to inquiries about voter identification laws.[53] The researchers sent emails to 1,871 state legislators in fourteen states in the two weeks before the 2012 elections.[54] Their emails read:

> Hello (Representative/Senator NAME),
>
> My name is (voter NAME) and I have heard a lot in the news lately about identification being required at the polls. I do not have a driver's license. Can I still vote in November? Thank you for your help.
>
> Sincerely,
>
> (voter NAME)[55]

The experimenters changed the names in the emails they sent, so that one group of legislators received the email from a "Jacob Smith"

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49. A "suspense list" generally refers to a list of voters with missing or incomplete information. Their registration status may be put on hold while the election official waits to receive the missing information from the voter. *See, e.g., State of Arizona's Election Procedures Manual*, ARIZ. DEP'T. OF STATE, at 35 (2015), www.azsos.gov/sites/azsos.gov/files/election_procedure_manual_2014.pdf.

50. Aura Bogado, *How Native Voters Are Routinely Disenfranchised in Arizona*, COLORLINES (Oct. 12, 2012), http://colorlines.com/archives/2012/10/democracy_in_suspense_why_arizonas_native_voters_are_in_peril.html (citing an interview with an Arizona election official explaining that voters have to "clarify their physical address to [her] satisfaction."). Because many Native voters live in rural areas in Arizona and other southwest states, many of these voters do not have traditional street addresses but rather use descriptions (i.e. cross streets) or draw maps when registering to vote. *See id.*

51. *See e.g.*, ARIZ. DEP'T. OF STATE, *supra* note 49.

52. *Id.* (citing an interview with an Arizona election official explaining that voters have to "clarify their physical address to [her] satisfaction.").

53. Matthew S. Mendez & Christian R. Grose, *Revealing Discriminatory Intent: Legislator Preferences, Voter Identification, and Responsiveness Bias*, UNIV. OF S. CAL. CLASS RESEARCH PAPER NO. 14-17 (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422596 (last visited June 26, 2015); *see also* Christopher Ingraham, *Study Finds Strong Evidence for Discriminatory Intent Behind Voter ID Laws*, WASH. POST (June 3, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/06/03/study-finds-strong-evidence-for-discriminatory-intent-behind-voter-id-laws/.

54. Mendez & Grose, *supra* note 53, at 14-15.

55. Ingraham, *supra* note 53.

while another group received the email from a "Santiago Rodriguez."[56] Because no state actually required a driver's license to vote, "legislators really could have simply responded with a 'yes'" and explained that drivers' licenses were not required to vote.[57] Instead, "[t]he researchers found that legislators who had supported voter ID laws were much more likely to respond to 'Jacob Smith' than to 'Santiago Rodriguez.' "[58] As the researchers note, this provides strong evidence that voter identification laws were enacted with consciously held discriminatory intent.[59] But, the study also noted that even those legislators who did not back photo identification laws responded less frequently to correspondents with Hispanic names, although this difference in response rates was less significant.[60] This difference in response rates may be the result of an unconscious association of minority voters with "unlikely" or "ineligible" voters. Another study found that both elected and appointed election officials—the latter presumably having less direct political incentive to dissuade certain populations of voters from casting their ballot—responded less frequently to emails asking about voter identification requirements sent from a fictional Latino person rather than a fictional White person.[61]

These studies bear similarities with research in the education and employment settings showing a difference in responses based on nothing more than whether a name sounds "ethnic." One study found that professors replied more often to requests by students asking to meet when the requests were from students with generically "White-sounding" names than names associated with minorities.[62] Another study found that recruiters called job applicants with "White names" fifty percent more often than those with typical African-American names, even when their resumes were identical.[63] Given that law firm partners,[64] university professors,[65] and employment recruiters[66] have demonstrated bias based on the perceived ethnicity of an individual's name, there is reason to question

56. Mendez & Grose, *supra* note 53, at 15-16.

57. Ingraham, *supra* note 53.

58. *Id*.

59. Mendez & Grose, *supra* note 53, at 21-22.

60. *Id*. at 21.

61. White et al., *supra* note 19, at 130, 139.,

62. Katherine L. Milkman, Modupe Akinola & Dolly Chugh, *What Happens Before? A Field Experiment Exploring How Pay and Representation Differentially Shape Bias on the Pathway into Organizations*, J. OF APPLIED PSYCHOL. (2015), https://www.apa.org/pubs/journals/releases/apl-0000022.pdf.

63. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,* 94 AM. ECON. REV. 991, 992 (2004).

64. Reeves et al., *supra* note 44.

65. Milkman et al., *supra* note 62.

66. Bertrand & Mullainathan, *supra* note 63.

whether election officials are free from the influence of similar implicit biases.

C. *Election Day Voting*

Implicit biases may also affect Election Day decisions made by poll workers and election officials. For example, a survey of the 2008 elections found that in states where poll workers are not required or allowed to request identification, the race of both the poll worker and the voter affects the rate at which voters from different racial groups are asked for identification, with Black and Hispanic voters being asked to "show 'picture ID' more often than Whites."[67]

Psychological research concerning how we perceive and recognize individuals from an in-group versus an out-group raises important questions about how implicit biases might influence the election process in states with photo identification requirements.[68] The "other race effect" (ORE) or "cross race effect" (CRE) describes the phenomenon in which a member of one ethnic group is better able to recognize and "individuate"[69] between members of his or her own ethnic group than between members of other ethnic groups.[70] Researchers have proposed a number of theories to explain this phenomenon. Under the categorization-individuation and perceptual expertise models, an individual who grows up with consistent and sustained exposure to his or her own race is trained to individuate faces and remember names of people with the same racial background.[71] These theories are supported by research showing that individuals "who grew up in diverse neighborhoods" are better able to individuate members of other races.[72] Social-cognitive theories, on the

67. R. Michael Alvarez et al., *2008 Survey of the Performance of American Elections Final Report* i, ii, 42-46 (2009); *see also* Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 20 (2009); Lonna Rae Atkeson et al., *A New Barrier to Participation: Heterogeneous Application of Voter Identification Policies*, 29 ELECTORAL STUD. 1, 66 (2010).

68. An in-group is a group in which an individual is a member, whereas an outgroup is a group in which one is not. UNDERSTANDING PREJUDICE AND DISCRIMINATION, *supra* note 16, at 10.

69. "Individuation" has multiple definitions within the field of social psychology but, in general, may refer to one's reliance on personal attributes, such as personality or behavior, to form an impression of another person. Galen Bodenhausen, C. Neil Macrae & Jeffrey W. Sherman, *On the Dialects of Discrimination: Dual Process in Social Stereotypes,* in DUAL-PROCESS THEORIES IN SOC. PSYCHOL. 271, 279 (Shelly Chaiken & Yaacov Trope eds., 1999).

70. W. Grady Rose, *Recognizing the Other: Training's Ability to Improve Other Race Individuation* 1, 8 (May 2013) (unpublished M.S. thesis, Georgia Southern University) (on file with Georgia Southern University).

71. *Id.* at 8-9.

72. *Id.* (citing Kurt Hugenberg, Steven G. Young, Michael J. Bernstein & Donald F. Sacco, *The Categorization-Individuation Model: An Integrative Account of the Other-Race Recognition Deficit*, 117 PSYCHOL. REV. 1168 (2010)).

other hand, hold that when an individual first encounters another person he or she automatically categorizes that person "as belonging to either our own social in-group or a social out-group."[73] Because members of an in-group are more "socially important," our brains recognize and store information regarding in-group members' individuating characteristics, while our memories struggle to store this information for out-group members.[74] Additional theories explaining the CRE have also been developed.[75]

To explore the impact of the cross race effect and implicit bias on Election Day, it is a useful to hypothesize what might happen when "Jane," a poll worker in a state with a new photo identification law, checks in her first voter. Jane is a White retiree, from a largely White, middle class neighborhood. Jane grew up attending largely White schools, and most of her friends are White. Jane would never call herself a racist and says the color of someone's skin does not matter to her. Jane's first voter is a Black man named Jamal Jones. What does psychological research on the subconscious suggest will happen when Jane attempts to check Jamal in to vote?

First, Jane will likely experience an increased rate of neurological activity, and her pupils will dilate.[76] In a study mapping the amygdala (the area of the brain that processes emotional information, such as fear, and helps make snap judgments), researchers found that when participants in a study were shown Black faces, but not White faces, they experienced an increase in amygdala activity.[77] The researchers concluded that, subconsciously at least, participants' brains processed Black faces as possible threats.[78] When Jamal approaches Jane at the poll workers' table, Jane's amygdala may activate, sending fear signals and causing her eyes to dilate.

In addition to experiencing heightened neurological activity, the cross race effect may create a situation in which Jane struggles to match

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73. Kathleen L. Hourihan, Scott H. Fraundorf & Aaron S. Benjamin, *Same Faces, Different Labels: Generating the Cross-Race Effect in Face Memory With Social Category Information*, 41 MEMORY & COGNITION 1021, 1022 (2013).

74. *Id*.

75. *Id*. at 1021-22; Rose, *supra* note 70, at 8. Other theories for the cross-race effect include "perceptual-expertise" theories which "rely on the fact that most people have more experience perceiving, encoding, and remembering faces from their own group" and demonstrate that "[w]e therefore simply lack the skill to properly remember other-race faces because we have not had sufficient experience to learn how to differentiate among other-race faces at the time of encoding." Hourihan et al., *supra* note 73, at 1021-22.

76. A study by Goldinger et al. found that when participants viewed facial images of members of another race their pupils dilated, indicating greater cognitive effort. Stephen D. Goldinger, Yi He & Megan H. Papesh, *Deficits in Cross-Race Face Learning: Insights from Eye Movements and Pupillometry*, 35 J. OF EXPERIMENTAL PSYCHOL., LEARNING, MEMORY, AND COGNITION 1105 (2009).

77. Charles Ogletree, Robert J. Smith & Johanna Wald, *Coloring Punishment: Implicit Social Cognition and Criminal Justice*, *in* IMPLICIT RACIAL BIAS ACROSS THE LAW, *supra* note 20, at 45, 48 (citing Michael D. Liberman et al., *An fMRI Investigation of Race-related Amygdala Activity in African-American and Caucasian-American Individuals*, 8 NATURE NEUROSCIENCE 720 (2005)).

78. *Id*.

Jamal to his picture. Jane wants to do her job properly, but she has always had difficulties with recognizing "Africans" because they "all look alike." Jane would not be alone in experiencing difficulty recognizing and individuating between people of another race, as studies indicate that, when asked to distinguish individuals, participants are more likely to study faces of other races longer than faces belonging to their own race.[79]

While Jane may ordinarily be able to override the cross race effect, circumstances on Election Day are ripe to exacerbate unintended reliance on implicit biases. Psychologists have established that people are more likely to rely on stereotypes and be influenced by unconscious assumptions when under stress or a tight deadline.[80] This makes sense because stereotypes are generalizations, and when one does not have time to investigate a situation fully before making a decision—whether that be a decision to hire someone or to give someone a provisional or regular ballot—our brains may automatically rely on generalizations or stereotypes.[81] As discussed below, undue reliance on stereotypes and implicit biases may mean that Jamal and other minority voters are more likely to be handed provisional ballots.

D. *Assisting Voters and Provisional Ballots*

Implicit biases may also influence whether poll workers decide to assist certain individuals *on* Election Day. That poll workers' decisions may be impacted by implicit biases on Election Day is particularly disconcerting for two reasons. First, the amount of effort a poll worker invests in reconciling an issue for a voter often determines whether that voter casts a regular or a provisional ballot.[82] Second, Election Day is a voter's last chance to cast his or her ballot. If implicit biases contribute to a situation in which a voter is denied a regular ballot, the harm is irreparable.

Information about the assistance offered to White voters as compared to minority voters is not readily available. We do not know if poll workers spend more time trying to reconcile differences between a name on an ID and a name in a poll book for some voters than for others. Nevertheless, research from other areas regarding assistance is instructive. A study by the

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79. Jonathan G. Tullis, Aaron S. Benjamin & Xiping Liu, *Self-Pacing Study of Faces of Different Races: Metacognitive Control Over Study Does Not Eliminate the Cross-Race Recognition Effect*, 42 MEMORY & COGNITION 863, 863 (2014).

80. *See* NAT'L CTR. FOR ST. CTS., *supra* note 18, at 4.

81. *Id.*

82. A provisional ballot is used when there is an issue regarding the voter's eligibility. Individuals voting with a provisional ballot must frequently follow up with the county registrar or with another election official with additional identification or other information. *Provisional Voting*, PROJECT VOTE, http://projectvote.org/provisional-voting.html (last visited Mar. 18, 2015). Because many times provisional ballots are cast at the wrong precinct, are not completed properly, or require additional action on the part of the voter to confirm their identity, they are frequently not counted. *Id.*

U.S. Department of Housing and Urban Development in 2000 found that "approximately one in five Black or Hispanic home seekers did not receive assistance and information that were provided to equally qualified whites," even though minority and White home seekers presented equal qualifications.[83] Minority home seekers were less likely to be offered the "chance to inspect units," were more likely to be denied "information about available units," and were more likely to be "steer[ed] towards [housing] in minority neighborhoods" than were Whites.[84] Minority home seekers were also more likely to be offered "inferior financial terms and inferior assistance and follow-up with housing transactions."[85]

Similarly, other studies examined the help given to a shopper who drops a bag of groceries.[86] In some cases, the "shopper" was White; in other cases, the "shopper" was Black.[87] In one study, researchers found that, while "whites and blacks were offered assistance in equal numbers, the amount of assistance offered was not equal."[88] The study revealed that although "70% of the time white subjects helped black women, they gave only perfunctory help, picking up only a few packages." However, "63% of the time that white subjects were aiding white women, the subjects gave complete help, picking up all of the groceries."[89]

Studies demonstrating that minorities frequently receive less assistance than Whites suggest that poll workers might unintentionally offer less assistance to minority voters than to White voters. A voter who attempts to cast a ballot on Election Day might run into any number of problems that could be resolved with help from a cooperative poll worker. If a voter lacks the proper form of identification, a poll worker could spend time explaining what is acceptable. If a voter's name is not found on the voting roll, a poll worker could call other voting locations to determine if the voter's name appears on the roll at a different polling location. If a voter needs additional assistance because he or she is not a native English speaker or is disabled, a poll worker's actions might contribute to how comfortable the voter may feel when asking for help. If a poll worker unintentionally provides less assistance to traditionally marginalized voters as compared to others because of the poll worker's implicit biases, there will be a disproportionate impact on minorities' votes being counted.

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83. Wilde Anderson & Plaut, *supra* note 20, at 29.

84. *Id*.

85. *Id*.

86. David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 911-12 (1993) (citing Lauren G. Wispe & Harold B. Freshley, *Race, Sex, and Sympathetic Helping Behavior: The Broken Bag Caper*, 17 J. PERSONALITY AND SOC. PSYCHOL. 59, 62-65 (1971); Faye Crosby et al., *Recent Unobtrusive Studies of Black and White Discrimination and Prejudice: A Literature Review*, 87 PSYCHOL. BULL. 546, 559 (1980)).

87. *Id*.

88. *Id*. at 912.

89. *Id*.

There is evidence that this is the case, as a 2004 survey found that Latino jurisdictions had the highest rates of provisional ballot use.[90] Provisional ballots are frequently used when there is an issue regarding the voter's eligibility and might not be counted because the voter must often take additional steps (i.e. go to a different polling location or submit additional identification).[91] It is impossible to know whether the decisions made in the examples above might be influenced by implicit biases or by the conscious intent to discriminate. The next sections discuss the legal framework established to protect voters and posit that the "totality of the circumstances" test established by Section 2 of the Voting Rights Act provides an opportunity for courts to consider evidence of unconscious bias in a "results" claim brought under that provision.[92]

III. LEGAL FRAMEWORK OF VOTING RIGHTS

In 1965, Congress responded to the systemic disenfranchisement of racial minorities by passing the Voting Rights Act (VRA).[93] The Voting Rights Act immediately changed the electoral landscape of the country. In the years after the VRA was implemented, voter registration of African-Americans increased dramatically. In Mississippi, for example, the number of African-Americans registered to vote rose from just 6.7 percent to sixty percent over the next three years.[94]

The Act included a number of provisions that worked together to prevent discriminatory voting laws and practices, most important of which were Sections 2 and 5. Section 5 required certain jurisdictions to obtain preclearance from either the United States Attorney General or from a three-judge panel in the United States District Court for the District of Columbia before implementing any change in voting practices or procedures.[95] In 2013, in *Shelby County v. Holder*,[96] the Supreme Court effec-

90. Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 39-40 (2009) (citing Kimball W. Brace & Michael P. McDonald, *Final Report of the 2004 Election Day Survey 6-6* (2005)).

91. PROJECT VOTE, *supra* note 82.

92. 52 U.S.C.A. § 10301 (West 2015).

93. *Id*.

94. J. Mijin Cha, *Registering Millions: The Success and Potential of the National Voter Registration Act at 20*, DEMOS, http://www.demos.org/registering-millions-success-and-potential-national-voter-registration-act-20 (last visited Mar. 2, 2015).

95. 52 U.S.C.A. § 10305 (West 2015). Jurisdictions subject to Section 5 were determined by a legislative formula in Section 4(b) designed to identify those jurisdictions based on a combination of the use of a prohibited "test or device" and low voter turnout in certain elections. 52 U.S.C.A. § 10304(b) (West 2015).

96. Shelby Cnty., Ala. v. Holder, 133 S. Ct. 2612 (2013).

tively gutted Section 5,[97] leaving Section 2 as the primary statutory means of challenging discriminatory voting practices.[98]

Section 2, as amended in 1982, states:

> (a) No voting . . . procedure shall be imposed . . . 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 . . . .
>
> (b) A violation . . . is established, if based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by [minorities] in that [minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[99]

The "results" phrase and the "totality of the circumstances" standard were expressly added by Congress in 1982, in response to the Supreme Court's decision in *City of Mobile, Alabama v. Bolden* requiring plaintiffs to show intentional discrimination in order to prove a voting rights violation under Section 2.[100] As a consequence of this amendment, there is no requirement that plaintiffs prove intentional discrimination to establish a Section 2 results violation (known as a "results test" claim).[101]

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97. The *Shelby* Court ruled that Section 4(b) of the Voting Rights Act, was unconstitutional. *Id.* at 2631. Before the Court's decision, Section 4(b) identified those jurisdictions subject to Section 5 preclearance requirements due to a history of discrimination and low minority turnout. *See* 52 U.S.C.A. § 10304 (West 2015). In *Shelby*, the Court found that the formula for including states under 4(b) was outdated and no longer based on "current conditions." *Shelby Cnty., Ala.*, 133 S. Ct. at 2629. Without a coverage formula, there are no jurisdictions subject to Section 5. *See id.*

98. The First, Fourteenth, and Fifteenth Amendments provide independent constitutional bases for claims against discrimination in voting. *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 434 (1992); Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); Rogers v. Lodge, 458 U.S. 613, 617 (1982). Constitutional claims require proof of intentional discrimination. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). A Section 2 violation may be found without proof of intentional discrimination in "results" cases. *See infra* note 99 and accompanying text. This Article focuses on Section 2 "results" claims.

99. 52 U.S.C.A. § 10301 (West 2015).

100. City of Mobile, Ala. v. Bolden, 446 U.S. 55 (1980). The language of the Voting Rights Act closely tracked the language of the Fifteenth Amendment prior to the 1982 Amendments. *The Voting Rights Act of 1965*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/intro/intro_b.php (last visited Mar. 25, 2015).

101. "Under the 'results test,' plaintiffs are not required to demonstrate that the challenged electoral law or structure was designed or maintained for a discriminatory purpose." S. REP. No. 97-417, at 16; *see also* Thornburg v. Gingles, 478 U.S. 30, 35 (1986) ("Congress substantially revised [Section] 2 [in 1982] to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test' . . . ."); *id.*

Courts have recognized two types of results test claims under Section 2: (1) vote access claims (otherwise known as "vote denial" or "ballot access" claims), which concern prerequisites to voting and practices which may limit a voter's ability to access a ballot, cast that ballot, and have that ballot fairly counted, and (2) vote dilution claims, which challenge practices weakening minority voting strength.[102] Although a plaintiff bringing a vote dilution results test claim must establish certain preconditions not applicable to a vote access claim,[103] both vote dilution and vote access

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at 43-44 ("First and foremost, the [Senate] Report [for the 1982 amendment] dispositively rejects the position of the plurality in Mobile v. Bolden, 446 U.S. 55 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters."); Chisom v. Roemer, 501 U.S. 380, 404 (1991) ("Thus, Congress made clear that a violation of [Section] 2 could be established by proof of discriminatory results alone.").

In addition to and apart from the results test, Section 2 of the Voting Rights Act is violated if a challenged voting law or practice is shown to have been adopted with a racially discriminatory purpose. *See, e.g.*, United States v. Brown, 561 F.3d 420, 432 (5th Cir. 2009) ("To violate the statute, however, these practices must be undertaken with an intent to discriminate or must produce discriminatory results); Garza v. Cnty. of Los Angeles, 918 F.2d 763, 766 (9th Cir. 1990) ("Congress amended the Voting Rights act in 1982 to add language indicating that the Act forbids not only intentional discrimination, but also any practice shown to have a disparate impact on minority voting strength."); S. REP. 97-417, at 27 ("The amendment . . . is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation.").

In order to prevail on a claim of racially discriminatory purpose, the evidence must demonstrate that discriminatory purpose was one of the motivating factors, not necessarily the primary one, underlying the official action. *See, e.g.*, Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265-66 (1977) (A plaintiff is not required "to prove that the challenged action rested solely on racially discriminatory purposes . . . . When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified."). "'Discriminatory purpose,' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (internal citation omitted).

Discriminatory purpose may be proven by direct evidence or circumstantial evidence. Rogers v. Lodge, 458 U.S. 613, 618 (1982). It does not require proof of invidious racial animus (ill feelings toward minorities), but rather simply an intent to disadvantage minority citizens. *Garza*, 918 F.2d at 778 n.1 (Kozinski, J., concurring in part and dissenting in part); *see also* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 440 (2006) (noting that taking away political opportunity because a minority group is about to exercise it "bears the mark of intentional discrimination that could give rise to an equal protection violation"). Our analysis in this paper is limited to the applicability of implicit or unconscious bias evidence in "results" cases under Section 2.

102. *See e.g.*, Johnson v. Governor of Fla., 405 F.3d 1214, 1227 n.26 (11th Cir. 2005), *cert. denied sub nom.*, Johnson v. Bush, 546 U.S. 1015 (2005) (citing 42 U.S.C. § 1973(a)); Farrakhan v. Gregoire, 590 F.3d 989, 998 (9th Cir. 2010) ("Farrakhan I"), *overruled on other grounds*, Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) ("Farrakhan II").

103. In *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), a seminal voting rights case (discussed further below), the Court set forth three "preconditions" plaintiffs must meet in order to bring a vote dilution results test claim under Section 2. These preconditions are: (1) the minority

claims require a showing of more than just the "disproportionate racial impact" of a practice.[104] This is where the "totality of the circumstances" standard comes into play. The "totality of the circumstances" analysis required by the Section 2 results standard "depends upon a searching practical evaluation of the 'past and present reality,' and on a 'functional' view of the political process."[105] In conducting this analysis, a court "must assess the impact of the contested structure of or practice on minority electoral opportunities 'on the basis of objective factors.' "[106]

In connection with the amendments to the VRA in 1982, the Senate Committee on the Judiciary issued a report suggesting factors for courts to consider when assessing the "totality of the circumstances."[107] The Senate factors include:

1. the "history of official voting-related discrimination in the state or political subdivision";
2. "the extent to which voting in the elections of the state or political subdivision is racially polarized";
3. the extent to which the "state or political subdivision" has used "voting practices or procedures" that tend to "enhance the opportunity for discrimination against the minority group," such as "unusually large election districts, majority-vote requirements," and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the "effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process";
6. the use of "overt or subtle racial appeals" in political campaigns; and

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group is "sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) the minority group is "politically cohesive;" and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.*

104. Veasey v. Perry, 71 F. Supp. 3d 627, 695 (S.D. Tex. 2014), *aff'd in part*, *vacated in part*, *remanded sub nom.* Veasey v. Abbott, 796 F.3d 487 (5th Cir. 2015) (noting that "a bare statistical showing of a disproportionate impact is not enough"); Frank v. Walker, 17 F. Supp. 3d 837, 896 (E.D. Wis. 2014).

105. *Gingles*, 478 U.S. at 45 (quoting S. REP. NO. 97-417, at 30).

106. *Id.* at 44 (quoting S. REP. NO. 97-417, at 27) (internal citation omitted).

107. S. REP. NO. 97-417, at 28-29 (1982).

7. "the extent to which members of the minority group have been elected to public office in the jurisdiction."[108]

The Senate Judiciary Committee made clear that the factors listed are not exclusive and that courts could consider additional factors in assessing Section 2 claims.[109] In *Thornburg v. Gingles*, the Court applied the Senate factors within the "totality of circumstances" and found that the overarching issue is whether the challenged practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by Black and White voters."[110] As discussed in the next section, the totality of the circumstances standard provides an opportunity for courts to consider social science research regarding implicit bias as part of a results test claim.

IV. PRESCRIPTIONS FOR THE FUTURE

While much of the research discussed thus far illustrates the deeply engrained and subconscious nature of bias, the role of implicit bias in the election process can be reduced through litigation strategies and policy changes. This section first provides an overview of case law discussing implicit bias. Next, it discusses possible ways that Section 2 "results" plaintiffs may attempt to introduce implicit bias research into evidence as part of the "totality of the circumstances." Finally, this section considers several policy changes that can be made at the state, county, and municipal levels to reduce the impact of implicit biases on the election process.

A. *The Legal Framework for Implicit Bias*

1. Overview of Case Law Discussing Implicit Bias and Challenges to Admitting Testimony on Implicit Bias

As previous literature has noted, courts have considered the potential implications of implicit bias in a wide range of cases, from warrantless

108. *Id*. In addition to the factors listed above, the Senate Report and Supreme Court have recognized additional factors that "in some cases have had probative value as part of plaintiffs' evidence to establish a violation." *Gingles*, 478 U.S. at 37. These factors include "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group" and "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id*.

109. *Id*.; *see also* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 401 (2006).

110. Thornburg v. Gingles, 478 U.S. 30, 47 (1986). Although *Gingles* was a vote-dilution case, Section 2 "prohibits all forms of voting discrimination." *Id*. at 45 n.10. Courts have routinely applied the Senate factors in voter access cases. *See, e.g.*, League of Women Voters v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014); *see also* Ohio State Conference of NAACP v. Husted, 768 F.3d 524, 554-55 (6th Cir. 2014); Gonzalez v. Arizona, 677 F.3d 383, 405-06 (9th Cir. 2012), *aff'd on other grounds sub nom.*, Arizona v. InterTribal Council of Arizona, 133 S. Ct. 2247 (2013); Ortiz v. City of Philadelphia, 28 F.3d 306, 309-10 (3d Cir. 1994); Operation PUSH v. Mabus, 932 F.2d 400, 405 (5th Cir. 1991).

searches to jury selection to employment matters.[111] For example, in the context of discussing the reasonableness of a warrantless stop of a person based on his "Hispanic appearance," the Ninth Circuit recognized that "racial stereotypes often infect our decision making processes only subconsciously."[112]

Courts have also discussed the impact of implicit bias in jury selection. In concurring with the Supreme Court's decision in *Miller-El v. Dretke*, a case involving a prosecutor's discretion in striking jurors, Justice Breyer cited social science articles discussing implicit bias and noted that " '[s]ubtle forms of bias are automatic, unconscious, and unintentional' and 'escape notice, even the notice of those enacting the bias.' "[113] In addition, the District Court for the Northern District of California discussed the effects of implicit bias on the jury process in *Chin v. Runnels*, finding that "a growing body of social science recognizes the pervasiveness of unconscious racial and ethnic stereotyping and group bias."[114] Ultimately, the court denied Chin's petition, noting that "the problem of unconscious bias has not yet been directly addressed by the [Supreme Court]."[115] Other courts have also discussed implicit bias in the jury selection process and jury deliberations.[116]

Courts have explored the implications of implicit bias in the employment arena more than in any other area of law and have relied on research

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111. Much of the research on case law regarding implicit bias for this section was drawn from Eva Paterson, Kimberly Thomas Rapp & Sara Jackson's article, *The Id, the Ego, and Equal Protection in the 21st Century: Building upon Charles Lawrence's Vision to Mount A Contemporary Challenge to the Intent Doctrine*, 40 CONN. L. REV. 1175 (2008) (discussing unconscious bias in the courts); *see also* Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 442-44 (2007).

112. Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450 (9th Cir. 1994). The court found that the police officer acted in bad faith, but avoided determining the level of "self-awareness" of the officer. *Id*. at 1442-43. The officer's testimony indicated that he acted with at least a partially explicit understanding of his motivations. *Id*. at 1443. The officer testified that he "decided to stop the vehicle" based on a few factors, including the fact that "Gonzalez and his father appeared to be Hispanic." *Id*. *But see* Martinez Carcamo v. Holder, 713 F.3d 916, 923 (8th Cir. 2013) (rejecting Ninth Circuit's "bad faith" standard); Garcia-Torres v. Holder, 660 F.3d 333, 337 n.4 (8th Cir. 2011) (declining to adopt the *Gonzalez-Rivera* standard).

113. Miller-El v. Dretke, 545 U.S. 231, 268 (2005) (Breyer, J., concurring) (quoting Antony Page, *Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 161 (2005)); *see also* Paterson et al., *supra* note 111, at 1194 (2008).

114. Chin v. Runnels, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004), *aff'd sub nom.*, Chin v. Carey, 160 F. App'x 633 (9th Cir. 2005). *See* Paterson et al., *supra* note 111, at 1194 for further discussion.

115. *Chin*, 343 F. Supp. 2d at 908.

116. *See, e.g.*, Georgia v. McCollum, 505 U.S. 42, 68 (1992) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); State v. Tucker, 629 A.2d 1067, 1077–78 (1993) (explaining that an "unconscious racial stereotype" may affect jury evaluation of defendant or witnesses").

on implicit bias and stereotyping to explain decisions made concerning hiring and firing,[117] promotions,[118] and pay.[119] In *EEOC v. Inland Marine*, for example, the Ninth Circuit found that even when an employer's practices were "harmless in appearance" and manifested discrimination "subtly," rather than "through a 'scheme or plan,' " they could still "hide subconscious attitudes, and perpetuate the effects of past discriminatory practices."[120] In *Kimble v. Wisconsin Department of Workplace Development*, the Eastern District of Wisconsin found that the defendant supervisor "behaved in a manner suggesting the presence of implicit bias."[121] In finding that implicit bias tainted the defendant's actions, the court pointed to the defendant's reluctance to interact with the plaintiff-employee, the speed with which the defendant blamed the plaintiff for mistakes but not other employees, and the defendant's grudging acknowledgement of plaintiff's achievements when the defendant "readily praised like accomplishments" of White employees, among other things.[122] Although the legal standards governing employment cases require proof that discrimination was a motivating factor,[123] unlike those governing Section 2 "results" claims, these cases lend support to the proposition that evidence of subconscious bias should be admissible in discrimination claims generally.

In admitting expert testimony on implicit bias, in both voting rights and other civil rights cases, a major issue is whether experts will be required to connect their opinions to the specific facts of the case or whether

117. *See, e.g.*, Thomas v. Eastman Kodak Co., 183 F.3d 38, 42 (1st Cir. 1999) (finding that "Title VII's prohibition against 'disparate treatment because of race' extends both to employer acts based on conscious racial animus and to employer decisions that are based on stereotyped thinking or other forms of less conscious bias").

118. *See, e.g.*, Lynn v. Regents of Univ. of Cal., 656 F.2d 1337, 1343 n.5 (9th Cir. 1981) (explaining that a subtle "discriminatory attitude" cannot "serve as the basis for job-related decisions in employment").

119. *See, e.g.*, EEOC v. Inland Marine Indus., 729 F.2d 1229, 1232 (9th Cir. 1984) (affirming the lower court's finding that a company was responsible for maintaining "a two-tiered wage structure" based on race, despite the fact that "[t]he company did not consciously set out to establish" such a structure).

120. *Id.* at 1235-36; *see also Lynn*, 656 F.2d at 1343 n.5 ("Other concepts reflect a discriminatory attitude subtly; the subtlety does not, however, make the impact less significant or less unlawful. It serves only to make the courts' task of scrutinizing attitudes and motivation, in order to determine the true reason for employment decisions, more exacting.").

121. Kimble v. Wis. Dep't of Workforce Dev., 690 F. Supp. 2d 765, 778 (E.D. Wis. 2010).

122. *Id.* at 777-78. *But cf.* Wells-Griffin v. St. Xavier Univ., 26 F. Supp. 3d 785, 793 (N.D. Ill. 2014) (declining to infer that supervisors' actions were attributable to implicit racial stereotypes because, unlike the plaintiff in *Kimble*, *Wells-Griffin* failed to "provide evidence that her treatment was different from other employees").

123. Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace with respect to an individual's "compensation, terms, conditions, or privileges of employment, because of such individual's race . . . or sex . . . ," and provides that a complainant may establish discrimination by demonstrating that race or sex "was a motivating factor . . . for the challenged employment practice." 42 U.S.C.A. § 2000e-2(a)(1) (West 2015).

they will be permitted to testify generally as to the phenomenon of implicit bias. In *Jones v. National Council of Young Men's Christian Association*, the Northern District of Illinois blocked the introduction of expert testimony by Dr. Anthony Greenwald, one of the creators of the IAT, finding that even testimony just on the "general principles" of implicit bias must be "adequately tied to the facts" of a specific case in order to be admissible.[124] The Supreme Court similarly rejected expert testimony regarding how stereotypes (but not "implicit bias" per se) might influence managers' decisions in the *Wal-Mart v. Dukes* class action.[125] The Court found that, because the plaintiffs' expert could not "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart"—whether that be "0.5 percent or 95 percent of the employment decisions"—his testimony could be "safely disregarded."[126]

The issue of whether such testimony is admissible will largely be governed by the Federal Rules of Evidence on relevancy (Rules 401 and 402) and the Federal Rule of Evidence regarding "helpfulness" or reliability (Rule 702). The Advisory Committee Notes to the 2000 Amendments to the Federal Rules of Evidence provide support for the admissibility of the general principles of the phenomenon of implicit bias:

> [I]t might . . . be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.[127]

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124. Jones v. Nat'l Council of Young Men's Christian Ass'ns of the United States of Am., 34 F. Supp. 3d 896, 900 (N.D. Ill. 2014). *But see* Samaha v. Washington State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *4 (E.D. Wash. 2012) (admitting expert's testimony on implicit bias and finding such evidence "likely to provide the jury with information that it will be able to use to draw its own conclusions").

125. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2553-54 (2011).

126. *Id.*

127. Fed. R. Evid. 702; *see also* Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1315 (9th Cir. 1995) ("[W]e must ensure that the proposed expert testimony is 'relevant to the task at hand,' . . . i.e., that it logically advances a material aspect of the proposing party's case."); In re Breast Implant Litig., 11 F. Supp. 2d 1217, 1223 (D. Colo. 1998) (citing In re Paoli R.R. Yard

In *Samaha v. Washington State Department of Transportation*, the Eastern District of Washington relied on the Advisory Committee Notes in admitting expert testimony by the afore-mentioned Dr. Greenwald.[128] The court found that Dr. Greenwald's opinions were admissible as they were "based on reliable methodologies and consist of relevant subject matter" and "likely to provide the jury with information that it will be able to use to draw its own conclusions."[129] Relying on the Supreme Court's decision in *Price Waterhouse*, the court found that "[t]estimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee."[130] Although Section 2 cases do not require proof of intent to discriminate, the decision to admit Dr. Greenwald's opinions of "general principles" supports the admissibility of similar evidence in Section 2 cases.

Given that courts might consider the admissibility of expert testimony on the IAT and implicit bias as a close question, plaintiffs wishing to introduce evidence regarding unconscious bias in Section 2 cases must be careful to satisfy the "fit" test and show a valid connection, or "good grounds to extrapolate," from psychological experiments to the situation at hand.[131] In addition, plaintiffs should be careful to present evidence regarding implicit bias as framed within the totality of the circumstances, as is discussed in more depth in the following section.

2. The Results Test and Implicit Bias

The "totality of the circumstances" test and application of the Senate factors present an opportunity for plaintiffs in a Section 2 results case to introduce evidence of implicit bias in the voting process. As Justice Scalia has noted, the "'results' criterion provides a powerful, albeit sometimes blunt, weapon with which to attack even the most subtle forms of discrimination."[132]

As discussed above, the ultimate inquiry is whether the challenged practice "interacts with social and historical conditions to cause an ine-

PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994)) (explaining that while the "fitness test" relates to relevancy, "[t]he standard for fit is higher than bare relevance").

128. *Samaha*, 2012 WL 11091843, at *4.

129. *Id*. *Samaha* was an employment discrimination case, and Dr. Greenwald's testimony was offered on the issue of discriminatory intent, which, again, is not an element of a "results" claim under Section 2. *Id*.

130. *Id*. (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989)); *see also* Rolls–Royce Corp. v. Heros, Inc., No. 3:07–CV–0739–D, 2010 WL 184313, at *3 (N.D. Tex. 2010) (finding expert testimony regarding the parts manufacture approval industry process admissible "to teach the jury background information to understand the case").

131. *In re Paoli R.R.*, 35 F.3d at 743 (quoting Daubert v. Merrill Dow Pharm. Inc., 509 U.S. 579, 591 (1993)). *But see Daubert*, 43 F.3d at 1322 (finding expert testimony inadmissible under the fit requirement because plaintiffs' experts did not state that Bendectin caused the birth defects, but merely stated that Bendectin could have caused the defects).

132. Chisom v. Roemer, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting).

quality in the opportunities enjoyed" by minority voters.[133] In this context, explanation of the principles of implicit bias may shed considerable light on the statistical analyses of disproportionate impact, demonstrating that the disproportionality was "on account of race,"[134] particularly where subconscious bias might affect discretionary decisions like those dealing with the allocation of electoral or voting resources (i.e. voting machines, voter registration forms, electronic poll books, etc.) and the identities of voters.

This was precisely how the court treated evidence in what appears to be the only Section 2 case that admitted testimony of implicit bias.[135] In *Farrakhan v. Gregoire*,[136] prisoners challenged Washington's practice of disenfranchising individuals convicted of felonies. Although, ultimately, *Farrakhan* was decided against the plaintiffs on a purely legal issue (i.e., that felony disenfranchisement laws may only be challenged under Section 2 of the VRA by meeting the high standard of showing "that the criminal justice system is infected by intentional discrimination" or that the legislature enacted the "felon disenfranchisement law . . . with such intent"),[137] its handling of expert testimony on implicit bias is instructive nevertheless. Specifically, the trial court considered the testimony of an expert to the effect that the racial disproportionality in Washington State's criminal justice system could not be explained by higher levels of criminal involvement and, therefore, could not be explained other than by race.[138] This evidence—described by the trial court as consisting of reports regarding both conscious and subconscious bias—was tied specifically to the statistical evidence in the case and did not consist only of "general principles" of implicit bias.[139]

It would appear that, at a minimum, evidence of studies into implicit bias, when tied to record evidence of disproportional impact or racially polarized voting,[140] should be readily admitted into evidence, as it would be highly relevant to any number of the Senate factors. For example, when considering the first Senate factor, "the history of official voting-related discrimination," plaintiffs might connect evidence of implicit bias research

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

134. 52 U.S.C.A. § 10301(a) (West 2015).

135. Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *5-6 n.6 (E.D. Wash. 2006), *rev'd and remanded*, 590 F.3d 989 (9th Cir. 2010), *aff'd on reh'g en banc*, 623 F.3d 990 (9th Cir. 2010).

136. *Id*.

137. *Farrakhan*, 623 F.3d at 993.

138. *Farrakhan*, 2006 WL 1889273, at *5-6.

139. *Id*. *Cf*. Jones v. Nat'l Council of Young Men's Christian Ass'ns of the United States of Am., 34 F. Supp. 3d 896, 900-01 (N.D. Ill. 2014) (blocking testimony concerning "general principles" of implicit bias because it was not tied to specific facts of case).

140. The Court discussed racially polarized voting at length in Thornburg v. Gingles, 478 U.S. 30 (1986).

to specific decisions concerning the allocation of election resources. Courts considering cases like the 2003 California lawsuit challenging the fact that minority communities were more likely to be provided "obsolete" voting machines than other communities[141] could benefit from testimony regarding the impact of implicit biases on resource allocation decisions.

As with the other Senate factors, factor two—which deals with the existence of racial polarization in voting or the extent to which voters vote along racial lines—is not required for a successful results test vote access claim.[142] Senate factor two, however, is a prime example of in-group bias. "In-group bias designates favoritism toward groups to which one belongs."[143] In the voting context, this contributes to racially polarized elections in which Whites vote for White candidates and minorities vote for candidates who share their race.[144] Courts may consider evidence regarding implicit bias and in-group favoritism to provide context for their assessment of the second Senate factor and their consideration of whether and why a jurisdiction is racially polarized within the totality of the circumstances.

Senate factor five asks "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process."[145] Advocates considering Senate factor five can draw on research showing how unconscious bias impacts minorities in terms of their education,[146] employment,[147] and health[148] to establish how the effects of both explicit and unconscious discrimination "hinder" the "ability [of minorities] to participate in the political process."[149] For example, studies showing how implicit bias contributes to patterns in which students of color are disproportionately punished, graded more harshly, and ultimately less likely to go on to higher education than White stu-

141. *See supra* Section II.A.; Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir. 2003).

142. As mentioned above, while a showing of racially polarized voting is not required in Section 2 results test claims challenging vote access, it is one of the three *Gingles* preconditions plaintiffs must satisfy in vote dilution cases. *Gingles*, 478 U.S. at 49-51.

143. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006).

144. *See generally* Gregory S. Parks & Jeffrey J. Rachlinksi, *Implicit Bias, Election '08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659 (2010) (explaining racial disparities in Congress and voting patterns in the 2008 presidential election as products of racial bias).

145. S. REP. NO. 97-417, at 27-30 (1982).

146. *See, e.g.*, Rachel D. Godsil et al., *The Science of Equality, Volume 1: Addressing Implicit Bias, Racial Anxiety, and Stereotype Threat in Education and Health Care*, PERCEPTION INST. (Nov. 2014), http://perception.org/app/uploads/2014/11/Science-of-Equality-111214_web.pdf.

147. *See, e.g.*, Bertrand & Mullainathan, *supra* note 63, at 1011.

148. *See, e.g.*, Godsil et al., *supra* note 146.

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

dents[150] can be tied to other studies showing that those without a college degree are less likely to vote regularly.[151] Demonstrating such a link between implicit bias in education and other arenas (employment, health, etc.), and the "ability [of minorities] to participate effectively in the political process," is one way advocates can frame a discussion of Senate factor five.[152]

Depending on the racial appeals made in a particular campaign, evidence regarding subconscious "priming" might be especially relevant to plaintiffs considering Senate factor six, the use of "overt or subtle racial appeals" in political campaigns.[153] Research shows that priming—which "takes place when an idea, image, or association is activated or made salient"[154]—can have a significant impact on one's decisions and actions. For instance, researchers have found that men primed with a sexist television commercial later judged female job applicants more harshly.[155] Similarly, Whites primed by watching stereotypic portrayals of African-Americans on television were "more likely to [later] judge a Black defendant [as] guilty of an assault."[156]

In the context of an election, subtle priming could have notable results. Take, as an example, the Willie Horton advertisement run in 1988 by the George H.W. Bush presidential campaign against Democratic opponent Governor Michael Dukakis of Massachusetts.[157] The advertisement featured intimidating photos of Horton, who committed robbery and rape while on a furlough from prison in Massachusetts.[158] One Democratic strategist argued that the Horton advertisement "changed the course of that race . . . . [I]t made white Americans—especially white southerners—raise an eyebrow and think, 'We can't have a man from Massachusetts releasing quote black criminals all across the country and letting them rape our white women and children.' "[159] While it cannot be determined exactly what impact the ad had on voters, Dukakis' standing in the

150. Godsil et al., *supra* note 146, at 34-36.

151. *Who Votes, Who Doesn't, And Why*, PEW RESEARCH CENTER (Oct. 18, 2006), http://www.people-press.org/2006/10/18/who-votes-who-doesnt-and-why/.

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

153. *Id*.

154. UNDERSTANDING PREJUDICE AND DISCRIMINATION, *supra* note 16, at 558.

155. *Id*. at 27 (citing Rudman & Borginda, *The Afterglow of Construct Accessibility: The Behavioral Consequences of Priming Men to View Women as Sexual Objects*, 31 J. OF EXPERIMENTAL SOC. PSYCH. 493 (1995)).

156. *Id*. (citing T.E. Ford, *Effects of Stereotypical Television Portrayals of African-Americans on Person Perception*, 60 SOC. PSYCH. Q. 266 (1997)).

157. Morgan Whitaker, *The Legacy of the Willie Horton Ad Lives On, 25 years Later*, MSNBC (Oct. 21, 2013), http://www.msnbc.com/msnbc/the-legacy-the-willie-horton-ad-lives.

158. *Id*.

159. *Id*.

polls dropped.[160] Although it is impossible to measure the exact effect of an ad appealing to racial stereotypes, social psychology research makes clear the significant impact of subtle priming, even when it consists of a brief television advertisement.[161] Research on priming equips courts to better understand the extent of the potential damage to a minority candidate when assessing Senate factor six in cases involving subtle racial appeals.

As an over-arching theme, plaintiffs might turn to the Court's guidance in *Gingles* and introduce implicit bias evidence by showing how "social and historical conditions" interact with existing laws or legal structures "to cause an inequality in the opportunities enjoyed" by minority voters.[162] A court's analysis of the social and historical conditions could include an examination of the effect implicit biases might have played in creating those conditions. Because the stereotypes may have played a role in decisions producing inequities and because stereotypes are a product of societal narratives and mass media, such evidence would fall within the *Gingles* guiding language and should be admitted to enable courts to consider the "social and historical conditions" of the situations at issue.

In addition to the seven factors listed in the Senate Report, "other factors may also be relevant."[163] The non-exhaustive nature of the Senate Report opens the door to the consideration of research on implicit bias in its own right.[164] Although implicit bias does not necessarily fit within the framework of every Senate factor or may not be relevant in every case, the totality of the circumstances test nonetheless provides a means through which courts can consider implicit bias in the electoral process.

B. *Policy Prescriptions*

In addition to pushing courts to rely on a framing of the totality of circumstances test to include evidence of implicit biases, stakeholders, like local advocates, foundations funding voting rights work, and civil rights lawyers, can also encourage jurisdictions to adopt practices aimed at reducing the effects of implicit biases in the electoral process. For electoral policies to effectively reduce the impact of implicit biases, stakeholders must ensure that the factors that exacerbate reliance on implicit biases are minimized. As mentioned above, factors such as stress, tight deadlines, and reliance on discretion contribute to one's reliance on unconscious biases.[165]

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160. *Id*.

161. *See* UNDERSTANDING PREJUDICE AND DISCRIMINATION, *supra* note 16, at 26-27; Kang, *supra* note 18, at 135-39 (discussing stereotypes in media and the neural and emotional responses to viewing those stereotypes).

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

163. *Id*. at 45; S. REP. NO. 97-417, at 28.

164. *Gingles*, 478 U.S. at 45 (1986); S. REP. NO. 97-417, at 28.

165. NAT'L CTR. FOR ST. CTS., *supra* note 18.

Policy prescriptions should focus on eliminating or reducing these and other conditions that foster implicit biases.

1. Training of Election Officials

While most Americans believe that they are able to treat everyone equally, more than seventy percent of Americans possess some level of implicit bias based on race.[166] Without a basic understanding of implicit bias or recognition that their decisions might be impacted by implicit biases, election officials cannot take the necessary steps to address the problem.

One of the first steps to reducing implicit biases in the electoral system is to educate election officials about implicit bias. Trainings aimed at raising awareness about the effects of implicit bias and at offering strategies through which individuals can reduce that bias have been proven to dramatically lower participants' racial biases.[167] Many counties and states already provide poll workers with training before Election Day,[168] so including a segment on implicit bias would serve to start the process of rooting implicit bias out of the electoral system. In addition to including a segment on implicit bias in training programs, jurisdictions can also reduce the impact of implicit biases in electoral decisions by diversifying poll workers and other election officials. While "the majority of White respondents [to the Implicit Association Test] show a preference for White over Black, the responses from Black respondents are more varied."[169] As Project Implicit explains, "[p]art of this might be understood as Black respondents experiencing the similar negative associations about their group from experience in their cultural environments, and also experiencing competing positive associations about their group based on their own group membership and that of close relations."[170] Regardless of the reasons for the more varied rates of implicit racial association amongst Black participants taking the Implicit Association Test, that Black participants have more varied rates of implicit race associations and that IAT scores are strong predictors of real world behavior[171] are reasons to encourage diversity amongst poll workers. Because other minority group members are also likely to have more varied implicit racial associations, due to their "own

166. Nosek et al., *supra* note 12, at 17.

167. *See* Patricia G. Devine et al., *Long-Term Reduction in Implicit Race Bias: A Prejudice Habit-Breaking Intervention*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 1267, 1268 (2012).

168. *See Compendium of State Poll Worker Requirements*, U.S. ELECTION ASSISTANCE COMM. (Aug. 2007), http://www.eac.gov/assets/1/Page/Compendium%20of%20State%20Poll%20Worker%20Requirements.pdf (last visited Oct. 5, 2015).

169. PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/demo/background/faqs.html#faq22 (last visited Oct. 5, 2015).

170. *Id*.

171. *Helping Courts Address Implicit Bias: Frequently Asked Questions,* NAT'L CTR. FOR ST. CTS. 11-13, http://www.ncsc.org/~/media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx (last visited Oct. 25, 2015).

group membership" and "close relations," ensuring diversity of poll workers across all races may lower the risk that implicit biases impact the voting process.[172]

2. Blind Review of Voter Registration Applications

Jurisdictions might reduce the role of implicit bias in the registration process by adopting blind review practices, in which the name and race (if such information is collected) of an applicant is temporarily redacted until other criteria for eligibility (i.e. criminal record, residency requirements, etc.) are confirmed. Blind screening has proven extremely effective in other areas. Major symphony orchestras, for example, have significantly increased their percentage of female musicians simply by investing in a cloth screen blocking the musician from the audition committee.[173] Although most orchestras previously required musicians to audition directly in front of an audition committee, by putting up a screen audition committees can no longer tell the musician's race, age, gender, or other social identities.[174] The screens effectively break the audition committee's unconscious reliance on the stereotype of a virtuoso musician as male. Similarly, temporarily redacting or otherwise blocking a voter's name and race, can help prevent election workers from unconsciously relying on stereotypes about who is a "responsible citizen" and from unintentionally rejecting a registration form for a minor reason.

3. Legislative Responses

A comprehensive response to implicit bias in the electoral system must also provide for monitoring mechanisms similar to the Section 5 preclearance regime. In their study, *What Do I Need to Vote?: Bureaucratic Discretion and Discrimination by Election Officials*, Ariel White and her colleagues sent emails to more than 7,000 election officials in forty-eight states, including states and jurisdictions covered by Section 5 and states and jurisdictions not covered by Section 5.[175] Although the emails were identical and included an inquiry about voter identification requirements, the researchers sent some under a Latino alias and some under a White alias.[176] The researchers discovered that, overall, election officials were less likely to respond to an email sent by a Latino than to those sent by a White.[177] Importantly, however, they found no bias in response rates or quality of

172. PROJECT IMPLICIT, *supra* note 169.

173. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians,* 90 AM. ECON. REV. 715, 726-27 (2000).

174. *Id*. at 715-16.

175. White et al., *supra* note 19, at 140.

176. *Id*. at 130.

177. *Id*.

responses in counties and municipalities covered under Section 5.[178] White and her colleagues stated that this finding is consistent with findings in other areas, such as employment and housing, which also identify monitoring as a key factor in reducing discriminatory decision-making.[179] Legislation providing for a monitoring system, like the one previously required by Section 5, can be introduced at the state and national levels to reduce implicit bias in the electoral system.[180]

4. Additional Research and Studies

Finally, but perhaps most important, it is time for individuals, organizations, jurisdictions, and other stakeholders to invest in research on the role of implicit bias in voting. Social psychologists and others have extensively studied the impact of implicit bias in other areas of law, from criminal justice to health care to education, yet little attention has been given to the effects of implicit biases in voting. Research is needed to examine how implicit biases may impact the election system at all stages, from planning for an election and allocating resources, to implementing new voting laws, to Election Day practices. Experiments could test participants' decision-making when allocating polling machines to minority or White neighborhoods, the impact of the cross race effect when poll workers implement a photo identification requirement, or the amount of time a poll worker gives to resolving an issue for a White voter as compared to a minority voter.

In designing these experiments, researchers can use studies examining the effects of implicit biases in other areas as prototypes. An experiment examining how election officials allocate resources might replicate Laurie Rudman and Richard Ashmore's experiment, in which they asked participants to determine how to administer a mandatory twenty percent budget cut to student groups.[181] Similarly, experiments regarding assistance offered during the voter registration process might replicate the University of Southern California's study[182] in which researchers tested the response rates of state legislators to emails from hypothetical voters of different races asking about identification requirements.

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178. *Id.*

179. *Id.* at 137.

180. The Voting Rights Advancement Act, introduced in June 2015 (after the Voting Rights Amendment Act of 2014 failed in Congress) provides a legislative response to the Supreme Court's gutting of Section 5 and a new coverage formula for Section 5 of the Voting Rights Act. H.R. 885, 114th Cong. (2015); Athena Jones, *Congressional Democrats file legislation to update the Voting Rights Act*, CNN POLITICS (Jun. 25, 2015), http://www.cnn.com/2015/06/24/politics/voting-rights-act-democrats-file-bill/index.html.

181. *Supra* Section II.A.

182. Mendez & Grose, *supra* note 53.

CONCLUSION

When the right to vote is undermined through explicit or implicit biases, other rights are also at risk of becoming "illusory."[183] The harm of denying a person the opportunity to participate in the political process on account of his or her race or ethnic background, even if not "intentional," goes beyond the harm to the individual. As with cognate equal protection claims, the injury is also "to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."[184] Steps can be taken to limit the effect of implicit bias in the electoral system. Section 2 results test claims provide a key opportunity for courts to consider evidence regarding how implicit biases might impact the electoral process. In addition, policy reforms at a more local level—holding implicit bias trainings for poll workers and redacting race on voter registration forms—provide a means through which stakeholders can reduce the detrimental impact of implicit biases on elections. Pursuing both litigation and policy strategies allows for a practical shift, in which our legal frameworks and daily electoral practices better account for the unconscious nature of much bias today. Only when all forms of discrimination are rooted out of our electoral system will we truly be able to ensure the health of our democracy.

183. Wesberry v. Sanders, 376 U.S. 1, 17 (1964); *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) ("the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights" (quoting Reynolds v. Sims, 377 U.S. 533, 561-62 (1964)).

184. Chin v. Runnels, 343 F. Supp. 2d 891, 900 (N.D. Cal. 2004), *aff'd sub nom.*, Chin v. Carey, 160 F. App'x 633 (9th Cir. 2005) (citing Rose v. Mitchell, 443 U.S. 545, 556 (1979)); *see also* Campbell v. Louisiana, 523 U.S. 392, 397 (1998) (holding that, where discrimination affects a White defendant's grand jury, he suffers an injury in fact because it "casts doubt on the integrity of the judicial process").