RIGHT TO REMAIN SILENT?: WHAT THE VOTING RIGHTS ACT CAN AND SHOULD SAY ABOUT FELONY DISENFRANCHISEMENT

Abstract: Despite the popular belief that all U.S. citizens should have a voice in government, many states continue to have felony disenfranchisement laws depriving felons of their voting rights in some fashion. There is, furthermore, sufficient evidence that such felony disenfranchisement laws have a greater effect on minorities than on others. As such, some litigants have turned to the Voting Rights Act of 1965, which is aimed at eliminating racially discriminatory voting regulations and practices, as a means of overturning felony disenfranchisement laws. This Note examines the current caselaw surrounding the application of the Voting Rights Act to state felony disenfranchisement statutes. In analyzing the caselaw, this Note attempts to explain the shortcomings of this strategy. Lastly, this Note suggests that future litigants should undertake an approach based on the Fourteenth Amendment's constitutional guarantee of an individual's right to vote.

INTRODUCTION

Since the Civil War, Constitutional emendation, judicial decisions, and congressional action have commingled in the area of voting rights jurisprudence to reflect a federal commitment to expand voting rights and electoral opportunity.[1] The cumulative effect of this activity has restricted, if not outright eviscerated, states' authority to regulate their citizens' franchise rights.[2] As it currently stands, nearly every state regulation that limits citizen access to polls is subject to

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[1] *See* U.S. CONST. amend. XV (extending suffrage rights to all races); *id.* amend. XVII (permitting direct election of senators); *id.* amend. XIX (extending franchise to women); *id.* amend. XXIII (permitting District of Columbia residents to vote for presidential electors); *id.* amend. XXIV (prohibiting federal poll taxes); *id.* amend. XXVI (lowering voting age to eighteen); Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb–1 (2000) (safeguarding voting rights against discrimination); Reynolds v. Sims, 377 U.S. 533, 555 (1964) (finding the right to vote protected by the Fourteenth Amendment's Equal Protection Clause); Peter Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 548–49 (2001) (discussing the progressive trajectory towards a more expansive democracy).

[2] *See* Dunn v. Blumstein, 405 U.S. 330, 363–64 (1972) (Burger, C.J., dissenting).

strict scrutiny, meaning the restriction must be narrowly tailored to promote a compelling state interest.[3] This standard has proven to be so rigorous that it compelled Chief Justice Burger to predict that no state could ever meet it, for "it demands nothing less than perfection."[4]

In light of this trend toward limiting state power to set voter qualifications, the practice of felony disenfranchisement stands as a demonstrable outlier.[5] Felony disenfranchisement—the practice of disqualifying those convicted of felonies from participating in elections—remains a prevalent state practice.[6] Forty-eight states disenfranchise criminals in one form or another.[7] Felony disenfranchisement statutes disfranchise more citizens than any other election procedure currently in use by states.[8] In 2004, over five million citizens could not vote because of their state's felony disenfranchisement policy.[9] Although the Supreme Court recognized the right to vote as a fundamental and constitutional right, overturning longstanding and traditional state election practices, such as poll taxes and durational residency requirements, felony disenfranchisement statutes have evaded the probing suspicion of strict scrutiny.[10] Attempts to challenge state criminal disenfranchisement statutes on constitutional grounds have proven largely unsuccessful.[11] Accordingly, disenfranchising felons remains within the purview of the states.[12] In many respects, the practice constitutes the sole remaining vestige of states' power to disfranchise their citizens.[13]

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[3] *See Reynolds*, 377 U.S. at 562 ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

[4] *Dunn*, 405 U.S. at 363–64 (1972) (Burger, C.J., dissenting).

[5] *Compare* Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (asserting state authority to disenfranchise felons as a class of citizens), *with Reynolds*, 377 U.S. at 562 (denying state authority to establish malapportioned districts).

[6] *See Developments in the Law—The Law of Prisons: One Person, No Vote: The Laws of Felony Disenfranchisement*, 115 HARV. L. REV. 1939, 1939–49 (2002) [hereinafter *One Person, No Vote*].

[7] *See id.* at 1942.

[8] *See* Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 231 (2004).

[9] *See id.*

[10] *See Richardson*, 418 U.S. at 54.

[11] *See, e.g., id.*; Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998); *One Person, No Vote, supra* note 6, at 1949–52 (listing unsuccessful constitutional challenges to felony disenfranchisement).

[12] *One Person, No Vote, supra* note 6, at 1939–58.

[13] *See* Behrens, *supra* note 8, at 231.

Furthermore, many states actively exercise this power, disenfranchising many citizens. The outcome-determinative effect that Florida's felony disenfranchisement laws, for example, had on the 2000 presidential election prompted a spate of scholarship on the practice.[14] Scholars and commentators have criticized the practice of disfranchising felons on the grounds that it stigmatizes criminals, fosters social withdrawal, and impedes rehabilitation efforts.[15] Others have mounted class-based arguments against the practice, noting the disparate impact that felony disenfranchisement laws have on minority communities.[16]

In addition to increased scholarship, litigants have renewed their focus on challenging disenfranchisement laws in the courts.[17] In recent years, litigants have moved away from constitutional challenges—effectively foreclosed by Supreme Court precedent—and looked to the Voting Rights Act (the "VRA" or "Act") as a means to overturn state criminal disenfranchisement laws.[18] As amended in 1982, the VRA prohibits voting restrictions that have a racially discriminatory impact, differing from the earlier version of the Act which prohibited only voting restrictions enacted with discriminatory intent.[19] Litigants contend that the current VRA renders felony disenfranchisement statutes, which undeniably effect racial minorities disproportionately, invalid.[20]

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[14] *See, e.g.*, Angela Behrens & Christopher Uggen, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felony Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 597 (2003); Alec Ewald, *Civil Death: The Ideological Paradox of Criminal Disenfranchisement Laws in the United States*, 2002 WIS. L. REV. 1045, 1072; George P. Fletcher, *Disenfranchisement As Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895, 1896–1904 (1998); Pamela Karlan, *Convictions and Doubts: Retribution, Representation and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1155 (2004); Christopher Uggen & Jeff Manza, *Democratic Contraction? Felon Disenfranchisement and American Democracy*, 67 AM. SOC. REV. 777, 778–94 (2002); Behrens, *supra* note 8, at 231; Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1624–27 (2004); JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998), http://www.sentencingproject.org/pdfs/9080.pdf.

[15] *See, e.g.*, Karlan, *supra* note 14, at 1166; FELLNER & MAUER, *supra* note 14, at 16.

[16] *See* Behrens & Uggen, *supra* note 14, at 596–99.

[17] *See, e.g.*, Johnson v. Governor of Fla., 405 F.3d 1214, 1230–33 (11th Cir. 2005) (en banc); Muntaqim v. Coombe, 366 F.3d 102, 115–30 (2d Cir.), *cert. denied*, 543 U.S. 978, *reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004); Farrakhan v. Washington (*Farrakhan II*), 338 F.3d 1009, 1014–23 (9th Cir. 2003).

[18] *See Johnson*, 405 F.3d at 1228–33; *Muntaqim*, 366 F.3d at 115–30; *Farrakhan II*, 338 F.3d at 1014–23.

[19] *See* 42 U.S.C. § 1973(a) (2000); S. REP. No. 97–417, at 27–43 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 204–21.

[20] *See, e.g.*, *Muntaqim*, 366 F.3d at 103–05; *Farrakhan II*, 338 F.3d at 1016.

Federal circuits have split on the question of whether the VRA presents an appropriate or allowable vehicle to challenge felony disenfranchisement laws.[21] In particular, the circuits disagree as to 1) whether Congress sufficiently indicated its intent for the VRA to reach felony disenfranchisement laws and 2) presuming the VRA can reach felony disenfranchisement laws, whether such an application would render the Act out of congruence and proportion to the injury it seeks to redress, and therefore unconstitutional.[22] In short, the disagreement among the circuits concerns the intended scope of the VRA and the permissible parameters of Congress's enforcement authority.[23] This Note assesses the sources and reasoning behind the circuit split, specifically examining whether applying the VRA to felony disenfranchisement statutes requires a plain congressional statement and whether such an application of the VRA exceeds Congress's enforcement powers.[24]

Part I of this Note briefly traces the history of federal encroachment on the traditional state practice of defining electoral qualifications, noting in particular the judicial trend in voting rights cases toward granting constitutional protection to individuals' franchise rights.[25] Part II of this Note juxtaposes the seminal Supreme Court decisions governing the constitutionality of felony disenfranchisement against the backdrop of these traditional voting rights cases, observing the heightened presumption of constitutionality felony disenfranchisement statutes receive, in contrast to almost all other state disenfranchisement laws.[26] Part II also explores the current prevalence and impact of state felony disenfranchisement laws and reviews some of the current policy debates concerning the practice.[27] Part III of this Note turns to the current litigation strategy of challenging state felony disenfranchisement statutes under the VRA, and introduces the tensions that have arisen between the circuits, describing in detail the different ap-

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[21] *See Muntaqim*, 366 F.3d at 130; *Farrakhan II*, 338 F.3d at 1016. *See generally* Lauren Handelsman, Note, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 7 FORDHAM L. REV. 1875 (2005).

[22] *See Muntaqim*, 366 F.3d at 130; *Farrakhan II*, 338 F.3d at 1012–14.

[23] *Compare Muntaqim*, 366 F.3d at 115–30 (holding that the VRA cannot constitutionally invalidate state criminal disenfranchisement laws), *with Farrakhan II*, 338 F.3d at 1016 (finding that the VRA can invalidate state criminal disenfranchisement laws).

[24] *See infra* notes 195–359 and accompanying text.

[25] *See infra* notes 36–58 and accompanying text.

[26] *See infra* notes 59–88 and accompanying text.

[27] *See infra* notes 89–111 and accompanying text.

proaches taken in the Second, Ninth, and Eleventh Circuit Courts of Appeals.[28]

Part IV of this Note critically assesses both sources of the circuit split.[29] It argues that the Ninth Circuit correctly disregarded the plain statement rule in applying the VRA to felony disenfranchisement statutes.[30] Indeed, the VRA does not alter the federal-state balance because the voting rights jurisprudence has charted a clear course away from state authority.[31] Furthermore, the VRA contains no ambiguity about its scope, so to the extent that the plain statement rule applies, Congress expressed its clear intent to invalidate all discriminatory voting practices, including felony disenfranchisement laws.[32] Part IV agrees with the Second and Eleventh Circuits—albeit for different reasons and with some reservations—that permitting the VRA to reach felony disenfranchisement would necessitate a presumption of congressional authority in excess of its enforcement power under the Fourteenth and Fifteenth Amendments.[33] To extend the VRA to invalidate criminal disenfranchisement statutes would exceed congressional power and therefore render the Act constitutionally suspect.[34] The Note concludes by suggesting that litigants seeking to challenge state criminal disenfranchisement laws explore alternative constitutional challenges.[35]

I. The Fundamentality of Voting Rights

A. *Traditional Voting Rights Cases*

As originally drafted, the U.S. Constitution grants states near-plenary power to restrict and regulate the franchise rights of their citizens.[36] On the basis of this broad grant of authority, much of U.S. history has seen and accepted pronounced restrictions on poll access. Throughout the eighteenth and nineteenth centuries and for much of the twentieth, states regularly conditioned voting rights upon race, sex, taxpayer status, or property ownership, to name just a few.[37]

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[28] *See infra* notes 112–279 and accompanying text.

[29] *See infra* notes 280–359 and accompanying text.

[30] *See infra* notes 291–317 and accompanying text.

[31] *See infra* notes 291–317 and accompanying text.

[32] *See infra* notes 291–317 and accompanying text.

[33] *See infra* notes 318–59 and accompanying text.

[34] *See infra* notes 318–59 and accompanying text.

[35] *See infra* note 359 and accompanying text.

[36] *See* U.S. Const. art. I, § 2, cl. 1; *id.* art. I, § 4, cl. 1.

[37] *See* Pamela Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. Cin. L. Rev. 1345, 1346–62 (2003).

The Fifteenth, Nineteenth, and Twenty-Fifth Amendments (the "Franchise Amendments") reign in states' authority to regulate franchise rights.[38] The Franchise Amendments prohibit states from discriminating at the polls on the basis of race, sex, or minority status.[39] These limitations, however, extend only to purposefully discriminatory practices, and on their own, do not significantly curb states' broad authority to restrict who can vote in elections.[40] The Franchise Amendments themselves are powerless to confront more subtle forms of discrimination, such as facially neutral voting requirements like poll taxes or literacy tests that in practice exclude a disproportionate percentage of minority or women voters.[41] Thus, prior to the 1960s, states retained their near-plenary authority to grant or restrict their citizen's right to vote, so long as the states did not act with discriminatory intent.[42]

A series of Warren Court decisions in the 1960s eviscerated that near-plenary authority and substantially curbed states' power to regulate franchise.[43] In 1962, in *Baker v. Carr*, the U.S. Supreme Court found that a malapportioned districting plan that diluted the voting strength of individuals in overpopulated districts presented a challengeable offense under the Fourteenth Amendment's Equal Protection Clause.[44] *Baker* touched off a string of cases, the cumulative effect of which created the one-person, one-vote constitutional principle.[45]

Although the Franchise Amendments shield *classes* of voters from discrimination, these Warren-era precedents embed the right to vote in modern conceptions of equality under the Fourteenth Amendment and afford constitutional protection to an *individual*'s right to "participate in elections on an equal basis with other citizens in the juris-

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[38] *See* U.S. CONST. amend. XV; *id.* amend. XIX; *id.* amend. XXV.

[39] *See id.* amend. XV; *id.* amend. XIX; *id.* amend. XXV.

[40] *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50–51 (1959) (upholding the constitutionality of a state literacy test as a prerequisite for voting).

[41] *See id.* (recognizing the potential for literacy tests to interact with racial segregation in schools to dilute minority voting strength, but finding no constitutional violation); *see also* Breedlove v. Suttles, 302 U.S. 277, 283 (1937) (sustaining the constitutionality of poll taxes).

[42] *See Lassiter*, 360 U.S. at 50–51; *Breedlove*, 302 U.S. at 283.

[43] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 360 (1972) (overturning durational residency requirements); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (overturning disparately apportioned redistricting plan); Wesberry v. Sanders, 376 U.S. 1, 17–18 (1964) (overturning a Georgia apportionment scheme); Baker v. Carr, 369 U.S. 186, 237 (1962) (finding a state's apportionment scheme subject to Fourteenth Amendment scrutiny).

[44] 369 U.S. at 236.

[45] *See, e.g.*, *Dunn*, 405 U.S. at 336; *Reynolds*, 377 U.S. at 562.

diction."[46] Free elections and, correspondingly, the right to participate in free elections allow American citizens to authorize their governmental agents to enact laws that affect their liberties, and are thus too precious to be subject to interference.[47] The legacy of these cases posits an individual's access to the polls not as a privilege conferred by the state, but as a fundamental federal right guaranteed by the Constitution's Fourteenth Amendment.[48] Any state regulation that infringes on that fundamental right triggers strict scrutiny and will only pass constitutional muster if it is narrowly tailored to promote a compelling state interest.[49] By grounding voting rights in the Fourteenth Amendment, the Court armed litigants seeking access to polls with a constitutional weapon far more powerful than that offered by the Franchise Amendments.[50]

An individual-rights based argument grounded in the Fourteenth Amendment not only suffices, but almost always wins.[51] Because voting is a fundamental right, any regulatory deprivation of voting triggers strict scrutiny, the Court's most stringent constitutional protection and a standard that is nearly impossible to meet.[52] Furthermore, because the right to vote plays such an integral role in preserving all other constitutional rights, it retains an exalted fundamentality.[53] The Court's scrutiny of state election practices has been particularly robust, reaching beyond the state's allocation of voting rights and into

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[46] *Dunn*, 405 U.S. at 336.

[47] *See, e.g.*, Kramer v. Union Free Sch. Distr. No. 15, 395 U.S. 621, 626 (1969); *Reynolds*, 377 U.S. at 562.

[48] *See, e.g.*, *Kramer*, 395 U.S. at 626; *Reynolds*, 377 U.S. at 562.

[49] *Reynolds*, 377 U.S. at 562.

[50] *See* City of Mobile v. Bolden, 446 U.S. 55, 121 (1980) (Marshall, J., dissenting) (observing a distinction between the substantive, fundamental right to vote and the right to be free from discrimination in voting). *Compare* Harper v. Va. St. Bd. of Elections, 383 U.S. 663, 670 (1966) (invalidating poll taxes as a violation of the Fourteenth Amendment), *with Breedlove*, 302 U.S. at 283 (upholding poll taxes against a challenge under the Franchise Amendments).

[51] *See Bolden*, 446 U.S. at 121; *Dunn*, 405 U.S. at 363–64 (Burger, C.J., dissenting) ("So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard [strict scrutiny], and I doubt one ever will, for it demands nothing less than perfection.").

[52] *Reynolds*, 377 U.S. at 562.

[53] *See* Bush v. Gore, 531 U.S. 98, 104 (2000) (extending Equal Protection analysis beyond the state's political structures and into the actual administration of the state's voting standards); *see also* Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FLA. ST. U. L. REV. 407, 414–17 (2001) (observing that political equality demanded by the one person, one vote principle has become an injury in and of itself, not a means to redress a particular injury; and concluding that voting rights jurisprudence has "become a jurisprudence where the rule is all that matters").

the manner of the election.[54] States must not only permit for equal access to the polls, but they must also ensure that mechanisms are in place to accord all votes equal weight and that all voters have equal opportunity to elect candidates of their choosing.[55]

In short, the Court has recognized a constitutional guarantee of an *individual's* voting rights within the Fourteenth Amendment because the right to vote is protective of all other basic political and civil rights.[56] Thus, although states may regulate franchise rights, they must do so narrowly and only to promote a compelling state interest.[57] Very rarely will states be able to meet that burden; state authority to regulate the franchise has become effectively nominal.[58]

II. Constitutional Challenges to Felony Disenfranchisement

A. *Early Supreme Court Cases and Their Legacy*

Early challenges to felony disenfranchisement framed the argument in constitutional terms and aligned the practice of disenfranchising felons with those practices invalidated under the Warren Court's progressive recognition of voting as a fundamental right.[59] The thrust

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[54] *Gore*, 531 U.S at 104–05; Richard Hasen, Bush v. Gore *and the Future of Equal Protection Law in Elections*, 29 Fla. St. U. L. Rev. 377, 380–81, 393 (2001) (arguing that *Gore* signifies the Court's entry into a "third level of equality—equality in the procedures and mechanisms used for voting").

[55] *Dunn*, 405 U.S. at 336.

[56] *Reynolds*, 377 U.S. at 562.

[57] *Dunn*, 405 U.S. at 337; *Reynolds*, 377 U.S. at 562.

[58] *See Dunn*, 405 U.S. at 364–65 (Burger, C.J., dissenting) ("So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard [strict scrutiny], and I doubt one ever will, for it demands nothing less than perfection."); *see also* Gabriel Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 Geo. L.J. 259, 308–09 (2004) ("The modern Supreme Court pays lip service to the idea that 'the States have the power to impose voter qualifications.' In practice, however, voter qualifications have been almost wholly federalized."). Many voting restrictions fail the first prong of strict scrutiny because the state interest is not compelling. *See* Carrington v. Rash, 380 U.S. 89, 94 (1965). Others present a compelling state interest, but the state restriction has proven not narrowly enough tailored to meet it. *Dunn*, 405 U.S. at 343–44 (noting that states have a compelling interest in ensuring that voters are residents, but finding the added requirement of *durational* residency overbroad). Limiting franchise to those over eighteen, however, is a narrowly tailored measure to promote a "compelling state interest" because the state has a compelling interest in assuring that voting is used intelligently. *See* Oregon v. Mitchell, 400 U.S. 112, 124–25 (1970). Similarly, a state may have a compelling interest in establishing a bona fide residency requirement because it ensures that those participating have a vested interest in the election. *See* Evans v. Cornman, 398 U.S. 419, 422 (1970).

[59] *See* Dillenburg v. Kramer, 469 F.2d 1222, 1224–25 (9th Cir. 1972).

of the challenge asserted that felony disenfranchisement impermissibly impinged on felons' fundamental, constitutional voting rights.[60] At the same time, state justifications for the practice were not compelling, nor were the blanket disenfranchisement regulations sufficiently tailored to further those ends.[61] At the lower court level, the claim produced mixed results, with some courts finding felony disenfranchisement violative of the Equal Protection Clause, and others holding that the practice met the standards of strict scrutiny.[62]

In 1974, the U.S. Supreme Court in *Richardson v. Ramirez* decided the issue of felony disenfranchisement wholly apart from considerations of an individual's fundamental right to vote and the state interest in restricting that right.[63] Instead, the Court found an affirmative sanction for the practice within the Fourteenth Amendment's text.[64] Section 2 of the Fourteenth Amendment provides that any state that denies or abridges the right to vote of any of its male inhabitants twenty-one years or older shall have its representation in Congress reduced to reflect the proportion of those who consequently lose their suffrage rights.[65] Section 2, however, exempts from this reduction in apportionment those disenfranchised for "rebellion, or other crime."[66] The *Richardson* Court rationalized that the Fourteenth Amendment's first section must be read in conjunction with its second.[67] The court then determined that the first section could not ban outright what it "expressly exempted" from the less severe penalty demanded by the second.[68] Because the "other crime" exception explicitly authorized the practice, the Court refused to apply strict scrutiny.[69] Thus, states may constitutionally disenfranchise felons or ex-felons without abridging their fundamental right to vote, regardless of the state interest implicated.[70]

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[60] *Id.*

[61] *See id.*

[62] *Compare id.* (recognizing the viability of a Fourteenth Amendment challenge to Washington's criminal disenfranchisement laws), *with* Green v. Bd. of Elections of N.Y., 380 F.2d 445, 451–52 (2d Cir. 1967) (denying a Fourteenth Amendment challenge to New York's criminal disenfranchisement laws).

[63] 418 U.S. 24, 54–56 (1974).

[64] *Id.* at 54.

[65] U.S. CONST. amend. XIV, § 2.

[66] *Id.*

[67] *Richardson*, 418 U.S. at 54–56.

[68] *Id.* at 55.

[69] *See id.* at 54–56.

[70] *See id.* While the *Richardson* decision found the text of the reduction-in-apportionment clause substantively controlling, it is hard to determine what, if any, value the Four-

The *Richardson* holding, however, did not insulate all state laws depriving felons of their right to vote from constitutional challenge.[71] The Supreme Court imposed an important, though narrow, limitation on states' ability to restrict criminal voting rights in its 1984 decision in *Hunter v. Underwood.*[72] In *Underwood,* the Court held that an Alabama statute excluding from franchise all felons convicted of crimes of "moral turpitude" violated the Equal Protection Clause of the Fourteenth Amendment.[73] The Court found a violation because evidence demonstrated that the legislature selected which crimes for inclusion under the umbrella of "moral turpitude" based on its perception of which crimes African-American would more likely commit.[74] It concluded that the protection of felony disenfranchisement laws found in Section 2 did not constitutionally immunize statutes passed for the illegal purpose of discriminating on the basis of race.[75] Put another way, states may constitutionally disenfranchise felons, but not for an unconstitutional purpose, such as denying voting rights on the basis of race or gender.[76]

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teenth Amendment's Section 2 still maintains in voting rights jurisprudence. *See* Chin, *supra* note 58, at 259–60 (noting that "no other provision of the Constitution of 1787 or any of its amendments has been so comprehensively unenforced"). Courts hearing challenges under Section 2 have refused to enforce the provision finding either no standing for suit or that it presents a non-justiciable political question. *See* Sharrow v. Brown, 447 F.2d 94, 97 (2d Cir. 1971) (finding that the plaintiff had no standing because the injury alleged was too speculative); Lampkin v. Connor, 360 F.2d 505, 509 (D.C. Cir. 1966) (declining to hear the issue because it presented a political question). Other opinions have simply disregarded or outright ignored the provision even where it seems patently applicable. *See Gore,* 531 U.S. at 104 (noting that the Florida state legislature retained the authority to "take back" the power to appoint Presidential electors even after having granted franchise rights, despite Section 2's express mandate that such disfranchisement be reflected in the state's apportionment); Shane, *supra* note 1, at 539–47. Thus, although the *Richardson* decision remains good law and continues to control constitutional challenges to felon disenfranchisement provisions, it proves decidedly anomalous in voting rights jurisprudence insofar as it gives any credence whatsoever to the Fourteenth Amendment's Section 2. *See Richardson,* 418 U.S. 54.

[71] *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985).

[72] *Id.* at 231–33.

[73] *Id.*

[74] *Id.* at 227. For example, writing a bad check and petty larceny disqualified citizens from electoral participation, but second-degree manslaughter and assault on a police officer did not. *Id.* at 226–27. Legislative history indicated that these arbitrary distinctions were intentionally delineated to make black citizens more likely to face disfranchisement. *Id.* at 229–33.

[75] *Id.* at 233.

[76] *See Underwood,* 471 U.S. at 233.

The *Underwood* limitation is exceptionally narrow.[77] Constitutional challenges to criminal disenfranchisement laws based on *Underwood* will only succeed if the plaintiff is able to demonstrate purposeful discrimination in the law's enactment.[78] The plaintiff must show that the illicit purpose played a substantial role in the passage of the law.[79] Plaintiffs challenging state laws on an Equal Protection claim will not meet their burden by demonstrating merely that a law disparately impacts a particular racial group.[80] Similarly, legislatures do not offend the Constitution by passing a law known to result in a discriminatory effect along racial lines so long as the law is passed according to racially neutral criteria.[81] Only if the legislature continues the practice because of, not in spite of, the discriminatory result will any law violate Equal Protection.[82]

The effect of the *Richardson* decision, then, post-*Underwood*, is to foreclose the individual rights challenge to criminal disenfranchisement statutes.[83] Arguments so imperative to the expansion of franchise

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[77] *See* Farrakhan v. Washington (*Farrakhan III*), 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc) (noting that *Underwood* violations are "exceedingly rare"); Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998) (finding that even though racial animus motivated Mississippi's criminal disenfranchisement statutes, subsequent emendation mitigated the illicit taint of the original); *One Person, No Vote*, *supra* note 6, at 1951 (noting courts' general reluctance to find *Underwood* violations).

[78] *See Farrakhan III*, 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing en banc) (noting that *Underwood* violations are "exceedingly rare"); *Cotton*, 157 F.3d at 391; *One Person, No Vote*, *supra* note 6, at 1951 (2002).

[79] *See* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

[80] *See id.*

[81] United States v. LULAC, 793 F.2d 636, 646 (5th Cir. 1986).

[82] *See id.*

[83] *See Richardson*, 418 U.S. at 54; Owens v. Barnes, 711 F.2d 25, 27 (3d Cir. 1983) (stating "the right of convicted felons to vote is not 'fundamental'"); Allen v. Ellisor, 664 F.2d 391, 395 (4th Cir. 1981) ("The decision in *Richardson* is generally recognized as having closed the door on the equal protection argument in a challenge to state statutory voting disqualifications for conviction of crime . . . ."). For an argument that the door may remain open, see Saxonhouse, *supra* note 14, at 1624–27. Elena Saxonhouse argues that *Richardson* merely foreclosed the application of strict scrutiny review to felon disenfranchisement statutes, but that such statutes are still subject to rational basis review. *Id.*; *see also* Karlan, *supra* note 14, at 1155 ("[E]ven if criminal disenfranchisement statutes are presumptively constitutional because of Section 2—as opposed to most other restrictions on the franchise which are presumptively unconstitutional—their constitutionality is only *presumptive*: They still must serve *some* legitimate purpose and they cannot rest on an impermissible one.") (emphasis added). If correct, this option should prove an attractive one for litigants challenging criminal disenfranchisement laws, because the policy justifications for disfranchising criminals are so tenuous they may fail even rational basis review. *See infra* notes 121–94 and accompanying text. Courts have generally rejected this argument, however, because the *Richardson* opinion seems, though in dicta, to validate the justifications for criminal disenfranchisement as reasonable. *See Richardson*, 418 U.S. at 53–54 (citing with approval

rights in the Warren Court—stressing the fundamentality of the individual's constitutional right to vote—become moot in the context of extending the franchise to people convicted of felonies.[84] Because the Fourteenth Amendment—the very amendment through which individual voting rights receive their heightened Constitutional protection—explicitly authorizes states to exclude criminals from voting, felons cannot argue that it protects their individual right to vote.[85] The consequence of *Richardson* is not necessarily that the individual rights argument fails in the context of felony disenfranchisement; it is simply that there is no individual rights argument to make.[86] Plaintiffs challenging the statute can resort only to the class-based challenge of the pre-Warren era.[87] Thus, only in the "exceedingly rare" instances where plaintiffs can demonstrate that invidious discrimination played a substantial factor in the passage of the criminal disenfranchisement law will they succeed.[88]

B. *The Ubiquity and Impact of Felony Disenfranchisement Laws*

Because felony disenfranchisement statutes enjoy *Richardson*'s constitutional shield, their employment by states remains remarkably pervasive.[89] Currently, forty-eight states disenfranchise convicted felons in some manner.[90] Thirty-two states disenfranchise felons for longer than their period of incarceration.[91] Eight states permanently disenfranchise even first-time offenders, pending executive restoration of voting rights.[92]

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lower court decisions that found criminal disenfranchisement a rational means to further a legitimate state interest); *see also* Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (citing *Richardson* for the proposition that states have a legitimate and compelling justification for disfranchising their felons).

[84] *See Richardson*, 418 U.S. at 54; *Owens*, 711 F.2d at 27; *Ellisor*, 664 F.2d at 395.

[85] *See Richardson*, 418 U.S. at 54; *Owens*, 711 F.2d at 27; *Ellisor*, 664 F.2d at 395.

[86] *See* Ewald, *supra* note 14, at 1072 ("The textual nature of the Court's decision in *Richardson* precluded investigation of principled arguments for and against laws removing suffrage rights from offenders.").

[87] *See Underwood*, 471 U.S. at 233.

[88] *See Farrakhan III*, 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing en banc).

[89] *See One Person, No Vote*, *supra* note 6, at 1939–49; FELLNER & MAUER, *supra* note 14, at 1–4. The prevalence of felony disenfranchisement laws appears to be dwindling, however. *See* Karlan, *supra* note 14, at 1168 (noting a discernible national trend towards restoring voting rights for ex-felons).

[90] *See One Person, No Vote*, *supra* note 6, at 1942. Maine and Vermont are the exceptions. *Id.*

[91] *Id.*

[92] *Id.* at 1943.

The impact of these laws is profound and escalating, in large measure due to the ballooning incarceration and conviction rates.[93] Over five million people in the United States, or two percent of the electorate, cannot vote because of felony disenfranchisement laws.[94] Roughly 1.4 million of those disenfranchised have completed their sentences, including probation and parole.[95]

The impact felt by criminal disenfranchisement statutes has a racial component as well.[96] Over a third of those disenfranchised (an estimated 1.4 million citizens) are African-American, though African-Americans comprise just over one-tenth of the national population.[97] Nationally, felony disenfranchisement statutes deprive the right to vote to thirteen percent of the African-American voting population, seven times the national average.[98] In states that disenfranchise ex-felons, the effect on minority communities is even more arresting; for example, Florida and Alabama's disenfranchisement laws deny the right to vote to one-in-three black men.[99]

The disqualification of such a magnitude of otherwise eligible voters suggests (and studies confirm) that the practice of disenfranchising felons has affected election outcomes.[100] One study found that since 1978, seven U.S. Senate elections would have turned out differently but for the state's criminal disenfranchisement laws.[101] Had fel-

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[93] *See* Karlan, *supra* note 14, at 1156–57 (observing that despite the curtailment of ex-felon disenfranchisement nationally, due to escalating conviction rates "[t]he actual impact of felon disenfranchisement is greater than at any point in our history."); *see also* Behrens, *supra* note 8, at 231.

[94] Behrens, *supra* note 8, at 231.

[95] Karlan, *supra* note 14, at 1157.

[96] FELLNER & MAUER, *supra* note 14, at 1–2.

[97] Karlan, *supra* note 14, at 1157; FELLNER & MAUER, *supra* note 14, at 1–2.

[98] Karlan, *supra* note 14, at 1157.

[99] FELLNER & MAUER, *supra* note 14, at 8.

[100] Uggen & Manza, *supra* note 14, at 788–92.

[101] *Id.* at 788–89. Christopher Uggen and Jeff Manza conclude that this difference would likely have shifted the balance of power to the Democrats throughout the 1990s. *Id.* at 789–90. Other studies and scholarly work have noted the likelihood that those convicted of crimes would support the Democratic Party, and the consequent resistance that the Republican Party would likely exhibit toward any legislative efforts to abolish the practice of criminal disenfranchisement. *See* Chin, *supra* note 58, at 307 ("Republicans have a terrible conflict of interest with respect to African-American voter turnout and its connection to felon disenfranchisement."); *see also* Behrens, *supra* note 8, at 273 n.228 (noting the political difficulty politicians face in advocating for felon re-enfranchisement). Unsurprisingly, federal legislative efforts to repeal or limit state authority have enjoyed support almost exclusively from Democrats. *See, e.g.*, Civic Participation and Rehabilitation Act of 2005, H.R. 1300, 109th Cong. (2005); Count Every Vote Act of 2005, S. 450, 109th Cong. (2005); Civic Participation and Rehabilitation Act of 2002, H.R. 5510, 107th Cong. (2002).

ons been permitted to vote in Florida in 2000, Al Gore would have carried the state (and thus the Presidency) by at least 40,000 votes.[102] Had only ex-felons—those who have served their incarceration, probation and parole sentences—been permitted to vote, the margin of Gore's victory would still have been 30,000.[103] Similarly, Washington's 2004 gubernatorial election was also skewed as a result of its felony disenfranchisement laws.[104]

C. *Current Debates Surrounding Felony Disenfranchisement*

The profound political impact of felony disenfranchisement laws, particularly in the wake of the 2000 election, has reinvigorated public and scholarly debate over the subject.[105] Much of the recent scholarly criticism of criminal disenfranchisement has centered on demonstrating the deficiencies in the political and legal rationales in support of the practice, a consideration conspicuously absent from the *Richardson* decision.[106] Substantial questions exist concerning whether the purposes served by criminal disenfranchisement statutes are sufficiently rational or compelling to survive constitutional scrutiny.[107]

Traditional justifications supporting the disenfranchisement of felons generally characterize the practice as within the regulatory authority of states to administer elections.[108] Other courts and com-

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[102] *See* Uggen & Manza, *supra* note 14, at 792–93. The 40,000 vote figure is based on the scholar's most conservative turnout estimate (13.6%). *Id.*

[103] *Id.*

[104] *Republicans Allege 1,108 Felons Voted Illegally in Election*, SEATTLE TIMES, Feb. 23, 2005, at B2, *available at* http://seattletimes.nwsource.com/html/localnews/2002187533_felons23m.html.

[105] *See supra* note 14 and accompanying text.

[106] *See Richardson*, 418 U.S. at 53–56. By finding a textual authorization within the Fourteenth Amendment for state criminal disenfranchisement regimes, the *Richardson* decision eschewed the more difficult question of whether a valid justification exists for the practice. *See id.* (grounding its decision in the text of the Fourteenth Amendment without approval of the policies underlying criminal disenfranchisement); Ewald, *supra* note 14, at 1072; Karlan, *supra* note 14, at 1154 ("The Court's analysis in [*Richardson*] short-circuited any discussion of *why* states might disenfranchise offenders: The Court simply held that they *could*.") (emphasis added).

[107] *See, e.g.*, Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172–77 (2002) (discussing the viability of state justifications for criminal disfranchisement); Ewald, *supra* note 14, at 1072–1137 (same); Karlan, *supra* note 14, at 1150–55, 1164–69 (same); Mark E. Thompson, *Don't Do the Crime If You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 186–98 (2002) (same); Saxonhouse, *supra* note 14, at 1624 (same).

[108] *See* Trop v. Dulles, 356 U.S. 86, 96 (1958) ("[B]ecause the purpose of [criminal disenfranchisement] is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise."); *Green*, 380 F.2d

mentators have suggested that disfranchising felons falls within the states' province as a form of criminal punishment.[109] Since the 2000 election, scholars have closely scrutinized and generally cast doubt as to the validity of both the regulatory and penal justifications.[110] The

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at 450 (holding that because New York's felony disenfranchisement provision was regulatory and not punitive, it was immune to challenges on Eighth Amendment cruel and unusual punishment grounds). Those espousing the regulatory justification for felony disfranchisement suggest that the practice functions as a valid regulatory tool for protecting the "purity of the ballot box." Washington v. State, 75 Ala. 582, 585 (1884). First, by their actions, felons have demonstrated an antipathy toward law; disenfranchising citizens is necessary to prevent criminals from casting subversive votes bent on undermining the criminal code. *Green*, 380 F.2d at 451–52; *see also* 148 CONG. REC. S803 (daily ed. Feb. 14, 2002) (statement of Sen. Sessions) ("[Felons'] judgment and character is such that they ought not to be making decisions on the most important issues facing our country."). Second, prohibiting felons from electoral participation is a valid regulatory mechanism to prevent electoral fraud. *See Richardson*, 418 U.S. at 79 (Marshall, J., dissenting). A related argument posits criminal disenfranchisement statutes as a valid regulatory measure because felons lack the character necessary to cast a vote responsibly. Clegg, *supra* note 107, at 174 (arguing that even after recognition of voting as a fundamental right, states retain the authority to disqualify from the franchise those citizens, like children and the insane, who lack trustworthiness or loyalty).

[109] *See* Muntaqim v. Coombe, 366 F.3d 102, 123 (2d Cir.), *cert. denied*, 543 U.S. 978, *reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004). An argument related to the punitive rationale posits criminal disfranchisement as a "collateral consequence" of a felony, like losing the right to bear arms or serve on juries. *See* 148 CONG. REC. S803 (daily ed. Feb. 14, 2002) (statement of Sen. Sessions) ("[A] person who violates serious laws of a State or Federal Government forfeits their right to participate in those activities of that government."); Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of a Criminal Conviction*, 6 GENDER RACE & JUST. 253, 258–62 (2002) (listing typical contemporary collateral consequences); Clegg, *supra* note 107, at 174.

[110] For a rejection of the regulatory rationale for disfranchising felons, see, for example, *Richardson*, 418 U.S. at 79–80 (Marshall, J., dissenting) (disqualifying felons from franchise is both over- and underinclusive as a means to prevent voting fraud); Karlan, *supra* note 14, at 1152 (citing Carrington v. Rash, 380 U.S. 89, 94 (1965)) (disqualifying voters out of fear that they may cast subversive votes is constitutionally impermissible); Thompson, *supra* note 107, at 195–96 (noting there is no evidentiary basis to support the proposition that felons will cast subversive votes). For a critique of the punitive rationale, see, for example, John R. Cosgrove, *Four New Arguments Against Felony Disenfranchisement*, 26 T. JEFFERSON L. REV. 157, 181–88 (2004) (categorizing criminal disfranchisement as punitive renders it vulnerable to an Eighth Amendment challenge); Fletcher, *supra* note 14, at 1904–06 (suggesting the vulnerability of criminal disfranchisement to Bill of Attainder challenges if categorized as punitive); Karlan, *supra* note 14, at 1164–69; FELLNER & MAUER, *supra* note 14, at 16 (arguing that criminal disenfranchisement statutes are disproportional because disenfranchisement statutes attach automatically upon conviction and thus do not permit for judicial tailoring of the sentence to fit the crime). One study has found a strong correlation between permanent disenfranchisement and inmate recidivism. *See generally* Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample* (2005), http://www.soc.umn.edu/%7Euggen/Uggen_Manza_04_CHRLR2.pdf (suggesting a correlation between permanent disenfranchisement and inmate recidivism).

practice has also come under renewed attack for its grossly disproportionate impact on minority voters.[111]

III. Challenging Felony Disenfranchisement under the VRA

State criminal disenfranchisement has faced renewed attacks not only in scholarship, but in the courts as well.[112] With the fundamental rights challenge, rooted in the Equal Protection Clause of the Fourteenth Amendment, foreclosed by the *Richardson v. Ramirez* and *Hunter v. Underwood* framework—barring an affirmative demonstration of illicit legislative intent—litigants have shifted their efforts to overturn state criminal disenfranchisement laws to section 2 of the VRA as amended in 1982.[113] These VRA challenges rest exclusively on the race-based objections outlined above.[114] The thrust of the allegation is that criminal disenfranchisement interacts with racial animus in the criminal justice system to deprive impermissibly citizens of the right to vote on account of their race.[115] This strategy has had mixed success in the courts.[116]

This Part examines the state of these challenges, beginning with a general discussion of the VRA's scope and purpose.[117] It notes that while ostensibly passed to enforce the Fourteenth and Fifteenth Amendments, the VRA restricts state authority to regulate franchise rights more effectively than the Amendments themselves.[118] The Part

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[111] *See, e.g.*, Behrens & Uggen, *supra* note 14, at 596 (observing a positive correlation between the likelihood and severity of states' felony disenfranchisement laws and the percentage of non-whites in prison); Fletcher, *supra* note 14, at 1899–1900 (arguing that the racial impact of criminal disfranchisement resuscitates the United States' historical of intentional and open defiance of minority voting rights, and thus renders the policy untenable); Andrew Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 537–43 (1993) (noting the historical correlation between the Fifteenth Amendment's enforcement and the rise of state criminal disenfranchisement provisions).

[112] *See* Johnson v. Governor of Fla., 405 F.3d 1214, 1230 (11th Cir. 2005); Muntaqim v. Coombe, 366 F.3d 102, 116–30 (2d Cir.), *cert. denied*, 543 U.S. 978, *reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004); Farrakhan v. Washington (*Farrakhan II*), 338 F.3d 1009, 1014–23 (9th Cir. 2003).

[113] *See Johnson*, 405 F.3d at 1230; *Muntaqim*, 366 F.3d at 116–30; *Farrakhan II*, 338 F.3d at 1014–23. *See generally* Hunter v. Underwood, 471 U.S. 222 (1985); Richardson v. Ramirez, 418 U.S. 24 (1974).

[114] *See Johnson*, 405 F.3d at 1230; *Muntaqim*, 366 F.3d at 116–30; *Farrakhan II*, 338 F.3d at 1014–23; *supra* 89–104.

[115] *See Johnson*, 405 F.3d at 1230; *Muntaqim*, 366 F.3d at 116–30; *Farrakhan II*, 338 F.3d at 1014–23.

[116] *See Johnson*, 405 F.3d at 1230; *Muntaqim*, 366 F.3d at 116–30; *Farrakhan II*, 338 F.3d at 1014–23.

[117] *See infra* notes 121–279 and accompanying text.

[118] *See infra* notes 121–62 and accompanying text.

then summarizes the 1982 Amendment to the VRA, which abrogated plaintiffs' burden to demonstrate illicit intent in proving voting discrimination.[119] Finally, it looks at litigants' attempts to use the 1982 Amendment to invalidate felony disenfranchisement statutes and the various courts' responses.[120]

A. *Scope and Purpose of the VRA*

Congress passed the VRA in 1965 to eliminate racially discriminatory voting regulations and practices.[121] The VRA accomplishes this goal primarily through two provisions, section 2 and section 5.[122] Section 5 requires that particular states and municipalities, which have demonstrated a historical hostility to minority voting rights, must attain pre-clearance from the U.S. Attorney General before implementing a voting practice or requirement.[123] Section 2 applies nationwide and prohibits any voting requirement that has the purpose or effect of denying or diluting voting rights on account of race or color.[124]

Because the Act targets racial discrimination in voting, a particularly pernicious evil, the Supreme Court has given the provisions their "broadest possible scope."[125] Congress's frustration with the ineffectiveness of the Fifteenth Amendment prompted the passage of the VRA.[126] Despite the Amendment's prohibition of racial discrimination in voting, states contrived sophisticated and ostensibly neutral election practices that sought to, and successfully did, evade the Fifteenth Amendment's requirements.[127] The VRA's primary purpose was to root out these seemingly innocuous—but operationally discriminatory—voting practices.[128] Further underpinning the breadth of the VRA's scope is the fundamentality of individual voting rights.[129] It is not merely state discrimination, but discrimination *in voting*, insofar as it touches on in-

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[119] *See infra* notes 163–94 and accompanying text.

[120] *See infra* notes 195–279 and accompanying text.

[121] *See* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

[122] *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000).

[123] *Id.* § 1973c.

[124] *Id.* § 1973(a)–(b).

[125] Allen v. State Bd. of Elections, 393 U.S. 544, 565–66 (1969); *see also* Holder v. Hall, 512 U.S. 874, 895 (1994) (Thomas, J., concurring).

[126] *See Holder*, 512 U.S. at 895; *Allen*, 393 U.S. at 565–66; S. REP. No. 97-417, at 5 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 181–82.

[127] *See Holder*, 512 U.S. at 895; *Allen*, 393 U.S. at 565–66; S. REP. No. 97-417, at 5, *as reprinted in* 1982 U.S.C.C.A.N. 177, 181–82.

[128] *See Holder*, 512 U.S. at 895; *Allen*, 393 U.S. at 565–66; S. REP. No. 97-417, at 5, *as reprinted in* 1982 U.S.C.C.A.N. 177, 181–82.

[129] *Allen*, 393 U.S. at 565–66.

dividuals' fundamental rights, that compels the broadest possible reading of the VRA. [130] Thus, although ostensibly passed pursuant Congress's enforcement authority under the Fifteenth Amendment, the Supreme Court has long recognized that the VRA may invalidate even those state electoral practices that do not violate the Fifteenth Amendment itself.[131]

For example, in 1966, the U.S. Supreme Court in *South Carolina v. Katzenbach* held that Congress did not exceed its constitutional authority by requiring South Carolina to pre-clear its literacy test, despite finding literacy tests constitutionally permissible just seven years earlier in *Lassiter v. Northampton County Board of Elections.*[132] The Supreme Court subsequently upheld the VRA's temporary suspensions of literacy tests in North Carolina and later the permanent prohibition of literacy tests nationwide.[133] These cases signal that Congress may prohibit voting practices and prerequisites that are not in and of themselves unconstitutional.[134]

In 1970, in *Oregon v. Mitchell*—which denied a constitutional challenge to the VRA's nationwide prohibition of literacy tests—the Supreme Court explained why the VRA may reach beyond the Franchise Amendments and remain an appropriate use of Congress's authority.[135] First, Congress had a record of purposefully discriminatory employment and administration of the literacy tests.[136] Under this explanation, the literacy tests themselves likely violated the Fifteenth Amendment, rendering their invalidation an appropriate use of congressional enforcement power.[137] Second, Congress had a record of unconstitutional discrimination in educational opportunities, a remnant of school segregation.[138] Congress may have determined that literacy tests intersected with educational inequality to perpetuate this unconstitutional discrimination at the polls.[139]

Mitchell's acceptance of the VRA's overinclusion, however, predated recent Court cases restricting Congress's enforcement authority

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[130] *See id.*

[131] *Katzenbach*, 383 U.S. at 326–27.

[132] *Id.*; Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[133] Oregon v. Mitchell, 400 U.S. 112, 132–34 (1970); Gaston County v. United States, 395 U.S. 285, 289, 292–93 (1969).

[134] *See* City of Rome v. United States, 446 U.S. 156, 174–77 (1980).

[135] 400 U.S. at 132–34.

[136] *See id.* at 132–33.

[137] *See id.*

[138] *Id.* at 133–34.

[139] *See id.*

under the Reconstruction Amendments.[140] At the time the Supreme Court decided *Mitchell,* it permitted Congress substantial deference to determine the necessary legislation for enforcement of the Reconstruction Amendments.[141] The judicial limitation on Congress's enforcement authority was the same as its authority under the Necessary and Proper Clause.[142] The Court noted: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[143]

In 1997, in *City of Boerne v. Flores,* the Supreme Court held that the Reconstruction Amendments give Congress the power to enforce, but not define, the constitutional rights granted by the Reconstruction Amendments.[144] In overturning the Religious Freedom Restoration Act (the "RFRA"), *Flores* altered the scope of congressional power under the enforcement clause of the Fourteenth and Fifteenth Amendment.[145] *Flores* held that in order for Congress to exercise its remedial authority pursuant to the Reconstruction Amendments, Congress must show "a congruence and proportionality" between the remedy imposed and the injury prevented.[146] If the remedial measure enacted by Congress proves overinclusive, or not in congruence and proportion to the injury prevented, then Congress has exceeded its remedial authority and instead impermissibly created a new substantive right.[147]

The *Flores* test is a two-step inquiry.[148] A court must first identify which constitutional rights Congress seeks to enforce (congruence), and then second determine whether the scope of the remedy is sufficiently tailored to enforce them (proportionality).[149] The congruence prong most often requires a congressional demonstration of a pattern of unconstitutional state behavior.[150] The proportional prong requires

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[140] *See* City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

[141] *Katzenbach,* 383 U.S. at 326.

[142] *Id.*

[143] *Id.* (quoting McCulloch v. Maryland, 17 U.S. 316, 421 (1819)).

[144] 521 U.S. at 520.

[145] *See id.*

[146] *Id.*

[147] *See id.* at 520–21.

[148] *See* Tennessee v. Lane, 541 U.S. 509, 522–23, 529 (2004) (interpreting the *Flores* test).

[149] *See id.*

[150] *See Flores,* 521 U.S. at 525–27, 530 (faulting the RFRA for failing to include a congressional finding of a pattern of unconstitutional behavior); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) (finding congressional revocation of state

that the scope of the law limit its reach to only the unconstitutional behavior.[151]

Thus, recent precedent has substantially restricted Congress's enforcement authority under the Reconstruction Amendments.[152] Nevertheless, the VRA's overinclusiveness has survived these limitations.[153] *Flores* itself cites the VRA approvingly—the literacy test cases in particular—as appropriate even under the congruent and proportional standard—as opposed to the Necessary and Proper Clause.[154] In fact, several cases applying the *Flores* standard laud the VRA as a benchmark of appropriate legislation, against which all other remedial legislation should be measured.[155]

Flores offered three reasons why the VRA persists as an appropriate use of congressional authority, despite the judicial limiting of Congress's power.[156] The first two reasons simply echoed the reasons in *Mitchell*.[157] First, Congress had a clear record of unconstitutional discrimination in voting, and therefore was simply redressing unconstitutional behavior.[158] Second, Congress had a clear pattern of impermissible discrimination in education, the effect of which was borne out in the literacy tests.[159] Thus, Congress had a demonstrated record of unconstitutional and insidious state conduct, and it chose a remedy—the prohibition of literacy tests—tailored to ameliorate the effects of that conduct.[160] The third reason *Flores* offered for the VRA's appropriateness is somewhat more expansive: prohibiting literacy tests because of their racially discriminatory impact is necessary because voting helps

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sovereign immunity incongruent absent a congressional record evidencing a pattern of unconstitutional discrimination); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999).

[151] *See Lane*, 541 U.S. at 529; United States v. Morrison, 529 U.S. 598, 626–27 (2000) (overturning the Violence Against Women Act as a disproportional use of Congress's enforcement authority because the legislation did not limit its scope to those states where the record demonstrated a patterned subjugation of women's rights).

[152] *See supra* notes 207–29 and accompanying text.

[153] *See Flores*, 521 U.S. at 525–33.

[154] *Id.*

[155] *See, e.g.*, *Lane*, 541 U.S. at 519 n.4; *Morrison*, 529 U.S. at 626; *Fla. Prepaid*, 527 U.S. at 640.

[156] *See Flores*, 521 U.S. at 525–31; Pamela Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 WM. & MARY L. REV. 725, 728–31 (1998).

[157] *See Flores*, 521 U.S. at 526–27; Karlan, *supra* note 156, at 728–29.

[158] *See Flores*, 521 U.S. at 526–27; Karlan, *supra* note 156, at 728.

[159] *See Flores*, 521 U.S. at 526; Karlan, *supra* note 156, at 728–29.

[160] *See Flores*, 521 U.S. at 526; Karlan, *supra* note 156, at 728–29.

preserve other liberties.[161] Under this theory, Congress can ban those voting practices that result in dilution of minority voting strength because such dilution deprives minority communities of the electoral clout necessary to safeguard their rights against future government intrusions.[162]

B. *VRA Section 2 and the 1982 Amendment*

The recent cases limiting congressional enforcement power under the Reconstruction Amendments cite the VRA as an appropriate use of congressional enforcement power.[163] The VRA provisions referenced, however, pre-date the amendments to the VRA that Congress enacted in 1982.[164] Whether the VRA *as amended* retains that constitutional appropriateness remains uncertain, an uncertainty that the current criminal disenfranchisement challenges directly address.[165]

Section 2 prohibits states from utilizing or administering a voting practice or qualification that abridges or deprives an individual's right to vote on account of race.[166] Prior to 1982, the language of section 2 essentially mirrored that of the Fifteenth Amendment, and operated in much the same way; section 2 functioned as merely a reiteration of the Fifteenth Amendment, prohibiting purposeful racial discrimination in voting.[167] Plaintiffs challenging state suffrage restrictions

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[161] *See Flores*, 521 U.S. at 528; Karlan, *supra* note 156, at 729. Relatedly, a recent Supreme Court decision suggested that Congress's enforcement authority may be broader when acting to vindicate a fundamental right. *See Lane*, 541 U.S. at 528–29.

[162] *See Flores*, 521 U.S. at 528; Karlan, *supra* note 156, at 729.

[163] *See, e.g.*, *Lane*, 541 U.S. at 519 n.4; *Morrison*, 529 U.S. at 626; *Fla. Prepaid*, 527 U.S. at 640; *Flores*, 521 U.S. at 531–32.

[164] *See Flores*, 521 U.S. at 531–32.

[165] *See* Jennifer G. Presto, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After* City of Boerne, 59 N.Y.U. ANN. SURV. AM. L. 609, 624–31 (2004). In 1984, in *Mississippi Republican Executive Committee v. Brooks*, however, the Supreme Court summarily affirmed a lower court decision rejecting a constitutional challenge to section 2. 469 U.S. 1002, 1003 (1984). The Court affirmed the lower court ruling that section 2 could prohibit practices not enacted with discriminatory intent without exceeding the powers vested in Congress by the Fifteenth Amendment. *Id.* Subsequent Supreme Court decisions have presumed, but never directly addressed, the section's constitutionality. *See* Bush v. Vera, 517 U.S. 952, 991–92 (1996) (O'Connor, J., concurring). Noting the unanimous affirmation of the provision's constitutionality, though, Justice O'Connor advised that lower courts continue to treat section 2 as constitutional "unless and until current lower court precedent is reversed and it is held unconstitutional." *Id.* These cases pre-dated *Flores* and its progeny, however, and so the VRA's constitutionality post-*Flores* remains an open question. *See Flores*, 521 U.S. at 520; *Vera*, 517 U.S. at 991–92 (O'Connor, J., concurring); *Brooks*, 469 U.S. at 1003.

[166] 42 U.S.C. § 1973(a)–(b) (2000).

[167] *See* City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980).

needed to demonstrate purposeful discrimination in an election law's enactment in order to prevail.[168] Consequently, in 1980, the Supreme Court in *City of Mobile v. Bolden* held that plaintiffs had no actionable claim under the VRA on the theory that an at-large districting plan diluted the African-American vote absent a showing of subjective discrimination on the part of the legislature.[169]

Justices White and Marshall both dissented from the *Bolden* decision on separate grounds.[170] Justice White's dissent contended that sufficient circumstantial evidence existed to permit an inference of illicit legislative intent, and therefore the districting plan could violate the Fifteenth Amendment.[171] He outlined a list of objective factors, previously articulated in the Supreme Court's 1973 decision in *White v. Regester*, that a court should consider as circumstantial evidence to support a finding of impermissible legislative purpose.[172] On the other hand, Justice Marshall contended that no inference of discriminatory intent was necessary because voting is a fundamental, individual right.[173] Citing Warren-era precedents that recognized voting rights as fundamental, Marshall's dissent argued that vote dilution, as much an affront to the one-man, one-vote principle as vote denial, deprives individuals of their constitutional right guaranteed by the Fourteenth Amendment, and thus a state may not deprive a citizen of that right regardless of its intent.[174]

Congress enacted the 1982 Amendment largely in response to the *Bolden* decision, and largely adopted Justice Marshall's reasoning.[175] The 1982 Amendment relieves plaintiffs challenging legislation under the VRA's section 2 of the difficult burden of proving subjective discriminatory intent.[176] The motivation for the 1982 Amendment was

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[168] *See id.*

[169] *Id.* at 61.

[170] *See id.* at 94–103 (White, J., dissenting); *id.* at 103–24 (Marshall, J., dissenting).

[171] *Id.* at 103 (White, J., dissenting).

[172] *Bolden*, 446 U.S. at 95–97 (White, J., dissenting) (citing White v. Regester, 412 U.S. 755, 766–67 (1973)). Congress subsequently adopted these factors and incorporated them into the "totality of circumstances" test required by the 1982 Amendment to the Voting Rights Act. *See infra* notes 182–83.

[173] *Bolden*, 446 U.S. at 118, 120–21 (Marshall, J., dissenting).

[174] *Id.* at 115–20.

[175] *See* Thornburg v. Gingles, 478 U.S. 30, 43–44 (1986) (reading the 1982 Amendment to the VRA as effectively overturning the *Bolden* requirement of showing purposeful discrimination); *Bolden*, 446 U.S. at 61; S. REP. No. 97-417, at 27–28, 36–37 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 204–06, 214–15 (noting that the purpose of the Amendments was to repeal *Bolden* and to focus the judicial inquiry only into whether there exists equal access to electoral opportunity).

[176] *See* 42 U.S.C. § 1973 (a)–(b) (2000).

two-fold: part theoretical and part pragmatic.[177] At the theoretical level, Congress believed that the judicial focus on legislative intent asked "the wrong question."[178] The appropriate inquiry under the VRA should focus solely on whether minority communities have equal access to the electoral process; legislative intent has no bearing on that question.[179] At the pragmatic level, Congress recognized that forcing litigants to prove discriminatory intent was an inordinate, sometimes impossible, burden for plaintiffs to meet.[180] Moreover, imposing an intent test on litigants would lead to racial divisiveness, as it requires accusations of racism and prejudice.[181]

Accordingly, the amended section 2 now mandates a plaintiff demonstrate only that the challenged voting procedure or qualification "results" in a denial or dilution of the vote on account of race or color.[182] Subsection (b) of section 2 further clarifies that an electoral practice or standard will violate the Act if a court determines that by a "totality of circumstances," the Act affords minority citizens less opportunity to participate in the political process or less opportunity to elect their chosen representatives.[183]

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[177] *See* S. REP. NO. 97-417, at 36, *as reprinted in* 1982 U.S.C.C.A.N. 177, 214; *see also Gingles*, 478 U.S. at 44–46.

[178] S. REP. NO. 97-417, at 36, *as reprinted in* 1982 U.S.C.C.A.N. 177, 214.

[179] *Id.* at 38.

[180] *Id.* at 36.

[181] *Id.*

[182] *See* 42 U.S.C. §1973 (a) (2000). The relevant text of the provision reads:

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

Id.

[183] *Id.* § 1973 (b). In applying the "totality of circumstances test" the Senate Report accompanying the statute indicates the following factors as a non-exhaustive list appropriate for judicial consideration: 1) the extent of historical discrimination in voting within the state; 2) the existence and extent of racially polarized voting; 3) the historical use of cer-

By shifting a plaintiff's burden from discriminatory intent to discriminatory results (the "results test"), Congress aimed to prevent state legislatures from shirking the VRA's express purpose—eliminating racial discrimination in voting—by enacting facially neutral election laws that, in practice, create electoral inequalities for non-whites.[184] The 1982 Amendment, at its core, seeks to further the purposes of the VRA by removing even ostensibly race-neutral systemic processes that inhibit minority communities' capacities for political empowerment.[185] The VRA accomplishes this aim by changing the standard of review for judicial consideration under section 2.[186]

Under the amended section 2, plaintiffs challenging state election practices no longer need "smoking gun" evidence of a state's illicit purpose or motivation. Rather, the presiding court need only determine, though a fact-intensive inquiry of a variety of factors, that the election practice operates so as to undermine racial equality in electoral opportunity.[187] The legislative purpose behind the challenged voting procedure itself is of no moment, for the sole inquiry is into whether the procedure operates to dilute or deny electoral equality to racial minorities.[188]

Although the 1982 Amendment textually abrogates the plaintiff's burden to demonstrate illicit legislative intent when making race-based challenges to state electoral regulations, it stops short of mandating proportional representation.[189] Section 2 prohibits voting practices that result in unequal participatory opportunity, not in unequal electoral outcomes.[190] Thus, courts have refused to find disparate impact alone

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tain electoral schemes known to dilute minority participation; 4) denial of access to the process of candidate slating; 5) the extent to which minorities still bear the effects of discrimination in areas "such as education, employment and health," that frustrate or impede their access to the political process; 6) whether campaigns have made, or been characterized as having made, overt or subtle racial appeals; 7) the success of minority candidates in pursuit of elective office; 8) whether elected officials have demonstrated an unresponsiveness to the particularized need of the minority communities; and 9) whether the policy underlying the challenged voting practice or standard is pretextual or tenuous. S. REP. No. 97-417, at 28–29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 205–07.

[184] *Gingles*, 478 U.S. at 45–47.

[185] *See id.*

[186] *See* Presto, *supra* note 165, at 628.

[187] *See* 42 U.S.C. § 1973(a)–(b) (2000); S. REP. No. 97-417, at 28–29, *as reprinted in* 1982 U.S.C.C.A.N. 177, 205–07.

[188] *See* 42 U.S.C. § 1973(a)–(b); S. REP. No. 97-417, at 28–29, *as reprinted in* 1982 U.S.C.C.A.N. 177, 205–07.

[189] 42 U.S.C. §1973(b).

[190] *Gingles*, 478 U.S. at 45–46.

sufficient to meet the results test.[191] Instead, the VRA prohibits those voting practices that exacerbate past or private discrimination.[192] The voting scheme promulgated by the legislature need not be purposefully discriminatory in and of itself to violate the VRA's amended section 2.[193] It must, however, interact with "social and historical conditions" so as to perpetuate existing racial discrimination and translate these conditions into electoral inequality.[194]

C. *Applying Section 2 to Felony Disenfranchisement Laws*

Litigants challenging felony disenfranchisement under the VRA contend that disfranchising criminals violates section 2's "results test."[195] In theory, qualifying electoral participation on non-commission of a felony interacts with racial bias within the criminal justice system—a "social and historical condition"—to illegally dilute minority electoral participation.[196] To demonstrate discrimination in the criminal justice system, plaintiffs typically offer statistical evidence demonstrating disparate arrest rates, charging decisions and sentencing outcomes that disproportionately impact minorities.[197]

As this litigation strategy has progressed through the courts, it has necessitated revisiting two questions.[198] The first concerns the scope of congressional intent behind the VRA; more particularly, did Congress intend the VRA to reach state felony disenfranchisement laws?[199] The second question resuscitates the question of section 2's constitutionality.[200] This question is not a broad-based facial challenge to the validity of the VRA itself, but, rather, whether the VRA's results test would exceed congressional enforcement authority under the Reconstruction Amendments if applied to state felony disenfranchisement statutes.[201] More specifically, would extending section 2 to invalidate state criminal disenfranchisement statutes enacted without illicit intent render it out

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[191] *Id.* at 46–47.

[192] *See id.* at 47.

[193] *See id.*

[194] *Id.*

[195] *See Farrakhan II*, 338 F.3d at 1009, 1012–13.

[196] *Id.*

[197] *See id.* at 1013.

[198] *See Muntaqim*, 366 F.3d at 116.

[199] *See id.*

[200] *See Muntaqim*, 366 F.3d at 118–26; Farrakhan v. Washington (*Farrakhan III*), 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc).

[201] *See Muntaqim*, 366 F.3d at 121.

of congruence and proportion with the injury it seeks to redress?[202] The U.S. Circuit Courts of Appeals are split on both of these issues, and thus have rendered contradictory positions on whether plaintiffs challenging criminal disenfranchisement provisions may proceed under the VRA.[203]

1. Opinions Rejecting the Application of Section 2 to the Felony Disenfranchisement Laws

Three recent circuit opinions rejected the application of the VRA to criminal disenfranchisement provisions: *Johnson v. Governor of Florida*, a 2005 case before the United States Court of Appeals for the Eleventh Circuit; *Muntaqim v. Coombe*, a 2004 case before the United States Court of Appeals for the Second Circuit; and the dissenting opinion in the Ninth Circuit Court of Appeals' denial of a rehearing en banc in its 2003 *Farrakhan v. Washington* decision.[204] All three have refused to extend the VRA to criminal disenfranchisement laws on two grounds: 1) Congress did not intend for the VRA to reach state criminal disenfranchisement laws, and 2) Congress lacks the authority to reach state criminal disenfranchisement laws.[205]

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[202] *Id.* ("The question before us is not whether Congress exceeded its authority when it enacted § 1973; rather it is whether Congress would exceed its authority if § 1973 were applied to felon disenfranchisement statutes.").

[203] *See id.* at 124; *Farrakhan II*, 338 F.3d at 1016.

[204] *See Johnson*, 405 F.3d at 1230; *Muntaqim*, 366 F.3d at 116–30; *Farrakhan III*, 359 F.3d at 1120–27 (Kozinski, J., dissenting from denial of rehearing en banc).

[205] *See Johnson*, 405 F.3d at 1230; *Muntaqim*, 366 F.3d at 116–30; *Farrakhan III*, 359 F.3d at 1120–27 (Kozinski, J., dissenting from denial of rehearing en banc). Two other circuit decisions addressed similar challenges to felon disenfranchisement laws, but neither decision is pertinent to this Note. *See* Baker v. Pataki, 85 F.3d 919, 920 (2d Cir. 1996); Wesley v. Collins, 791 F.2d 1255, 1257 (6th Cir. 1986). In 1986, in *Wesley v. Collins*, the United States Court of Appeals for the Sixth Circuit presumed without determining the applicability of the VRA to Tennessee's felony disenfranchisement statute. *See* 791 F.2d at 1259–61. In 1996, in *Baker v. Pataki*, the United States Court of Appeals for the Second Circuit heard a challenge to New York's felon disenfranchisement statute under the VRA. 85 F.3d at 920. The en banc court split evenly as to the applicability of the VRA to felony disenfranchisement, thus rendering the case without precedential effect. *Id.* at 921 n.2. The Second Circuit's 2003 opinion in *Muntaqim* elaborated upon and resolved the split opinion in *Baker* and thus constitutes the prevailing view in the Second Circuit. *See Muntaqim*, 366 F.3d at 107–11, 116.

a. *Did Congress Intend the VRA to Reach Criminal Disenfranchisement Laws?*

The first objection relies on the "plain statement" rule as articulated in the Supreme Court's 1991 decision, *Gregory v. Ashcroft*.[206] There, the Supreme Court held that the Age Discrimination in Employment Act (the "ADEA") did not invalidate Missouri's constitutional requirement that judges retire at age seventy.[207] The ADEA, which generally forbids mandated retirement, applied to all "employees" except appointees "on the policy making level."[208] The *Gregory* Court held that the "appointee" exception was ambiguous as to whether state judges fell under the exception.[209] With two plausible constructions of the ADEA in question, the court erred on the side of preserving the federal-state balance, and permitted Missouri to retain a law the Court found "a decision of the most fundamental sort for a sovereign entity."[210] The Court held that in order for Congress to upset the traditional federal-state constitutional balance, it must make its intention "unmistakably clear" in the text of the statute.[211]

In 2004, in *Muntaqim*, the Second Circuit heard a challenge to New York's criminal disenfranchisement law under the VRA and held that *Gregory's* plain statement rule was applicable.[212] The *Muntaqim* court found criminal disenfranchisement a traditional state function.[213] The *Muntaqim* court couches felony disenfranchisement within the traditional state authority to punish its criminals.[214] Further, as a regulatory restriction, unlike most voting laws and regulations, criminal disenfranchisement receives special recognition in the

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[206] 501 U.S. 452, 460–61 (1991).

[207] *Id.* at 474.

[208] *Id.* at 464–65.

[209] *Id.*

[210] *Id.* at 460.

[211] *Gregory*, 501 U.S. at 460.

[212] *Muntaqim*, 366 F.3d at 126.

[213] *Id.* at 121–23.

[214] *Id.* at 123. The *Muntaqim* opinion stresses disenfranchisement as a form of punishment, and to that extent seems to overturn the Second Circuit's holding in *Green v. Board of Elections of New York* that disfranchisement is a non-penal, regulatory practice. *Compare id.* (noting that, "there is a longstanding practice in this country of disenfranchising felons as a form of punishment"), *with Green*, 380 F.2d at 450 ("Depriving convicted felons of the franchise is not a punishment but rather is a 'nonpenal exercise of the power to regulate the franchise.'" (citation omitted)). To the extent that the Second Circuit's initial classification of New York's disfranchisement provision as regulatory in its *Green* decision insulated the law from Eighth Amendment and Bill of Attainder attacks, the *Muntaqim* opinion may have left the door open for reviving those challenges. *See Muntaqim*, 366 F.3d at 123; Cosgrove, *supra* note 110, at 181–88; Karlan, *supra* note 14, at 1164–69.

Fourteenth Amendment, and therefore remains under the peculiar and exclusive province of the state.[215] Any federal encroachment on these rights, which the Constitution historically reserves to the states, would necessarily upset the traditional federal-state balance, and so a clear statement of congressional intent becomes required.[216]

In probing the statute's legislative history, the *Muntaqim* court found no unmistakably clear statement from Congress that it intended to amend the VRA in 1982 to reach felony disenfranchisement.[217] In fact, there was no mention of criminal disenfranchisement whatsoever in the passage of the 1982 Amendment.[218] Furthermore, the only mention of felony disenfranchisement in the entire legislative history of the VRA came in 1965, when Congress specifically exempted felony disenfranchisement statutes from the coverage of another provision.[219] Absent a clear intent to alter the traditional federal-state balance of power, the *Muntaqim* court held that section 2 of the VRA was inapplicable to felony disenfranchisement laws.[220]

The *Johnson* court and the dissent in *Farrakhan* essentially echoed the *Muntaqim* opinion finding no affirmative congressional intent to extend the VRA to reach criminal disenfranchisement laws.[221] The dissenting opinion in the decision to deny a rehearing en banc in the Ninth Circuit's *Farrakhan* decision also points to the 1993 National Voter Registration Act as evidence that Congress never intended to invalidate state criminal disenfranchisement laws.[222] That law expressly lists criminal conviction as a valid justification for disqualifying a voter from the franchise.[223] Why would Congress expressly condone a law it supposedly intended to invalidate ten years prior?[224] Thus,

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[215] *See Muntaqim*, 366 F.3d at 122–23.

[216] *Id.* at 126.

[217] *Id.* at 127–28.

[218] *Id.*

[219] *Id.*

[220] *Muntaqim*, 366 F.3d at 128–30.

[221] *See Johnson*, 405 F.3d at 1232–34; *Farrakhan III*, 359 F.3d at 1120–21 (Kozinski, J., dissenting from denial of rehearing en banc).

[222] *Farrakhan III*, 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing en banc). Additionally, the Eleventh Circuit points to language from the legislative history of section 4 of the VRA, expressly exempting criminal disenfranchisement laws from that section's reach, to further support its holding that Congress did not intend the VRA to reach criminal disenfranchisement laws. *Johnson*, 405 F.3d at 1233.

[223] *See Farrakhan III*, 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing en banc).

[224] *See id.*

these opinions hold, Congress never intended the VRA to reach felony disenfranchisement regimes.[225]

It is important to note though, that in rejecting the application of the VRA to felony disenfranchisement laws, the *Johnson* majority and *Farrakhan* dissent rested not on the plain statement rule, but on the canon of constitutional avoidance.[226] These opinions found that the application of the VRA to criminal disenfranchisement statutes not only altered the federal-state balance, but also raised serious questions of the Act's constitutionality. In accordance with the principle of statutory construction, courts should avoid reading statutes to create constitutional questions absent a clear manifestation of Congress to address these questions.[227] Despite the different doctrinal route these opinions took, they, like *Muntaqim*, require an affirmative showing of congressional intent to reach criminal disenfranchisement laws.[228] Since none of the courts found such a showing, they refused to apply section 2 of the VRA to criminal disenfranchisement laws.[229]

b. *Congruence and Proportionality*

The *Muntaqim* and *Johnson* courts, as well as the dissenting opinion in *Farrakhan*, also found that the VRA would be neither congruent nor proportional to the injury it seeks to remedy if applied to felony disenfranchisement laws.[230] Because such an application would exceed con-

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[225] *See Johnson*, 405 F.3d at 1229; *Farrakhan III*, 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing en banc).

[226] *See Johnson*, 405 F.3d at 1229 ("[F]ederal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding."); *Farrakhan III*, 359 F.3d at 1125 (Kozinski, J., dissenting from denial of rehearing en banc) ("My colleagues fail in their duty *not* to adopt a constitutionally deficient interpretation of the VRA.").

[227] *Johnson*, 405 F.3d at 1229; *Farrakhan III*, 359 F.3d at 1125 (Kozinski, J., dissenting from denial of rehearing en banc). The Second Circuit in *Muntaqim*, however, determined that the constitutional avoidance canon was inapposite because that doctrine requires statutory ambiguity as a prerequisite to its application and section 2 of the Voting Rights Act is not ambiguous. *See Muntaqim*, 366 F.3d at 128 n.22 (citing Dept. of Hous. v. Rucker, 535 U.S. 125, 134 (2002)). *But see* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 208–10 (1998) (noting that statutory ambiguity is also a requirement for the *Gregory* plain statement rule).

[228] *See Johnson*, 405 F.3d at 1229; *Muntaqim*, 366 F.3d at 126–27; *Farrakhan III*, 359 F.3d at 1125 (Kozinski, J., dissenting from denial of rehearing en banc).

[229] *See Johnson*, 405 F.3d 1230–31; *Muntaqim*, 366 F.3d at 130; *Farrakhan III*, 359 F.3d at 1127 (Kozinski, J., dissenting from denial of rehearing en banc).

[230] *See Johnson*, 405 F.3d 1230–31; *Muntaqim*, 366 F.3d at 126; *Farrakhan III*, 359 F.3d at 1123–24. These opinions recognize that the VRA may sweep more broadly than the Fifteenth Amendment itself. *See Muntaqim*, 366 F.3d at 119. They assert, however, that applying the VRA to felony disenfranchisement regimes extends beyond this measure of permis-

gressional enforcement authority under the Fourteenth and Fifteenth Amendments, applying the VRA to felony disenfranchisement statutes would necessarily jeopardize the Act's constitutionality.[231]

On the congruence prong, the *Muntaqim* opinion holds that the 1982 Amendment to section 2 lacks any congressional findings whatsoever to indicate that states use disenfranchisement laws to discriminate purposefully on account of race.[232] Absent a finding of discriminatory intent, Congress has not sufficiently demonstrated a pattern of unconstitutional behavior that would justify the employment of its enforcement authority under the Reconstruction Amendments.[233] Moreover, the *Muntaqim* court expressed its reservations about whether Congress could ever amass such a record because state employment of felony disenfranchisement laws was ubiquitous before the Civil War.[234] Because felony disenfranchisement statutes pre-date the Civil War, the contention that states have used them disingenuously to evade the subsequently-enacted Reconstruction Amendments proves a dubious proposition.[235]

The *Johnson* court and the *Farrakhan* dissent took the congruence analysis a step further.[236] Relying on *Richardson,* they asserted that a state's prerogative to enact criminal disenfranchisement laws received explicit constitutional sanction from the Fourteenth Amendment.[237] Because the Fourteenth Amendment expressly permits states the discretion to disfranchise their felons, using the VRA's section 2 to invalidate criminal disenfranchisement laws would permit a statute to trump the Constitution's explicit grant of authority to the states to disfranchise their felons.[238]

On the "proportional" prong, all three opinions reasoned that section 2 of the VRA did not tailor its scope to comport sufficiently

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sible latitude. *See Muntaqim,* 366 F.3d at 119 (noting that the decisions permitting the extension beyond the Fifteenth Amendment do not "delineate the outer boundaries of Congress's authority").

[231] *Muntaqim,* 366 F.3d at 126.

[232] *Id.*

[233] *Id.*

[234] *Id.* at 123–24.

[235] *Id.* at 123.

[236] *See Johnson,* 405 F.3d at 1229–32; *Farrakhan III,* 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing en banc).

[237] *See Johnson,* 405 F.3d at 1229–32; *Farrakhan III,* 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing en banc).

[238] *See Johnson,* 405 F.3d at 1229–32; *Farrakhan III,* 359 F.3d at 1121 (Kozinski, J., dissenting from denial of rehearing en banc).

with the *Flores* limitations.[239] The *Muntaqim* opinion holds that section 2, as applied to criminal disenfranchisement laws, is substantively overbroad.[240] Relying on *Underwood,* the *Muntaqim* court observes that criminal disenfranchisement laws are only invalid if motivated by racial animus.[241] Any appropriate congressional encroachment on felony disenfranchisement laws must narrowly target only those enacted with this illicit intent.[242] Extending section 2 to criminal disenfranchisement laws is disproportionate to the injury it seeks to remedy because it would invalidate laws enacted with neutral intent, even if such neutral laws produce a disparate *impact.*[243]

The *Farrakhan* dissent endorsed *Muntaqim*'s substantive reservations about the scope of section 2 and also expressed additional reservations concerning section 2's geographical scope.[244] Judge Kozinski held that to be proportional, congressional remedial legislation under the Reconstruction Amendments must be geographically targeted to correspond to varied regional threats of Constitutional violations.[245] In *Farrakhan,* which addressed a challenge to Washington's felony disenfranchisement law, the dissent observed that unlike some states—particularly southern states—Washington does not have a long and patterned history of racial discrimination.[246] If the VRA could reach felony disenfranchisement laws, it would have to narrow its geographic scope to those states most likely to employ these laws in a constitutionally impermissible manner.[247]

In short, the *Johnson* and *Muntaqim* opinions and the *Farrakhan* dissent each found the VRA as applied to criminal disenfranchisement laws to be neither congruent nor proportional.[248] The Fourteenth Amendment expressly grants states the discretion to disfranchise their felons; it is unlikely that any congressional act could overcome this Constitutional grant of authority.[249] At the very least, a congressional act would need to amass a more substantial evidentiary

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[239] *See Muntaqim,* 366 F.3d at 125–26.

[240] *See id.* at 124–26.

[241] *See id.*

[242] *See id.*

[243] *See id.*

[244] *See Farrakhan III,* 359 F.3d at 1123–24 (Kozinski, J., dissenting from denial of rehearing en banc).

[245] *Id.* at 1124 (citing *Morrison,* 529 U.S. at 626–27).

[246] *Id.*

[247] *Id.* at 1123–24.

[248] *See Johnson,* 405 F.3d at 1228–33; *Muntaqim,* 366 F.3d at 126; *Farrakhan III,* 359 F.3d at 1125 (Kozinski, J., dissenting from denial of rehearing en banc).

[249] *See Johnson,* 405 F.3d at 1230.

record and impose a more tailored remedy to invalidate state felony disenfranchisement laws without exceeding Congress's enforcement authority under the *Flores* test.[250]

2. Opinions Permitting the Application of Section 2 to Felony Disenfranchisement Laws

The majority opinion in *Farrakhan* ruled in direct contradiction to the opinions discussed above.[251] There, the Ninth Circuit permitted challenges to criminal disenfranchisement laws under the VRA.[252] It held that neither the federalism nor the constitutional concerns raised by the dissents and the *Muntaqim* opinion prevented the VRA from reaching criminal disenfranchisement laws.[253] Two dissents in the *Johnson* opinion concluded likewise.[254]

a. *Did Congress Intend the VRA to Reach Criminal Disenfranchisement Laws?*

In addressing the plain statement rule, the *Farrakhan* court simply affirmed the lower court's finding that the plain statement rule is inapplicable to the VRA.[255] The district court held the plain statement inapplicable to the VRA reasoning the plain statement rule only applied when legislation altered the federal-state balance.[256] Because the Fourteenth and Fifteenth Amendments have already altered the federal-state balance of power to permit federal intrusion into traditional state functions.[257] Because Congress derives its authority to pass the VRA from the enforcement clause of these Amendments, it presumptively and necessarily alters the federal-state balance, too.[258] The plain

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[250] *See Muntaqim*, 366 F.3d at 130; *Farrakhan III*, 359 F.3d at 1125 (Kozinski, J., dissenting from denial of rehearing en banc).

[251] *Compare Farrakhan II*, 338 F.3d at 1016 (applying the VRA to state criminal disenfranchisement laws), *with Johnson*, 405 F.3d at 1232 (rejecting the application of the VRA to state criminal disenfranchisement laws), *and Muntaqim*, 366 F.3d at 130 (same), *and Farrakhan III*, 359 F.3d at 1125 (Kozinski, J., dissenting from denial of rehearing en banc) (same).

[252] *See Farrakhan II*, 338 F.3d at 1016.

[253] *See id.*

[254] *Johnson*, 405 F.3d at 1244 (Wilson, J., dissenting); *id.* at 1250 (Barkett, J., dissenting).

[255] *Farrakhan II*, 338 F.3d at 1016.

[256] Farrakhan v. Locke *(Farrakhan I)*, 987 F. Supp. 1304, 1309 (E.D. Wash. 1997).

[257] *Id.*

[258] *Id.*

statement rule is thus inapplicable because in the context of the VRA, it is superfluous.[259]

The Ninth Circuit decision affirmed this finding, adding one brief, yet important point.[260] The Ninth Circuit held that the VRA, by its plain terms, applies to *any* voter qualification or prerequisite that undermines racial equality in electoral opportunity.[261] Felony disenfranchisement is a voting qualification.[262] To the extent federalism concerns require a plain statement of Congress's intent to reach felony disenfranchisement, Congress met that burden by indicating its intent to reach *all* state-imposed voting qualifications.[263]

b. *Congruence and Proportionality*

The *Farrakhan* court also held that the VRA's section 2 comports with the *Flores* test, even as applied state to criminal disenfranchisement laws.[264] On the congruence prong, the Ninth Circuit held that the Fourteenth Amendment prohibited criminal disenfranchisement laws that purposefully discriminated on the basis of race.[265] It necessarily followed that Congress has the right to eliminate those laws pursuant to its Fourteenth Amendment enforcement authority.[266] Thus, although the VRA's section 2 protects a state's right to disfranchise criminals generally, it does not protect states rights to do so in a racially discriminatory manner.[267] Congress enacted the VRA to protect the rights of citizens to be free from discrimination and to remedy precisely these types of constitutional abuses.[268]

The *Farrakhan* court also excused the absence of congressional findings of patterned impermissible employment and administration of felony disenfranchisement laws.[269] First, it noted that the *Flores* decision itself cited the VRA approvingly as appropriate remedial legisla-

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[259] *See id.*

[260] *See Farrakhan II*, 338 F.3d at 1016.

[261] *Id.*

[262] *Id.*; *see also Johnson*, 405 F.3d at 1250 (Barkett, J., dissenting).

[263] *See Johnson*, 405 F.3d at 1250 (Barkett, J., dissenting).

[264] *Farrakhan II*, 338 F.3d at 1016.

[265] *Id.*

[266] *Id.*

[267] *Id.*

[268] *See id.*; *see also Johnson*, 1248 F.3d at 1248 (Barkett, J., dissenting) (arguing that the VRA as applied to criminal disenfranchisement laws would only invalidate those which result in a denial of the right to vote on account of color).

[269] *Farrakhan II*, 338 F.3d at 1016.

tion under the test articulated therein.[270] Second, the court held that racism in voting has been such a deep and persistent problem in the United States that Congress needs and should be afforded exceptional remedies when it seeks to redress that problem.[271] The taint and effects of racial discrimination, particularly in voting, have been far more engrained in the social fabric of the country's history than that of the religious discrimination at issue in the challenged statute in *Flores*.[272] Thus, although congressional findings of recurrent constitutional violations may have been necessary in *Flores*, they are not in the context of the VRA.[273] A dissent in *Johnson* also reinforced this argument by emphasizing that when Congress acts to vindicate fundamental rights, its enforcement power is at its most expansive, thus relaxing the requirement for supporting findings.[274]

On the proportional prong, *Farrakhan* found the VRA's section 2 sufficiently tailored to reach only unconstitutional uses of felony disenfranchisement.[275] Section 2's "results test" does not proscribe racially neutral disenfranchisement laws, nor does it proscribe disenfranchisement laws that merely affect minorities more than whites.[276] Rather, section 2 prohibits only those disenfranchisement provisions that, when evaluated in light of the "totality of circumstances," perpetuate the effects of past discrimination.[277] The preeminent function of the results test is simply to change the standard of review so as to permit an inference of discrimination where proof of illicit legislative intent is unavailable.[278] As applied to criminal disenfranchisement statutes, the results test merely permits courts to infer *Underwood* violations by examining the totality of circumstances instead of relying on affirmative evidence of impermissible intent. [279]

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[270] *Id.*

[271] *Id.*; *see also Johnson*, 405 F.3d at 1250 (Barkett, J., dissenting) (arguing that the majority's rigid requirement of congressional findings conflicts with Congress's intent to give the VRA it's broadest possible scope).

[272] *Farrakhan II*, 338 F.3d at 1016.

[273] *Id.*; *see also Johnson*, 405 F.3d at 1243 (Wilson, J., dissenting) (arguing that Congress need only record a pattern of constitutional violations, not the manner in which a state abridges constitutional rights, and therefore finding of "no moment" that the record does not specify criminal disfranchisement as a means for discriminating).

[274] *See Johnson*, 405 F.3d at 1242 (Wilson, J., dissenting).

[275] *Farrakhan II*, 338 F.3d at 1016.

[276] *Id.*

[277] *Id.*

[278] *See id.*

[279] *See id.*

IV. Evaluating the Circuit Split

The opinions described above vary widely in their interpretation of the intended scope of the VRA and the permissible boundaries of Congress's enforcement authority under the Reconstruction Amendments.[280] In particular, the opinions diverge on whether applying the VRA's section 2 to felony disenfranchisement laws requires a plain statement of intent by Congress to do so.[281] The opinions also disagree sharply over the severity of the limitation that Section 2 of the Fourteenth Amendment—as interpreted by *Richardson v. Ramirez*—imposes on Congress's enforcement authority under that Amendment.[282]

Reconciliation of these differences is in the offing.[283] The VRA's section 2 applies nationally, underscoring the need for uniformity of its interpretation.[284] It would be senseless to allow the VRA to invalidate Washington's criminal disenfranchisement statutes, but to find it inapplicable to New York's or Florida's.[285] Moreover, given the ubiquity of state criminal disenfranchisement laws, and the current controversy surrounding the practice, resolution of this dispute is paramount, for the practice's vitality hangs in the balance.[286]

This Part examines the merits of the circuit split.[287] It seeks to further animate the debate over the federalism and constitutional concerns raised by this issue.[288] It argues that the Ninth Circuit correctly disregarded application of the "plain statement" rule and the constitutional avoidance canon.[289] It then sides with the Second and Eleventh Circuits on whether the VRA as applied to criminal disenfranchisement statutes is a constitutionally valid use of Congress's enforcement authority.[290]

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[280] *See supra* notes 195–279 and accompanying text.

[281] *See supra* notes 206–29, 255–63, and accompanying text.

[282] *See supra* notes 230–50, 264–79, and accompanying text. *See generally* Richardson v. Ramirez, 418 U.S. 24 (1974).

[283] *See supra* notes 195–279 and accompanying text.

[284] *See supra* notes 195–279 and accompanying text.

[285] *See supra* notes 195–279 and accompanying text.

[286] *See supra* notes 108–11 and accompanying text.

[287] *See infra* notes 291–359 and accompanying text.

[288] *See infra* notes 291–359 and accompanying text.

[289] *See infra* notes 291–317 and accompanying text.

[290] *See infra* notes 318–59 and accompanying text.

A. *Did Congress Intend the VRA to Reach Criminal Disenfranchisement Laws?*

The "plain statement" rule and constitutional avoidance canon should not apply to the VRA because the VRA does not alter the federal-state balance.[291] The Ninth Circuit addressed this argument briefly when it noted that the Fourteenth and Fifteenth Amendments by their own accord alter this balance.[292] Its observation that legislation enforcing the Reconstruction Amendments necessarily also alters the federal-state balance, thus rendering the plain statement rule superfluous, is persuasive but deficient on its own.[293] The Reconstruction Amendments undoubtedly disrupted the federal-state balance by permitting federal intrusion into state functions to remedy constitutional violations generally, but not every act passed pursuant to them necessarily touches traditional and sensitive areas of state sovereignty.[294] *Gregory v. Ashcroft*, after all, concerned a federal age discrimination statute passed, in part, pursuant to the Fourteenth Amendment, and a plain statement from Congress was still required.[295]

What bolsters the Ninth Circuit's rejection of the plain statement rule—though unmentioned by the Ninth Circuit—is the Constitutional trajectory towards more expansive federal oversight of voting regulations in particular.[296] It is not simply that Congress passed the VRA pursuant to the Fourteenth and Fifteenth Amendments that exempts the legislation from the plain statement rule.[297] Rather, because the VRA limits its coverage to only voting regulations—which between the operation of the Franchise Amendments and the categorization of voting rights as fundamental can no longer be considered a traditional state function—it does not alter significantly any federal-state balance of power.[298]

The Second Circuit's opinion in *Muntaqim v. Coombe* holds, however, that despite the long tradition of federal intrusion on state authority to regulate franchise rights, felony disfranchisement in particular remains in the peculiar province of the state because it receives explicit

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[291] *See* Farrakhan v. Washington *(Farrakhan II)*, 338 F.3d 1009, 1012 (9th Cir. 2003).
[292] *See id.*
[293] *See id.*
[294] *See* Gregory v. Ashcroft, 501 U.S. 452, 468–69 (1991).
[295] *See id.*
[296] *See supra* notes 1–4, 36–58, and accompanying text.
[297] *See supra* notes 1–4, 36–58, and accompanying text.
[298] *See supra* notes 1–4, 36–58, and accompanying text.

sanction in the Fourteenth Amendment.[299] States' discretionary decision to disfranchise their felons has a long history in the United States, and currently nearly every state employs the practice in some form.[300] Thus eliminating criminal disenfranchisement laws alters the federal-state balance and the plain statement rule should apply in full force.[301] *Muntaqim* essentially requires that Congress explicitly identify felony disfranchisement as a target of the VRA in order to permit the application of the VRA to reach state laws disfranchising felons.[302]

Yet the purpose of the VRA belies this contention.[303] Congress passed the VRA out of frustration with the ineffectiveness of the Fifteenth Amendment and a case-by-case approach to handling discriminatory voting practices.[304] It aimed to eliminate not only obviously unconstitutional voting practices, but the more subtle ones as well.[305] The main impetus for the VRA's broad scope was that Congress could not effectively keep up with the sophisticated practices states concocted to circumvent the Fifteenth Amendment strictures.[306]

Moreover, even if one searched for a plain statement of intent to reach criminal disenfranchisement laws through the VRA's section 2, Congress met that standard.[307] *Hunter v. Underwood* holds that criminal disenfranchisement laws are presumptively valid, unless the plaintiff challenging those laws can prove that the legislature passed the law with a discriminatory purpose.[308] Allegations of *Underwood* violations—racially motivated criminal disenfranchisement measures—generally

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[299] *See* Muntaqim v. Coombe, 366 F.3d 102, 123 (2d Cir.), *cert. denied*, 543 U.S. 978, *reh'g en banc granted*, 396 F.3d 95 (2d Cir. 2004); *see also* Johnson v. Governor of Fla., 405 F.3d 1214, 1228 (11th Cir. 2005).

[300] *See Muntaqim*, 366 F.3d at 123.

[301] *See id.*

[302] *See id.*

[303] *See supra* notes 121–94 and accompanying text.

[304] *See* S. REP. No. 97-417, at 5–6 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 181–83.

[305] *See id.*; *see also Johnson*, 405 F.3d at 1243–44 (Wilson, J., dissenting) (noting that "*Boerne* and its progeny require that the legislative record show a pattern of state constitutional violations, not that the right at issue be abridged in any particular way"); *Johnson*, 405 F.3d at 1250 (Barkett, J., dissenting) (arguing that the majority's rigid requirement of congressional findings conflicts with Congress's intent to give the VRA it's broadest possible scope).

[306] *See* S. REP. No. 97-417, at 5–6, *as reprinted in* 1982 U.S.C.C.A.N. 177, 181–83; *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 565–67 (1969); *Johnson*, 405 F.3d at 1244 (Wilson, J., dissenting) (noting that requiring Congress to catalogue specific ways in which states may violate the Constitution would give states "one free bite at the apple" and undermine Congress's intent to remedy voting rights violation "'comprehensively and finally'" (citations omitted)).

[307] *See supra* notes 163–94 and accompanying text.

[308] *See* 471 U.S. 222, 233 (1985); *see also supra* notes 59–88 and accompanying text.

fail precisely because plaintiffs cannot affirmatively demonstrate illicit legislative intent.[309] Congress amended the VRA in 1982 to adopt the results test, in part, for the pragmatic purpose of alleviating the inordinate burden plaintiffs faced in proving purposeful discrimination motivated the challenged election practice or qualification.[310]

There is still a more compelling reason why courts should not require a clear or strong showing of congressional intent before applying the VRA's section 2 to felony disenfranchisement laws: section 2 is not ambiguous.[311] Both the plain statement rule, invoked by *Muntaqim*, and the constitutional avoidance canon, invoked by *Johnson v. Governor of Florida*, require statutory ambiguity as a threshold matter.[312] Only if the plain meaning of the statute's text presents two plausible interpretations may a court invoke these doctrines.[313] Section 2 of the VRA applies to *all* voting qualifications.[314] Felony disfranchisement is a voting qualification.[315] Reading an exception for felony disenfranchisement laws into the VRA's section 2 is not an exercise in statutory construction; it is an exercise in legislative revision and an impermissible judicial intrusion into the legislative process.[316] Courts must abide by the plain terms of section 2 and apply the VRA to criminal disenfranchisement laws.[317]

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[309] *See supra* notes 59–88 and accompanying text.

[310] *See supra* notes 163–94 and accompanying text.

[311] *See* 42 U.S.C. § 1973 (a)–(b) (2000); *Muntaqim*, 366 F.3d at 128 n.22; *Farrakhan II*, 338 F.3d at 1016.

[312] Dep't of Hous. v. Rucker, 535 U.S. 125, 134 (2002) (finding ambiguity a prerequisite to constitutional avoidance doctrine); Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 208–10 (1998) (finding statutory ambiguity a prerequisite to the plain statement rule). *See generally Johnson*, 405 F.3d at 1214; *Muntaqim*, 366 F.3d at 102.

[313] *See Rucker*, 535 U.S. at 134; *Yeskey*, 524 U.S. at 208–10.

[314] *See* 42 U.S.C. § 1973 (a)–(b); *Farrakhan II*, 338 F.3d at 1016. The *Johnson* majority states, in a footnote, that section 2 is ambiguous because of the inclusion of the phrase "on account of color." 405 F.3d at 1229 n.30. Whether a particular voting practice deprives or dilutes the vote "on account of color" is the ultimate question of fact to be determined by the application of the totality of circumstances test. *Id.* at 1250 (Barkett, J., dissenting). It does not bear on the scope of the Act's coverage, which unambiguously applies to all voting qualification, prerequisites, standards, practices, or procedures. *Id.* The *Johnson* court's alternative basis for finding ambiguity—because "deep division among eminent judicial minds on the issue" exists—is unpersuasive because it merely affirms the consequent. *See id.* at 1229 n.30.

[315] *See* 42 U.S.C. § 1973 (a)–(b); *Farrakhan II*, 338 F.3d at 1016.

[316] *See Rucker*, 535 U.S. at 134; *Yeskey*, 524 U.S. at 208–10.

[317] *See Rucker*, 535 U.S. at 134; *Yeskey*, 524 U.S. at 208–10.

B. *Congruence and Proportionality*

Faced with the plain and unambiguous terms of section 2, courts must abide by that language and apply section 2 to state criminal disenfranchisement laws.[318] Thus, avoidance principles are inapposite, and courts must address the constitutionality of such an application.[319]

As an initial matter, the opinions holding that the use of section 2 to proscribe felony disenfranchisement laws would exceed Congress's enforcement authority reach that conclusion prematurely.[320] The Supreme Court's summary affirmation of section 2's constitutionality in *Mississippi Republican Executive Committee v. Brooks*, and Justice O'Connor's explicit instructions in her concurring opinion in *Bush v. Vera* for lower courts to presume the constitutionality of section 2 "unless and until" the Supreme Court holds otherwise should preclude these circuit courts from so finding.[321] The opinions finding section 2 unconstitutional as applied to criminal disenfranchisement statutes blatantly ignored her message.[322]

Nevertheless, the results reached by *Muntaqim* and *Johnson* would likely win should the Supreme Court resolve this conflict.[323] Section 2 as applied to felony disenfranchisement statutes does exceed Congress's enforcement power as limited by the *City of Boerne v. Flores* test.[324] The dispute between the circuits as it currently stands, however, focuses exclusively and therefore excessively on states' rights to disfranchise their felons.[325] The *Johnson* and *Muntaqim* opinions, and the *Farrakhan* dissent, citing *Richardson*, noted that states enjoy a constitutionally protected right to choose to disqualify criminals from the franchise.[326] Permitting the VRA to reach those laws infringes on the states' Fourteenth Amendment right to exercise that discretion, and thereby exceeds Congress's enforcement authority.[327] The *Farrakhan* court, and the *Johnson* dissents, citing *Underwood*, hold that states do

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[318] *See supra* notes 291–317 and accompanying text.

[319] *See supra* notes 291–317 and accompanying text.

[320] *See* Bush v. Vera, 517 U.S. 952, 991–92 (1996) (O'Connor, J., concurring); Miss. Republican Executive Comm. v. Brooks, 469 U.S. 1002, 1003 (1984).

[321] *See Vera*, 517 U.S. at 991–92 (O'Connor, J., concurring); *Brooks*, 469 U.S. at 1003.

[322] *Brooks*, 469 U.S. at 1003 (summarily affirming the Amendment's constitutionality). *Compare Vera*, 517 U.S. at 991–92 (O'Connor, J., concurring) (advising lower courts to presume the Amendment's constitutionality), *with Muntaqim*, 366 F.3d at 126 (finding the 1982 Amendment in excess of congressional enforcement authority).

[323] *See infra* notes 325–59 and accompanying text.

[324] *See infra* notes 325–59 and accompanying text.

[325] *See supra* notes 230–50, 264–79, and accompanying text.

[326] *See supra* notes 230–50 and accompanying text.

[327] *See supra* notes 230–50 and accompanying text.

not enjoy the right to disfranchise felons for the purpose of discriminating against minority voters.[328] Permitting section 2 to reach those laws simply enables courts to root out those unconstitutional applications of criminal disenfranchisement, and thereby comports with Congress's enforcement authority.[329]

Neither side gives appropriate consideration to the *individual* rights at stake.[330] The congruence prong of the *Flores* test requires an analysis of "the constitutional right or rights that Congress sought to enforce."[331] This requires an analysis that focuses not on a state's right to disfranchise its felons, but on what *individual* constitutional rights Congress sought to enforce through the adoption of the "results test" in 1982.[332]

This question becomes murky in the context of voting rights jurisprudence because the Reconstruction Amendments protect the right to vote in two distinct ways.[333] By consequence of the Franchise Amendments and the antidiscrimination strand of the Equal Protection Clause, individuals enjoy the right to be free from discrimination in voting (what could be called their antidiscrimination rights) and a state may not confer voting rights in a manner that discriminates on the basis of race or sex unless it passes strict scrutiny.[334] By consequence of the Warren-era voting rights jurisprudence, individuals also enjoy a broader substantive right to vote and have equal access to the electoral process; a state may not infringe on that individual right for any reason, unless it can meet the requirements of strict scrutiny.[335] The VRA operates to enforce both of these rights at some levels; it seeks to eradicate racism in voting *and* to ensure equal electoral opportunity.[336]

In the context of whether Congress may permissibly extend franchise rights to felons, however, distinguishing between these two rights becomes crucial.[337] *Richardson* and its progeny effectively deprive felons of their fundamental, individual substantive right to vote.[338] *Underwood,*

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[328] *See supra* notes 264–79 and accompanying text.

[329] *See supra* notes 264–79 and accompanying text.

[330] *See supra* notes 230–50, 264–79, and accompanying text.

[331] Tennessee v. Lane, 541 U.S. 509, 522–23 (2004).

[332] *See id.*

[333] *See* City of Mobile v. Bolden, 446 U.S. 55, 83 (1980) (Stevens, J., concurring); *id.* at 120 (Marshall, J., dissenting).

[334] *See* Hunter v. Underwood, 471 U.S. 222, 231–33 (1985).

[335] *See supra* notes 36–58 and accompanying text.

[336] *See supra* notes 121–94 and accompanying text.

[337] *See infra* notes 338–59 and accompanying text.

[338] *See supra* notes 59–88 and accompanying text.

however, stands for the proposition that felons retain their antidiscrimination rights.[339] Thus, the question of whether extending the VRA's section 2 to criminal disenfranchisement statutes constitutes an appropriate use of Congress's enforcement authority depends on which font of authority Congress relied upon in enacting the results test.[340] If Congress enacted the results test to protect individuals' antidiscrimination rights, the 1982 Amendment would likely be an appropriate exercise of federal enforcement power under the Reconstruction Amendments, even as applied to felony disenfranchisement laws, because felons retain the right to be free from discrimination in voting.[341] On the other hand, if Congress enacted the results test to vindicate individuals' fundamental rights to cast a meaningful vote, then applying the results test to invalidate criminal disenfranchisement laws would exceed Congress's enforcement authority because felons do not enjoy fundamental, substantive voting rights under the Fourteenth Amendment.[342]

When framed in this context, it becomes clear that section 2 cannot constitutionally apply to criminal disenfranchisement statutes.[343] Antidiscrimination rights violations under the Fourteenth and Fifteenth Amendments require a showing of discriminatory intent.[344] Congress considered and rejected adopting the totality of circumstances test in order to permit judicial inference of that intent.[345]

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[339] *See Underwood*, 471 U.S. at 231–33; *supra* notes 59–88 and accompanying text.

[340] *See Lane*, 541 U.S. at 522–23.

[341] *See id.*

[342] *See id.*

[343] *See infra* notes 344–55 and accompanying text.

[344] *See Underwood*, 471 U.S. at 231–33; *see also supra* notes 59–88 and accompanying text.

[345] S. REP. No. 97-417, at 37 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 215 ("This defect cannot be cured completely even though plaintiffs are allowed to establish discriminatory intent by use of a wide variety of circumstantial and indirect evidence, including proof of the same factors used to establish a discriminatory result."). Presumably, Congress could have adopted Justice White's dissent in the *City of Mobile v. Bolden* decision, and allowed the totality of circumstances test to constitute circumstantial evidence permitting a judicial inference of illicit legislative intent. *See Bolden*, 446 U.S. at 103 (White, J., dissenting). Congress, however, worried that if the totality of circumstances test supported only an inference of illicit intent, states could too easily rebut that inference by putting forth a non-discriminatory rationale for the challenged voting practice. S. REP. No. 97-417, at 37, *as reprinted in* 1982 U.S.C.C.A.N. 177, 215. Of course, Congress does require that courts consider the totality of circumstances, and that the voting practice in question interact with social and historical conditions to perpetuate the past effects of discrimination. *See supra* notes 264–79 and accompanying text. The legislative history makes clear, however, that this limitation operates not to permit an inference of discriminatory intent, but rather to ensure that protecting minority rights to equal electoral opportunity does not mandate

Rather, it determined that the question of what legislators intended asked the "wrong question."[346] Congress's preeminent purpose in abrogating the intent requirement was to redirect judicial inquiry to the question of whether minorities have "equal access to the electoral process."[347] The right to equal poll access and voting strength stems directly from the Warren-era voting rights cases and their progressive recognition of the right to vote as fundamental.[348] Thus, by enacting the 1982 Amendment, Congress acted pursuant to its enforcement authority under the fundamental rights strand of the Fourteenth Amendment.[349] The rights Congress sought to enforce by abrogating section 2's intent standard were individuals' rights to vote as guaranteed by the Fourteenth Amendment.[350] Because felons lack the fundamental, substantive voting rights granted by the Fourteenth Amendment, Congress has no remedial authority with respect to their substantive, individual voting rights.[351]

Any application of section 2 to the criminal disenfranchisement statutes would thus exceed congressional authority under the Fourteenth Amendment and thereby render the Act incongruent and disproportional to the injury it seeks to redress.[352] Congress would not be acting to vindicate constitutional rights; the VRA would, in effect, endow felons with the substantive voting rights that the Constitution—at least as read by *Richardson* and its progeny—does not grant them.[353] The creation of substantive rights—as opposed to enforcing existing rights—is precisely what the congruence and proportional

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proportional representation. S. REP. No. 97-417, at 30–31, *as reprinted in* 1982 U.S.C.C.A.N. 177, 207–09.

[346] S. REP. No. 97-417, at 36, *as reprinted in* 1982 U.S.C.C.A.N. 177, 214.

[347] *Id.* at 38.

[348] *See supra* notes 36–58 and accompanying text.

[349] *See supra* notes 163–94 and accompanying text. Of course the VRA operates *generally* to enforce individual's antidiscrimination rights. *See* S. REP. No. 97-417, at 5, *as reprinted in* 1982 U.S.C.C.A.N. 177, 181–82. The argument presented here, however, is that the 1982 Amendment to section 2—namely, its relaxation of the intent requirement—*specifically* operates solely to enforce individuals' substantive, fundamental voting rights grounded in the Equal Protection Clause. *See id.* at 28, 36, 37.

[350] *See* S. REP. No. 97-417, at 28, 36, 37, *as reprinted in* 1982 U.S.C.C.A.N. 177, 205–06, 214, 215 (recognizing that any voting requirement that denies minorities equal opportunity to participate or elect representatives of their choosing constitutes a violation of the amended section 2).

[351] *See supra* notes 59–88 and accompanying text.

[352] *See* City of Boerne v. Flores, 521 U.S. 507, 520–21 (1997).

[353] *See id.*

test seeks to prevent.[354] As applied to felony disenfranchisement, section 2 of the VRA is therefore unconstitutional.[355]

At the most base level, the VRA claims fail because they neglect to address head-on the legacy of *Richardson*, which effectively deprives felons of a fundamental, individual right to vote.[356] So long as depriving felons of voting rights does not touch on individuals' fundamental, constitutional rights, states will remain free to deny felons access to franchise, and congressional action or private litigation will prove ineffectual.[357] If, however, challenges focus on individual rights and place the burden of justifying these statutes on the states enacting them, success seems likely given the tenuous policy support for the practice. [358] Litigants challenging felony disenfranchisement provisions should therefore consider shifting their focus and strategy towards challenges that implicate fundamental rights.[359]

Conclusion

Disenfranchising felons is an anachronistic policy whose time has come. As a punitive measure, it undermines efforts at rehabilitation

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[354] *See id.*

[355] *See supra* notes 318–54 and accompanying text. The siren-sounding proclamation that such a finding would lead to the "dismantling of the most important piece of civil rights litigation since Reconstruction" seems overblown. *See Farrakhan III*, 359 F.3d at 1117 (Kozinski, J., dissenting from denial of rehearing en banc). The Act's severability provision would ensure the continued vitality of the rest of the Act. *See* Pub. L. No. 94–73 (codified as amended at 42 U.S.C. § 1973).

[356] *See supra* notes 318–54 and accompanying text.

[357] *See supra* notes 318–54 and accompanying text.

[358] *See supra* notes 105–11 and accompanying text.

[359] Arguments of this sort, which directly challenge the legacy of *Richardson*, have been suggested elsewhere. For example, a few commentators have suggested that the Fifteenth Amendment may have invalidated the "other crime" exception within Section 2 of the Fourteenth Amendment. *See* Chin, *supra* note 58, at 259–61; Ewald, *supra* note 14, at 1131; Fletcher, *supra* note 14, at 1291; Shapiro, *supra* note 111, at 565 n.149. Another scholar has persuasively argued that because Section 2 of the Fourteenth Amendment only covers men, it may have been superseded by the Nineteenth Amendment. *See* Cosgrove, *supra* note 110, at 189–91; *see also* Sharrow v. Brown, 447 F.2d 94, 98 n.9 (2d Cir. 1971) ("[I]t is quite natural for Section 2 to limit its reduction formula to the disenfranchisement of adult males."). Additionally, if a political party were to open unilaterally its primary to felons, a state's disfranchisement provision may substantially burden that party's First Amendment associational rights, thereby requiring the state to put forth a compelling purpose for its practice. *See* Ca. Democratic Party v. Jones, 530 U.S. 567, 581–82 (2000). Even if the burden on a party's associational rights is not "severe," a state still must articulate a valid regulatory purpose for its action. *See* Clingman v. Beaver, 125 S. Ct. 2029, 2039 (2005). It is questionable that a state could meet even this lesser burden given the suspect justifications that exist for the practice. *See supra* notes 105–11 and accompanying text.

and serves no legitimate punitive rationale. As a regulatory measure, the practice serves to retard—if not outright defy—our progressive, national commitment toward a more inclusive and representative democracy. The practice's disparate impact on minority communities renders the practice not only politically unwise, but morally deplorable, evoking the historical blight of open state hostility towards minority political empowerment.

As a legal issue, however, states will likely retain their authority to disenfranchise felons unless and until a challenge successfully incorporates an individual, fundamental rights-based challenge to trigger the application of strict scrutiny to the practice. The current challenge to criminal disenfranchisement laws under the Voting Rights Act—resting solely on felons' antidiscrimination rights and not on any fundamental, substantive rights—fails to advance this line of argument and thereby not only fails in its mission to eliminate felony disenfranchisement laws, but jeopardizes the constitutionality of the Voting Rights Act itself. Litigants should instead explore alternative routes to challenge the practice in ways that incorporate substantive, fundamental rights-based arguments.

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