

2005

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Recommended Citation

Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 Fordham L. Rev. 1875 (2005).

Available at: <https://ir.lawnet.fordham.edu/flr/vol73/iss4/14>

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Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965

Cover Page Footnote

J.D. Candidate, 2006, Fordham University School of Law.

GIVING THE BARKING DOG A BITE: CHALLENGING FELON DISENFRANCHISEMENT UNDER THE VOTING RIGHTS ACT OF 1965

*Lauren Handelsman**

INTRODUCTION

Felon disenfranchisement—the practice of denying the right to vote to currently incarcerated felons, those serving terms of probation or parole, and former felons—prevents over four and one-half million men and women from voting in local, state, and federal elections.¹ Felon disenfranchisement laws are particularly troublesome when viewed in light of their racially disparate impact. While African-Americans comprise approximately 12% of the United States population,² they comprise 36% of the population that has lost the right to vote due to a criminal conviction.³

The right to vote has been declared fundamental by the United States Supreme Court,⁴ yet states, which are constitutionally empowered to control voter qualifications, continue to disenfranchise felons and ex-felons in staggering numbers. Consequently, some of the state laws that restrict the voting rights of felons have been challenged as impermissible violations of that fundamental right. These challenges have traditionally proceeded as claims of violations of the Equal Protection Clause, the Due Process Clause, and the Fifteenth Amendment.⁵ Attempts to overturn felon disenfranchisement laws have, however, been largely unsuccessful.

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1. In this Note, the term “felon disenfranchisement,” which is also commonly called “prisoner disenfranchisement” or “felony disenfranchisement,” is used to refer generally to the practice of denying a citizen the right to vote due to a criminal conviction, including both felony and even some misdemeanor convictions. In this Note, the term “felon” refers to any individual who is disenfranchised under such a law.

2. U.S. Census Bureau, *The Black Population: 2000* (Aug. 2001), *available at* <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

3. Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws* 1 (1998).

4. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964).

5. *See infra* Part I.C.1.

The Voting Rights Act of 1965 ("VRA"),⁶ which prohibits states from imposing racially discriminatory voting practices, has emerged in the last decade as a potentially powerful tool for challenging felon disenfranchisement laws. The VRA was revised in 1982 to prohibit voting restrictions that have a racially discriminatory impact, abandoning the previous version of the Act which prohibited only voting restrictions that were enacted with discriminatory intent.⁷ Because felon disenfranchisement statutes disproportionately impact African-Americans,⁸ plaintiffs have attempted to use the revised version of the VRA to challenge the legality of state felon disenfranchisement laws. These challenges have not yet resulted in the overturning of a state felon disenfranchisement law. Yet if VRA challenges to these laws are permitted to proceed in a meaningful way, because the racial impact of felon disenfranchisement is so great, many of these laws could be declared impermissible restrictions on the right to vote.

The federal circuit courts are divided on whether the VRA provides a valid means to challenge felon disenfranchisement laws because such challenges involve application of a federal law to state statutes in an area of law typically under state control. Four recent cases in three circuits have addressed this issue head on. In each, convicted felons who at the time were incarcerated, on probation or parole, or have already fully served their sentences alleged that their state's felon disenfranchisement scheme violated the VRA. These cases have not yet addressed whether the state felon disenfranchisement statutes under review must be struck down for having a racially discriminatory impact. Rather, these four cases have addressed only whether a VRA challenge to a state felon disenfranchisement statute can proceed.

The three federal circuit courts that have addressed this issue disagreed about the use of the VRA in the context of state felon disenfranchisement statutes. The disagreement is largely about the allowable scope of the VRA as legislation passed pursuant to the enforcement powers of the Fourteenth and Fifteenth Amendments. The circuits also disagree about whether there must be a "clear statement" from Congress that it intended the VRA to apply to felon disenfranchisement statutes, the underlying congressional intent that accompanied the amendment of the VRA in 1982, and whether the VRA, as applied to felon disenfranchisement laws, is congruent and proportional legislation under the Fourteenth and Fifteenth Amendments. All of these factors inform whether the VRA, a federal law, may be used to challenge state felon disenfranchisement statutes.

6. 42 U.S.C. § 1973 (2000).

7. See *infra* notes 116-21 and accompanying text.

8. See *infra* notes 59-71 and accompanying text.

The U.S. Court of Appeals for the Second Circuit ruled in two separate cases, *Baker v. Pataki*⁹ and *Muntaqim v. Coombe*,¹⁰ that VRA challenges to felon disenfranchisement statutes cannot proceed. Application of the VRA to felon disenfranchisement, the Second Circuit concluded in both cases, would impermissibly alter the state/federal balance of power, as states have traditionally enjoyed exclusive control of establishing voter qualifications. Moreover, the Second Circuit held that an interpretation that the VRA applies to these state statutes would violate rules of constitutional construction.

The Eleventh and Ninth Circuits took the opposite approach from the Second Circuit. In *Farrakhan v. Washington*, the Ninth Circuit ruled that the VRA can be used to challenge the Washington law that prohibits convicted felons from voting.¹¹ The Eleventh Circuit embraced this approach in *Johnson v. Governor of Florida*, where the court determined that a VRA challenge to Florida's statutory scheme, which disenfranchises not only current felons but all ex-felons, should be allowed to proceed.¹² These two circuits determined that permitting application of the VRA to felon disenfranchisement laws does not violate the established balance of power between the states and Congress, nor do such challenges offend notions of constitutional construction.

On November 8, 2004, the United States Supreme Court denied petitions for certiorari in two of these cases—the Ninth Circuit's decision in *Farrakhan* and the Second Circuit's decision in *Muntaqim*.¹³ Both petitions specifically requested that the Court decide whether felons and ex-felons can challenge their state felon disenfranchisement laws as having a racially discriminatory impact under the VRA. The Supreme Court's decision not to hear these cases cemented the circuit split that has been developing over the last ten years.¹⁴

9. 85 F.3d 919 (2d Cir. 1996).

10. 366 F.3d 102 (2d Cir.), *cert. denied*, 125 S. Ct. 480 (2004) (mem.), *reh'g en banc granted*, No. 01-7260, 2004 WL 2998551 (2d Cir. Dec. 29, 2004). The Second Circuit recently decided to rehear this case en banc, but did not vacate its previous decision. *See Muntaqim*, 2004 WL 2998551, at *1.

11. *Farrakhan v. Washington*, 338 F.3d 1009, 1011-12 (9th Cir. 2003).

12. *Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir. 2003), *reh'g en banc granted, opinion vacated by* 377 F.3d 1163 (11th Cir. 2004). *Johnson* was recently granted rehearing en banc, vacating the court's previous decision, and is currently pending decision. No petition for certiorari was filed in that case. *See Johnson*, 377 F.3d at 1163.

13. *Muntaqim*, 125 S. Ct. at 480; *Locke v. Farrakhan*, 125 S. Ct. 477 (2004) (mem.); *see also* Linda Greenhouse, *Supreme Court Declines to Hear 2 Cases Weighing the Right of Felons to Vote*, N.Y. Times, Nov. 9, 2004, at A19; James Vicini, *Justices Refuse to Review Inmate Voting Rights*, Reuters, Nov. 8, 2004, available at http://news.orb6.com/stories/nm/20041108/court_voting_dc.php.

14. *See* Tony Mauro, *Mixed Signals from Supreme Court on Felon Voting Rights*, Legal Times, Nov. 9, 2004 (claiming that the Court "sent conflicting signals" on the

The Ninth, Eleventh, and Second Circuit decisions highlighted fundamental disagreements over the correct reading of the language of the Fourteenth Amendment, and the breadth of Congress's enforcement powers under the Fourteenth and Fifteenth Amendments as they relate to the application of federal legislation to areas of traditional state control. Specifically, this Note examines: (1) how to address inherent contradictions within the language of the Fourteenth Amendment; (2) whether the VRA, as applied to felon disenfranchisement statutes, exceeds Congress's enforcement powers under the Fourteenth and Fifteenth Amendments; (3) whether the clear statement rule applies when interpreting section 2 of the VRA; and (4) whether Congress intended that the VRA apply to felon disenfranchisement statutes, using the recent litigation regarding the permissibility of challenging state felon disenfranchisement statutes under the VRA, as a means of understanding the disparate views of the federal circuit courts. This Note also proposes a possible solution to the current split among the three circuits that have addressed the issue.

Part I of this Note explores the history of felon disenfranchisement and the history of racially discriminatory voting practices in the United States. Part I also explores some of the key areas of conflict between the Second, Ninth, and Eleventh Circuits regarding the use of the VRA in felon disenfranchisement statute challenges. Part II of this Note examines the specific tensions between the circuits in the four recent cases in the Second, Ninth, and Eleventh circuits and describes in detail the different approaches taken in the opinions issued by these courts.

Part III of this Note argues that the Supreme Court's denial of certiorari in the Ninth and Second Circuit decisions leaves an irreconcilable conflict that is best resolved by allowing the application of the VRA in felon disenfranchisement statute challenges. Part III posits that there is no inherent constitutional conflict that prevents VRA challenges to felon disenfranchisement statutes from proceeding. It further contends that federalism concerns do not preclude the application of the VRA to felon disenfranchisement statutes because the VRA, as applied to felon disenfranchisement statutes, does not exceed Congress's enforcement powers. Therefore, in applying the VRA to felon disenfranchisement statutes, federal courts need not look at the congressional intent behind the VRA or whether there has been a clear statement. Thus, the VRA can properly be applied to state felon disenfranchisement statutes.

issue of felon disenfranchisement, but that "the high court may yet decide the issue in a future case"), at <http://www.law.com/jsp/article.jsp?id=1099927152958>.

I. FELON DISENFRANCHISEMENT AND RACIAL DISCRIMINATION IN VOTING: HISTORY AND CHALLENGES

A. *Felon Disenfranchisement in the United States*

In the United States, a felony conviction carries not only criminal repercussions, but also civil ones.¹⁵ Civil consequences include the loss of the right to hold public office, the loss of the right to serve as a juror, and the loss of the right to vote.¹⁶ Approximately 4.7 million Americans were prohibited from voting in elections in the year 2000 because they were incarcerated due to criminal convictions, had previous criminal convictions, were still serving terms of probation or parole for criminal convictions, or had fees outstanding that were imposed as a condition of a criminal conviction.¹⁷

Felon disenfranchisement has its roots in ancient Greece, ancient Rome, and Medieval Europe, where those who committed crimes were banished from their communities and subject to loss of their property rights and the ability to inherit or pass down property to their heirs.¹⁸ Early European felon disenfranchisement was limited to cases of serious crimes and was imposed on a case-by-case basis by judicial pronouncement.¹⁹ Colonists brought the practice to the United States, though they abandoned other European civil disabilities, such as loss of inheritance rights.²⁰

Early felon disenfranchisement laws in the United States were, for the most part, limited to a few particular offenses.²¹ By the mid-1800s, more than half of the states prohibited felons who had committed serious offenses from voting.²² Today, citizens may be disenfranchised for committing minor offenses, including misdemeanors and felonies that do not impose a sentence of incarceration.²³ Disenfranchisement

15. See Fellner & Mauer, *supra* note 3, at 2; Carlos M. Portugal, Comment, *Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida*, 57 U. Miami L. Rev. 1317, 1318 (2003).

16. See Fellner & Mauer, *supra* note 3, at 2.

17. See Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Soc. Rev. 777, 780, 797 (2002).

18. See Fellner & Mauer, *supra* note 3, at 1, 2; Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wis. L. Rev. 1045, 1060; Portugal, *supra* note 15, at 1318-19.

19. See Ewald, *supra* note 18, at 1061.

20. See Fellner & Mauer, *supra* note 3, at 2.

21. See Angela Behrens & Christopher Uggen, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 Am. J. Soc. 559, 563 (2003).

22. At that time, the right to vote was not universal. Women, many racial and ethnic minorities, people who could not read, and those who did not own property were not permitted to vote. See Fellner & Mauer, *supra* note 3, at 3.

23. See *id.* at 5 (citing, as an example, the loss of voting rights for a conviction for passing a bad check in Mississippi). In *Richardson v. Ramirez*, Justice Marshall,

can even be imposed on a first-time offender who enters a guilty plea, as most first-time offenders do, regardless of guilt or innocence.²⁴

Felon disenfranchisement imposed by state legislatures continues despite the fact that the Supreme Court has declared voting to be a fundamental right that requires the application of strict scrutiny analysis under the Equal Protection Clause.²⁵ The United States Constitution grants states, and not the federal government, the power to establish voter qualifications.²⁶ There is therefore no federal law that disenfranchises felons,²⁷ as states have the inherent power to establish “[t]he Times, Places and Manner of holding Elections for Senators and Representatives.”²⁸ Most states do not distinguish state from federal offenses in applying felon disenfranchisement statutes.²⁹ Because the practice of felon disenfranchisement is imposed at a state level, there is a resulting “national crazy-quilt of disqualifications and restoration procedures.”³⁰

dissenting, noted that felon disenfranchisement could even be imposed for convictions “for seduction under promise of marriage, or conspiracy to operate a motor vehicle without a muffler . . . vagrancy in Alabama or breaking a water pipe in North Dakota . . . [e]ven a jaywalking or traffic conviction.” *Richardson v. Ramirez*, 418 U.S. 24, 75 n.24 (1974) (Marshall, J., dissenting) (citations omitted).

24. See Fellner & Mauer, *supra* note 3, at 5.

25. See *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. . . . [A]n alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”); see also *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (invalidating a poll tax as a voting qualification that does not meet strict scrutiny analysis); Gabriel J. 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, 309 (2004). The Equal Protection Clause of the Fourteenth Amendment prohibits states from depriving all citizens of “equal protection of the laws.” U.S. Const. amend. XIV, § 1. Strict scrutiny demands that states demonstrate that a voting restriction advances a compelling state interest, is narrowly tailored, and is the least restrictive means to achieve the state’s ends. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972) (employing “strict equal protection” in analyzing durational residence laws); *Oregon v. Mitchell*, 400 U.S. 112, 241-42 (1970) (applying strict scrutiny equal protection analysis to restrictions on the right to vote); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-27 (1969) (same).

26. U.S. Const. art. I, § 2, cl. 1; see John M. Mathews, *Legislative and Judicial History of the Fifteenth Amendment* 12 (Da Capo Press 1971) (1909) (“[R]egulation of the suffrage was a matter properly belonging to the state governments.”). States also have the authority to regulate criminal law. The Tenth Amendment to the United States Constitution gives the states police powers to protect the health, safety, and welfare of their citizens. See U.S. Const. amend. X; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

27. See *Right to Vote, FAQ*, at http://www.righttovote.org/upload/facts/290_uFile_FAQ%20for%20Web.doc (last visited Jan. 31, 2005).

28. U.S. Const. art. I, § 4, cl. 1; see *id.* amend. XVII.

29. See Fellner & Mauer, *supra* note 3, at 6.

30. Margaret Colgate Love & Susan M. Kuzma, U.S. Dep’t of Justice, *Civil Disabilities of Convicted Felons: A State-by-State Survey* 1 (1996).

Only two states—Vermont and Maine—do not restrict the voting rights of felons, permitting them to vote from prison.³¹ The remaining forty-eight states and the District of Columbia prohibit felons from voting while incarcerated.³² Of those forty-eight states, twenty-nine also extend the prohibition to parolees, and thirty-two extend the prohibition to both parolees and probationers.³³ In fourteen states ex-prisoners are not permitted to vote for some period of time after the completion of all terms of their sentences, and in some of these states ex-felons are not permitted to vote for the duration of their lives.³⁴ Restoring one's right to vote is purportedly possible—even in states that permanently disenfranchise felons—by way of pardon, executive order, or a clemency proceeding, although there may be a waiting period before such action is permitted.³⁵

The United States is the only democratic country in the world that disenfranchises so many felons.³⁶ This is, in large part, due to the soaring incarceration rate in the United States. The incarceration rate was 686 per 100,000 people in the United States in the year 2000, while the rate in Canada was only 105 per 100,000, the rate in Germany was only 95 per 100,000, and the rate in Japan was only 45 per 100,000.³⁷ As a result, “the United States stands at an extreme end

31. Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 Minn. L. Rev. 231, 239 (2004). Utah recently passed a state constitutional amendment that took away voting rights for currently incarcerated felons. The state had previously allowed incarcerated felons to vote. See Utah Const. art. IV, § 6. Similarly, Massachusetts passed a state constitutional amendment in 2000. Mass. Const. art. of amend. III; see also Mass. Gen. Laws Ann. ch. 51, § 1 (West 2004).

32. Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 Temp. Pol. & Civ. Rts. L. Rev. 71, 77 (2003).

33. Behrens & Uggen, *supra* note 21, at 563 tbl.1; Parkes, *supra* note 32, at 77.

34. See Fellner & Mauer, *supra* note 3, at 1.

35. See *id.* at 5-6. This process may be time or cost prohibitive, rendering it “illusory.” Marc Mauer, *Disenfranchisement: The Modern-Day Voting Rights Challenge*, 40 C.R. J. 40, 42 (2002); see Fellner & Mauer, *supra* note 3, at 5-6.

36. See Fellner & Mauer, *supra* note 3, at 1. The United States also has the lowest voter participation rate of any democracy in the Western world. Mauer, *supra* note 35, at 43. In the 2000 presidential election, the voter turnout rate was 51.3%. Parkes, *supra* note 32, at 73 n.4. The estimated voter turnout rate for the 2004 presidential election was 59.6%. See Press Release, Comm. for the Study of the Am. Electorate, President Bush, Mobilization Drives Propel Turnout to Post-1968 High, Kerry, Democratic Weakness Shown (Nov. 4, 2004), available at <http://www.fairvote.org/reports/CSAE2004electionreport.pdf>. By contrast, Italy's voter turnout rate from 1945-1998 was 92.5%. See IDEA Int'l, Voter Turnout: A Global Survey, available at http://www.idea.int/voter_turnout/voter_turnout2.html (last visited Jan. 31, 2005).

37. Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 Persp. on Pol. 491, 500 (2004).

of the spectrum in comparison to other democratic nations” when it comes to limiting prisoner and ex-prisoner voting rights.³⁸

The trends in legislative activity in the area of felon disenfranchisement demonstrate mercurial attitudes toward the practice. In the 1860s and 1870s, the country saw a spike in more restrictive felon disenfranchisement practices, a period of white legislative backlash to Reconstruction.³⁹ In the 1960s and 1970s, however, the country saw another spike in legislative activity characterized by the “liberalization” of such statutes.⁴⁰ The 1990s were “once again restrictive rather than liberal.”⁴¹ In February 2002, however, a United States Senate measure that would restore voting rights to all ex-felons in federal elections garnered enough support to make it to the floor of the Senate, a possible move back towards expansion of voting rights.⁴² This measure was ultimately voted down.⁴³

Proponents of felon disenfranchisement argue that when citizens commit crimes, they forfeit their right to engage in voting and deserve to suffer a “civil death.”⁴⁴ Another common rationale supporting felon disenfranchisement laws is that these restrictions maintain the “purity of the ballot box.”⁴⁵ This argument turns on the claim that felons pose a serious threat to the integrity of the voting process—namely, that they will engage in fraud to distort the outcomes of elections.⁴⁶ Proponents of felon disenfranchisement laws also assert

38. *Civic Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Constitution of the Comm. on the Judiciary, House of Representatives*, 106th Cong. 31 (1999) (statement of Marc Mauer, Assistant Director, The Sentencing Project); see Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 Stan. L. Rev. 1147, 1168-69 (2004) (noting that “consensus ‘within the world community’ is uniformly against lifetime disenfranchisement” and that “the states that continue to exclude all felons permanently are outliers, both within the United States and in the world”).

39. See Behrens & Uggen, *supra* note 21, at 582-83.

40. *Id.* at 583.

41. *Id.*

42. See *id.* at 572.

43. The bill was defeated by a vote of 63 to 31. *Id.* at 599; cf. Marc Mauer, *Felon Disenfranchisement: A Policy Whose Time Has Passed?*, 31 Hum. Rts. 16, 17 (2004).

44. But see George P. Fletcher, *Disenfranchisement As Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. Rev. 1895, 1899 (1999) (arguing that the concept of “civil death” made sense in an age where all felons were sentenced to death, and those still living had “little ground to complain”). See generally Ewald, *supra* note 18.

45. Alice E. Harvey, Comment, *Ex-felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. Pa. L. Rev. 1145, 1162-63 (1994). But see Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box,”* 102 Harv. L. Rev. 1300, 1317 (1989) (challenging the soundness of this argument).

46. See *Washington v. State*, 75 Ala. 582, 585 (1884) (arguing that the purpose of disenfranchisement is “to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption”). But see Fletcher, *supra* note 44, at 1899 (claiming that this argument

that states are empowered by the Constitution to impose appropriate criminal penalties upon felons, and disenfranchisement is simply one of those penalties.⁴⁷

Despite these assertions, opponents of felon disenfranchisement argue that the practice must end because the right to vote is at “the heart of representative government.”⁴⁸ Voting is a right that has been declared fundamental by the Supreme Court, these critics argue, and should not be denied to such a large number of people; over 2% of the voting-age population in the United States is not permitted to vote due to felon disenfranchisement.⁴⁹ This point is highlighted by the nation’s growing incarceration rate.⁵⁰ While state legislatures have tended to limit the use of permanent disenfranchisement over time, the gross number of people disenfranchised by such laws continues to balloon.⁵¹ Some commentators have recognized the actual impact that felon disenfranchisement has on the outcomes of both state and federal elections, including presidential elections.⁵² The incredibly close vote in Florida in the 2000 presidential race contributed to a resurgence in the movement to abolish felon disenfranchisement statutes.⁵³ In the wake of that election, the National Commission on

cannot “withstand a minute of rational argument” and that the claim of “metaphysical taint has no place in a secular legal culture, and it seems obvious that electoral officials can, with proper measure, protect the honesty of the balloting process”).

47. See Fellner & Mauer, *supra* note 3, at 16; *cf. supra* note 26 and accompanying text.

48. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

49. See Behrens, *supra* note 31, at 239.

50. See *Developments in the Law—The Law of Prisons*, 115 Harv. L. Rev. 1838, 1940-41 (2002) [hereinafter *The Law of Prisons*]. Pamela Karlan notes that the incarceration rate is six times higher today than it was in 1974. See Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. Cin. L. Rev. 1345, 1364 (2003).

51. See Fletcher, *supra* note 44, at 1899.

52. See Uggen & Manza, *supra* note 17, at 781, 789, 792-93. Uggen and Manza’s analysis of the impact of felon disenfranchisement in the national presidential race in 2000 reveals that had Florida not had any felon disenfranchisement statute, Al Gore would have defeated George W. Bush by a margin of approximately 84,000 votes in Florida. *Id.* at 792-93. Had Florida’s felon disenfranchisement statute only disenfranchised current felons and not ex-felons, Al Gore would have defeated George W. Bush by over 60,000 votes. *Id.* Uggen and Manza assert that “[s]ince 1978, there have been over 400 Senate elections, and we find 7 outcomes that may have been reversed if not for the disenfranchisement of felons and ex-felons.” *Id.* at 789. They also estimate that had there been no felon disenfranchisement laws in the United States, the Democratic Party would have held majority control in the United States Senate from 1986-2002. *Id.* at 794. Professor Gabriel Chin also notes that because African-Americans are overwhelmingly Democrats, “Republicans have a terrible conflict of interest with respect to African-American voter turnout and its connection to felon disenfranchisement.” Chin, *supra* note 25, at 307.

53. Pamela Karlan notes:

For a variety of reasons, the aftermath of Election 2000 seems to have reinvigorated the voting rights restoration movement. The scope of felon disenfranchisement and its disproportionate impact on members of minority groups has received far greater national attention and state-level political

Federal Election Reform recommended that all states end the practice of ex-felon disenfranchisement.⁵⁴

Critics of felon disenfranchisement advance a number of other compelling arguments. Some argue that the country has extended the concept of universal suffrage over the last 150 years, and should complete that movement by re-enfranchising felons.⁵⁵ Some argue that disenfranchising ex-felons does little good in terms of rehabilitation, deterrence, or the other policy rationales that underlie the criminal justice system and serve to stigmatize ex-felons who are disenfranchised.⁵⁶ Critics also argue that because the United States is one of the only Western democracies that permanently bans felons from voting, the practice marginalizes the country from the global community.⁵⁷ Opponents also point to the lack of public support for felon disenfranchisement laws. One recent survey revealed that 80% of Americans favor restoring voting rights to former felons once they have served their sentences.⁵⁸

One of the strongest arguments that critics advance for eliminating felon disenfranchisement laws in the United States is that such laws disproportionately impact African-American communities. Imprisonment rates for African-Americans have continuously exceeded the rates for white Americans since the Civil War.⁵⁹ In 1996, African-American men were 8.5 times more likely than white men to be imprisoned and since 1988 the rate of incarceration for African-American men has increased ten times faster than that of white men.⁶⁰ Nearly 1.5 million African-Americans are disenfranchised, which accounted for 36% of the total population of felons disenfranchised in 1998.⁶¹ At this rate, 40% of African-American men could be disenfranchised in the states where ex-offenders as well as those currently incarcerated, serving probation, or on parole, are all

efforts have restored the voting rights of nearly a half-million people. By contrast, litigation challenging even lifetime felon disenfranchisement has been uniformly unsuccessful.

Karlan, *supra* note 50, at 1365.

54. See Mauer, *supra* note 43, at 17. Former Presidents Carter and Ford chair the Commission. *Id.*

55. See Fellner & Mauer, *supra* note 3, at 14.

56. See *id.* at 17; Ewald, *supra* note 18, at 1105; Fletcher, *supra* note 44, at 1896 (noting that some lifelong sanctions “flout the retributive principle that the offender should be required (and permitted) to pay his debt in full to society”).

57. See Brandon Rottinghaus, Int’l Found. for Election Systems, Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform 28 (2003), available at http://www.ifes.org/research_comm/manatt.htm.

58. Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 Pub. Opinion Q. 275, 281 (2004). The same survey revealed that only 60% favor re-enfranchising those on parole or probation, and only 31% favor re-enfranchising currently incarcerated felons. *Id.* at 280.

59. Behrens & Uggen, *supra* note 21, at 560.

60. Fellner & Mauer, *supra* note 3, at 12.

61. *Id.* at 1.

disenfranchised,⁶² and 30% of all African-American men are predicted to face disenfranchisement either permanently or temporarily in their lifetimes.⁶³ This is partially the result of disparate targeting by police, disparate prosecutorial activity, and disparate sentencing trends.⁶⁴

Alabama and Florida have some of the most stringent felon disenfranchisement statutes.⁶⁵ As a result, in these two states, a staggering 31% of the African-American male voting-age population is prohibited from voting.⁶⁶ In Iowa, Mississippi, New Mexico, Virginia, and Wyoming one in four African-American men is permanently disenfranchised.⁶⁷ In California, 70% of those sentenced under the state's "three strikes" law are African-American or Hispanic.⁶⁸ Approximately 8400 ex-felons have had their voting rights restored after a period of disenfranchisement in Florida since 1997.⁶⁹ Only 25% of these restorations were granted to African-Americans.⁷⁰ Of the full pardons granted in the state since 1987, only 15% were granted to African-American ex-felons.⁷¹

Many consider the racially-disparate impact of felon disenfranchisement intolerable. The numerous arguments against the practice of felon disenfranchisement prompted Professor George P. Fletcher to comment that it is obvious that the country cannot continue to disenfranchise such a significant portion of the population.⁷² "The only question," he asserts, "is whether the reinstatement of voting rights for felons—both in prison and out—will come by the way of legislative change or constitutional ruling."⁷³

62. *Id.*

63. *See id.* at 12-13. Disparate drug offense conviction rates greatly contribute to these trends. *See id.* at 13.

64. *See* Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 307 (2000); *Sentencing-Guidelines Study Finds Continuing Disparities*, N.Y. Times, Nov. 27, 2004, at A11. Angela Behrens and Christopher Uggen, who conducted a study of felon disenfranchisement laws throughout the past 150 years, concluded as follows:

Our key finding can be summarized concisely and forcefully: the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws. States with greater nonwhite prison populations have been more likely to ban convicted felons from voting than states with proportionally fewer nonwhites in the criminal justice system.

Behrens & Uggen, *supra* note 21, at 596.

65. *See The Law of Prisons, supra* note 50, at 1943-46.

66. Fellner & Mauer, *supra* note 3, at 8; *see The Law of Prisons, supra* note 50, at 1944-45.

67. Fellner & Mauer, *supra* note 3, at 8.

68. *Id.* at 11.

69. *The Law of Prisons, supra* note 50, at 1945.

70. *See id.* (citing Gary Kane & Scott Hiaasen, *Clemency Process Unfair to Blacks?*, Palm Beach Post, Dec. 23, 2001, at 1A).

71. *See id.* at 1945-46.

72. Fletcher, *supra* note 44, at 1901-02.

73. *Id.* Fletcher's article does not highlight section 2 of the VRA as a potentially

B. *The History of Racially Discriminatory Voting Practices in the United States*

The history of voting in the United States has been characterized by both restricted voting rights for felons and ex-felons, and by restricted voting rights for racial minorities. Both types of voting restrictions have an interwoven past, and have, at times, collided head on. In particular, many felon disenfranchisement statutes that were enacted and/or enforced after the Civil War were imposed with the express purpose of preventing African-Americans from voting.⁷⁴ Additionally, even felon disenfranchisement statutes that were not enacted with the specific intent of discriminating on the basis of race have had a racially discriminatory impact on the African-American population of the country.⁷⁵

Still, felon disenfranchisement has been but one voting restriction intended to dilute the African-American community's voting strength. The recent cases in the Second, Ninth, and Eleventh Circuits that address the permissibility of using the VRA to challenge felon disenfranchisement statutes consider not only the history of felon disenfranchisement, but also the nation's history of denying African-Americans the right to vote through a variety of methods. An examination of this country's general history of racial discrimination in voting—both through felon disenfranchisement and other schemes—sheds light on the current debate over whether the VRA should be permitted to apply to felon disenfranchisement statutes.

1. Early History of Voting Rights and the Civil War Amendments

The United States Constitution of 1787 did not expressly deny the right to vote to any group,⁷⁶ yet only 6% of the population at the time was permitted to vote.⁷⁷ Prior to the Civil War, the Constitution also failed to provide any sort of voting protections for its citizens.⁷⁸ At that time only a few states permitted African-Americans to vote at all.⁷⁹ After the Civil War concluded, however, Congress passed the Military Reconstruction Act of 1867,⁸⁰ which permitted former

effective judicial tool, though this Note argues that the VRA may be the most effective litigation tool currently available for challenging felon disenfranchisement laws.

74. See *infra* notes 96-100 and accompanying text.

75. See *supra* notes 59-73 and accompanying text.

76. See Behrens & Uggen, *supra* note 21, at 561.

77. See Mauer, *supra* note 43, at 16.

78. U.S. Dept. of Justice, Introduction to Federal Voting Rights Laws, Before the Voting Rights Act, at http://www.usdoj.gov/crt/voting/intro/intro_a.htm (last visited Jan. 31, 2005).

79. *Id.* None permitted women to vote. See Behrens & Uggen, *supra* note 21, at 562 (noting that the passage of the 19th Amendment finally gave women the right to vote).

80. 14 Stat. 428 (1867).

Confederate states to rejoin the Union if each conceded to permitting universal male suffrage.⁸¹

The Military Reconstruction Act was followed by the amendment of the United States Constitution. In 1868, the Fourteenth Amendment was ratified, conferring citizenship on all persons born or naturalized in the country and extending equal protection and due process requirements.⁸² In 1870 the Fifteenth Amendment was ratified, which provided that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.”⁸³ These two Amendments are known together with the Thirteenth Amendment as the Civil Rights Amendments.⁸⁴

The Fifteenth Amendment, in theory, overcame any state law that prohibited African-Americans from voting.⁸⁵ Congress also passed the Enforcement Act of 1870⁸⁶ to impose criminal penalties on those who interfered with Fifteenth Amendment protections and the Force Act of 1871⁸⁷ which imposed federal oversight of federal elections.⁸⁸ As a result of this legislation, former slaves registered to vote, African-Americans could be elected to public office at all levels of government, and African-Americans emerged as voting majorities in many states.⁸⁹

Many of the most egregious racially discriminatory voting practices were enacted during the Civil War and Reconstruction to halt this trend of African-American voting.⁹⁰ A number of white terrorist organizations used violence and threats to prevent the

81. See U.S. Dep’t of Justice, *supra* note 78; see also Chin, *supra* note 25, at 270-271 (noting that the Military Reconstruction Act “established military governance of the South and provided for trial of offenses” and resulted in the enfranchisement of approximately one million African-Americans).

82. U.S. Const. amend. XIV.

83. U.S. Const. amend. XV. Gabriel Chin argues that Congress proposed the Fifteenth Amendment with its direct approach to enfranchising African-Americans because the mandate of the Fourteenth Amendment failed to gain traction in the former Confederate states. Chin, *supra* note 25, at 260-61. Chin also notes that Thaddeus Stevens, the Chair of the Joint Committee on Reconstruction, a congressional committee tasked with proposing constitutional amendments to resolve political conflicts following the Civil War, had commented that he had already started to draft the Fifteenth Amendment to grant African-Americans the right to vote even before the Fourteenth Amendment was ratified. *Id.* at 270.

84. The Thirteenth Amendment abolished slavery. U.S. Const. amend. XIII.

85. See U.S. Dep’t of Justice, *supra* note 78.

86. 16 Stat. 141 (codified as amended at 18 U.S.C. § 241 (2000)).

87. 16 Stat. 433 (codified as amended at 2 U.S.C. § 9 (2000), 28 U.S.C. §§ 1357, 1442, 1446-47, 1449-50 (2000)).

88. For a description of the history of these two acts, see *Anderson v. United States*, 417 U.S. 211, 237, 242 (1974) (Douglas, J., dissenting).

89. See U.S. Dep’t of Justice, *supra* note 78.

90. See Fellner & Mauer, *supra* note 3, at 3.

enfranchisement of African-Americans, which worked to reverse the impact of the Fifteenth Amendment.⁹¹ Through the process of "Redemption"—gerrymandering election districts to reduce the strength of African-American voting populations—white citizens regained control of political offices and voting strength.⁹² Some states, driven by particularly strong racial discrimination, even amended their state constitutions to support white voting power.⁹³ These states also enacted poll taxes, private primaries, and literacy tests, all specifically intended to reduce African-American voting strength.⁹⁴

It was during this era that felon disenfranchisement emerged as a tool for disenfranchising African-Americans. Despite the intention of the Fourteenth Amendment to require states to meet the mandates of the Equal Protection Clause and Due Process Clause, Section 2 of the Fourteenth Amendment also provided constitutional support for felon disenfranchisement. The Amendment provides, in part:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.⁹⁵

In the years following the passage of the Fifteenth Amendment, many Southern states embraced Section 2 of the Fourteenth Amendment, using felon disenfranchisement as another means of disenfranchising African-Americans.⁹⁶ Many of these states specifically designed their felon disenfranchisement laws "to increase the effect of these laws on black citizens."⁹⁷

91. See U.S. Dep't of Justice, *supra* note 78.

92. See *id.*

93. See *id.*

94. See *id.*

95. U.S. Const. amend. XIV, § 2 (emphasis added).

96. The court in *McLaughlin v. City of Canton*, 947 F. Supp. 954, 977 (S.D. Miss., 1995), noted the following:

Virtually all historians agree that [the attempt to enfranchise African-Americans] was greeted by obstructionist whites with alarm. Virtually all historians also agree that disenfranchising tactics and methods, including literacy and property tests, poll taxes, understanding clauses, and grandfather clauses were adopted in hopes of reducing the enthusiasm and lessening the impact of the black vote. Some historians have remarked that disenfranchising provisions in state constitutions for convictions of certain "black" crimes was one additional method explored.

Id.

97. Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 540 (1993); see Chin, *supra* note

One way that these Southern states disenfranchised African-Americans through felon disenfranchisement statutes without explicitly violating the Fifteenth Amendment was by disenfranchising those who had committed a particular *group* of crimes—those committed most often by African-Americans—while exempting felons convicted of crimes typically committed by whites.⁹⁸ For example, in 1901 the Alabama legislature designated crimes committed predominately by African-Americans as crimes of “moral turpitude,” and determined that the commission of such crimes warranted imposition of disenfranchisement as a term of punishment.⁹⁹ In South Carolina, the crime of murder, which was committed in roughly equal numbers by African-Americans and whites, was not included under the felon disenfranchisement statute, while the crime of adultery, which was committed more often by African-Americans, was included.¹⁰⁰

Despite the significant advances in African-American voting rights achieved by 1867, by 1910 nearly all of the headway made by the passage of the Fifteenth Amendment and its accompanying legislation was negated, hardly any African-American public officials were still in office, and nearly all African-American voters were disenfranchised.¹⁰¹ The Supreme Court attempted to fight these racist tactics in a number of decisions.¹⁰² None of these decisions, however, eliminated the case-by-case analysis of whether a voting law violated the Fifteenth Amendment, and thus reversing the effects of racially discriminatory election laws proved difficult.¹⁰³ Moreover, none of these Supreme Court decisions addressed felon disenfranchisement as an impermissibly racist tactic. African-American voter registration in a

25, at 305 (“There is strong evidence that the crimes leading to disenfranchisement were manipulated to accomplish the disenfranchisement of African-Americans.”); Ewald, *supra* note 18, at 1065 (“After Reconstruction, several Southern states carefully re-wrote their criminal disenfranchisement provisions with the express intent of excluding blacks from suffrage.”).

98. See Mauer, *supra* note 43, at 16 (noting that such laws went unchallenged for 100 years).

99. See *Hunter v. Underwood*, 471 U.S. 222, 223 (1985).

100. See Shapiro, *supra* note 97, at 541.

101. See Gabriel J. Chin, *The “Voting Rights Act of 1867”: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. Rev. 1581, 1591-92 (2004); Shapiro, *supra* note 97, at 538 (noting that only five African-Americans were elected to state legislatures and Congress by 1900, a drop from 324 in 1872, and that in 1867 almost 70% of eligible African-Americans were registered to vote in Mississippi, yet by 1892 the rate had dropped to only 6%).

102. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that Alabama’s gerrymandering strategy for city boundaries violated the Fifteenth Amendment); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding that a state “white primary” violated the Fifteenth Amendment); *Guinn v. United States*, 238 U.S. 347 (1915) (declaring “grandfather clauses,” which required stringent literacy and property qualifications for all voters except those descendants of men who voted before 1867, invalid under the Fifteenth Amendment).

103. See U.S. Dep’t of Justice, *supra* note 78.

number of southern states continued to be much lower than white registration rates, despite Supreme Court action.¹⁰⁴

2. The Voting Rights Act of 1965

Congress enacted the Voting Rights Act of 1965 in reaction to the ineffectiveness of the Fourteenth Amendment, the Fifteenth Amendment, their progeny legislation, and Supreme Court action.¹⁰⁵ The legislature and President Lyndon B. Johnson crafted the VRA in 1965 to specifically counter southern states' resistance to implementing equal voting rights legislation.¹⁰⁶ While the VRA provides a wide range of protections, section 2 of the Act is perhaps its most important provision. Section 2 guarantees that

[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.¹⁰⁷

The Supreme Court explained that section 2 of the VRA prohibits "any standards, practices, or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial and language minorities."¹⁰⁸ Section 2 is also the provision of the VRA recently used to challenge felon disenfranchisement laws.¹⁰⁹

a. *Early History of the VRA*

The VRA was signed into law on August 6, 1965, and those opposing it immediately challenged its constitutionality. The Supreme Court quickly affirmed, in a series of cases, that Congress could constitutionally prohibit voting practices that perpetuated the effects of past intentional discrimination through the VRA, even if such

104. *See id.*

105. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)). The VRA was passed pursuant to Congress's authority under both the Fourteenth and Fifteenth Amendments. *See United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 126-27 (1978); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

106. *See* U.S. Dep't of Justice, *Introduction to Federal Voting Rights Laws, The Voting Rights Act of 1965*, at http://www.usdoj.gov/crt/voting/intro/intro_b.htm (last visited Jan. 31, 2005) (stating that Congress had "determined that the existing federal anti-discrimination laws were not sufficient to overcome the resistance by state officials to enforcement of the 15th Amendment" and that case-by-case litigation had proved ineffective).

107. 42 U.S.C. § 1973(a).

108. *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986).

109. *See infra* Part II.

practices considered alone were not themselves constitutional violations.

In the first case affirming the VRA's constitutionality, the landmark decision of *South Carolina v. Katzenbach*, the Supreme Court indicated that the purpose of the VRA was to "rid the country of racial discrimination in voting."¹¹⁰ The opinion also explicitly upheld the constitutionality of the VRA:

Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims.¹¹¹

The Court also stressed that there was "reliable evidence of actual voting discrimination in a great majority of the States and political subdivisions affected by the new remedies of the Act."¹¹²

Congress amended the VRA to expand its protections in the 1970s after hearings revealed that the electorate was still subject to gerrymandering, at-large elections, and other systematic tools used to exclude the African-American and other minority groups from voting.¹¹³ Throughout the 1970s and into the 1980s, the Supreme Court continued to uphold the constitutionality of various VRA provisions.¹¹⁴ The Act was successfully used to strike down numerous state voter restrictions enacted with racially discriminatory intent, prompting the Justice Department to declare the VRA the most effective piece of civil rights legislation Congress has ever passed.¹¹⁵

b. *Failure to Provide an Entirely Effective Tool—The 1982 Amendment*

Despite the protections to the African-American vote provided by the VRA, the Civil Rights movement suffered another setback with the Supreme Court's 1980 decision in *City of Mobile v. Bolden*.¹¹⁶ In the opinion, the Supreme Court concluded that to prevail on a claim

110. *Katzenbach*, 383 U.S. at 315.

111. *Id.* at 328.

112. *Id.* at 329.

113. U.S. Dep't of Justice, *supra* note 106.

114. See, e.g., *City of Rome v. United States*, 446 U.S. 156 (1980) (holding that a seven-year extension on the VRA's preclearance requirement was constitutional); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (holding that a VRA ban on literacy tests and durational state residency requirements was constitutional).

115. U.S. Dep't of Justice, Introduction to Federal Voting Rights Laws, at <http://www.usdoj.gov/crt/voting/intro/intro.htm> (last visited Jan. 31, 2005).

116. 446 U.S. 55 (1980) (plurality opinion).

of minority voting dilution under the VRA of 1965, there must be proof of a racially discriminatory purpose driving the passage of the legislation under review.¹¹⁷ The opinion also stressed that the VRA had “an effect no different from that of the Fifteenth Amendment itself,” which had been interpreted to cover “action by a State that is racially neutral on its face . . . only if motivated by a discriminatory purpose.”¹¹⁸

In 1982, largely in response to the *City of Mobile* decision, Congress again revised the VRA to establish a “results” test that made clear that discriminatory intent is not necessary to establish a violation of section 2.¹¹⁹ With this amendment, the Act provided that a violation is established when, through the “totality of circumstances,” the impact of a challenged voting practice is discriminatory.¹²⁰ The Senate report for the 1982 amendment identified “typical factors” that could be relevant in a section 2 analysis, including a history of not only voting discrimination, but discrimination in society at large to the extent such

117. *Id.* at 62. This requirement was acknowledged to be difficult to prove. See *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (noting that the discriminatory intent test is “inordinately difficult” to meet (internal quotations omitted)); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 557 (9th Cir. 1998) (noting Congress’s conclusion that the discriminatory intent test demanded by the *City of Mobile* decision was “unnecessarily divisive” and “placed an inordinately difficult burden of proof on plaintiffs” (internal quotations omitted)); see also S. Rep. No. 97-417, at 36 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 214.

118. *City of Mobile*, 446 U.S. at 61, 62.

119. See Harvey, *supra* note 45, at 1176. The revised VRA provides, in part:

(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 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.

42 U.S.C. § 1973 (2000) (emphasis added). This version replaced the original language “to deny or abridge” with “which results in a denial or abridgement.” In *Thornburg v. Gingles*, the Supreme Court outlined key reasons for revision of section 2:

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

Thornburg, 478 U.S. at 44 (internal quotations and citations omitted).

120. See 42 U.S.C. § 1973(a).

discrimination interferes with a racial minority group's ability to participate fully in the political process.¹²¹

In the 1986 case *Thornburg v. Gingles*, the Supreme Court determined that the amended version of the VRA required that the Court employ a "flexible, fact-intensive test for § [1973] violations" and incorporate the factors discussed in the Senate report on the 1982 amendment, which the Court determined to be "neither comprehensive nor exclusive."¹²² After *Thornburg*, the federal courts allowed section 2 challenges to proceed and conducted a totality of the circumstances analysis in a variety of voting practice challenges.¹²³ The amendment of the VRA also provided a clearer opportunity for opponents of felon disenfranchisement to challenge such statutes. In theory, plaintiffs challenging felon disenfranchisement statutes needed to prove only racially discriminatory effects of felon disenfranchisement, and not that such laws were enacted with discriminatory intent.

121. See S. Rep. No. 97-417, at 28-29, reprinted in 1982 U.S.C.C.A.N. 177, 206-07. The report listed these factors for consideration:

(1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction. Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[,] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution. The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.

Id. (footnotes omitted).

122. *Thornburg*, 478 U.S. at 45, 46.

123. See, e.g., *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 813 (5th Cir. 1993) (holding that a method of electing district court judges violated section 2 of the VRA); *McMillan v. Escambia County*, 748 F.2d 1037, 1047 (5th Cir. 1984) (holding that county at-large election system violated section 2 of the VRA); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1574 (11th Cir. 1984) (finding county at-large elections were a "clear" violation of section 2 of the VRA).

C. Challenges to Felon Disenfranchisement

Limiting the voting rights of convicted felons remained "largely unquestioned" until after 1950.¹²⁴ In the latter half of the twentieth century, however, challenges to felon disenfranchisement statutes began to gain some momentum. Initially, challenges to state felon disenfranchisement laws proceeded primarily under the Fourteenth Amendment as due process and equal protection challenges and did not allege racial discrimination.¹²⁵ Those that did make an allegation of racial discrimination underlying a felon disenfranchisement law were initially forced to rely on the Fifteenth Amendment or the original version of the VRA to provide relief, both of which demanded a showing that a felon disenfranchisement law was passed with the intent of discriminating on the basis of race, a difficult element to prove.¹²⁶

The 1982 amendment to the VRA eclipsed the protections of the Fifteenth Amendment and emerged as a potential tool for challenging racially discriminatory felon disenfranchisement laws.¹²⁷ While challenges to felon disenfranchisement laws brought under the Fourteenth and Fifteenth Amendments largely failed because proving discriminatory intent was difficult, the revision of the VRA in 1982 to employ a "results" test has revived interest in challenging felon disenfranchisement laws. To date, the federal circuit courts are split on whether the VRA's "results" test can be applied to felon disenfranchisement statutes and whether they can be struck down for having a racially discriminatory impact.¹²⁸

1. Early Challenges to the Constitutionality of Felon Disenfranchisement

Much of the debate regarding whether challenges to felon disenfranchisement laws can proceed under the amended section 2 of

124. *The Law of Prisons*, *supra* note 50, at 1939 n.2.

125. The success of these challenges was mixed. *See, e.g.*, *Owens v. Barnes*, 711 F.2d 25, 28 (3d Cir. 1983) (holding that the Pennsylvania felon disenfranchisement scheme did not violate equal protection); *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) (holding that the Texas reenfranchisement scheme for state felons did not violate equal protection). *But see* *Hobson v. Pow*, 434 F. Supp. 362, 366-67 (N.D. Ala. 1977) (holding that a misdemeanor disenfranchisement law was arbitrary and violated equal protection).

126. *See, e.g.*, *Jones v. Edgar*, 3 F. Supp. 2d 979, 980 (C.D. Ill. 1998) (holding that the state constitutional provision that denied voting rights to incarcerated felons did not violate the Fifteenth Amendment); *see also supra* notes 117-19 and accompanying text.

127. One student commentator suggested that "plaintiffs are most likely to succeed in challenging criminal disenfranchisement laws if they allege that these laws violate the Voting Rights Act because they disproportionately affect minorities." Shapiro, *supra* note 97, at 544.

128. *See infra* Part II.

the VRA has been shaped by earlier challenges under the Fourteenth and Fifteenth Amendments and the original version of the VRA. In *Richardson v. Ramirez*, the Supreme Court concluded that the Equal Protection Clause does not require states to advance a compelling interest before denying citizens who have been convicted of crimes the right to vote.¹²⁹ The Court relied on the language of Section 2 of the Fourteenth Amendment that appears to authorize felon disenfranchisement in reaching its conclusion that the Constitution explicitly permits states to disenfranchise felons, despite the fact that Section 1 of that same Amendment requires that states do not deny citizens equal protection of the laws.¹³⁰ The *Richardson* Court highlighted that “those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment.”¹³¹ The Court also concluded that Section 2 of the Fourteenth Amendment effectively exempts felon disenfranchisement laws from strict scrutiny and distinguishes them from other types of laws that affect voting rights.¹³²

Justice Marshall, dissenting in *Richardson*, argued that equal protection analysis applies in full force to felon disenfranchisement statutes.¹³³ The crafting of the language of Section 2 of the Fourteenth Amendment, he argued, had nothing to do with authorizing felon disenfranchisement, and had everything to do with the 39th Congress’s fear of increased congressional representation of the southern states.¹³⁴ Congress worried, Justice Marshall asserted, that this increased representation “might weaken their own political dominance.”¹³⁵ Section 2 of the Fourteenth Amendment, therefore, forced southern states to enfranchise former slaves—who were aligned with the interests of Northern congressmen—or lose representation, he argued, and this constitutional provision was a “compromise.”¹³⁶ Therefore, according to Justice Marshall, Section 2 of the Fourteenth Amendment was not intended to limit other

129. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

130. See U.S. Const. amend. XIV, § 1. *Green v. Board of Elections*, a Second Circuit decision, was the earliest opinion that determined that the text of Section 2 of the Fourteenth Amendment exempted felon disenfranchisement statutes from strict scrutiny review. *Green v. Bd. of Elections*, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968); see Chin, *supra* note 25, at 313.

131. *Richardson*, 418 U.S. at 43.

132. *Id.* at 54 (“We hold that the understanding of those who adopted the Fourteenth Amendment . . . is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.”).

133. *Id.* at 77-78 (Marshall, J., dissenting).

134. *Id.* at 73.

135. *Id.*

136. *Id.* at 73-74.

sections of the same amendment and did not exempt state felon disenfranchisement practices from strict scrutiny analysis.¹³⁷

Despite Justice Marshall's strong dissent, the majority opinion in *Richardson* continues to dominate the debate over the constitutional permissibility of felon disenfranchisement.¹³⁸ The Court's holding in *Richardson* prompted one scholar to argue that "[a]bsent a Constitutional amendment, constitutional approval of felon disenfranchisement in section 2 [of the Fourteenth Amendment] forever precludes felons from invoking equal protection under section 1, even where the criminal justice system enforces its laws in a racially discriminatory fashion."¹³⁹ Despite some lower courts' agreement that *Richardson* effectively "closed the door on the equal protection argument" being applied in felon disenfranchisement challenges, when the challenges alleged that felon disenfranchisement statutes intentionally discriminated on the basis of race, the debate took a new turn.¹⁴⁰

In *Hunter v. Underwood*, decided over a decade after *Richardson*, the Supreme Court concluded that felon disenfranchisement laws that were passed with the intent of discriminating on the basis of race violate the Equal Protection Clause.¹⁴¹ The Alabama statute challenged in the case disqualified persons convicted of crimes of moral turpitude from voting, a category of crimes that included minor misdemeanor offenses like petty larceny and omitted more serious offenses such as second-degree manslaughter.¹⁴² The Court affirmed the lower court's finding that the Alabama state legislature had deemed crimes of "moral turpitude" as those that warranted disenfranchisement because those crimes were more often committed by African-Americans than by whites.¹⁴³ The Alabama felon disenfranchisement scheme had therefore been passed with racial animus.¹⁴⁴

The *Hunter* opinion, written by Justice Rehnquist who had also written for the majority in *Richardson*, concluded, "we are confident that §2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of [the statute being challenged] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in

137. *Id.* at 74.

138. *See infra* Parts II.A.1, II.B.1.

139. Portugal, *supra* note 15, at 1325.

140. *The Law of Prisons*, *supra* note 50, at 1950 (quoting *Allen v. Ellisor*, 664 F.2d 391, 395 (4th Cir.), *vacated mem.*, 454 U.S. 807 (1981)). For examples of successful action, see *Hunter v. Underwood*, 471 U.S. 222 (1985), and *McLaughlin v. City of Canton*, 947 F. Supp. 954 (S.D. Miss. 1995).

141. *Hunter*, 471 U.S. at 233.

142. *Id.* at 226-27.

143. *Id.* at 224, 233.

144. *Id.* at 233.

Richardson v. Ramirez . . . suggests the contrary.”¹⁴⁵ The *Hunter* standard was a stringent one, however, requiring a plaintiff to prove that a felon disenfranchisement law was passed with racially discriminatory legislative intent, a notoriously difficult showing to make.¹⁴⁶

Other courts embraced the *Hunter* holding and rejected *Richardson*’s abandonment of strict scrutiny analysis of felon disenfranchisement laws. In *McLaughlin v. City of Canton*, the U.S. District Court for the Southern District of Mississippi analyzed the Mississippi legislature’s decision to disenfranchise those who had committed misdemeanor offenses under strict scrutiny rather than the lower-level standard of review set by *Richardson*.¹⁴⁷ The court concluded that the state had not provided a compelling enough justification for disenfranchising the plaintiff for pleading guilty to a misdemeanor offense, and therefore the felon disenfranchisement regime was a violation of equal protection as applied.¹⁴⁸ The *McLaughlin* court would not go so far as to hold that the felon disenfranchisement statutory regime was enacted with a racially discriminatory purpose absent a full evidentiary investigation, but left room for such an inquiry.¹⁴⁹ *McLaughlin*, however, “represents the exception rather than the rule” in its willingness to explore racial animus as a reason to strike down a felon disenfranchisement law.¹⁵⁰

Other courts have limited the impact of *Hunter*.¹⁵¹ In *Cotton v. Fordice*, the Fifth Circuit held that although Mississippi’s legislature was motivated by a desire to discriminate against African-Americans in enacting its felon disenfranchisement statute, “each amendment [to the felon disenfranchisement statute] superseded the previous provision and removed the discriminatory taint associated with the original version.”¹⁵² The court reached this conclusion despite the fact that the “core of the discriminatory law remained intact.”¹⁵³ The

145. *Id.*

146. *See id.*; *supra* note 126 and accompanying text.

147. *McLaughlin v. City of Canton*, 947 F. Supp. 954, 976 (S.D. Miss. 1995) (“Under strict scrutiny, the state must demonstrate a ‘substantial and compelling reason’ for its disenfranchisement of the plaintiff for a misdemeanor false pretenses conviction.”). The *McLaughlin* court also argued that the “the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with ‘precision.’” *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

148. *Id.* at 976-77.

149. *Id.* at 976-78. The parties had not fully briefed the issue of racially discriminatory intent motivating the felon disenfranchisement framework, so the court only briefly addressed this issue. *Id.* at 976.

150. *The Law of Prisons*, *supra* note 50, at 1952 n.110.

151. *See id.* at 1951.

152. *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998).

153. *The Law of Prisons*, *supra* note 50, at 1951.

plaintiff's challenge to the Mississippi statute therefore failed to satisfy the *Hunter* standard.

Because the Supreme Court in *Richardson* concluded that the Equal Protection Clause does not require states to advance a compelling interest before denying convicted citizens the right to vote, courts have consistently held that felon disenfranchisement laws not passed with discriminatory intent do not violate either the Due Process Clause or the Fifteenth Amendment.¹⁵⁴ Until the 1982 amendment, the VRA and the Fifteenth Amendment provided co-extensive protections. Therefore, like the Equal Protection Clause, Due Process Clause, and Fifteenth Amendment, the VRA could only be used to challenge felon disenfranchisement statutes passed with racial animus. When the Act was amended in 1982, opponents of felon disenfranchisement saw a new opportunity to challenge felon disenfranchisement laws that had a racially discriminatory impact but were not passed with a provable discriminatory intent.¹⁵⁵

2. VRA Challenges to Felon Disenfranchisement Following the 1982 Amendment

With the amendment of section 2 of the VRA in 1982 offering more expansive protections than the Fourteenth and Fifteenth Amendments under which it was authorized, the Act emerged as a possible mechanism for challenging felon disenfranchisement statutes that had only a racially discriminatory impact.¹⁵⁶ The use of the revised VRA in the felon disenfranchisement context, however, has continued to be difficult. As this Note highlights in Part II, recent VRA challenges to felon disenfranchisement statutes have not been uniformly decided and the Supreme Court has declined to address the applicability of the revised VRA to felon disenfranchisement laws. Despite the series of successful challenges to other racially discriminatory voting practices that employed the amended section 2 of the VRA, few plaintiffs have succeeded in challenges to felon disenfranchisement statutes using the Act.¹⁵⁷

The first challenge to a felon disenfranchisement law under the revised section 2 of the VRA was the Sixth Circuit case of *Wesley v.*

154. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (holding that an at-large voting system did not violate Fifteenth Amendment); *Butts v. City of New York*, 779 F.2d 141, 143 n.1 (2d Cir. 1985) (holding that a requirement of run-off election in city primary did not violate Fifteenth Amendment).

155. See generally Shapiro, *supra* note 97.

156. See generally *id.*

157. There are two typical claims raised under section 2 of the VRA: (1) vote denial occurs when the ability to vote is denied on account of race; (2) vote dilution occurs when a voting practice diminishes "the force of minority votes that were duly cast and counted." *Holder v. Hall*, 512 U.S. 874, 896 (1994) (Thomas, J., concurring in judgment). Courts have often failed to distinguish between vote dilution and vote denial claims. See Shapiro, *supra* note 97, at 555.

Collins.¹⁵⁸ The *Wesley* plaintiffs alleged that the Tennessee felon disenfranchisement statute under review diluted the African-American vote, and sought to strike it down under section 2 of the VRA.¹⁵⁹ The district court concluded in rejecting the plaintiff's claim that the statute "does not deny any citizen, *ab initio*, the equal opportunity to participate in the political process and to elect candidates of their choice. Rather, it is the commission of preascertained, proscribed acts that warrant the state to extinguish certain individuals' rights" to vote.¹⁶⁰

The Fourth Circuit also briefly applied the VRA to a felon disenfranchisement statute in *Howard v. Gilmore*, an unpublished, two-page opinion.¹⁶¹ The court held that the plaintiff, an incarcerated felon, failed to state a claim under the VRA upon which relief could be granted.¹⁶² In only a few sentences, the court concluded that because the felon disenfranchisement statute in question pre-dated the Fifteenth Amendment (meaning that it could not have been enacted in response to the Fifteenth Amendment) and because the plaintiff failed to demonstrate "any nexus between the disenfranchisement of felons and race," his claim had to fail.¹⁶³

Wesley and *Howard*, however, did not mark the end of the use of the amended section 2 of the VRA in the felon disenfranchisement context. Neither of the *Wesley* and *Howard* courts' opinions addressed the permissibility of applying section 2 to felon disenfranchisement laws and merely proceeded under the assumption that such a challenge was permitted. Recent litigation has called this assumption into question.¹⁶⁴

a. *An Overview of the Recent Litigation*

Only four cases—*Baker* and *Muntaqim* from the Second Circuit, *Johnson* from the Eleventh Circuit, and *Farrakhan* from the Ninth Circuit—have specifically explored the permissibility of using the amended section 2 of the VRA in the context of felon disenfranchisement challenges. Each challenge was brought by plaintiffs who were either incarcerated at the time, serving a term of probation or parole, or had already served a term of incarceration. All these plaintiffs asserted that their state felon disenfranchisement statutes violated the amended section 2 of the VRA because they had a racially disparate impact.

158. 605 F. Supp. 802, 804 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).

159. *Id.*

160. *Id.* at 813.

161. No. 99-2285, 2000 WL 203984, at *1 (4th Cir. Feb. 23, 2000).

162. *Id.*

163. *Id.*

164. See *infra* Part II.

The first of these cases, *Baker*, decided in 1996 by the Second Circuit, sitting en banc, reviewed the district court's dismissal of the plaintiff's claim that New York State's felon disenfranchisement law violated section 2 of the VRA.¹⁶⁵ The ten Second Circuit judges who heard the appeal were deadlocked, issuing three opinions, and ultimately affirming the district court's dismissal of the plaintiff's claim.¹⁶⁶ These *Baker* opinions represented the most comprehensive analysis of the application of the amended section 2 of the VRA in a state felon disenfranchisement statute challenge at the time.¹⁶⁷

In July 2003, the Ninth Circuit had occasion to address this same issue in *Farrakhan*.¹⁶⁸ After a decision allowing the VRA to be applied to the state felon disenfranchisement statute, the defense moved for a hearing en banc, which was denied over a vigorous dissent.¹⁶⁹ On November 8, 2004, the Supreme Court denied certiorari in the case.¹⁷⁰ Only months later, the Eleventh Circuit embraced a similar approach in *Johnson* and permitted the amended section 2 of the VRA to apply in a challenge to Florida's felon disenfranchisement statutory scheme.¹⁷¹ The Eleventh Circuit then agreed to rehear this case en banc, and vacated its previous decision.¹⁷²

The Second Circuit recently had an opportunity to re-examine its *Baker* reasoning in 2004's *Muntaqim*.¹⁷³ Unlike in *Baker*, the *Muntaqim* court was not evenly divided, coming out definitively against the use of the VRA in felon disenfranchisement statute challenges, deepening the circuit split. On October 1, 2004, the Second Circuit rejected one judge's request that the court rehear the *Muntaqim* case en banc.¹⁷⁴ When the petition for certiorari was

165. *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996).

166. *Id.* at 921. Because the bench was evenly divided, the opinions have no precedential effect, and the district court decision was affirmed.

167. *The Law of Prisons*, *supra* note 50, at 1954 n.124.

168. 338 F.3d 1009 (9th Cir. 2003).

169. *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004). Judge Kozinski, joined by six judges, dissented.

170. *Locke v. Farrakhan*, 125 S. Ct. 477 (2004) (mem.). Now that the Supreme Court has denied the petition for certiorari, the case will proceed back to the district court for trial, per the instructions of the Ninth Circuit opinion. *See Mauro, supra* note 14.

171. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1293 (11th Cir. 2003), *reh'g en banc granted, opinion vacated by* 377 F.3d 1163 (11th Cir. 2004).

172. *Johnson*, 377 F.3d at 1163. Oral arguments have been reheard in the case, but no decision has been issued. *See Greenhouse, supra* note 13. The vacated Eleventh Circuit opinion will still be examined in Part II of this Note, as the court's reasoning is helpful in understanding the current circuit split.

173. 366 F.3d 102 (2d Cir.), *cert. denied*, 125 S. Ct. 480 (2004) (mem.), *reh'g en banc granted*, No. 01-7260, 2004 WL 2998551 (2d Cir. Dec. 29, 2004).

174. *Muntaqim v. Coombe*, 385 F.3d 793, 794 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 480 (2004) (mem.), *reh'g en banc granted*, No. 01-7260, 2004 WL 2998551 (2d Cir. Dec. 29, 2004).

denied, however, the Second Circuit reconsidered and decided to rehear the case en banc without vacating its previous decision.¹⁷⁵

These four cases produced numerous opinions—plurality opinions, majority opinions, dissenting opinions, opinions accompanying decisions to grant or deny rehearing en banc, and district court opinions—which have disagreed on the viability of section 2 of the VRA challenges to felon disenfranchisement laws. Moreover, these cases are still in flux, and several may not be resolved in the immediate future. The circuit split, therefore, will continue to develop. Part I.C.2.b of this Note explains the key points of dispute between these opinions, particularly the disagreement over the importance of Section 2 of the Fourteenth Amendment, whether the clear statement rule applies to section 2 of the VRA, and whether section 2 of the VRA is congruent and proportional legislation. Part I.C.2.b also discusses the origins of these points of dispute and lays the groundwork for understanding the approaches embraced by the opinions in *Baker*, *Farrakhan*, *Johnson*, and *Muntaqim*.

b. Understanding Key Points of Dispute

Part II of this Note examines the reasoning of the opinions in these four cases—*Baker*, *Farrakhan*, *Johnson*, and *Muntaqim*—and explores the circuit split in detail. To better understand the reasoning advanced in the opinions in these four cases it is important to understand the foundations underlying their points of disagreement. Specifically, the application of the amended version of section 2 of the VRA to felon disenfranchisement laws in these four cases has raised issues of both constitutional interpretation and federalism that did not surface in the *Wesley v. Collins* or *Howard v. Gilmore* decisions.¹⁷⁶

Two central related points of dispute emerged in these four cases. First, some opinions gave great weight to the constitutional authorization of felon disenfranchisement in the Fourteenth Amendment.¹⁷⁷ The reference to felon disenfranchisement in the actual text of the Constitution, these opinions argued, affords the practice of felon disenfranchisement special, protected status.¹⁷⁸ Other opinions deferred less to the textual authorization of felon disenfranchisement in the Fourteenth Amendment, instead giving more credence to the other sections of the Fourteenth Amendment and to the Fifteenth Amendment, which they argued support the application of the VRA to felon disenfranchisement laws.¹⁷⁹

175. See *Muntaqim*, 2004 WL 2998551, at *1. Oral argument for the rehearing has been scheduled for April 7, 2005. *Id.* at *2.

176. See *supra* notes 158–63 and accompanying text.

177. See *infra* Part II.A.1.

178. See *infra* Part II.A.1.

179. See *infra* Part II.B.1.

Second, the circuits are split on whether application of the amended section 2 of the VRA to felon disenfranchisement laws exceeds congressional authority to legislate under the Civil War Amendments.¹⁸⁰ In a related area of disagreement, the opinions disputed whether the clear statement rule—the rule that Congress must make an unambiguous statement of its intent for legislation to alter the constitutional balance between the states and Congress in order for that legislation to do so—applied to these cases, and whether the legislative history of the 1982 amendment to the VRA indicates the requisite clear statement from Congress of its intent to exceed the normal balance of state and federal power.¹⁸¹ These opinions were also divided on whether the VRA’s “results test” constitutes “congruent and proportional” legislation.”¹⁸² These points of dispute will be described more fully in turn.¹⁸³

i. The Constitutional Conflict

The affirmative constitutional grant of power to states to control election law does not ordinarily exempt state voting restrictions from application of strict scrutiny equal protection analysis.¹⁸⁴ The Supreme Court rejected the idea that states can “impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions,” including the Equal Protection Clause.¹⁸⁵

180. See *infra* Parts II.A.2, II.B.2.

181. See *infra* Parts II.A.2, II.B.2.

182. See *infra* Part II.A.2.

183. The opinions also disagreed about what type of causal connection between the alleged racially discriminatory effect and the disenfranchisement of felons a plaintiff must establish to be successful in a challenge under section 2 of the VRA. Some opinions concluded that felon disenfranchisement statutes are distinct from other voting laws analyzed under the VRA because they lack a sufficient causal link to racial discrimination. See *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir. 2004); *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004) (Kozinski, J., dissenting); *Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir. 2003) (Kravitch, J., dissenting), *reh'g en banc granted, opinion vacated* by 377 F.3d 1163 (11th Cir. 2004). These opinions embraced the argument asserted in *Wesley v. Collins* that “[f]elons are not disenfranchised based on any immutable characteristic, such as race, but on their conscious decision to commit an act for which they assume the risks of detection and punishment.” 605 F. Supp. 802, 813 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986). Other opinions in these four cases argued that the fact that racial minorities are targeted for prosecution, receive more severe sentences, and are overrepresented in prisons sufficiently supports a causal connection between felon disenfranchisement and a violation of section 2 of the VRA, and that a more stringent requirement would read a higher causation standard into the VRA than the drafters intended. See *Johnson*, 353 F.3d at 1287; *Farrakhan*, 358 F.3d at 1009. The conflict over the causation standard demanded by section 2 of the VRA will undoubtedly continue to develop absent Supreme Court resolution. This area of dispute, however, will not be specifically addressed in this Note, as it is arguably not as extensively developed.

184. Deborah S. James, Note, *Voter Registration: A Restriction on the Fundamental Right to Vote*, 96 Yale L.J. 1615, 1618 n.15 (1987).

185. *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); see *Rodriguez v. Popular*

Chief Justice Rehnquist, writing for the majority in *Richardson v. Ramirez*, recognized the difficulty of applying these concepts in the felon disenfranchisement context.¹⁸⁶ While Section 2 of the Fourteenth Amendment appears to authorize state felon disenfranchisement practices, the Equal Protection Clause of the same amendment appears to limit the ability of states to impose racially discriminatory laws.¹⁸⁷ In addressing the language of Section 2 of the Fourteenth Amendment, Rehnquist gave that section effect despite the mandates of equal protection:

The legislative history bearing on the meaning of the relevant language of § 2 is scant indeed; the framers of the Amendment were primarily concerned with the effect of reduced representation upon the States, rather than with the two forms of disenfranchisement which were exempted from that consequence by the language with which we are concerned here. Nonetheless, what legislative history there is indicates that this language was intended by Congress to mean what it says.¹⁸⁸

To bolster his argument, Justice Rehnquist noted the existence of provisions in twenty-nine state constitutions that either prohibited or allowed state legislatures to prohibit those convicted for crimes to vote at the time the Fourteenth Amendment was ratified, meaning that the laws could not have been passed in response to the Fourteenth Amendment.¹⁸⁹

Justice Marshall's dissent in *Richardson* revealed an alternative approach to understanding the Fourteenth Amendment's contradictory directives. Concerned about allowing text in Section 2 of the Fourteenth Amendment to guide a determination of the constitutionality of felon disenfranchisement, in light of the Equal Protection Clause, Justice Marshall stated:

The political motivation behind § 2 was a limited one. It had little to do with the purposes of the rest of the Fourteenth Amendment. As one noted commentator explained: "It became a part of the Fourteenth Amendment largely through the accident of political exigency rather than through the relation which it bore to the other sections of the Amendment. . . ." "[I]t seems quite impossible to conclude that there was a clear and deliberate understanding in the House that § 2 was the sole source of national authority to protect voting rights, or that it expressly recognized the states' power to deny or abridge the right to vote."¹⁹⁰

Democratic Party, 457 U.S. 1, 10 (1982) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." (internal quotations omitted)).

186. *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974).

187. See *supra* notes 95-100 and accompanying text.

188. *Richardson*, 418 U.S. at 43.

189. *Id.* at 48.

190. *Id.* at 74 (Marshall, J., dissenting) (footnotes omitted) (quoting Van Alstyne,

Justice Marshall likewise did not find persuasive the fact that felon disenfranchisement statutes were common in the states at the time the Fourteenth Amendment was ratified. Concepts such as equal protection, he argued, must adapt to changing realities and are "not immutably frozen like insects trapped in Devonian amber."¹⁹¹ Rigid readings of Section 2 of the Fourteenth Amendment, therefore, are not appropriate, according to Justice Marshall.¹⁹²

Some of the opinions issued in the four cases discussed in Part II demonstrated reliance on the language of Section 2 of the Fourteenth Amendment in prohibiting the use of the VRA to evaluate felon disenfranchisement statutes.¹⁹³ These opinions advocated an originalist approach to the Constitution, and argued that the actual words of the document carry the greatest weight in understanding the overall meaning of the Constitution. They asserted that courts must recognize the importance of Section 2 of the Fourteenth Amendment in section 2 of the VRA challenges to felon disenfranchisement laws as Chief Justice Rehnquist did in *Richardson v. Ramirez*.¹⁹⁴ The mention of felon disenfranchisement in Section 2 of the Fourteenth Amendment itself, these opinions emphasized, gives the states special power to disenfranchise felons, and the practice enjoys protection when considering Congress's enforcement powers.¹⁹⁵

The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress, 1965 Sup. Ct. Rev. 33, 43-44 (1965). Prof. Alec C. Ewald notes the following:

Section 2 was enacted with a clear racial purpose: to assess a penalty should resurgent Southern whites disenfranchise black men, while permitting them to do so. . . . [One authority] writes that Section 2 was designed "indirectly to help Negroes in the South without antagonizing whites in the North," many of whom were unwilling to confront racial discrimination directly at the national level. Abolitionist Wendell Phillips denounced the entire amendment as a "fatal and total surrender" because "it implicitly acknowledged the right of states to limit voting because of race." The Supreme Court declared implicitly in *Richardson* that this "original understanding" of Section 2 is constitutionally irrelevant. For legal challenges, that is a significant obstacle.

Ewald, *supra* note 18, at 1133-34.

191. *Richardson*, 418 U.S. at 76 (Marshall, J., dissenting) (citing *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (9th Cir. 1972)).

192. *Id.* at 78. Justice Marshall noted:

[B]ecause Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by § 2 does not necessarily imply congressional approval of this disenfranchisement. By providing a special remedy for disenfranchisement of a particular class of voters in § 2, Congress did not approve all election discriminations to which the § 2 remedy was inapplicable, and such discriminations thus are not forever immunized from evolving standards of equal protection scrutiny.

Id. at 75-76.

193. *See infra* Part II.A.1.

194. *See infra* Part II.A.1.

195. *See infra* Part II.A.1.

The opinions opposing this approach argued that allowing Section 2 of the Fourteenth Amendment to prevail over the rest of the amendment would result in an inherent contradiction.¹⁹⁶ These opinions adhered instead to Justice Marshall's dissent in *Richardson v. Ramirez*.¹⁹⁷ One critic summarized this core "paradox" of the Fourteenth Amendment:

A constitutional amendment was enacted to support the voting rights of emancipated slaves. The text of this amendment refers to the possibility of disenfranchising people who have committed crimes. Because patterns of law enforcement have changed over the years, because the number of felons convicted has greatly increased and because a large percent of those convicted are black, the policy of felon disenfranchisement sharply reduces the voting rights of African Americans. Thus, a constitutional provision designed in 1868 to improve the political representation of blacks has turned out . . . to have precisely the opposite effect.¹⁹⁸

Some opinions in the four cases described in Part II of this Note agreed with this understanding and argued that the constitutional language authorizing felon disenfranchisement is not dispositive.¹⁹⁹ Rather, these opinions argued, the text of Section 2 of the Fourteenth Amendment does not permit purposeful racial discrimination to continue in any circumstance.²⁰⁰ The VRA, the opinions asserted, seeks to weed out such purposeful, invidious discrimination by use of a "results test."²⁰¹

Scholars have advanced a series of more aggressive arguments regarding the conflict within the Fourteenth Amendment.²⁰² Some

196. See *infra* Part II.B.1.

197. See *infra* Part II.B.1.

198. Fletcher, *supra* note 44, at 1901; see Parkes, *supra* note 32, at 78 n.38. Professor George P. Fletcher also asserted that the issue resolved in *Richardson*, that Section 2 of the Fourteenth Amendment authorizes and endorses the practice of felon disenfranchisement, warrants reconsideration. He emphasized that Marshall's dissent in *Richardson* highlighted the inherent problems evident in the majority's approach. Fletcher, *supra* note 44, at 1903-04. Fletcher also argued that Section 2 of the Fourteenth Amendment must be read in its historical context—that Section 2, like Section 3 and Section 4 of the Amendment, was merely a provision included to address problems presented by the Civil War. Section 2, he argued, "was not meant to provide lasting constitutional guidance." *Id.* at 1906.

199. See *infra* Part II.B.1.

200. See Portugal, *supra* note 15, at 1331 (arguing that "[t]he Fourteenth Amendment was specifically created to enable the federal government to police states for violations of the constitutional rights of racial minorities").

201. See *infra* Part II.B.1.

202. The *Richardson* decision prompted scholarly backlash. Professor Laurence H. Tribe argued that the Supreme Court's approach in the case was "fundamentally misconceived." Laurence H. Tribe, *American Constitutional Law* § 13-16, at 1094 (2nd ed. 1988). Professor David L. Shapiro argued that the *Richardson* Court's decision was a "construction sustaining states' rights that finds little warrant in the language of the amendment or its legislative history." David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293, 304 (1976).

argued that Section 2 of the Fourteenth Amendment had been completely disregarded by courts prior to the *Richardson* decision.²⁰³ Others argued that Section 2 of the Fourteenth Amendment was effectively repealed by the ratification of the Fifteenth Amendment.²⁰⁴ John Hart Ely asserted that Section 2 of the Fourteenth Amendment has been “no big deal” in practice, and that “Congress has never invoked it.”²⁰⁵ Accordingly, lending legitimacy to Rehnquist’s reading in *Richardson v. Ramirez* would give legitimacy to a practice that is out of date.²⁰⁶

203. Ewald argued that the Supreme Court’s “previous disregard for Section 2, together with subsequent Amendments and the Court’s interpretation of those Amendments, have effectively made Section 2 a dead letter.” Ewald, *supra* note 18, at 1070. He continued: “Scholars today refer to Section 2 as an obsolete and never enforced provision, and a never-exercised tool; it is a Reconstruction-era measure[] of no lasting significance, which is no longer operative and has never had a practical impact.” *Id.* at 1070-71 (internal quotations and footnotes omitted). He also assessed the impact of the *Richardson* decision: “[T]he Court plucked a phrase from a long-slumbering sentence and breathed new life into it, reading the Fourteenth Amendment in isolation from subsequent Amendments and constitutional jurisprudence. The result was a ruling which cannot be coherently reconciled with a generation of Supreme Court decisions protecting voting rights.” *Id.* at 1071-72; see Chin, *supra* note 25, at 304 (“After a century of vigorous nonenforcement, and just as the ink was drying on the Voting Rights Act of 1965, Section 2 was revived as a justification not to subject felon disenfranchisement laws to equal protection scrutiny.”).

204. See Chin, *supra* note 25. Chin argued that because Section 2 of the Fourteenth Amendment was intended by Congress to be repealed by the passage of the Fifteenth Amendment, it cannot provide textual support for felon disenfranchisement, and the courts that analyze felon disenfranchisement challenges under the VRA are wrong to rely on Section 2 of the Fourteenth Amendment as it is a “nonexistent constraint.” *Id.* at 316. He also argued that after 1870, it appeared that the Constitution had “two provisions regulating the same subject. Section 2 reduced the basis of representation for racial disenfranchisement, and the Fifteenth Amendment prohibited racial disenfranchisement.” *Id.* at 272. The Fifteenth Amendment, “Congress’s last word on African-American suffrage,” did not give an express authorization of felon disenfranchisement as Section 2 of the Fourteenth Amendment had. *Id.* at 315; see Parkes, *supra* note 32, at 78 (“Section 2 of the Fourteenth Amendment was rendered largely superfluous by the Fifteenth Amendment.”).

205. John Hart Ely, *Interclausal Immunity*, 87 Va. L. Rev. 1185, 1195 (2001).

206. John Hart Ely argued:

We know perfectly well, for example, that most of the [Fourteenth] amendment’s framers and ratifiers did not believe that they were invalidating racially segregated schools either, but it would be next to impossible today to find a judge or commentator who believes for that reason that *Brown v. Board of Education* was incorrectly decided. Not everything that was assumed to be constitutional in 1868 remains immune to the Equal Protection Clause (assuming it ever was) and Section 2 says nothing stronger on the subject of denying felons the franchise than that in 1868 it was assumed to be constitutional.

Id.

ii. State Authority and Congress's Enforcement Powers—The Balance of Power

Under the Constitution, judicial authority to determine the constitutionality of state laws is based on the concept that “powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”²⁰⁷ In the area of the Civil War Amendments, Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment define the scope of Congress's enforcement powers.²⁰⁸ “Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”²⁰⁹ Congress's enforcement powers are not without limitation.²¹⁰ Legislation under the Fourteenth and Fifteenth Amendments can only “secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited.”²¹¹

The most critical point of disagreement between the circuits in the four recent cases addressing the applicability of section 2 of the VRA to felon disenfranchisement laws is whether that application exceeds Congress's enforcement powers under Section 2 of the Fifteenth Amendment and Section 5 of the Fourteenth Amendment. Because the VRA is legislation passed pursuant to the Civil War Amendments, it must meet the standards established for enforcement power legislation.²¹²

207. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

208. The Fourteenth Amendment provides, in relevant part: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. Const. amend. XIV, § 5. The Fifteenth Amendment provides, in relevant part: “The Congress shall have power to enforce this article by appropriate legislation.” U.S. Const. amend. XV, § 2.

209. *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

210. *See Oregon v. Mitchell*, 400 U.S. 112, 128 (1970). The Rehnquist Court has handed down several decisions that severely restrict Congress's enforcement powers. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000) (concluding that Congress may not regulate noneconomic violent criminal conduct based solely on its aggregate effects on interstate commerce); *United States v. Lopez*, 514 U.S. 549 (1995) (holding the Gun-Free School Zones Act of 1990 unconstitutional). *But see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (concluding that Metropolitan Transit Authority was not entitled to Tenth Amendment immunity from the Fair Labor Standards Act).

211. *Ex parte Virginia*, 100 U.S. 339, 346 (1879).

212. *See infra* Parts II.A.2, II.B.2. The enforcement powers of Congress under the Civil War Amendments is limited, and Congress: (1) may not repeal Constitutional provisions with such legislation; (2) cannot strip states of the power of self-governance and convert the government into one of “unrestrained authority”; and (3) may only

Some of the opinions in the four cases adhered to the view that the application of the VRA to felon disenfranchisement laws exceeds Congress's enforcement powers because it upsets the delicate balance between state and federal power in the areas of criminal and election law, which are traditionally under the authority of states.²¹³ Some of these opinions concluded that allowing challenges to felon disenfranchisement statutes under the VRA to proceed will call the constitutionality of the Act into question because it would push the boundaries of congressional enforcement power too far.²¹⁴ These opinions expressed fear that an interpretation of the VRA that allows for challenging the validity of felon disenfranchisement statutes may result in the Supreme Court striking down "all but the most limited applications of Section 2 [of the VRA]."²¹⁵

Other opinions in these four cases, however, decided that application of the "results test" of the VRA to felon disenfranchisement statutes does not exceed Congress's enforcement powers under the Civil War Amendments.²¹⁶ These opinions argued that the application of the VRA to felon disenfranchisement laws is legitimate congressional action designed to ensure that states comply with the mandates of the Fourteenth and Fifteenth Amendments.²¹⁷

This dispute between the circuits becomes more complicated when one considers whether or not the clear statement rule applies to the VRA in felon disenfranchisement statute challenges.²¹⁸ *Gregory v. Ashcroft*, a leading case on the clear statement rule, concluded that the statutory rule of construction applies to both Commerce Clause legislation, as well as legislation under Section 5 of the Fourteenth Amendment.²¹⁹ In that case, the Court held that Congress may use its

exercise its enforcement powers with "appropriate legislation." Portugal, *supra* note 15, at 1331-32 (internal quotations omitted).

213. See *infra* Part II.A.2. Gabriel Chin argued that the Fifteenth Amendment, unlike the Fourteenth Amendment, "gave no deference to state authority over suffrage." Chin, *supra* note 25, at 272. He also argued that "[t]he 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." *Id.* at 308-09 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

214. See *infra* Part II.A.2.

215. *The Law of Prisons*, *supra* note 50, at 1957. That article argued that those advocating for the end of felon disenfranchisement might achieve more favorable results by focusing on legislative action and not the judicial process. *Id.* at 1957-63.

216. See *infra* Part II.B.2.

217. See *infra* Part II.B.2.

218. The clear statement rule is sometimes referred to as the plain statement rule.

219. *Gregory v. Ashcroft*, 501 U.S. 452, 467-68 (1991). *Gregory* considered the application of the federal Age Discrimination Employment Act to Missouri's mandatory retirement policy for judges. The court concluded that Congress had not made it unmistakably clear that it intended to interfere with Missouri legislators' judgments requiring the age qualifications of judges. *Id.* Some courts have identified two slightly different standards for what circumstances invoke the clear statement rule. *NLRB v. Catholic Bishop*, which reviewed the National Labor Relations Board's exercise of power, was one of the primary cases advancing the clear

delegated powers to “upset the usual constitutional balance of federal and state powers”²²⁰ only when it makes its intent to do so “unmistakably clear in the language of the statute.”²²¹

Chisom v. Roemer,²²² decided the same day as *Gregory v. Ashcroft*, did not embrace the clear statement rule. The *Chisom* majority opinion held that section 2 of the VRA applies to the election of state judges but did not seek to discern whether the clear statement rule applied to the Act, failing to even mention the rule.²²³ Only Justice Scalia, dissenting, noted the absence of the rule:

[W]e tacitly rejected a “plain statement” rule as applied to the unamended §2 in *City of Rome v. United States*, though arguably that was before the rule had developed the significance it currently has. I am content to dispense with the “plain statement” rule in the present cases—but it says something about the Court’s approach to this decision that the possibility of applying that rule never crossed its mind.²²⁴

He also conceded, “[w]hile the ‘plain statement’ rule may not be applicable, there is assuredly nothing whatever that points in the opposite direction, indicating that the ordinary meaning here should *not* be applied.”²²⁵

As the cases described in Part II of this Note reveal, there is a deep divide over whether the clear statement rule applies in a section 2 of the VRA challenge to a state felon disenfranchisement statute. Some opinions argued that *Gregory v. Ashcroft* demands that the clear

statement rule and required only that an act of Congress alter the balance of power between the federal and state governments for the rule to apply. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). *Gregory*, unlike *Catholic Bishop*, suggested that a statute must also be “ambiguous” before the clear statement rule applies. See *Muntaqim v. Coombe*, 366 F.3d 102, 126-28 (2d Cir.) (discussing the differences between these two rules), *cert. denied*, *Muntaqim v. Coombe*, 125 S. Ct. 480 (2004) (mem.), *reh’g en banc granted*, *Muntaqim v. Coombe*, No. 01-7260, 2004 WL 2998551 (2d Cir. Dec. 29, 2004).

220. *Gregory*, 501 U.S. at 460.

221. *Id.* (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989)); see Calvin R. Massey, *Etiquette Tips: Some Implications of “Process Federalism,”* 18 Harv. J.L. & Pub. Pol’y 175, 192 (1994) (noting that the clear statement rule is derived from the “requirement imposed upon Congress when it seeks to abrogate state immunity from suit under the Eleventh Amendment, or when Congress assertedly pre-empts the historic powers of the States, or when Congress intends to enforce the guarantees of the Fourteenth Amendment upon states” (internal quotations and footnotes omitted)).

222. 501 U.S. 380 (1991).

223. *Id.* at 404. *Chisom* addressed the same provision of the VRA under review in the four felon disenfranchisement statute challenges described in detail in Part II of this Note. See Nickolai G. Levin, *Constitutional Statutory Synthesis*, 54 Ala. L. Rev. 1281, 1365 (2003) (arguing that “[i]f state autonomy of process interests are important, they should be acknowledged uniformly, even if they are occasionally trumped by national policies such as the VRA” (internal quotations omitted)).

224. *Chisom*, 501 U.S. at 412 (Scalia, J., dissenting) (citations omitted).

225. *Id.*

statement rule must be invoked in such cases.²²⁶ These opinions also argued that because the clear statement rule applies, the court must examine the congressional intent behind the VRA.²²⁷ These opinions concluded that the legislative history of the VRA, including the record for the 1982 amendment, does not indicate a clear intent from Congress that the Act should apply to felon disenfranchisement statutes, and therefore it cannot apply.²²⁸

Other opinions in the four cases argued that the clear statement rule does not apply to section 2 of the VRA because there is not sufficient ambiguity in the Act's language to trigger it, and because *Chisom v. Roemer* did not employ it.²²⁹ According to these opinions, the clear statement rule only applies in certain cases and to certain types of legislation.²³⁰ The *Chisom* majority's silence on the clear statement rule was dispositive in these opinions and supported the idea that the clear statement rule does *not* apply to legislation passed pursuant to the Fourteenth Amendment.²³¹ Those opinions adhering to the opposite view asserted that the clear statement rule was either overlooked or merely forgotten by the Justices deciding *Chisom*.²³² Opinions that did not embrace the clear statement rule also consistently argued that the Fourteenth and Fifteenth Amendments already altered the state/federal balance of power, and the VRA's application to felon disenfranchisement statutes does nothing to further alter this balance.²³³

226. See *infra* Part II.A.2.a.

227. See *infra* Part II.B.2.a.

228. See *infra* Part II.A.2.a.

229. See Portugal, *supra* note 15, at 1331 ("Given the constitutional foundation upon which the Act relies, I suggest the 'plain statement' rule is redundant as applied to the Voting Rights Act."); *infra* notes 355-66 and accompanying text. For an alternative argument, see Michael P. Lee, Comment, *How Clear is "Clear"? A Lenient Interpretation of the Gregory v. Ashcroft Clear Statement Rule*, 65 U. Chi. L. Rev. 255 (1998), which argues for a "lenient" clear statement rule, and notes that while the interests protected by the *Gregory* rule are important, they "must be weighed against the harm that an overly stringent rule may cause." *Id.* at 258. This proposed approach, he argued "provides sufficient protection for state sovereignty while providing Congress the power to utilize its limited resources efficiently." *Id.*

230. See *infra* notes 355-77 and accompanying text.

231. See *id.*

232. See *id.*

233. See *infra* Part II.B.2. One student commentator argued that the clear statement rule should not be a consideration when interpreting the VRA's reach, because

the Supreme Court consistently has recognized that Congress has the power to enforce the Fourteenth and Fifteenth Amendments through the Voting Rights Act, despite the burdens those measures placed on the states. . . . The Voting Rights Act is a byproduct of the Civil War Amendments, which inevitably altered the federal/state balance of power as contemplated by the original Constitution. Additionally, since the Civil War there have been six Constitutional amendments specifically designed to increase participation in the vote.

Portugal, *supra* note 15, at 1331 (internal quotations omitted).

Another issue that arose in these four cases, in a somewhat more limited manner, was whether the VRA is adequately “congruent” and “proportional” legislation under the Civil Rights Amendments.²³⁴ In *City of Boerne v. Flores*, the Supreme Court held that Congress’s enforcement powers under these Amendments could be exercised only when doing so would be congruent and proportional.²³⁵ In noting that Congress’s enforcement powers are not unlimited, the Court in *City of Boerne* concluded that “[t]he design of the [Fourteenth] Amendment and the text of § 5 [of the Fourteenth Amendment] are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States. . . . Congress does not enforce a constitutional right by changing what the right is.”²³⁶ The Court noted that while Congress must have broad power to remedy a constitutional violation, there still “must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²³⁷ Additionally, the Court demanded that Congress identify a pattern and history of discrimination by the states in order for legislation to fit the congruence and proportionality requirement.²³⁸ Because the VRA has met these requirements, the Supreme Court has consistently held that it is congruent and proportional legislation.²³⁹

Some opinions described in Part II were split on whether application of the VRA to felon disenfranchisement laws would violate the congruence and proportionality requirement.²⁴⁰ Some argued that an interpretation of section 2 of the VRA that allows it “to prohibit felon disenfranchisement might sweep too broadly to

234. See *infra* Part II.A.2.b.

235. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

236. *Id.* at 519.

237. *Id.* at 520.

238. See *id.* at 531-32. The Supreme Court has specifically distinguished the VRA from other federal legislation as being congruent and proportional, in part, because it has the requisite congressional record of racial discrimination in voting practices. See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368-70, 373 (2001) (distinguishing the VRA from the Americans with Disabilities Act and noting the failure to demonstrate that Congress had a record of a pattern of employment discrimination by the states against the disabled); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 640 (1999) (distinguishing the VRA from the Patent Remedy Act); *City of Boerne*, 521 U.S. at 530-31 (distinguishing the VRA from the Religious Freedom Restoration Act (“RFRA”) and holding that the RFRA was not congruent and proportional in part because the legislative record did not adequately demonstrate a pattern of unconstitutional conduct).

239. See, e.g., *Mixon v. Ohio*, 193 F.3d 389, 398 (6th Cir. 1999) (concluding that the VRA is a valid exercise of congressional authority); *United States v. Marengo County Comm’n*, 731 F.2d 1546, 1550 (11th Cir. 1984) (holding that the amended section 2 of the VRA is constitutional); *Jones v. City of Lubbock*, 727 F.2d 364, 372-75 (5th Cir. 1984) (holding that section 2 of the VRA’s “results” test is appropriate legislation under the Fourteenth and Fifteenth Amendments).

240. See *infra* Part II.A.2.b.

satisfy the *Boerne* congruence and proportionality test.”²⁴¹ A related criticism was that allowing section 2 of the VRA to prevail in the felon disenfranchisement context would result in the overturning of many existing state laws, rendering it disproportionate.²⁴² Other opinions took an alternative approach and argued that the VRA is clearly congruent and proportional legislation and that no court has ever held otherwise.²⁴³

II. CHALLENGING FELON DISENFRANCHISEMENT UNDER THE VRA: DISPUTING THE IMPORTANCE OF SECTION 2 OF THE FOURTEENTH AMENDMENT AND THE APPROPRIATE BALANCE OF STATE AND FEDERAL POWER

Since the VRA was amended in 1982, only four federal circuit court cases have directly addressed whether section 2 of the VRA should apply to felon disenfranchisement statutes. The outcomes of these cases have serious implications. If such challenges are permitted to proceed and plaintiffs can successfully prove that these laws result in a racially disparate impact, the states where felon disenfranchisement has the most racially disparate effects could see their statutes declared impermissible.²⁴⁴

To date, however, the federal circuit courts have not uniformly held that section 2 of the VRA can apply to felon disenfranchisement statutes. Instead, a circuit split has developed, with the Second Circuit on one side of the debate, and the Ninth Circuit on the other. It is unclear which side of the debate the Eleventh Circuit will ultimately join, as its previous decision in *Johnson*²⁴⁵ to permit section 2 of the VRA to be applied to Florida’s felon disenfranchisement law, was recently vacated and granted rehearing en banc.²⁴⁶ Similarly, because the Second Circuit has decided to rehear *Muntaqim*, its position in the circuit split is also questionable.²⁴⁷

As illustrated in Part I of this Note, the points of disagreement between the circuits are serious and numerous and may not be resolved without Supreme Court action. This part describes the disputed issues that currently divide the circuits in greater detail and

241. *The Law of Prisons*, *supra* note 50, at 1956.

242. *See id.* at 1954.

243. *See infra* Part II.B.2.

244. It is not yet clear what statistical evidentiary showing would be required to prove a racially disparate impact. *See* *Muntaqim v. Coombe*, No. 01-7260, 2004 WL 2998551, at *1 (2d Cir. Dec. 29, 2004) (requesting the parties brief the issue).

245. *Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir. 2003), *reh’g en banc granted*, *opinion vacated* by 377 F.3d 1163 (11th Cir. 2004).

246. This Note will explore the reasoning in the vacated Eleventh Circuit opinion in *Johnson v. Governor of Florida*. While this opinion no longer has precedential value, its reasoning is useful in framing the current debate between the circuits. *See supra* note 172.

247. *Muntaqim*, 2004 WL 2998551, at *1.

highlight the reasoning employed in *Baker*, *Muntaqim*, *Johnson*, and *Farrakhan*. Part II.A explains the analysis advanced by the opinions that conclude that section 2 of the VRA cannot be applied to felon disenfranchisement laws. These opinions argue that applying section 2 of the VRA to felon disenfranchisement statutes would contradict the language of Section 2 of the Fourteenth Amendment and would upset the balance of state and federal power. Part II.B explains the rationale advanced by the opinions that determine that section 2 of the VRA can be applied to felon disenfranchisement laws. These opinions maintain that racially discriminatory voting laws cannot be sustained, regardless of the language of Section 2 of the Fourteenth Amendment, and that application of section 2 of the VRA to felon disenfranchisement statutes does not upset the balance of state and federal power.

A. Opinions Rejecting the Application of Section 2 of the VRA in Felon Disenfranchisement Statute Challenges

The Second Circuit, in the prevailing *Baker* opinion²⁴⁸ and in the *Muntaqim* opinion,²⁴⁹ concluded that section 2 of the VRA cannot be applied in challenges to state felon disenfranchisement statutes.²⁵⁰

248. *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996). The action in *Baker* was brought by African-American and Hispanic incarcerated felons, who alleged that New York's felon disenfranchisement provision disproportionately deprived African-Americans and Hispanics of the right to vote, resulting in a violation of section 2 of the VRA. *Id.* at 923. The plaintiffs alleged, in part, that African-American and Hispanics comprise approximately 22% of the New York state population, but comprise 82% of the New York State prison population, and that a state Chief Judge-commissioned study on the presence and effect of racism in the state court system revealed that there was a racial disparity in conviction rates and sentence types. *Id.* The district court opinion concluded that since the plaintiffs lost the right to vote because of their decision to commit a crime, and not their race, the disproportionate racial impact of felon disenfranchisement did not itself establish a violation of section 2 of the VRA. "absent other reasons to find discrimination." *Baker v. Cuomo*, 842 F. Supp. 718, 722 (S.D.N.Y. 1993), *vacated by reh'g en banc sub nom. Baker*, 85 F.3d at 919. Because the Second Circuit was deadlocked in its decision, the district court's decision to dismiss the plaintiffs' complaint was affirmed. The first opinion in the Second Circuit's decision, authored by Judge Mahoney, which agreed with the district court's dismissal, is referred to as the "prevailing" opinion in this Note. *Baker*, 85 F.3d at 921.

249. In *Muntaqim*, a convicted felon serving a life sentence in a New York state prison brought an action against the New York State Department of Correctional Services alleging that New York's felon disenfranchisement statute violates section 2 of the VRA. *Muntaqim v. Coombe*, 366 F.3d 102, 104-05 (2d Cir.), *cert. denied*, 125 S. Ct. 480 (2004) (mem.), *reh'g en banc granted*, 2004 WL 2998551, at *1.

250. Both *Baker* and *Muntaqim* challenged New York's felon disenfranchisement statute, § 5-106(2)-(5), which provides, in part:

No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.

N.Y. Elec. Law § 5-106(2) (McKinney 2005); *see also id.* § 5-106(3)-(5).

Both the prevailing *Baker* and *Muntaqim* opinions reasoned that allowing such challenges to proceed would cause a serious constitutional conflict between the different sections of the Fourteenth Amendment, interfere with the balance of state and federal power in the area of voting law, allow Congress to exceed its enforcement authority under the Civil War Amendments, and run afoul of both the clear statement rule and the legislative intent accompanying the VRA's enactment in 1965 and amendment in 1982. The dissenting opinion in the decision to deny a rehearing en banc in the Ninth Circuit's *Farrakhan* opinion,²⁵¹ as well as the dissenting opinion in *Johnson*,²⁵² also advanced these arguments.

1. The Equal Protection Clause Cannot Trump Section 2 of the Fourteenth Amendment

The prevailing opinion in the Second Circuit's *Baker* opinion opposed the use of the VRA in felon disenfranchisement statute challenges, in part, because of the potency of the constitutional authorization of felon disenfranchisement in Section 2 of the Fourteenth Amendment.²⁵³ *Richardson v. Ramirez*,²⁵⁴ the opinion asserted, properly advanced the idea that the drafters of the Fourteenth Amendment could not have intended to authorize both felon disenfranchisement and simultaneously allow for its prohibition by the Equal Protection Clause within the same Amendment.²⁵⁵

251. The plaintiffs in *Farrakhan v. Washington* were disenfranchised felons who sought to strike down Washington's felon disenfranchisement statutory scheme. *Farrakhan v. Washington*, 338 F.3d 1009, 1011 (9th Cir. 2003). Article VI, Section 3 of the Washington State Constitution provides that "[a]ll persons convicted of infamous crime . . . are excluded from the elective franchise." Wash. Const. art. VI, § 3; see Wash. Rev. Code Ann. § 29.01.080 (West 2004) (recodified as Wash. Rev. Code Ann. § 29A.04.079 (West 2005) (defining infamous crime)). The district court opinion made a factual determination that the state's felon disenfranchisement scheme disproportionately affected the voting rights of African-Americans, Native Americans, and Hispanics. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1311-13 (E.D. Wash. 1997), *aff'd in part, rev'd in part, remanded in part sub nom. Farrakhan*, 338 F.3d at 1009.

252. *Johnson v. Governor of Florida* (originally *Johnson v. Bush*) was brought against the Florida Clemency Board by a class of ex-felons in Florida who had completed all terms of their incarceration, probation, and parole, challenging the Florida constitutional provision that denies them the right to vote. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1293 (11th Cir. 2003), *reh'g en banc granted, opinion vacated by* 377 F.3d 1163 (11th Cir. 2004). Florida is one of the few states that permanently disenfranchises felons unless they receive clemency. See Fla. Const. art. VI, § 4.

253. *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996). The opinion opposing the application of section 2 of the VRA in *Baker* originated many of the arguments embraced in *Muntaqim*, as well as the dissent in *Johnson* and the dissent in the *Farrakhan* court's decision not to rehear the case en banc.

254. 418 U.S. 24 (1974).

255. *Baker*, 85 F.3d at 928-29.

In emphasizing this argument, the prevailing opinion in *Baker* first noted that twenty-nine of the thirty-six states that ratified the Fourteenth Amendment had existing provisions in their constitutions that allowed for prohibiting felon voting at the time the Fourteenth Amendment was ratified.²⁵⁶ The opinion argued that this fact could only indicate that the limitations on states imposed by the Civil War Amendments were not meant to apply to the state practice of felon disenfranchisement.²⁵⁷ The opinion distinguished felon disenfranchisement from other voting restrictions enacted with racial animus for this reason. The House record accompanying the 1965 version of the VRA stated, the opinion noted, "apparently no Southern State required proof of literacy, understanding of constitutional provisions or of the obligations of citizenship, or good moral character, as prerequisites to voting. However, . . . these tests and devices were soon to appear in most of the States with large Negro populations."²⁵⁸ Unlike felon disenfranchisement, these other racially discriminatory voting restrictions did not exist prior to the ratification of the Civil War Amendments and are therefore more clearly the type of state laws intended to be covered by the protections of the Fourteenth and Fifteenth Amendments.

The prevailing *Baker* opinion admitted that the Fourteenth and Fifteenth Amendments, along with the VRA, infringe in a significant manner upon state power when racial discrimination motivating a law's enactment is "apparent," but argued that felon disenfranchisement statutes are distinguished because they have a "long history and have been accorded explicit constitutional recognition."²⁵⁹ The opinion argued that "an *explicit* constitutional balance has been struck by the mandate in § 2 of the Fourteenth Amendment."²⁶⁰ States, the opinion also emphasized, have the "primary responsibility"²⁶¹ for regulating federal, state, and local elections, as well as "for defining and enforcing"²⁶² criminal law, and this must be respected when states implement felon disenfranchisement schemes.

The Second Circuit's opinion in *Muntaqim* also denied that the VRA should apply in a challenge to New York's felon disenfranchisement statute, in part, because of the explicit constitutional authorization of felon disenfranchisement in Section 2 of the Fourteenth Amendment.²⁶³ Additionally, the opinion argued,

256. *Id.* at 928.

257. *Id.*

258. *Id.* at 928-29 (citing H.R. Rep. No. 439, at 11-12 (June 1, 1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2443).

259. *Id.* at 931.

260. *Id.*

261. *Id.*

262. *Id.* (internal quotations omitted).

263. *Muntaqim v. Coombe*, 366 F.3d 102, 122 (2d Cir.), cert. denied, 125 S. Ct. 480

“Congress did not wholly abandon its focus on purposeful discrimination” with the 1982 amendment to the VRA.²⁶⁴ While noting that the Fourteenth Amendment does not permit state felon disenfranchisement laws to intentionally disenfranchise African-Americans, the *Muntaqim* opinion nonetheless determined that it would be “anomalous” for those that ratified the Fourteenth Amendment to specifically permit felon disenfranchisement without demanding a showing of discriminatory intent before allowing such laws to be struck down.²⁶⁵

The *Muntaqim* opinion also gave credence to the “longstanding practice” of felon disenfranchisement as a method of punishment for committing a crime.²⁶⁶ The number of states with such statutes on the books before the Fourteenth and Fifteenth Amendments were ratified, the opinion emphasized, indicates that the statutes were not enacted in response to the Fourteenth and Fifteenth Amendments, but rather to punish criminals.²⁶⁷ The opinion made clear, however, that it was not calling the constitutional validity of the VRA’s “results test” into question.²⁶⁸ Rather, because the practice of felon disenfranchisement existed before the Civil War, and because the practice is sanctioned in the text of the Fourteenth Amendment itself, the VRA is not intended to apply to these particular types of state laws.²⁶⁹ Application of the VRA to other laws restricting individual voting rights, however, was permissible in the eyes of the *Muntaqim* opinion.²⁷⁰

The dissenting opinion in the decision to deny a rehearing en banc in the Ninth Circuit’s *Farrakhan* opinion articulated perhaps the most ominous warning regarding application of the VRA in felon disenfranchisement statute challenges. “This is a dark day for the Voting Rights Act,” the dissenting opinion began.²⁷¹ “In adopting a constitutionally questionable interpretation of the Act, the panel lays the groundwork for the dismantling of the most important piece of civil rights legislation since Reconstruction.”²⁷² The majority panel opinion, the dissent argued, should have respected the language of Section 2 of the Fourteenth Amendment and permitted the entire court to reconsider the case en banc.²⁷³ The dissent further claimed

(2004) (mem.), *reh’g en banc granted*, No. 01-7260, 2004 WL 2998551 (2d Cir. Dec. 29, 2004).

264. *Id.* at 117.

265. *Id.* at 122.

266. *Id.* at 123.

267. *Id.*

268. *Id.* at 121 (citations omitted).

269. *Id.* at 123.

270. *Id.* at 129.

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

272. *Id.* at 1116-17.

273. *Id.* at 1117.

that because felon disenfranchisement laws are endorsed by Section 2 of the Fourteenth Amendment, they are “presumptively constitutional.”²⁷⁴ Therefore, the dissenting opinion concluded, only those felon disenfranchisement laws enacted with racial animus can be reached by the VRA, and no others.²⁷⁵

The forceful dissent in the Eleventh Circuit’s *Johnson* opinion also noted that the text of Section 2 of the Fourteenth Amendment exempts felon disenfranchisement statutes from VRA review.²⁷⁶ The Supreme Court in *Richardson v. Ramirez*, the opinion argued, had already “unambiguously” determined that felon disenfranchisement is not an equal protection violation without a showing of racially discriminatory intent.²⁷⁷ The dissent worried specifically that allowing the VRA to be used to strike down a state law that is not unconstitutional “creates a constitutional problem because such an interpretation allows a congressional statute to trump the text of the Constitution.”²⁷⁸

Ultimately, the prevailing opinion in *Baker*, the opinion in *Muntaqim*, the dissenting opinion in *Johnson*, and the dissenting opinion in the decision to deny rehearing en banc in *Farrakhan* each relied on the holding of the Supreme Court in *Richardson v. Ramirez* that Section 2 of the Fourteenth Amendment protects the practice of felon disenfranchisement from strict equal protection analysis. This textual authorization is bolstered, these opinions agreed, by the existence of felon disenfranchisement statutes prior to ratification of the Civil War Amendments, which indicates that they could not have been passed with racial animus, a prerequisite to permitting application of the amended section 2 of the VRA.

2. The Balance of State and Federal Power Cannot Tip in Favor of Congress

These same opinions also agreed that the VRA’s scope is no wider than that of the Fourteenth and Fifteenth Amendments under which it was passed. Despite the Act’s amendment in 1982 to implement a “results test,” these opinions insisted that a showing of racially discriminatory intent is still demanded. Without confining the VRA to the breadth of the Civil War Amendments, its application could exceed Congress’s enforcement powers and infringe on states’ rights.

The prevailing *Baker* opinion concluded that the application of section 2 of the VRA to New York’s felon disenfranchisement law

274. *Id.* at 1121.

275. *Id.*

276. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1308 (11th Cir. 2003) (Kravitch, J., dissenting), *reh’g en banc granted*, *opinion vacated* by 377 F.3d 1163 (11th Cir. 2004).

277. *Id.*

278. *Id.* at 1315.

“would raise serious constitutional questions regarding the scope of Congress’ authority to enforce the Fourteenth and Fifteenth Amendments . . . and would alter the usual constitutional balance between the States and the Federal Government.”²⁷⁹ The opinion suggested that the “results test” itself may be an invalid exercise of Congress’s powers:

[I]t is unclear whether, as a *general rule*, the “results” methodology of § 1973 is constitutionally valid. As our discussion of the relevant case law makes clear, the Supreme Court has never authorized an uncircumscribed application of the “results” methodology of § 1973 in furtherance of the enforcement of the Fourteenth and Fifteenth Amendments, and it is the uncertainty concerning the outer limits of Congress’ enforcement powers that raises the serious constitutional questions at issue in this case.²⁸⁰

Such a disruption of federalism principles is intolerable, the opinion concluded.²⁸¹

The Second Circuit’s opinion in *Muntaqim* relied heavily on the prevailing opinion in *Baker* to guide its discussion of the scope of congressional enforcement power under the Fourteenth and Fifteenth Amendments.²⁸² The *Muntaqim* opinion, however, went a step further, noting “our task here is not simply to choose the opinion in *Baker* that we consider most persuasive,”²⁸³ because “over the last seven years, the Supreme Court has substantially clarified the scope of Congress’ enforcement power under the Reconstruction Amendments,” making it the duty of the court to reassess the issue.²⁸⁴ In the years since *Baker*, the opinion concluded, the Supreme Court has “introduced an entirely new framework” for analyzing Congress’s enforcement power under Section 5 of the Fourteenth Amendment.²⁸⁵

279. *Baker v. Pataki*, 85 F.3d 919, 922 (2d Cir. 1996) (internal quotations and citation omitted).

280. *Id.* at 928 n.12.

281. *See id.* at 931.

282. *Muntaqim v. Coombe*, 366 F.3d 102, 119 (2d Cir.), *cert. denied*, 125 S. Ct. 480 (2004) (mem.), *reh’g en banc granted*, No. 01-7260, 2004 WL 2998551 (2d Cir. Dec. 29, 2004).

283. *Id.*

284. *Id.*

285. *Id.* The opinion briefly reviewed the relevant case law that had developed in the eight years since *Baker*, highlighting two cases that particularly revealed that the balance of federal/state power had been “significantly refined” since *Baker*. *Id.* at 120. In *City of Boerne v. Flores* the Supreme Court determined that Congress’s enforcement powers may be exercised only in order to respond to a pattern of constitutional violations with a congruent and proportional remedy. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (analyzing the RFRA); *see infra* Part II.A.2.b (discussing in more depth the congruence and proportionality requirement). In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court determined that Congress cannot exercise its enforcement powers under the Fourteenth Amendment unless it has identified a pattern and history of violations of judicially protected rights by the state.

This new framework, the *Muntaqim* opinion argued, does not support the use of the revised version of section 2 of the VRA in felon disenfranchisement statute challenges.²⁸⁶ Rather, the opinion argued, it is now clear that this “would infringe upon the states’ well-established discretion to deprive felons of the right to vote” and impermissibly alter the balance of power between Congress and the states.²⁸⁷ Additionally, because states have primary authority for criminal law and election law (particularly state election law), the issue of the state/federal balance of power becomes the central inquiry.²⁸⁸ If a state uses the disenfranchisement of felons as an aspect of punishment, then the application of the VRA to such a statute would upset state/federal power relating to jurisdiction over criminal law.²⁸⁹

The dissenting opinion in the decision to deny a rehearing en banc in the Ninth Circuit’s *Farrakhan* case also determined that application of the VRA to Washington’s felon disenfranchisement law exceeded congressional authority.²⁹⁰ The opinion concluded that such an abrogation of state authority also unnecessarily called the Act’s constitutionality directly into question.²⁹¹ Relying on the prevailing opinion in *Baker*, the opinion concluded that there is only a small group of felon disenfranchisement laws, “those enacted with an invidious, racially discriminatory purpose,” that are permissibly struck down by congressional action under the Fourteenth and Fifteenth Amendments.²⁹² Because Washington’s felon disenfranchisement laws did not demonstrate the requisite history of racial discrimination underlying their enactment for the express purpose of undermining the Civil War Amendments, they are not under the VRA’s purview.²⁹³

The dissent also argued that the majority panel failed to address the fact that the VRA was “never intended” to apply to felon disenfranchisement statutes.²⁹⁴ Therefore, the dissent concluded, the

286. *Muntaqim*, 366 F.3d at 104. Recognizing that the “results test” of the VRA requires a plaintiff to prove only that he was subject to intentional discrimination at sentencing and not that the felon disenfranchisement statute was enacted with an intentionally discriminatory purpose does little, the *Muntaqim* opinion argued, to address whether the results test itself adheres to the correct balance of state and federal power. *Id.*

287. *Id.*

288. *Id.* at 122.

289. *Id.*

290. *Farrakhan v. Washington*, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting).

291. *Id.*

292. *Id.*

293. *Id.* at 1122. This argument was bolstered by the fact that the felon disenfranchisement law was enacted *before* the Civil War Amendments were ratified. *Id.*

294. *Id.* at 1120. The legislative record for the Act’s passage and amendment in 1982 both support the conclusion that the Act was not intended to reach this type of case, the dissent reasoned. *See id.* at 1120-21. This dissent also recognized that in 1993

panel's decision to deny rehearing in the case will have "far-reaching" consequences and will result in an array of voting regulations being declared invalid which are beyond the permissible reach of congressional power.²⁹⁵ "The permutations," the dissenting opinion argued, "are endless."²⁹⁶ All state decisions regarding voting practices, the opinion predicted, will be "vulnerable, no matter how unrelated to race" if the VRA is applied in felon disenfranchisement statute challenges.²⁹⁷

a. *The Clear Statement Rule Applies and Congressional Intent Must Be Examined*

In light of concerns about whether the amended version of section 2 of the VRA as applied to felon disenfranchisement statutes is within the scope of Congress's enforcement powers under the Civil War Amendments, the prevailing opinion in *Baker* stressed the need to invoke the clear statement rule.²⁹⁸ Summoning first the rule set forth in *NLRB v. Catholic Bishop of Chicago*, that the "affirmative intention of the Congress [be] clearly expressed" before a court should uphold a federal intrusion into an area of traditional state control, the opinion argued that VRA challenges to felon disenfranchisement statutes require application of this rule.²⁹⁹ The opinion also argued that the rule specifically "requires a clear statement by Congress in support of the statutory interpretation posing the constitutional question, a statement manifestly lacking in this case."³⁰⁰ The opinion relied heavily on the fact that it is not "unmistakably clear that, in amending § 1973 in 1982 to incorporate the 'results' test, Congress intended that the test be applicable to felon disenfranchisement statutes."³⁰¹

Congress enacted the National Voter Registration Act, which included felony convictions as one justification for denying an individual's voter registration. *Id.* at 1121 (citing National Voter Registration Act, Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified at 42 U.S.C. 1973gg (2000))). That same legislation, the opinion argued, instructed federal prosecutors to aid states in the practice of disenfranchising felons, making it "crystal clear that felon disenfranchisement wasn't one of the practices about which Congress was concerned." *Id.*

295. *Id.* at 1125.

296. *Id.* at 1126. According to this dissenting opinion, only requiring statistics showing a racially disparate impact to demonstrate a section 2 of the VRA violation will result in a variety of voting laws being struck down on the basis of socioeconomic status, computer ownership, and internet access. *Id.* If a plaintiff could show that having Election Day on a Tuesday somehow resulted in fewer minorities voting, then the states might be required to move Election Day, the opinion argued. *Id.*

297. *Id.*

298. *Baker v. Pataki*, 85 F.3d 919, 922 (2d Cir. 1996).

299. *Id.* at 930 (quoting *NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979)); see *supra* note 219 (discussing the two formulations of the clear statement rule).

300. *Baker*, 85 F.3d at 930.

301. *Id.* at 922.

The prevailing *Baker* opinion also relied on the Supreme Court's decision in *Gregory v. Ashcroft*³⁰² to support its argument that the clear statement rule applies, although that case required the application of the rule to age discrimination legislation enacted pursuant to the Commerce Clause and did not address the VRA specifically.³⁰³ The opinion highlighted the *Gregory* opinion's statement that: "[W]e will not attribute to Congress an intent to intrude on state governmental functions *regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment.*"³⁰⁴ Justices White and Stevens concluded in separate opinions in *Gregory* that "[the] plain statement rule will *apply with full force* to legislation enacted to enforce the Fourteenth Amendment."³⁰⁵ Therefore, the prevailing opinion in *Baker* argued, the *Gregory* rule applies to the VRA, since it is legislation Congress enacted under its Fourteenth Amendment enforcement powers.³⁰⁶

The prevailing *Baker* opinion did acknowledge, however, that *Chisom v. Roemer*, a case involving the VRA and decided the same day as *Gregory*, did not incorporate the clear statement rule.³⁰⁷ The prevailing *Baker* opinion explained this omission with Justice Scalia's statement that it was "curious[]" that the Court applied the plain statement rule in *Gregory* but not in *Chisom*," and agreed with Scalia's assumption that nothing in the *Chisom* decision indicated that the plain statement rule does not apply.³⁰⁸

The Second Circuit's opinion in *Muntaqim* also adopted the "super-strong clear statement rule" advanced in *Gregory*.³⁰⁹ The opinion concluded that the court would only reach the constitutional question of whether Congress has the power to strike down felon disenfranchisement statutes in situations that are beyond the power directly granted in the Fourteenth and Fifteenth Amendments if

302. 501 U.S. 452, 466-67 (1991).

303. See *Baker*, 85 F.3d at 931.

304. *Id.* at 931-32 (quoting *Gregory*, 501 U.S. at 470).

305. *Id.* at 932 (quoting *Gregory*, 501 U.S. at 479 (White, J., concurring in part, dissenting in part, and concurring in the judgment)).

306. *Id.* at 931-32.

307. *Id.* at 932.

308. *Id.* at 932 n.13 (quoting *Chisom v. Roemer*, 501 U.S. 380, 411-12 (1991) (Scalia, J., dissenting)).

309. *Muntaqim v. Coombe*, 366 F.3d 102, 115 (2d Cir.) (citing William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 82 (1994)), *cert. denied*, 125 S. Ct. 480 (2004) (mem.), *reh'g en banc granted*, No. 01-7260, 2004 WL 2998551 (2d Cir. Dec. 29, 2004). This rule, the court noted, has particular effect in areas of law that were "traditionally sensitive . . . such as legislation affecting the federal balance." *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)). This rule is also "closely related, but not identical, to the general constitutional avoidance canon," which requires the court to avoid addressing rules that create constitutional conflict unless the proposed construction is clearly contrary to the legislative intent of Congress. *Id.* at 115 n.15.

Congress made a clear statement of its intent to do so.³¹⁰ “Because we find that Congress did not make an unmistakably clear statement that § 1973 applies to state felon disenfranchisement statutes, we will not apply § 1973 to § 5-106,” the *Muntauqim* opinion concluded.³¹¹

The omission of the clear statement rule in *Chisom* was similarly unpersuasive to the *Muntauqim* court.³¹² The New York felon disenfranchisement provision under review in *Muntauqim*, the opinion noted, unlike the voting practice reviewed in *Chisom*, enjoys special authorization in Section 2 of the Fourteenth Amendment, and therefore is reviewed with a lower level of scrutiny and demands application of the clear statement rule.³¹³

The emphatic dissenting opinion in *Johnson* took the same approach as the prevailing opinions in *Baker* and *Muntauqim*, fundamentally disagreeing with the majority’s assertion that the VRA can be applied in any form to felon disenfranchisement statutes.³¹⁴ The dissent agreed that allowing the VRA to be applied to felon disenfranchisement statutes violates the “long-standing rule of statutory interpretation that federal courts should not construe a statute to create a constitutional question unless there is a clear statement from Congress endorsing this understanding.”³¹⁵

When the scope of a congressional act presents “grave constitutional questions,” the dissenting *Johnson* opinion argued, the court must determine whether the interpretation of the questioned congressional action is in line with congressional intent.³¹⁶ Instead of Congress sanctioning the application of the VRA to felon disenfranchisement statutes, the opinion continued, the “legislative history indicates just the opposite—that Congress did not intend the Voting Rights Act to apply to felon disenfranchisement provisions.”³¹⁷

310. *Id.* at 116.

311. *Id.* at 129. The opinion determined that under either the *Catholic Bishop* or the *Gregory* formulation of the clear statement rule, the case failed, because the legislative record revealed “ample evidence” that Congress did not intend for the revised version of section 2 of the VRA to apply to felon disenfranchisement statutes. *Id.* at 127.

312. *Id.* at 128-29.

313. *See id.* at 129.

314. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1314 (11th Cir. 2003) (Kravitch, J., dissenting), *reh’g en banc granted*, *opinion vacated* by 377 F.3d 1163 (11th Cir. 2004).

315. *Id.* at 1315.

316. *Id.*

317. *Id.* at 1316. The dissenting opinion argued its point by referring only to the portion of the VRA’s Senate report that addresses felon disenfranchisement statutes, the portion discussing section 4, not section 2. *Id.*; *see* S. Rep. No. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2561-62. The congressional record’s silence on application of section 2 of the VRA to felon disenfranchisement statutes, the dissent urged, indicates that section 2 of the Act was not intended to be applied to felon disenfranchisement statutes. *See Johnson*, 353 F.3d at 1317-18 (Kravitch, J., dissenting).

The dissenting opinion in *Johnson* also argued that the 1982 amendment did not affect the VRA's applicability to felon disenfranchisement statutes.³¹⁸ The opinion declared that because the congressional record for the amendment did not "plainly" indicate intent to extend the Act's coverage to incorporate felon disenfranchisement statutes, it did not.³¹⁹ "Although it is conceivable that certain legislators may have wanted the Voting Rights Act to encompass felon disenfranchisement provisions," the opinion argued, "we should not assume that Congress intended to produce a statute contrary to the plain text of the Fourteenth Amendment without a clear statement."³²⁰ The opinion also criticized the *Farrakhan* court, which permitted the VRA challenge to Washington's felon disenfranchisement scheme to proceed, for failing to speak directly to the constitutionality of its conclusions and failing to address whether there needs to be a clear statement from Congress that it intended for section 2 of the VRA to be applied in state felon disenfranchisement statutes before such challenges can proceed.³²¹

b. *Congruence and Proportionality of the VRA Questioned*

The *Muntaqim* opinion also disputed that the results test of the VRA should apply to felon disenfranchisement statutes from a different but related angle. Section 2 of the VRA, as applied to felon disenfranchisement statutes, is not sufficiently tailored, the opinion argued.³²² As a result of the recent developments in Supreme Court jurisprudence, the opinion asserted, congressional legislation must have congruence and proportionality between the injury prevented and the means adopted in order to be constitutional.³²³ Congress must also expose a pattern of unconstitutional racial discrimination in order for legislation passed pursuant to Congress's enforcement powers under the Fourteenth and Fifteenth Amendments to pass muster, the opinion argued.³²⁴

The *Muntaqim* opinion was careful to note that despite the recent developments in Supreme Court jurisprudence regarding Congress's

318. *Johnson*, 353 F.3d at 1317 (Kravitch, J., dissenting).

319. *Id.* at 1317-18.

320. *Id.* at 1318. The *Johnson* dissenting opinion also highlighted the fact that two congressional bills that acknowledge the practice of felon disenfranchisement were circulated that seemed to contradict the majority's opinion, since it was "unclear why these bills have been proposed if Congress has the clear understanding that the Voting Rights Act currently covers these cases." *Id.* at 1318 n.15.

321. *Id.* at 1316 n.11 (emphasizing that *Farrakhan v. Washington* is merely persuasive authority, and is not binding precedent).

322. *Muntaqim v. Coombe*, 366 F.3d 102, 120-26 (2d Cir.), *cert. denied*, 125 S. Ct. 480 (2004) (mem.), *reh'g en banc granted*, No. 01-7260, 2004 WL 2998551 (2d Cir. Dec. 29, 2004).

323. *Id.* at 120-21.

324. *Id.* at 120, 124.

enforcement powers, the VRA has generally been deemed both proportional and congruent by the Supreme Court and numerous circuit courts, as there is a “vast and undisputed” congressional record of racially invidious voting practices.³²⁵ Therefore, the question, according to the *Muntauqim* opinion, is not the constitutionality of the VRA, but “whether Congress would exceed its authority if § 1973 were applied to state felon disenfranchisement statutes.”³²⁶ While section 2 of the VRA is both congruent and proportional in its standard application, it is not so when applied to felon disenfranchisement statutes, the opinion concluded.³²⁷

The link between the injury to be prevented by Congress—namely, the use of various dilution schemes by certain states to avoid the strictures of the VRA—and Congress’s supposed remedy—namely, the prohibition of *any* felon disenfranchisement law enacted at *any* time in *any* state that “results” in the abridgement of the right to vote on account of race—is too attenuated.³²⁸

Further, the opinion argued, the congruence and proportionality requirement demands that Congress present a specific legislative record of intentional discrimination driving the enactment of felon disenfranchisement laws in order for the VRA to apply to them.³²⁹ Because Congress has not done so or mentioned that such a record exists in the legislative history of the 1982 amendment to section 2 of the VRA, the opinion concluded, the application of the VRA to felon disenfranchisement statutes is not congruent and proportional.³³⁰

The dissenting opinion in the decision to deny a rehearing en banc in *Farrakhan* also argued that federal legislation must be congruent and proportional to the injury sought to be prevented, and is not so when applied to felon disenfranchisement statutes.³³¹ The opinion argued:

It is unlikely that Congress could have reached felon disenfranchisement even if it wanted to, at least not without a substantial evidentiary record and a more tailored remedy. In interpreting the VRA to reach felon disenfranchisement in a state without a history of race discrimination like Washington, the

325. *Id.* at 121.

326. *Id.*

327. *Id.* at 125.

328. *Id.*

329. *Id.* at 126.

330. *Id.*

331. *Farrakhan v. Washington*, 359 F.3d 1116, 1122 (9th Cir. 2004) (Kozinski, J., dissenting) (citing *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). With regard to section 5 of the VRA, the opinion argued, the Supreme Court has required enforcement legislation to have a specific record of constitutional violations. *Id.* A section 2 violation, it continued, should be supported by the same finding, and a “theoretical, undocumented threat of unconstitutional felon disenfranchisement laws simply doesn’t justify such a broad remedy.” *Id.* at 1123.

[majority panel that elects to deny a rehearing en banc] has created a constitutional problem that Congress itself avoided.³³²

Avoiding constitutional conflicts and recognizing the limits on Congress in the legislation it can pass, the dissenting opinion argued, is one of the roles of the court.³³³

B. Opinions Permitting the Application of Section 2 of the VRA in Felon Disenfranchisement Statute Challenges

The non-prevailing opinion in *Baker*,³³⁴ the opinion in *Farrakhan*, and the majority opinion in *Johnson* disagreed with the reasoning in the opinions described above. In concluding that section 2 of the VRA can be applied to felon disenfranchisement statutes, these opinions stressed the importance of the mandates of equal protection and preventing racially discriminatory voting practices under the Fifteenth Amendment, and argued that the balance of power between the states and Congress had previously been shifted by the Fourteenth and Fifteenth Amendments. Therefore, these opinions argued, the application of the VRA to felon disenfranchisement statutes does not alter this balance further. These opinions also advanced the idea that because racial discrimination causes the disproportionate conviction of minorities, there is, in turn, an impermissibly racially disparate impact on voting rights. Finally, these opinions rejected the contention that the clear statement rule applies to the VRA and were therefore not compelled to address the legislative intent of the VRA, since such an inquiry is contingent on finding that the clear statement rule applies.

1. Section 2 of the Fourteenth Amendment Cannot Overcome the Demands of Equal Protection

Both the non-prevailing opinion in *Baker* and the Eleventh Circuit's opinion in *Johnson* viewed the amended section 2 of the VRA as a new and improved tool for tackling racially discriminatory felon disenfranchisement laws—a tool that still seeks to weed out invidious discrimination in felon disenfranchisement but requires only a demonstration of discriminatory impact. The forceful non-prevailing opinion in *Baker* conceded that felon disenfranchisement is constitutionally authorized by Section 2 of the Fourteenth

332. *Id.* at 1124. The Supreme Court has rejected interpretations of the VRA in other cases that threatened the Act's constitutionality. *Id.*

333. *Id.* at 1125.

334. The term "non-prevailing opinion" refers to the second *Baker* opinion by Judge Feinberg, which opposed the district court's holding that section 2 of the VRA cannot apply to New York's felon disenfranchisement statute. *Baker v. Pataki*, 85 F.3d 919, 934 (2d Cir. 1996), *aff'd by an equally divided court*, *Baker v. Cuomo*, 842 F. Supp. 718 (S.D.N.Y. 1993).

Amendment pursuant to *Richardson v. Ramirez*, but argued that this fact does not give states “the right to disenfranchise felons on the basis of race.”³³⁵ The opinion argued that *Hunter v. Underwood*, rather than *Richardson*, set forth a definitive rule regarding whether Section 2 of the Fourteenth Amendment enjoys a special exemption from the Equal Protection Clause.³³⁶ The *Hunter* court, the opinion indicated, stated: “[W]e are confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of [the Alabama felon disenfranchisement provision] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* . . . suggests the contrary.”³³⁷ This statement was dispositive for the non-prevailing opinion in *Baker*. Purposeful discrimination need not be proven through a showing of intent, the opinion argued, and can adequately be demonstrated by a showing of discriminatory results under the VRA.³³⁸

The majority opinion in *Johnson* took a similar approach and emphasized that “[t]he proper question here is whether felon status interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”³³⁹ The opinion also criticized the district court for failing to examine the totality of the circumstances as demanded by section 2 of the VRA and relying solely on the fact that the plaintiffs were criminally convicted in granting the defendant summary judgment.³⁴⁰

The *Johnson* opinion briefly refuted the allegations made by the dissent that its decision creates serious constitutional problems by permitting the VRA to subjugate Section 2 of the Fourteenth Amendment. “[S]tates clearly do not have the right to intentionally

335. *Id.* at 937.

336. *Id.* at 936 (quoting *Hunter v. Underwood*, 471 U.S. 222, 233 (1985)).

337. *Id.* (quoting *Hunter*, 471 U.S. at 233).

338. *Id.* at 937.

339. *Johnson v. Governor of Fla.*, 353 F.3d 1287, 1305 (11th Cir. 2003) (internal quotations omitted), *reh'g en banc granted*, *opinion vacated* by 377 F.3d 1163 (11th Cir. 2004). To establish a violation of section 2, the district court opinion concluded that “there must be a nexus between the discriminatory exclusion of blacks from the political process and the disenfranchisement of felons” that was demanded in *Wesley v. Collins*, 605 F. Supp. 802, 813 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986). *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1341 (S.D. Fla. 2002), *aff'd in part, rev'd in part and remanded sub nom. Johnson*, 353 F.3d at 1287. Bias within the criminal justice system is not enough to establish a vote denial claim, the district court opinion declared, and the fact that discrimination exists within the criminal justice system, but not the voting system, precludes it from application of the results test of section 2 of the VRA. *Id.* at 1342. The plaintiffs also argued that discriminatory intent was a substantial or motivating factor behind the enactment of the constitutional provision in question. *Id.* at 1338-42. This argument contributed to both the district and circuit courts' decisions, but will not be discussed in depth in this Note.

340. *Johnson*, 353 F.3d at 1305.

disenfranchise felons on the basis of race,” the opinion argued.³⁴¹ While congressional authority may not include simply banning all felon disenfranchisement statutes, the opinion admitted, “it may certainly exercise the power granted to it under Section 5 of the Fourteenth Amendment to enforce statutorily the constitutional prohibition against racially discriminatory criminal disenfranchisement.”³⁴² Permitting racially neutral felon disenfranchisement but prohibiting felon disenfranchisement with racially discriminatory results, the opinion emphasized, is “compatible” with the constitutional authorization of felon disenfranchisement and congressional enforcement powers under the Fourteenth and Fifteenth Amendments.³⁴³

Unlike the Second Circuit opinions in *Baker* and *Muntaqim*, and the Eleventh Circuit opinion in *Johnson*, the Ninth Circuit opinion in *Farrakhan* did not directly address the constitutional conflict between the authorization of felon disenfranchisement in Section 2 of the Fourteenth Amendment and the Equal Protection Clause. Rather, the opinion simply affirmed the district court’s determination that section 2 of the VRA can be applied in a felon disenfranchisement statute challenge.³⁴⁴ The Ninth Circuit’s decision to permit the state felon disenfranchisement statute challenge to proceed was grounded in the argument that “evidence of discrimination within the criminal justice system can be relevant to a Section 2 [of the VRA] analysis.”³⁴⁵ In reversing the district court’s decision to dismiss the claim, the opinion concluded that the district court erred in failing to consider how the felon disenfranchisement law “interacts with external factors such as ‘social and historical conditions’ to result in denial of the right to vote on account of race or color.”³⁴⁶

341. *Id.* at 1306 n.27.

342. *Id.*

343. *Id.*

344. *Farrakhan v. Washington*, 338 F.3d 1009, 1016 (9th Cir. 2003). The district court in *Farrakhan v. Locke* rejected the argument that the “results test,” if applied to felon disenfranchisement statutes, violates Section 2 of the Fourteenth Amendment:

Viewed in isolation, it is constitutionally permissible to strip an individual of the right to vote based upon conviction for a felony. However, in spite of this facial validity, the Supreme Court has made clear [in *Hunter v. Underwood*] that the states cannot use felon disenfranchisement as a tool to discriminate on the basis of race.... It necessarily follows, then, that Congress also has the power to protect against discriminatory uses of felon disenfranchisement statutes through the VRA.

Farrakhan v. Locke, 987 F. Supp. 1304, 1310 (E.D. Wash. 1997) (citation omitted), *aff’d in part, rev’d in part, remanded in part sub nom. Farrakhan*, 338 F.3d at 1009.

345. *Farrakhan*, 338 F.3d at 1012.

346. *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

2. The Balance of State and Federal Power Was Previously Altered by the Civil War Amendments

The non-prevailing opinion in *Baker* addressed head on concerns that applying section 2 of the VRA to felon disenfranchisement statutes alters the balance of power between the states and the federal government. The opinion argued that reliance on the Supreme Court case law advanced by the opposing opinion is misplaced, as the case law does not demonstrate "that felon disenfranchisement statutes that discriminate on the basis of race are beyond the reach of the Equal Protection Clause."³⁴⁷ Ultimately, the non-prevailing opinion asserted, there is "no persuasive reason, in view of *Hunter*, why Congress may not use its enforcing power under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment to bar racially discriminatory results, as it did in the Voting Rights Act."³⁴⁸

The opinion further asserted that the position advanced by the prevailing opinion in *Baker*, that the amended VRA still demanded a showing of racially discriminatory intent, simply overlooked the purpose of the 1982 amendment. The prevailing opinion's approach would "drastically limit the scope of § 2 of the Voting Rights Act, prohibiting a § 2 claim by any minority citizen in the absence of an allegation that the particular discriminatory practice had been intentionally imposed in the past in the particular jurisdiction."³⁴⁹ Rather, the opinion argued, "Congress included past discrimination as *only one of a list of factors* to be considered in determining whether there has been a violation of § 2 under the totality of the circumstances test."³⁵⁰

That opinion also disputed the prevailing opinion's implication that the "results test" requires a specific legislative record demonstrating that past racial discrimination drove the enactment of a state felon disenfranchisement statute in order for a VRA inquiry to be constitutionally permissible.³⁵¹ The opinion noted that there is, in fact, such a history of using felon disenfranchisement statutes to purposefully discriminate on the basis of race, were one actually demanded:

Although there has been no record developed in this case, due largely to its premature dismissal sua sponte, there is evidence to

347. *Baker v. Pataki*, 85 F.3d 919, 936-37 (2d Cir. 1996). *Richardson v. Ramirez*, the opinion asserted, did not give proper attention to *Hunter v. Underwood*, nor did *Green v. Board of Elections*, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968), a case that did not involve an analogous claim of racial discrimination or implicate the VRA. Therefore, neither opinion was dispositive. *Baker*, 85 F.3d at 936-37.

348. *Baker*, 85 F.3d at 937.

349. *Id.*

350. *Id.* at 938.

351. *Id.*

suggest that felon disenfranchisement statutes often have been used to deny the right to vote on account of race. . . . While felon disenfranchisement may be a widespread historical practice, disenfranchisement based on race is a historical practice that the Voting Rights Act seeks to eradicate.³⁵²

The non-prevailing *Baker* opinion also rejected the prevailing opinion's assertion that there is sufficient ambiguity in the language of the VRA to require a clear statement from Congress that it intended section 2 of the VRA to be applied to felon disenfranchisement statutes.³⁵³ Instead, the opinion argued, because the VRA did nothing to alter the constitutional balance between states and the federal government, previously established by the Civil War Amendments, there is no need to explore the use of the clear statement rule.³⁵⁴

The non-prevailing opinion also argued that *Chisom v. Roemer*, and not *Gregory v. Ashcroft*, must guide any discussion of the application of the clear statement rule to section 2 of the VRA.³⁵⁵ *Chisom*, the opinion pointed out, provided "clear Supreme Court authority that the plain statement rule does *not* apply when determining coverage under § 2 of the Voting Rights Act."³⁵⁶ While the prevailing opinion in *Baker* framed *Chisom*'s silence on the clear statement rule as a mere oversight, the non-prevailing opinion relied instead on Scalia's statement that "'the possibility of applying that rule never crossed [the Court's] mind,'"³⁵⁷ and that the "rule probably does not apply to Congressional exercises of authority under the Fourteenth Amendment."³⁵⁸ The opinion asserted that *Chisom*, and not *Gregory*, is more analogous to *Baker*, as it analyzed the same section of the VRA and involved a similar level of intrusion on state authority.³⁵⁹ *Gregory*, the opinion argued, not only dealt with a different type of legislation, passed under the Commerce Clause, but also demanded application of the clear statement rule only when a statute is ambiguous.³⁶⁰ Such ambiguity is not an issue in *Baker*, the opinion asserted: "The Voting Rights Act does not seem to be ambiguous. 'Any citizen' usually means any citizen, and I submit that it does so in the Voting Rights Act."³⁶¹

352. *Id.*

353. *Id.* at 940.

354. *Id.* at 938.

355. *Id.*

356. *Id.*

357. *Id.* at 938-39 (quoting *Chisom v. Roemer*, 501 U.S. 380, 412 (1991)).

358. *Id.* at 939.

359. *Id.* at 938-39.

360. *Id.* at 939.

361. *Id.* The opinion also found that the State's argument that the VRA's ambiguity is evident from the legislative history of section 4 of the Act, the section that sets forth the definition for "tests and devices," must fail. *Id.*; see 42 U.S.C. § 1973b(c) (2000). The opinion instead concluded that section 4 had "different

A third *Baker* opinion concurred with this non-prevailing approach, and sought to clarify the exact point of dispute between the prevailing and non-prevailing opinions in the case.³⁶² This third opinion found the dispute to be “whether Congressional power to enforce by a ‘result’ test the constitutional ban against voting discrimination based on race may validly reach a voting discrimination among felons.”³⁶³ While

[the Judge writing for the prevailing group of five judges] requires a clear statement of Congressional intent because the Supreme Court in other contexts has required such a statement. . . . [the Judge writing for the non-prevailing group of judges argues] the Supreme Court has already decided that section 2 of the Voting Rights Act is not subject to the plain statement rule.³⁶⁴

This third opinion supported the approach of the non-prevailing opinion, pointing out that “[s]ince *Gregory* construed [legislation that is not the Voting Rights Act] it is not readily apparent why . . . *Gregory* is any aid to an understanding of whether the plain statement rule applies to section 2 of the Voting Rights Act.”³⁶⁵ This opinion went a step further, explicitly linking the inapplicability of the clear statement rule in the context of section 2 of the VRA to the fact that the Civil War Amendments had already changed the balance of state/federal power.³⁶⁶

The district court in *Farrakhan v. Locke* also rejected the contention that the clear statement rule applies to section 2 of the VRA. Agreeing that the Civil War Amendments already changed the state/federal balance of power in the area of racially discriminatory voter requirements, the opinion determined that “Congress has the power to enforce the Fourteenth and Fifteenth Amendments through the VRA, ‘despite the burdens those measures placed on the states.’”³⁶⁷ The Ninth Circuit opinion in *Farrakhan*, however, did not address the clear statement rule at all.³⁶⁸ “Although states may deprive felons of the right to vote without violating the Fourteenth Amendment,” the Ninth Circuit opinion instead emphasized, “when felon disenfranchisement results in denial of the right to vote or vote

purposes, scope and language” than section 2 and therefore could not be relied on to create ambiguity in the language of section 2. *Baker*, 85 F.3d at 939.

362. *Baker*, 85 F.3d at 941 (Newman, C.J., concurring in the opinion of Feinberg, J.).

363. *Id.*

364. *Id.* at 942 (citations omitted).

365. *Id.* at 942 n.2.

366. *Id.* at 942. The opinion agreed with the prevailing opinion’s statement that the Commerce Clause, which was under specific consideration in *Gregory*, would not receive immunity from the clear statement rule. *Id.* at 942-43.

367. *Farrakhan v. Locke*, 987 F. Supp. 1304, 1309 (E.D. Wash. 1997) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997)), *aff’d in part, rev’d in part, remanded in part sub nom.* *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003).

368. *Farrakhan*, 338 F.3d at 1009.

dilution on account of race or color, Section 2 affords disenfranchised felons the means to seek redress.”³⁶⁹

Instead of searching for a specific legislative intent demanded by clear statement rule analysis, the Ninth Circuit’s opinion argued that the factors listed in the Senate report accompanying the 1982 Amendment, along with additional factors, should be used to evaluate a challenged voting practice with a “practical perspective.”³⁷⁰ While Congress did not list the criminal justice system’s racially discriminatory practices as a specific factor in the report, the opinion reasoned, this omission does not indicate that it should be excluded from analysis under section 2.³⁷¹

The *Farrakhan* opinion also argued that the workings of the criminal justice system, to the extent that they contribute to the conviction of minorities at disproportionate rates, “would clearly hinder the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic . . . rendering it simply another relevant social and historical condition to be considered where appropriate.”³⁷² The *Farrakhan* court ultimately remanded the case to the district court to conduct the proper evidentiary inquiry into evidence of racial bias in the state’s criminal justice system.³⁷³

The recently vacated Eleventh Circuit opinion in *Johnson*, like the non-prevailing opinion in *Baker* and the Ninth Circuit opinion in *Farrakhan*, disagreed that the clear statement rule applies to section 2 of the VRA.³⁷⁴ The opinion rebutted the dissenting opinion’s argument that the congressional record indicated that Congress intended to exempt felon disenfranchisement statutes from VRA coverage.³⁷⁵ The majority opinion in *Johnson* also criticized the dissent’s examination of the legislative history of section 4 of the VRA, declaring that such an examination was not dispositive in discussions of the intent underlying section 2.³⁷⁶

It is perfectly conceivable that Congress might wish to exclude a particular practice from section 4’s “test or device” label to avoid attaching to it the additional requirements, yet still intend to

369. *Id.* at 1016.

370. *Id.* at 1019.

371. *Id.* at 1020. The court indicated that this factor could be considered under factor (5) in the report which directs courts to consider discrimination in areas such as “education, employment, and health.” *Id.* (quoting S. Rep. No. 97-417, at 29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206).

372. *Id.*

373. *Id.*

374. *Johnson v. Governor of Fla.*, 353 F.3d 1287 (11th Cir. 2003), *reh’g en banc granted*, opinion vacated by 377 F.3d 1163 (11th Cir. 2004).

375. *Id.* at 1306 n.27.

376. *Id.*

prohibit that practice when the evidence shows that its use results in the denial of the right to vote on account of race.³⁷⁷

III. COURTS MUST ALLOW SECTION 2 OF THE VRA CHALLENGES TO FELON DISENFRANCHISEMENT STATUTES TO PROCEED

It is clear from the opinions in *Baker*, *Muntaqim*, *Farrakhan*, and *Johnson* that the circuits are divided by very different interpretations of the importance of Section 2 of the Fourteenth Amendment when viewed in light of the Equal Protection Clause.³⁷⁸ The circuits also disagree about the scope of Congress's enforcement powers under the Civil War Amendments, the current balance of state and federal power in the area of voter requirements, whether the clear statement rule applies to the amended version of section 2 of the VRA, and what the legislative history of the enactment and 1982 amendment of the VRA reveal about its applicability to felon disenfranchisement statutes.³⁷⁹ It is also clear from the numerous majority and dissenting opinions in these cases that the circuits are also internally divided in their reasoning. Without Supreme Court intervention, these opposing approaches will continue to be applied in the different circuits, and the racially disparate impact of felon disenfranchisement will continue unchallenged in the circuits that do not permit application of the VRA to felon disenfranchisement statutes.³⁸⁰ These racially disparate impacts of felon disenfranchisement are intolerable.

When the Supreme Court denied certiorari in *Farrakhan* and *Muntaqim*, it declined to resolve the fundamental, seemingly irreconcilable disagreements between and within the circuits.³⁸¹ When that resolution does ultimately come, the Supreme Court must adopt the approach of the Ninth Circuit and permit the amended version of section 2 of the VRA to be applied to felon disenfranchisement statutes.³⁸² The Court must also declare the constitutionality of the "results test" of section 2 as applied to felon disenfranchisement laws, conclude that the application of the VRA to felon disenfranchisement statutes does not alter the existing balance of state/federal power (thereby negating the need to apply the clear statement rule), and emphasize the important public policy considerations that will be met by allowing VRA challenges to felon disenfranchisement to proceed. By doing so, the Court will recognize that the disparate racial impacts of felon disenfranchisement are an unacceptable infringement on the fundamental right to vote.

377. *Id.*

378. *See supra* Parts II.A.1, II.B.1.

379. *See supra* Parts II.A.2, II.B.2.

380. *See supra* notes 13-14 and accompanying text.

381. *See supra* notes 13-14 and accompanying text.

382. *See supra* Part II.B.

This part argues first that Section 2 of the Fourteenth Amendment must not prevent section 2 of the VRA from being applied to felon disenfranchisement statutes; second, that applying the VRA to felon disenfranchisement statutes does nothing to alter the state/federal balance of power because the Civil Rights Amendments previously altered this balance; and third, that meaningful application of section 2 of the VRA to felon disenfranchisement statutes is critical to realizing the mandates of the Fourteenth and Fifteenth Amendments.

A. *Relieving Constitutional Tension*

The circuit courts generally do not dispute the fact that Section 2 of the Fourteenth Amendment permits states to disenfranchise felons.³⁸³ The traditionally untouchable position that this provision has been afforded, however, is out of step with modern readings of the Civil War Amendments.³⁸⁴ These Amendments, despite the universal acknowledgement that they have altered the path of the country's history of racial discrimination, still are not given validity in the prevailing *Baker* opinion and in the *Muntaqim* opinion.³⁸⁵ The Second Circuit failed to recognize that felon disenfranchisement does not merit any special protections.

Opinions that relied heavily on Section 2 of the Fourteenth Amendment in denying the use of the VRA in felon disenfranchisement statute challenges failed to examine this provision within the specific context of racially discriminatory voting practices. *Richardson v. Ramirez*, which held that Section 2 of the Fourteenth Amendment is key to analyzing felon disenfranchisement laws under the equal protection doctrine, did not address the applicability of that provision in the context of Congress's enforcement powers to prohibit racially discriminatory voting practices, and racially discriminatory felon disenfranchisement laws in particular.³⁸⁶ Because *Richardson* did not address the racially disparate impacts of felon disenfranchisement, its majority opinion should not be viewed as dispositive. Rather, *Hunter v. Underwood* is the case that must guide this discussion.³⁸⁷ The *Hunter* court recognized that Section 2 of the Fourteenth Amendment's mention of felon disenfranchisement is not enough to overcome racially discriminatory felon disenfranchisement statutes.³⁸⁸ That is, it recognized that racial discrimination in a felon disenfranchisement law is an impermissible violation of the Equal Protection Clause.

383. See *supra* Parts II.A.1, II.B.1.

384. See *supra* Part II.B.1.

385. See *supra* Part II.B.2.

386. See *supra* Part II.A.1; notes 129-40 and accompanying text.

387. See *supra* notes 141-50 and accompanying text.

388. See *supra* notes 141-50 and accompanying text.

The Supreme Court, or any other federal court addressing this issue, must reconsider the approach of Justice Marshall in his strong dissent in *Richardson v. Ramirez*.³⁸⁹ Justice Marshall's argument that Section 2 of the Fourteenth Amendment should not be given a protected place in equal protection jurisprudence and should be subjected to the same scrutiny as other voting rights restrictions warrants a second look.³⁹⁰ His approach is attractive for two reasons. First, it does not render Fourteenth Amendment jurisprudence static, and would allow the equal protection doctrine to grow, change, and apply more effectively in an evolving world. Second, his approach prevents language in Section 2 of the Fourteenth Amendment that was arguably not formulated for the express purpose of upholding felon disenfranchisement to have such an effect.³⁹¹ Rather, Justice Marshall recognized that Section 2 of the Fourteenth Amendment was merely part of a political struggle between southern and northern legislators, and the purpose of the provision was to create a compromise between these factions.³⁹² The focus of Section 2 of the Fourteenth Amendment, therefore, was not felon disenfranchisement.³⁹³ By adhering to Justice Marshall's approach, the Supreme Court and other federal courts could give Section 2 of the Fourteenth Amendment only the weight that it deserves and properly realign the equal protection analysis courts apply to felon disenfranchisement statutes with that of other voting restrictions.

The Supreme Court should continue on the path it forged in *Hunter v. Underwood* and hold that the application of section 2 of the VRA is not limited by Section 2 of the Fourteenth Amendment.³⁹⁴ Racial discrimination in felon disenfranchisement statutes, be it intentional or de facto, is impermissible and remedies for this wrong should not be limited by the "other crime" provision of the Fourteenth Amendment. To allow this provision to limit the effects of the other sections of the Fourteenth Amendment and the Fifteenth Amendment would be to elevate one constitutional provision over others. This is not called for. As the Supreme Court has previously noted, constitutional concepts of equal protection are not "confined to historic notions of equality," and the Constitution can be interpreted and re-interpreted as the meaning of democracy changes and progresses.³⁹⁵

389. See *supra* notes 133-37 and accompanying text.

390. See *supra* notes 133-37 and accompanying text; see also Fletcher, *supra* note 44, at 1906 (arguing that courts must not overlook the historical context of Section 2 of the Fourteenth Amendment).

391. See *supra* notes 133-37 and accompanying text.

392. See *supra* note 136 and accompanying text.

393. See *supra* note 136 and accompanying text.

394. See *supra* notes 141-46 and accompanying text.

395. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966).

The Second Circuit opinions in *Baker* and *Muntaqim*, arguing that Section 2 of the Fourteenth Amendment cannot be trumped by the Equal Protection Clause, propose an unsettling solution: that Section 2 of the Fourteenth Amendment be permitted to trump the Equal Protection Clause instead.³⁹⁶ This solution to the constitutional conflict inherent in the Fourteenth Amendment fails to consider not only the history of the Fourteenth Amendment, but also the public policies underlying the ratification of, and subsequent application of, the Equal Protection Clause by the courts. Section 2 of the Fourteenth Amendment, a provision of secondary importance in our country's jurisprudence, must not be elevated to a position of artificial importance.³⁹⁷ Instead, in this zero-sum game where two constitutional provisions conflict, the provisions that prevail should be those that ensure equality, protect fundamental rights, and have held a continuous and important position in our legal history. Therefore, it is improper to allow Section 2 of the Fourteenth Amendment to be elevated above the Equal Protection Clause, which possesses these qualities.

The Supreme Court and the other federal courts must also recognize that Section 2 of the Fourteenth Amendment was given little attention until Justice Rehnquist picked it out of oblivion in his *Richardson* opinion, one that has been the target of scholarly backlash.³⁹⁸ One cannot help but question why this section of the amendment was not interpreted to grant the power to sustain felon disenfranchisement laws nationwide until the *Richardson* opinion.³⁹⁹ The courts should also consider the argument that the Fifteenth Amendment effectively repealed Section 2 of the Fourteenth Amendment.⁴⁰⁰ While neither of these inquiries gained significant traction in the *Baker*, *Farrakhan*, *Johnson*, and *Muntaqim* decisions, they may prove useful to plaintiffs in future cases.

B. *Unraveling the Balance of Power*

Scholarly criticism of felon disenfranchisement to date has focused primarily on the effects of felon disenfranchisement and the sociopolitical factors that indicate that the practice must end.⁴⁰¹ Few have addressed the federalism conflicts that emerged in the *Baker*, *Farrakhan*, *Johnson*, and *Muntaqim* opinions examined in Part II.⁴⁰² It is necessary to begin addressing these issues head on.

396. See *supra* Part II.A.1.

397. See *supra* Part II.B.1.

398. See *supra* note 203 and accompanying text; see also Tribe, *supra* note 202, at 1094; Shapiro, *supra* note 202, at 302, 304.

399. See *supra* note 203 and accompanying text.

400. See Chin, *supra* note 25, at 316 (advancing this argument).

401. See *supra* notes 48-73 and accompanying text.

402. See *supra* Parts II.A.2, II.B.2.

In leaving both the *Farrakhan* and *Muntaqim* decisions intact, the Supreme Court left two competing readings of the balance of state and federal power standing.⁴⁰³ The federal district and circuit courts, until provided with a definitive Supreme Court resolution to the issue, must universally recognize that the Civil War Amendments significantly and permanently shifted the balance of power between the states and the federal government.⁴⁰⁴ The Supreme Court must also adhere to this rationale, as it is supported by its previous jurisprudence.⁴⁰⁵

Moreover, the federal courts must acknowledge that the constitutional grant of power to states to establish voter qualifications is not boundless.⁴⁰⁶ Rather, the Fourteenth and Fifteenth Amendments have severely limited the ability of states to enact voter qualifications that impermissibly infringe on the fundamental right to vote.⁴⁰⁷ Since the late 1800s, Congress has protected the fundamental right to vote, even though doing so has often limited state power.⁴⁰⁸ The VRA, legislation that has repeatedly been declared congruent and proportional, must therefore be permitted to apply to the states in full force in order to prevent impermissible infringements on the right to vote.⁴⁰⁹ The time has come to subject felon disenfranchisement laws to the same scrutiny as other state laws that limit the fundamental right to vote and recognize that doing so falls within the balance of state and federal power that has existed since the Fourteenth and Fifteenth Amendments were ratified.

The plain language of the VRA is unambiguous.⁴¹⁰ Section 2 of the VRA clearly applies to "any citizen."⁴¹¹ No qualification can be found that indicates that it does not apply to any citizen convicted of a crime. Because the language of section 2 of the VRA is clear and unambiguous, there is simply no need to apply the clear statement rule or examine congressional intent behind the VRA. The most recent formulations of the clear statement rule of statutory

403. See *supra* Parts II.A.2, II.B.2.

404. But see *Hayden v. Pataki*, No. 00 Civ. 8586, 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004) (following *Muntaqim v. Coombe*, 366 F.3d 102 (2d Cir.), *cert. denied*, 125 S. Ct. 480 (2004) (mem.), *reh'g en banc granted*, No. 01-7260, 2004 WL 2998551 (2d Cir. Dec. 29, 2004)).

405. See *supra* notes 216-17, 233 and accompanying text; cf. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that Congress acted within its enforcement powers under the Fourteenth Amendment in abrogating Eleventh Amendment state immunity for purposes of the Family Medical Leave Act).

406. See *supra* notes 26-28 and accompanying text.

407. See *supra* Parts I.C.1, II.B.2.

408. See *supra* Part I.C.

409. See *supra* Parts I.C.2., II.A.2.b; note 239 and accompanying text.

410. See *supra* notes 360-61 and accompanying text.

411. See *supra* notes 360-61 and accompanying text.

construction indicate that it only applies when the statute under review is ambiguous.⁴¹²

Ultimately, the conflict regarding the application of the clear statement rule boils down to the conflict between the Supreme Court's decisions in *Gregory v. Ashcroft* and *Chisom v. Roemer*.⁴¹³ The Court must adhere to its own decision in *Chisom*, as it remains the only case to date that provided an opportunity for the clear statement rule to be applied to section 2 of the VRA.⁴¹⁴ *Chisom* cannot be dismissed as an anomaly in failing to apply the clear statement rule.⁴¹⁵ *Chisom* undoubtedly stands for the proposition that the clear statement rule does *not* apply to all legislation passed pursuant to the Fourteenth and Fifteenth Amendments, despite the Court's conclusions in *Gregory*.⁴¹⁶ Accordingly, *Gregory*, despite the Second Circuit's contention to the contrary, is not controlling precedent in determining whether the clear statement rule applies to the VRA.⁴¹⁷ The Supreme Court must clarify that *Chisom*, and not *Gregory*, guides the application of the clear statement rule to section 2 of the VRA to resolve the existing confusion.

Even if it were assumed *arguendo* that the plain language of the VRA is ambiguous and the clear statement rule therefore applies, an examination of the legislative history of the Act would not reveal that Congress would exceed its enforcement powers if the VRA was applied to felon disenfranchisement statutes. Instead, an examination of the Senate report for the 1982 amendment reveals silence from Congress on whether felon disenfranchisement statutes were intended to be exempted from section 2 of the Act.⁴¹⁸ This silence cannot be interpreted to indicate that the VRA was not intended to apply to felon disenfranchisement statutes. Instead, this silence only signals that Congress did not state its position on the application of section 2 of the VRA to felon disenfranchisement statutes. In order for legislation to be adequately flexible, Congress must not exhaustively list every potential application of every law. Such an approach would make the law rigid and nonresponsive.

The VRA is also congruent and proportional legislation.⁴¹⁹ The Supreme Court has held this to be the case on numerous occasions.⁴²⁰ Those opinions arguing that the Act, if applied to felon disenfranchisement statutes, is not congruent and proportional lack

412. See *supra* notes 219, 229-31 and accompanying text.

413. See *supra* Part II.A.2; notes 222-33 and accompanying text.

414. See *supra* notes 222-25, 355-61 and accompanying text.

415. See *supra* notes 307-08, 312-13 and accompanying text.

416. See *supra* notes 219-25 and accompanying text.

417. See *supra* Part II.A.2.a.

418. But see *supra* notes 318-20 and accompanying text.

419. See *supra* Parts II.A.2, II.B.2.

420. See *supra* note 325 and accompanying text.

supporting case law.⁴²¹ These opinions attempted to rely instead on the lack of a discrete congressional record on racial discrimination driving the enactment of felon disenfranchisement laws.⁴²² Nationally, there is a substantial record of the country's history of racial discrimination driving the enactment of felon disenfranchisement statutes.⁴²³ The fact that this record is not compiled into a single congressional record does not indicate that it is not available for analysis. The Supreme Court has already declared that the VRA has a fully developed and adequate congressional record to be generally congruent and proportional legislation under the Fourteenth and Fifteenth Amendments.⁴²⁴ This is sufficient, as a demand for a specific congressional record for felon disenfranchisement finds no significant support in the case law.

The amendment of the VRA in 1982 is also congruent with the power shift between the states and federal government that occurred with ratification of the Civil War Amendments.⁴²⁵ The Fourteenth and Fifteenth Amendments, with their accompanying demand for a showing of discriminatory intent to successfully challenge a voting restriction, did not provide enough federal protection.⁴²⁶ The difficulty of proving that racial discrimination motivated the enactment of legislation such as felon disenfranchisement laws is precisely the reason that the VRA was amended in 1982 to adopt a results test.⁴²⁷ This amendment in no way altered the congruence and proportionality of the VRA, and the Supreme Court must definitively rule that section 2 of the Act still meets this test.⁴²⁸ To rule any other way would be to afford undeserved protection to the invidious racial discrimination that originally spurred the enactment and amendment of felon disenfranchisement laws following the Civil War simply because racially discriminatory intent is not usually provable.⁴²⁹

By ruling that the application of the amended section 2 of the VRA to felon disenfranchisement laws does not exceed Congress's enforcement powers under the Civil War Amendments, the Supreme Court would bolster the protections against racially discriminatory voting practices. The current impact of felon disenfranchisement statutes on racial minorities cannot be ignored, and indicates that the mandates of the Fourteenth and Fifteenth Amendments have yet to be met. Cases such as *Baker*, *Farrakhan*, *Johnson*, and *Muntaqim*

421. See *supra* notes 322-33 and accompanying text.

422. See *supra* notes 329-30 and accompanying text.

423. See *supra* notes 96-100 and accompanying text.

424. See *supra* notes 238-39 and accompanying text.

425. See *supra* Part II.B.2; see also Chin, *supra* note 25, at 308-09 (noting that voter qualifications have been greatly federalized).

426. See *supra* notes 116-21 and accompanying text.

427. See *supra* notes 116-21 and accompanying text.

428. See *supra* Part I.C.

429. See *supra* notes 96-100, 116-21 and accompanying text.

provide an opportunity to better adhere to those mandates.⁴³⁰ Therefore, VRA challenges to felon disenfranchisement statutes must be permitted to proceed.

C. Maintaining the Potency and Effectiveness of the VRA

Allowing a totality of the circumstances analysis under section 2 of the VRA to proceed in the felon disenfranchisement context will allow for comprehensive, meaningful review.⁴³¹ This analysis will bring to the surface racial discrimination in the criminal justice system. It will also permit for examination of all the factors that result in discriminatory voting practices without meeting the difficult—if not impossible—showing of discriminatory intent.⁴³²

The work of the Fourteenth and Fifteenth Amendments is far from over. Even if some felon disenfranchisement laws were not enacted with discriminatory intent, the administration of the criminal justice system—with higher investigation, prosecution, and incarceration rates for African-Americans—creates an obvious discriminatory outcome.⁴³³ The “well-documented empirical findings” of the racially discriminatory impacts of the criminal justice system cannot be disregarded.⁴³⁴ Many studies have revealed that the disproportionate number of African-Americans in the criminal justice system cannot be adequately explained by mere propensity for criminal conduct.⁴³⁵

The effects of felon disenfranchisement on minority populations cannot be taken lightly. Almost 150 years after the ratification of the Fourteenth and Fifteenth Amendments, African-American voting strength continues to be diluted to a staggering extent by felon disenfranchisement.⁴³⁶ Moreover, felon disenfranchisement has significantly impacted our electoral system in numerous ways, determined the outcome of elections,⁴³⁷ and continues to prevent ex-felons from reintegrating back into society.⁴³⁸ Felon disenfranchisement has, in truth, prevented the fundamental right to vote from being fully realized by the African-American community.

Congress abandoned the racially discriminatory intent test for the VRA in 1982 because such a standard is nearly impossible to meet.⁴³⁹ Courts have the duty to ensure that Congress’s decision to employ a results test is realized in enforcing this legislation. By employing an

430. See *supra* Part II.

431. See *supra* Part II.B.1.

432. See *supra* notes 116-21 and accompanying text.

433. See *supra* notes 59-71 and accompanying text.

434. See Keyssar, *supra* note 64, at 307.

435. See Ewald, *supra* note 18, at 1125.

436. See *supra* notes 59-71 and accompanying text.

437. See *supra* note 52 and accompanying text.

438. See *supra* note 56 and accompanying text.

439. See *supra* notes 116-21 and accompanying text.

intricate, proper totality of the circumstances analysis under the VRA—an analysis that extensively examines the multifaceted racially discriminatory impact of felon disenfranchisement, and does not merely search for discriminatory intent—courts have the opportunity to meet the mandates of the Fourteenth and Fifteenth Amendments in a meaningful way.

CONCLUSION

“Today, our political Constitution looks frail and incomplete in the face of modern universal suffrage principles visible all over the world.”⁴⁴⁰ In order to overcome the current harm caused by felon disenfranchisement, the United States Supreme Court and other federal courts must take drastic steps to affirm the fundamental right to vote. Felon disenfranchisement offends our most basic notions of the democratic ideal of voting. That offense deepens when considered in conjunction with the disparate racial impact of the practice. The VRA finally offers a potent tool for overcoming these statutes. Those fighting to end felon disenfranchisement must press for Supreme Court review of cases such as *Baker v. Pataki*, *Muntaqim v. Coombe*, *Johnson v. Governor of Florida*, and *Farrakhan v. Washington*, and continue litigating the issue.

The most invidious types of discrimination in the realm of voting must be weeded out with tools that go beyond the traditional scope of the Fourteenth and Fifteenth Amendments. The Civil War Amendments alone were unable to halt subtle racially discriminatory legislation. Instead, Congress and the courts must tackle the most latent forms of racism in our voting system with tools that are more probing. Application of section 2 of the VRA to felon disenfranchisement statutes presents that opportunity.

440. Jamin Raskin, *From Slave Republic to Constitutional Democracy: The Continuing Struggle for the Right to Vote*, Poverty & Race (Poverty & Race Res. Action Council, Washington, D.C.), Nov./Dec. 2004, at 18 (“Our felon disenfranchisement policies are backward compared to those of other advanced democracies.”).