Race-Based Discrimination in the Totality of the Circumstances: Why America's Highest Court Should Permit Section 2 Voting Rights Act Challenges to State Felon Disenfranchisement Laws

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* © 2021 Ellen Atkinson. J.D. Candidate 2022, University of San Diego School of Law; B.A. 2017 Colorado College. My sincerest thanks to Roy Brooks, Warren Distinguished Professor of Law at the University of San Diego, for his guidance and for our many conversations during the development of this Comment. Professor Brooks reminded me, in my final year of law school, to not be bound by traditional paradigms or to settle for justice as we now have or conceive of it, but to continue to pursue better justice with ingenuity. Professor Brooks recently said, "There is a great deal of complexity, but it doesn't mean we need to be paralyzed. We can move forward as long as we recognize there are trade-offs." Gratitude also to my parents, for instilling in me the importance of moral courage, and my brothers, for challenging me to reconsider my perspectives again and again—I will continue to do so on this very subject long after this Comment's publication. But especially to my brother Ford Atkinson, to whom I dedicate this Comment.

I. INTRODUCTION

Betty McKay served twenty-seven years in prison.[1] During her past three years on parole, she became a motivational speaker, justice advocate, and organizer.[2] Similarly, John Windham served thirty years in prison.[3] Since his release from prison to parole in 2018, he became a motivational speaker and consultant, and works with nonprofits providing reentry services to others formerly incarcerated.[4] But that is not all Ms. McKay and Mr. Windham have in common: Neither has *ever* been able to vote.[5] They are among the 50,000 parolees in the State of California that, despite having served their prison sentences, have been barred from voting by the California State Constitution until completion of their parole.[6]

Last November, that changed. Californians voted[7] to amend the State Constitution to permit parolees to vote after completion of their prison

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1. *Our Stories*, YES ON 17, https://yeson17.vote/our-stories/ [https://perma.cc/L3BF-HS47].

2. *Id.* Ms. McKay "is currently an Organizing Fellow with Essie Justice Group, where she is working on the #FreeBlackMamas campaign – a campaign focused on providing bail for incarcerated, Black mothers." *See Webinar Wednesday: Free the Vote!*, INITIATE JUST., https://www.initiatejustice.org/event/webinar-wednesday-free-the-vote/ [https://perma.cc/ QAU2-A936]. She is also a member of the Sister Warriors Freedom Coalition and a graduate of Initiate Justice's Institute of Impacted Leaders. *Id.* The Institute of Impacted Leaders is a twelve-week "organizing training program for people directly impacted by mass incarceration." *The Institute of Impacted Leaders: About the Institute*, INITIATE JUST., https://www.initiatejustice.org/our-work/institute-of-impacted-leaders/ [https://perma.cc/ B4XQ- SGPE]. The Sister Warriors Freedom Coalition is a campaign led by formerly incarcerated people in fourteen chapters across the state of California seeking to replace mass incarceration with "transformative justice processes and community-based alternatives." *See Freedom 2030 Campaign*, SISTER WARRIORS FREEDOM COAL., https://sisterwarriors free.org/ [https://perma.cc/PBJ2-L2NK].

3. Telephone Interview with John Windham, Founder & CEO, We All We Got JMW Found. (Feb. 21, 2021). To learn more about his story and work, see WE ALL WE GOT JMW FOUND., https://www.weallwegotfoundation.org/ [https://perma.cc/LD7U-9ZH7].

4. *See About Us*, WE ALL WE GOT JMW FOUND., https://www.weallwegot foundation.org/about-us [https://perma.cc/FRP3-MXM2].

5. *Our Stories*, *supra* note 1. Mr. Windham and Ms. McKay were the face of the "Yes on 17" campaign to pass Proposition 17. *See infra* note 9.

6. Bob Egelko & Michael Cabanatuan, *Prop. 17, Giving Californians on Parole the Right to Vote, Wins*, S.F. CHRON. (Nov. 6, 2020, 4:23 PM), https://www.sfchronicle.com/local-politics/article/Prop-17-giving-people-on-parole-right-to-vote-15699622.php [https://perma.cc/6V72-VXR7].

7. *California Proposition 17 Election Results: Give Vote to Felons on Parole*, N.Y. TIMES (Dec. 12, 2020), https://www.nytimes.com/interactive/2020/11/03/us/elections/results-

sentence.[8] Known on the ballot as "Proposition 17,"[9] the measure re-enfranchised[10] an estimated 50,000 parolees who were prohibited from registering to vote until the completion of their parole.[11] However, this modification to the State Constitution preserved denial of the right to vote for convicted felons while still incarcerated.[12] In California, that means approximately 95,000 felons[13] remain ineligible to vote, and nationally,

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california-proposition-17-give-vote-to-felons-on-parole.html [https://perma.cc/H4T7-MNYJ]. The measure passed by a vote of 58.6% in favor over votes for 41.4% against. *Id.*

8. LEGIS. ANALYST'S OFF., PROPOSITION 17 RESTORES RIGHT TO VOTE AFTER COMPLETION OF PRISON TERM. LEGISLATIVE CONSTITUTIONAL AMENDMENT. 1 (2020).

9. *Id.* The amendment altered sections 2 and 4 of Article II of the California Constitution to read:

> SEC. 2. *(a)* A United States citizen 18 years of age and resident in this State may vote.
>
> *(b) An elector disqualified from voting while serving a state or federal prison term, as described in Section 4, shall have their right to vote restored upon the completion of their prison term.*
>
> . . .
>
> SEC. 4. The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or . . . *serving a state or federal prison term for the conviction of a felony.*

CAL. SEC'Y STATE, OFFICIAL VOTER INFORMATION GUIDE: TEXT OF PROPOSED LAWS 10 (2020). The new provisions are in italics. *Id.* Formerly, section 4 allowed for the disqualification of electors "while imprisoned or on parole." *Id.* The amendments removed this language to limit disqualification to those serving a state or federal prison term. *Id.*

10. Although the right to vote is technically restored after completing a state or federal prison term for felony conviction, registration remains a necessary next step, either by registering online or completing a hardcopy voter registration card. *Voting Rights: Persons with a Criminal History*, CAL. SEC'Y STATE, https://www.sos.ca.gov/elections/voting-resources/voting-california/who-can-vote-california/voting-rights-californians [https://perma.cc/NAV4-9VRJ]. But merely taking that step to register to vote is not the only barrier formerly convicted felons face to political participation. Misinformation abounds. Jewel Wicker, *First-Time Black Voters, from Gen Z to New Citizens to Snoop Dogg, on What's Driving Them*, NBC NEWS (Oct. 22, 2020, 3:01 AM), https://www.nbcnews.com/news/nbcblk/black-voters-series-what-s-driving-people-vote-first-time-n1244181 [https://perma.cc/Q9W8-C99R]. Even nationally famous rapper Snoop Dogg did not vote until the 2020 elections because he did not know he could. *Id.* "For many years, they had me brainwashed thinking that you couldn't vote because you had a criminal record." *Id.* Snoop Dogg, who lives in L.A., could have voted before the passage of Proposition 17 because his criminal records had been expunged. *Id.*

11. Egelko & Cabanatuan, *supra* note 6.

12. *Restoration of Voting Rights for Felons*, NAT'L CONF. STATE LEGISLATURES (Jan. 8, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/DCZ2-G4DY].

13. DIV. CORR. POL'Y RSCH. & INTERNAL OVERSIGHT, CAL. DEP'T OF CORR. & REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT JANUARY 13, 2021, at 1 (2021). The California Department of Corrections and Rehabilitation population decreased sharply, nearly 21%, from about 123,100 inmates in February, 2020, to 97,000 in October,

more than 5 million people with prior felony convictions remain ineligible to vote as the direct result of state felon disenfranchisement laws.[14]

California is now the twentieth state to either automatically restore voting rights upon release from prison, or not revoke voting rights in the first place, joining a national trend toward restoring voting rights to people with past convictions.[15] However, these changes take place on a state-by-

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2020, as a result of measures taken to slow the spread of COVID-19 in jails and prisons. LEGIS. ANALYST'S OFF., THE 2021-22 BUDGET: STATE CORRECTIONAL POPULATION OUTLOOK 1–2 (2020). The sharp reduction is attributable to reduced prison commitments and early releases from prison to post release community supervision. *Id.* at 2. Those inmates released early on post-release community supervision can now register to vote. *Voting Rights: Persons with a Criminal History*, *supra* note 10. For convenience and simplicity, this Comment uses the term felon to refer to individuals who have been convicted of a felony.

14. CHRISTOPHER UGGEN ET. AL., THE SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 4 (2020).

15. *What is Prop 17?*, YES ON 17, https://yeson17.vote/what-is-prop-17/ [https://perma.cc/5GGL-C7NN]. Since 2017, Florida, Kentucky, New Jersey, New York, Nevada, Colorado, and Louisiana have all expanded access to the ballot for people with past convictions. *Id.* On May 28, 2019, Colorado Governor Jared Polis signed into law HB 19-1266, restoring voting rights to parolees upon release from detention or incarceration. *See* H.R. 19-1266, 2019 Gen. Assemb., Reg. Sess. (Colo. 2019). Colorado restores the right to vote in both state and federal elections, regardless of whether the conviction was in state or federal court. *Voters with Convictions FAQs*, COLO. SEC'Y STATE JENA GRISWOLD, https://www.sos.state.co.us/pubs/elections/FAQs/VotingAndConviction.html [https://perma.cc/44GF-Z89M]. Similarly, Assembly Bill 431 in Nevada restores voting rights immediately and automatically upon release from prison regardless of the category of felony or whether the individual was convicted in another state or federal court. *See Restoration of Voting Rights in Nevada*, NEV. SEC'Y STATE, https://www.nvsos.gov/sos/elections/voters/restoration-of-voting-rights-in-nevada [https://perma.cc/S4Z2-V5T4]. The change restored rights to citizens who had been permanently disenfranchised after receiving "dishonorable discharge" from probation or parole and restored rights to those with "category B" convictions immediately upon release, where previously "category B" individuals did not get voting rights restored for another two years after completion of their sentence. *Voting Rights Restoration Efforts in Nevada*, BRENNAN CTR. FOR JUST. (May 30, 2019), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-nevada [https://perma.cc/5P35-ESGH]. The Colorado and Nevada legislation have greater permanence than the reforms in New York, where Governor Cuomo signed an executive order restoring voting rights to individuals on parole upon release from incarceration. *See Governor Cuomo Signs Executive Order to Restore Voting Rights to New Yorkers on Parole*, N.Y. STATE (Apr. 18, 2018), https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-restore-voting-rights-new-yorkers-parole [https://perma.cc/ACH5-HPX2]. Cuomo explained his decision to issue the order, saying, "It is unconscionable to deny voting rights to New Yorkers who have paid their debt and have re-entered society. This reform will reduce disenfranchisement and will help restore justice and fairness to our democratic process. Withholding or delaying voting rights diminishes our democracy." *Id.*

state basis,[16] and the gradual restoration of rights to some—but not all—convicted felons distracts from the role some state felon disenfranchisement laws may play in race-based vote denial.

As a Black man, Mr. Windham is among the 75% of men leaving California prisons that are Black, Latino, or Asian American,[17] who comprise less than 28.5% of the state's population.[18] Data from 2017 shows the imprisonment rate for Black men in California was ten times more than white men, and imprisonment rates for Black women ten times that of white women.[19] The disparity begs the question: Do state felon voting disenfranchisement laws impermissibly deny the right to vote in a racially discriminatory manner?

His action was lauded for re-enfranchising African Americans and Hispanic New Yorkers comprising 71% of previously disenfranchised parolees, the New York Legislature passed bill S.830 and Governor Cuomo signed it into law on May 4, 2021 which converted the executive order into law. *Id; Voting Rights Restoration Efforts in New York*, BRENNAN CTR. FOR JUST. (May 4, 2021), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-new-york [https://perma.cc/D8TN-RJ67]. Governors in Kentucky have had less success. *See infra* note 68 and accompanying text. Louisiana has taken much smaller steps. On May 31, 2018, Governor Edwards signed HB 265 into law as Act No. 636 to restore voting rights only after serving five years of parole. Elizabeth Crisp, *Gov. John Bel Edwards Signs Law Restoring Felon Voting Rights After Five Years*, ADVOCATE (May 31, 2018, 4:29 PM) [https://perma.cc/GP92-QPJ6]. Florida took two steps forward and one step back. In November 2018, Florida Voters restored voting rights to formerly convicted felons, excepting only felony convictions for murder or "sexual offenses," by approving Amendment 4 to amend the state constitution. Patricia Mazzei & Michael Wines, *How Republicans Undermined Ex-Felon Voting Rights in Florida*, N.Y. TIMES (Sept. 17, 2020), https://www.nytimes.com/2020/09/17/us/florida-felons-voting.html [https://perma.cc/R6CB-TWFQ]. But in June 2019, the Republican Governor signed a law requiring the payment of court fines and fees before voting rights are restored. *Id.* For many, payment of all fines and fees is an insurmountable hurdle. For Florida resident Mr. Kelly, paying his full restitution for $600,000 would, at the rate his current payment plan of $100 per month, take more than 400 years to pay off. The Daily, *The Field: The Fight for Voting Rights in Florida*, N.Y. TIMES (Oct. 2, 2020), https://www.nytimes.com/2020/10/02/podcasts/the-daily/voting-rights-florida-election.html [https://perma.cc/Z7ML-MYBH].

16. *Restoration of Voting Rights for Felons*, *supra* note 12.

17. *What is Prop 17?*, *supra* note 15.

18. *Quick Facts: California Population Estimates*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/CA [https://perma.cc/7WVN-P7HT].

19. CAL. DEP'T. OF CORR. & REHAB., OFFENDER DATA POINTS: OFFENDER DEMOGRAPHICS FOR THE 24-MONTH PERIOD, ENDING DECEMBER 2017, at 14, 30 (2018). *See also* CAL. DEP'T. OF CORR. & REHAB., OFFENDER DATA POINTS FOR THE 24-MONTH PERIOD ENDING IN JUNE 2018, at 30 (2019) (finding the composition of the California inmate population as of June 30, 2019 to be 28.3% black, 20.9% white, and 44.2% Hispanic).

II. FELON DISENFRANCHISEMENT IS CONSTITUTIONAL: CHALLENGES TO FELON DISENFRANCHISEMENT IN THE AFTERMATH OF *RICHARDSON V. RAMIREZ*

Despite the common conception that voting is a fundamental right,[20] the United States Constitution does not provide for universal suffrage,[21] even in the wake of the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.[22]

A state's choice to enact felon disenfranchisement laws is still within the bounds of the Constitution.[23] Three years after Justice Thurgood Marshall wrote for a majority of the Supreme Court holding all adult citizens have a right to vote under the Equal Protection Clause and all qualifications of that right would be subject to strict scrutiny,[24] the Court found an affirmative

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20. Indeed, the Supreme Court has referred to "the political franchise of voting" as a "fundamental political right, because preservative of all rights." Yick Wo. v. Hopkins, 118 U.S. 356, 370 (1886). "Voting is a fundamental right in the United States, yet in the 2004 Presidential election, over five million people were unable to cast a vote because of a felony conviction at some point in their lives." Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 231 (2004). "The existence of [felon disenfranchisement] laws therefore calls into question the notion of voting as a fundamental right." *Id.* Notably, Chief Justice Warren's declaration that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" because "the right of suffrage is a fundamental matter in a free and democratic society" that is "preservative of other basic civil and political rights" predated the Court's finding in *Richardson* authorizing the felon disenfranchisement carve out for this most fundamental of rights. Reynolds v. Sims, 377 U.S. 533, 561–62 (1964); *see infra* notes 24 and 26.

21. John Crain, *How Congress Can Craft a Felon Enfranchisement Law that Will Survive Supreme Court Review*, 29 B.U. PUB. INT. L.J. 1, 9 (2019).

22. U.S. CONST. amend. XV (prohibiting vote denial on account of race); U.S. CONST. amend. XIX (expanding suffrage to women); U.S. CONST. amend. XXIV (prohibiting poll taxes in federal elections); U.S. CONST. amend. XXVI (changing the voting age to 18).

23. Richardson v. Ramirez, 418 U.S. 24, 54, 56 (1974) (finding that California could, "consistent with the Equal Protection Clause of the Fourteenth Amendment, exclude from [voting] convicted felons who have completed their sentences and paroles" because section 2 of the Fourteenth Amendment's "applicability to state laws disenfranchising felons[] is of controlling significance" and distinguishes felon disenfranchisement from other limitations on state voting qualifications found invalid by the Supreme Court).

24. Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (noting that the constitutionally protected "equal right to vote" is "not absolute; the States have the power to impose voter qualifications, and to regulate access to the [voting] franchise in other ways" but that "as a general matter, 'before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny" (quoting Evans v. Cornman, 398 U.S. 419, 422 (1970))). The Court clarified that a state's showing of a substantial state interest was insufficient to justify "unnecessarily burden[ing] or

sanction in section 2 of the Fourteenth Amendment for the exclusion of the right to vote for those convicted of a crime.[25] This opinion, *Richardson v. Ramirez*,[26] affirmed the presumption that state felon disenfranchisement laws are constitutional unless shown to be otherwise.[27] The Court acknowledged the difficulty of interpreting constitutional provisions, the scarcity of legislative history for section 2, and the intent of the Amendment framers regarding the exemptions to the right to vote.[28] Yet, the Court decided the language was intended to mean what it said: A "participation in rebellion or other crime"[29] can be grounds for exemption from the right to vote.[30] The language "except for participation in rebellion, or other

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restrict[ing] constitutionally protected activity. *Id.* at 343. Instead, the Court applied strict scrutiny, requiring a showing of a compelling state interest narrowly tailored to achieve the state's "legitimate objectives." *Id.*

25. *Richardson*, 418 U.S. at 54–56. *Richardson* firmly distinguished felon disenfranchisement from the usual requirement of strict scrutiny applied to equal protection claims and rejected plaintiffs' argument that the government need prove disenfranchising people with felony convictions serves a compelling state interest. *See* Matthew E. Feinberg, *Suffering without Suffrage: Why Felon Disenfranchisement Constitutes Vote Denial under Section Two of the Voting Rights Act*, 8 HASTINGS RACE & POVERTY L.J. 61, 68 (2011) (discussing how section 2 of the Fourteenth Amendment permits state felon disenfranchisement without any further state justification); *see also* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box*," 102 HARV. L. REV. 1300, 1302 n.8 (1989) ("[Section] 2 . . . obviated any need to justify" felon disenfranchisement "with a compelling state interest.").

26. *See Richardson*, 418 U.S. at 56. Douglass, Marshall, and Brennan dissented in this 6-3 decision, referring to voting as a "fundamental right" and condemning the historical analysis as "unsound." *Id.* The Justices noted the proposed second section of the Fourteenth Amendment "went to a joint committee containing only the phrase 'participation in rebellion' and emerged with 'or other crime' inexplicably tacked on." *Id.* at 73.

27. *Id.* at 56. Because the Fourteenth Amendment included an affirmative sanction to exclude, the Supreme Court found that state laws excluding felons from the franchise were not inconsistent with or violative of the Equal Protection Clause. *Id.* The Court interpreted section 2 as exempting felon disenfranchisement from strict-scrutiny analysis, which is the standard of review for other voting qualifications. Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 J. LEGAL STUD. 85, 89–90 (2004).

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

29. Section 2 of the Fourteenth Amendment provided: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. 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." U.S. Const. amend. XIV, § 2.

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

crime," the Court noted, was never altered during floor debates proposing changes to the language.[31]

Because felon disenfranchisement laws are presumptively constitutional, there are limited ways to prevent their application.[32] Plaintiffs turn to constitutional challenges, primarily using the Fourteenth Amendment, to oppose felon disenfranchisement statutes for having a disparate impact on a protected class.[33] The Supreme Court has, however, affirmed the rejection of such constitutional challenges on a number of occasions.[34] In the last three decades, petitioners have also launched attacks against felon disenfranchisement laws under section 2 of the Voting Rights Act (VRA) to argue impermissible vote dilution or vote denial on account of race.[35] Authors have argued litigating felon disenfranchisement laws is ineffective; the future of section 2 challenges in the felon disenfranchisement context is uncertain;[36] and proponents of eliminating felon disenfranchisement laws should therefore look to legislation as the solution.[37] These arguments have merit—short of an amendment to the U.S. Constitution, the only way

31. *Id.* at 45.

32. *See* Miles, *supra* note 27, at 89–90.

33. *Id.* at 89–91.

34. *Richardson*, 418 U.S. at 53 (first citing Fincher v. Scott, 352 F. Supp. 117 (M.D.N.C. 1972), *aff'd*, 411 U.S. 961 (1973); and then citing Beacham v. Braterman, 396 U.S. 12 (1969)).

35. *See* William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 624–25 (2007). *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986) was one of the first cases to apply a section 2 challenge to state felon disenfranchisement laws. *Id.* at 625. *See infra* notes 80–83, 99 and accompanying text for the language of section 2.

36. Erin Kelly, *Do the Crime, Do the Time—and Then Some: Problems with Felon Disenfranchisement and Possible Solutions*, 51 U. TOL. L. REV. 389, 398 (2020) (finding use for section 2 of the VRA uncertain given the circuit split and Supreme Court's repeat denial of certiorari on these cases).

37. *See* Amanda J. Wong, *Locked Up, Then Locked Out: The Case for Legislative—Rather Than Executive—Felon Disenfranchisement Reform*, 104 CORNELL L. REV. 1679, 1713 (2019) (arguing for reform via national legislation rather than gubernatorial action and promoting passage of the Democracy Restoration Act first introduced to Congress in 2008 by Russ Feingold); Kierra W. Mai, *A Uniform Approach to Felon Disenfranchisement: Is the Multi-State System an Artifact of Slavery?*, 13 IDAHO CRITICAL LEGAL STUD. J., 2019, at 1, 4, 42 (arguing for a uniform national approach and encouraging Congress to "addres[s] felon disenfranchisement as an amendment to the Voting Rights Act" to eliminate patchwork state felon disenfranchisement laws disproportionately affecting Black citizens); *see also* Liles, *supra* note 35, at 616 (suggesting that Congress and state legislatures are the best forums for plaintiffs to seek abolishment of state disenfranchisement laws).

to abolish felon disenfranchisement is on a state-by-state basis.[38] In the meantime, however, with Fourteenth and Fifteenth amendment challenges frequently failing, plaintiff options to challenge the application of felon disenfranchisement laws on the basis of racial discrimination are bleak. The VRA, intended by Congress to prevent racial discrimination from affecting voter qualifications, is the only remaining tool to effectuate the promises enshrined in the Fifteenth Amendment.[39]

This Comment establishes why the Supreme Court should decide the current circuit split in favor of permitting VRA section 2 challenges to root out the racially discriminatory effect of state felon disenfranchisement laws, where applicable and provable. After briefly addressing the long history of felon disenfranchisement, this Comment addresses the varied landscape and discriminatory effect of state felon disenfranchisement laws, the limitations of other challenges, and the status of the circuit split on the issue of VRA challenges. Then, this Comment argues the viability of VRA section 2 challenges and endorses the totality of the circumstances test within the amended section 2 as the proper test the Supreme Court should adopt to resolve the circuit split and provide a remedy for felon disenfranchisement laws that have a racially discriminatory effect. To guide the Court's clarification of the proper application of the totality of the circumstances analysis, this Comment addresses how the Ninth Circuit's

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38. When the Fourteenth Amendment was adopted, 29 states had felon disenfranchisement provisions written into their constitutions. *Richardson*, 418 U.S. at 48 n.14. While some states have seen partial restoration of voting rights via legislation or executive order, amending the state constitution is the most permanent way to reenfranchise felons. *See* Martine J. Price, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & Pol'y 369, 400, 405–408 (2002). For example, in 2016, the Virginia Supreme Court found that its governor's executive order reenfranchising felons violated the state constitution. Lauren Latterell Powell, *Concealed Motives: Rethinking Fourteenth Amendment and Voting Rights Challenges to Felon Disenfranchisement*, 22 MICH. J. RACE & L. 383, 399 (2017). The processes for constitutional amendment differ by state and include permitting ballot initiative amendments, calling constitutional conventions, and submitting legislative amendments to voter ballots for consideration. *See Amending State Constitutions*, BALLOTPEDIA, https://ballotpedia.org/Amending_state_constitutions [https://perma.cc/BH74-MDQJ]. Delaware is the only state whose legislature can amend the state constitution without putting the amendment to a vote on the ballot. *Id.*

39. The John Lewis Voting Rights Advancement Act is one of the latest Congressional efforts to "restor[e] and strengthen[] the protections of the VRA." Myrna Pérez & Tim Lau, *How to Restore and Strengthen the Voting Rights Act*, BRENNAN CTR. FOR JUST. (Jan. 28, 2021), https://www.brennancenter.org/our-work/research-reports/how-to-restore-and-strengthen-voting-rights-act [https://perma.cc/2N2R-UR6Y]. Although the Act passed the House of Representatives by a vote of 219–212 on August 24, 2021, Senate Republicans blocked the bill from advancing in November, 2021. *See* S. 4263, 116th Cong. (2020); Clare Foran, *Senate Republicans Block John Lewis Voting Rights Bill in Key Vote*, CNN (Nov. 3, 2021, 4:44 PM), https://www.cnn.com/2021/11/03/politics/john-lewis-voting-rights-act-senate-vote/index.html [https://perma.cc/RNE3-HHRD].

opinion in *Farrakhan II*[40] provides a roadmap for correctly applying the section 2 analysis, and also, where that court went wrong in *Farrakhan III*.[41] Lastly, this Comment examines the use of felon disenfranchisement laws to suppress the African American vote, particularly considering the disproportionate mass incarceration of African Americans in the wake of the Civil Rights Movement. In conclusion, where a plaintiff can show in the totality of the circumstances that state felon disenfranchisement laws have a racially discriminatory effect in violation of section 2 of the VRA, the remedy must be to strike down the law causing racially discriminatory vote denial.

A. The History of Felon Disenfranchisement

Felon disenfranchisement has a long history in the Western World dating back to Ancient Greece, continuing in Medieval Europe, and following colonists to the United States.[42] In Greece, criminals designated "infamous" were banned from civic participation—they could not vote, appear in court, hold office, or even make public speeches.[43] In Rome, commission of a crime involving "moral turpitude" could also result in this "civil death."[44] Proponents of felon disenfranchisement refer to this ancient heritage as justification for the continued disenfranchisement of felons in the United States.[45]

Felon disenfranchisement laws have been on the books in the United States since its inception.[46] As early as the Seventeenth Century, preventing civic involvement was used to punish moral crimes such as drunkenness.[47] Between 1776 and 1821, eleven states—Virginia, Kentucky, Ohio, Louisiana, Indiana, Mississippi, Connecticut, Illinois, Alabama, Missouri, and New York—adopted constitutions that disenfranchised felons or

40. Farrakhan v. Gregoire (*Farrakhan II*), 590 F.3d 989 (9th Cir. 2010).
41. Farrakhan v. Gregoire (*Farrakhan III*), 623 F.3d 990 (9th Cir. 2010).
42. George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 852–53 (2005); *see also* Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 728 (2006).
43. Figler, *supra* note 42.
44. Feinberg, *supra* note 25, at 65.
45. Roger Clegg, George T. Conway III & Kenneth K. Lee, *The Case Against Felon Voting*, U. ST. THOMAS J.L. & PUB. POL'Y, Spring 2008, at 1, 3.
46. Brooks, *supra* note 42.
47. *Id*.

permitted their statutory disenfranchisement.[48] By the ratification of the Fourteenth Amendment, eighteen more states joined their ranks.[49]

The long, entrenched history of felon disenfranchisement played a role in justifying its continued survival. In 2009, the First Circuit justified denial of a challenge to felon disenfranchisement laws in part upon its historicity, noting: "Felon disenfranchisement statutes are not like all other voting qualifications. Congress has treated such laws differently. They are deeply rooted in our history, in our laws, and in our Constitution."[50] Judge Andrew Kleinfeld also raised the historicity of felon disenfranchisement as a presumably legitimate state interest during oral argument en banc in *Farrakhan III*.[51] Be wary of such arguments—although states have the prerogative to enact felon disenfranchisement laws, no amount of longstanding history or tradition can override the impermissibility of exercising that prerogative in a discriminatory manner.[52]

B. State Authority to Determine Voter Qualifications & the Varied Landscape of State Felon Disenfranchisement Laws

In addition to the historicity of felon disenfranchisement, states are traditionally understood to have the constitutional authority to establish voter qualifications,[53] including the inclusion or exclusion of a limitation on voting for those convicted of crimes.[54] States possess "broad powers to determine the conditions under which the right of suffrage may be

48. *Id.* at 853.
49. *Id.*
50. Simmons v. Galvin, 575 F.3d 24, 34 (1st Cir. 2009).
51. Oral Argument, *Farrakhan III*, 623 F.3d 990 (2010) (No. 06-35669).
52. As noted in petitioners' writ of certiorari in *Simmons v. Galvin*, "an affirmative sanction," such as that in section 2 of the Fourteenth Amendment, "is not the same as an unlimited sanction;" the allowance is limited "by the constraints of the Fifteenth Amendment . . . which expressly outlaws voting discrimination on account of race." Petition for a Writ of Certiorari at 17, *Simmons*, 575 F.3d 24 (No. 09-920) (citing Hayden v. Pataki, 449 F.3d 305, 350–51 (2d Cir. 2006) (Parker, J., dissenting)).
53. U.S. Const. art. I, § 2; U.S. Const. amend. X; U.S. Const. amend. XVII; *see also* Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 212 n.306 (2015) ("[T]he Constitution gives the states exclusive authority to set voter qualifications under the Qualifications Clause . . . ."); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 122–24 (2014) ("[T]he U.S. Constitution does not directly grant the right to vote to anyone" and "delegates to the states in the first instance the right to dictate the times, places, and manner of holding elections and provides that states determine rules for voter qualifications.").
54. *See supra* note 48 and accompanying text.

exercised," including "[r]esidence requirements, age, [and] previous criminal record," with the only federal limitation being discrimination.[55]

The landscape of criminal disenfranchisement changed drastically in the last fifty years.[56] Although only 1.17 million convicted or formerly convicted felons were disenfranchised in 1976, more than 6.1 million individuals were as of 2016.[57] This increase is because of the uptick in mass incarceration, not an increase in state disenfranchisement laws.[58] In fact, trends across the nation are irrefutably leaning towards reenfranchisement.

In the last thirty-five years, more than half of the fifty states either narrowed the scope of their felon disenfranchisement laws or used legislation or executive action to inform persons with felony convictions of their voting rights.[59] As of August 5, 2020, the eleven states that disenfranchise felons indefinitely for certain crimes are now in the minority.[60] Only two of those eleven states—Virginia and Kentucky—permanently disenfranchise,[61] although some of those eleven states—like Delaware—permanently disenfranchise certain disqualifying felonies, such

55. Brooks, *supra* note 42, at 853 (quoting Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 50–51 (1959))*; see also* U.S. CONST. art. I, § 2 cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the state Legislature.").

56. *See* JEAN CHUNG, THE SENT'G PROJECT, VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER 3 (2021).

57. *Id*.

58. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 60 (2012) ("Convictions for drug offenses are the single most important cause of the explosion in incarceration rates in the United States."); *see also* THE SENT'G PROJECT, TRENDS IN U.S. CORRECTIONS 1–2, 7 (2020). The rise of mass incarceration during the Civil Rights Movement, Nixon and Reagans' War on Drugs, and Clinton's Tough on Crime agenda disproportionately targeted blacks and correlated with a rise in black activism. ALEXANDER, *supra*, at 48–50, 56.

59. CHUNG, *supra* note 56, at 4 ("Among these: Ten states either repealed or amended lifetime disenfranchisement laws. Eight states expanded voting rights to some or all persons on probation and/or parole. Thirteen states eased the restoration process for persons seeking to have their right to vote restored after the completion of their sentence. Three states improved data and information sharing.").

60. *Restoration of Voting Rights for Felons*, *supra* note 12. The eleven states permitting indefinite disenfranchisement are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming. *Id.*

61. *Felony Disenfranchisement Laws (Map)*, ACLU, https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map [https://perma.cc/UP2D-MH8C].

as murder, bribery, and sexual offenses.[62] Even some states that permanently disenfranchise retain the possibility of reenfranchisement, however remote, through a petition process after completion of a sentence or by executive pardon.[63] Sixteen states and the District of Columbia disenfranchise felons while incarcerated but restore the right to vote when released.[64] Twenty-one states revoke the right to vote until the convicted felon has completed not only the prison sentence, but any applicable probation or parole.[65] Only two states, Maine and Vermont, have chosen to altogether eliminate disenfranchisement for people with criminal convictions.[66]

Because states have near absolute control over voter qualifications and each state has different values, culture, and history, every state has different felon disenfranchisement laws.[67] State disenfranchisement laws are highly politicized. In a 2015 executive order, Kentucky Governor Steve Beshear, a Democrat, restored voting rights to those with non-violent felony convictions[68] upon completion of sentence.[69] His Republican successor promptly reversed the order after taking office later that same

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62. *Restoration of Voting Rights for Felons*, *supra* note 12.

63. *See id.* Mississippi provides a creative option for an individual's restoration of voting rights "by two-thirds vote of both houses of the legislature." *Id.*; *see also* MISS. CONST. art. XII, § 253.

64. Once released from prison, restoration of the right to vote still requires voter registration. *Restoration of Voting Rights for Felons*, *supra* note 12; *see also Felony Disenfranchisement Laws (Map)*, *supra* note 61.

65. *Felony Disenfranchisement Laws (Map)*, *supra* note 61. Some of these states require all restitution, fines, and fees to be paid before the restoration of voting rights. *Id.*

66. BRENNAN CTR. FOR JUST., CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES 1 (2020).

67. Jacey Fortin, *Can Felons Vote? It Depends on the State*, N.Y. TIMES (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/us/felony-voting-rights-law.html [https://perma.cc/3QTF-BYM3].

68. Erik Eckholm, *Kentucky Governor Restores Voting Rights to Thousands of Felons*, N.Y. TIMES (Nov. 25, 2015), https://www.nytimes.com/2015/11/25/us/kentucky-governor-restores-voting-rights-to-thousands-of-felons.html [https://perma.cc/LPX8-WBH4]. "As an executive order, the new policy can be altered or scrapped by a future governor." *Id.*

69. Jonathan Bullington & Chris Kenning, *Gov. Andy Beshear Restores Voting Rights to More Than 140,000 Nonviolent Kentucky Felons*, COURIER J. (Dec. 12, 2019, 3:41 PM), https://www.courier-journal.com/story/news/politics/ky-governor/2019/12/12/felons-right-vote-kentucky-restores-voting-rights-more-than-100000/4397887002/ [https://perma.cc/4CB7-Q92X]. In Kentucky, unlike Florida, completion of sentence does not require payment of fines, fees, and restitution, but does require completion of terms such as probation. Mazzei & Wines, *supra* note 15. Consider the impact of this interpretation of the wording "completion of sentence" on someone like Mr. Windham, who will be on probation for a minimum of seven years and a maximum of life. Telephone Interview with John Windham, *supra* note 3.

year.[70] Governor Beshear's son, Governor Andy Beshear, reinstated his father's order on December 12, 2019,[71] resulting in restoration of rights to an estimated 178,390 of 312,000 Kentuckians previously barred from voting due to a felony conviction.[72] Similarly, in 2005, Iowan Governor Tom Vilsack restored voting rights to all formerly convicted of a felony, but Governor Terry Branstad reversed the executive order in 2011.[73]

Felon disenfranchisement may also have political consequences. Given the high rates of felon disenfranchisement in Florida, which deprives more people of the right to vote than any other state, studies in the aftermath of the close 2000 Presidential race estimate that if ex-offenders who had completed their sentences had been allowed to vote, Al Gore would have been elected President of the United States rather than George Bush.[74]

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70. *Restoration of Voting Rights for Felons*, *supra* note 12. However, restoring rights to convicted felons does not always split evenly along political lines. Louisville Republican House Representative Jason Nemes is sponsoring a pending bill to restore all civil rights, including gun ownership and jury service, to convicted felons five years after completion of sentence. Chris Kenning, *Kentucky Restored Voting Rights to 178,000 with Felonies. That's Not Far Enough, Advocates Say*, COURIER J. (Jan. 28, 2021, 11:00 AM), https://www.courier-journal.com/story/news/2021/01/28/kentucky-felon-voting-rights-must-go-farther-advocates-say/4258930001/ [https://perma.cc/94GJ-6JU4]. For text of the proposed amendment to Section 145 of the Kentucky State Constitution, pending at time of publication, see H.R. 232, 2021 Gen. Assemb., Reg. Sess. (Ky. 2021).

71. Bullington & Kenning, *supra* note 69. Kentucky Equal Justice Center attorney Ben Carter criticized the partial restoration as politically motivated, commenting that "the distinction between violent and non-violent felons is so frustrating, because it ignores a fact that Gov. [Andy] Beshear knows very well – that the distinction has already been made by our justice system," adding "[t]hose convicted of violent felonies have served more time in prison and on parole" than those convicted of non-violent felonies. *Id.* Acknowledging bipartisan support in the Kentucky legislature for partial restoration of felon voting rights, Republican House Speaker David Osborne expressed concerns about the use of executive orders to effectuate a result that can only be permanently affixed by a constitutional amendment approved by Kentucky voters. *Id.*

72. Kenning, *supra* note 70. The 2019 order reduced the percentage of the state population barred from voting due to a felony conviction by more than half, where prior to the order an estimated 9% of the state population was barred from voting because of a felony conviction. Bullington & Kenning, *supra* note 69.

73. *Restoration of Voting Rights for Felons*, *supra* note 12.

74. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157 (2004). University of Minnesota sociologist Chris Uggen determined that if "felons had the vote, Al Gore would have likely won the popular vote by more than a million votes. In Florida alone, Gore would have picked up 60,000-80,000 votes–enough to swamp the narrow victory margin declared for George Bush." Rebecca Perl, *The Last Disenfranchised Class*, NATION (Nov. 6, 2003), https://www.thenation.com/article/archive/last-disenfranchised-class/ [https://perma.cc/PXV9-T3CU]; *see also* Christopher Uggen & Jeff Manza, *Democratic*

The variance of felon disenfranchisement laws from state to state reflects the foundations of American federalism. And the variance, and even politicization, of felon disenfranchisement is indisputably constitutional. But there is a caveat—state felon disenfranchisement laws that have a racially discriminatory effect cannot pass constitutional muster.[75]

III. THE TENSION BETWEEN STATE AUTHORITY TO DETERMINE VOTER QUALIFICATIONS AND FEDERAL PROHIBITIONS AGAINST DISCRIMINATION

The broad language of Article I, section 2[76] of the U.S. Constitution has been interpreted to give states authority to determine voter qualifications.[77] States traditionally have constitutional authority and wide latitude to set voter qualifications.[78] The Supreme Court is reluctant to impinge upon a traditional area of state authority.[79] However, the Reconstruction Amendments were enacted for precisely that purpose: To bring state law in line with a

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Contraction? Political Consequences of Felon Disenfranchisement in the United States, 67 AM. SOCIO. REV. 777, 792 (2002). Bush won Florida by only 537 votes, where 57% of the white vote in Florida went to Bush but 93% of the Black vote in Florida went to Gore. See Peter Wagner, *Massachusetts Disenfranchises its Prisoners*, PRISON POL'Y INITIATIVE (Nov. 30, 2000), https://www.prisonpolicy.org/blog/2000/11/30/mavote/ [https://perma.cc/49KH-6BRB]. Where 11% of Florida registered voters were Black in 2000, Blacks comprised an estimated 44% of 58,000 alleged felons listed on a "purge list" distributed to county election supervisors to prevent convicted felons from voting. Ari Berman, *How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement*, NATION (July 28, 2015), https://www.thenation.com/article/archive/how-the-2000-election-in-florida-led-to-a-new-wave-of-voter-disenfranchisement/ [https://perma.cc/8FVA-EWS7]. An estimated 12,000 people on that list were incorrectly labeled felons and turned away from the ballot box. *Id.*

75. Liles, *supra* note 35, at 618–21. An otherwise constitutional disenfranchisement law is unconstitutional if violative of another provision of the constitution, such as equal protection or the Fifteenth amendment. *Id*; *see also* U.S. CONST. amend. XV, § 1 ("The 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.").

76. *See supra* note 54.

77. Mai, *supra* note 37, at 21.

78. *Id.* "Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 45 (1959) (citing Davis v. Beason, 133 U.S. 333, 345–47 (1890)) (upholding North Carolina literacy requirement for voting).

79. Franita Tolson, *The Spectrum of Congressional Authority Over Elections*, 99 B.U. L. REV. 317, 341 (2019). Courts have traditionally imposed limitations upon the exercise of federal power under the Fourteenth and Fifteenth Amendments. *Id.* at 318, 340. However, Congress has constitutional power under the Elections Clause to "police state action . . . to protect the fundamental right to vote." *Id.* at 318.

national program prohibiting slavery and its collateral consequences.[80] The Reconstruction Amendments have always been at tension with state rights.[81] Constitutional laws may be found otherwise unconstitutional if racially discriminatory.[82]

A. The Fifteenth Amendment and the VRA

The Fifteenth Amendment was the last of the three Reconstruction Amendments and intended as the final death knell of slavery.[83] On the first day of the amendment's consideration by the U.S. Senate, Senator Stewart, explaining why Congress should pass the amendment, stated:

> This amendment is a declaration to make all men without regard to race or color, equal before the law. The arguments in favor of it are so numerous, so convincing, that they carry conviction to every mind. The proposition itself has been recognized by the good men of this nation; and it is important, as the new administration enters upon the charge of the affairs of this country, that it should start on this high and noble principle that all men are free and equal, that they are really equal before the law. We cannot stop short of this. It must be done. It is the only measure that will really abolish slavery. It is the only guarantee against peon laws and against oppression. It is that guarantee which was put in the Constitution of the United States originally, the guarantee that each man shall have a right to protect his own liberty. It repudiates that arrogant, self-righteous assumption, that one man can be charged with the liberties and destinies of another. You may put this in the form of legislative enactment; you may empower Congress to legislate; you may empower the States to legislate, and they will agitate the question. Let it be made the immutable law of the land; let it be fixed; and then we shall have peace. Until then there is no peace.[84]

This amendment did not confer the right to vote on anyone but prohibited discrimination in voting based on race, color, or previous condition of servitude.[85] The promise to eradicate discriminatory barriers to the vote

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80. *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm [https://perma.cc/884Q-BEVL].

81. One of the first objections to consideration of the proposed Fifteenth Amendment was the concern with "regulating the suffrage in a State," which had been "left with the people of the State . . . from the foundation of the Government to this time." CONG. GLOBE, 40th Cong., 3d Sess. 542 (1869) (statement of Senator Dixon).

82. Liles, *supra* note 35, at 621.

83. CONG. GLOBE, 40th Cong., 3d Sess. 668 (1869).

84. *Id.*

85. *Megan Bailey, The Fifteenth Amendment*, NAT'L PARK SERV., https://www.nps.gov/articles/the-fifteenth-amendment.htm [https://perma.cc/3WSJ-G74K]; *see also* Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J.S. HIST. 202, 204 (1962)

was declaratory, but in practice had no teeth.[86] States continued to enact laws to frustrate and dilute the African American vote, undermining the efficacy of the Fifteenth Amendment's declaration with poll taxes, grandfather clauses, property requirements, and literacy tests.[87] African Americans were prevented from voting by intimidation and violence.[88]

The Voting Rights Act of 1965 was enacted by Congress to course-correct this failure of states and courts[89] to enforce the Fifteenth Amendment.[90] The Act's enactment was authorized by section 2 of the Fifteenth Amendment itself, which provides: "The Congress shall have power to enforce this article by appropriate legislation."[91] Initially, the phrasing of section 2 of the VRA mirrored the Fifteenth Amendment.[92] Where the Fifteenth Amendment provided in section 1 that "the right of citizens of

("The Fifteenth Amendment . . . did not grant the Negro the right to vote; it merely outlawed the use of race as a test for voting.").

86. For example, many southern states were able to amend their state constitutions following Reconstruction to restrict access to voting. *See* Paul Moke & Richard B. Saphire, *The Voting Rights Act and the Racial Gap in Lost Votes*, 58 HASTINGS L. J. 1, 27–28 (2006).

87. *Id.*

88. Swinney, *supra* note 85, at 202. Congressional efforts to thwart the use of "force, bribery, threats, and intimidation" through three acts passed between 1870 and 1871, known as the Enforcement Acts, met limited success as state and local authorities declined cooperation and local communities stalled efforts to prosecute violations. *Id.* at 202–03, 209–11.

89. Stephanie N. Kang, *Restoring the Fifteenth Amendment: The Constitutional Right to an Undiluted Vote*, 62 UCLA L. REV. 1392, 1400 (explaining that the VRA was a response to the "widespread practice of state disenfranchisement and acts of violence toward voting rights activists"); *see also* ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 83–84, 89 (2005). Initial prosecutions under the Enforcement Acts were highly effective. *Id.* at 83–84. However, by 1873, "the Justice Department completely abandoned civil rights enforcement," declining to prosecute cases unless the crime was both a "fragrant violation of the law *and* the probability of conviction was strong." *Id.* at 89.

90. *History of Federal Voting Rights Laws*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/history-federal-voting-rights-laws [https://perma.cc/648U-5L3K] (noting the language of the VRA "closely followed the language of the 15th Amendment" and "contained special enforcement provisions targeted at those areas of the country where Congress believed the potential for discrimination to be the greatest"). Promoting the VRA's adoption, the Senate Judiciary Committee wrote: "We all recognize the necessity to eradicate once and for all the chronic system of racial discrimination which has for so long excluded so many citizens from the electorate because of the color of their skins, contrary to the explicit command of the 15th amendment." Kang, *supra* note 89, at 1400 (citing S. Rep. No. 89-162, pt. 3, at 2 (1965)).

91. U.S. CONST. amend. XV, § 2.

92. *History of Federal Voting Rights Laws*, supra note 90; *see also* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973–1973aa-6) (current version at 52 U.S.C. §§ 10301–10314).

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,"[93] the VRA as enacted in 1965[94] stated: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."[95]

To be clear, section 2 does not mention felon disenfranchisement. Before the application of section 2 to felon disenfranchisement challenges, plaintiffs were using section 2 to challenge election districting schemes on grounds of vote dilution.[96]

B. Vote Dilution vs. Vote Denial

Section 2 provides a remedy for claims of vote denial or vote dilution.[97] Vote denial affects participation and refers to practices that bar people from registering to vote or voting at all.[98] Vote dilution affects representation and refers to practices that diminish a group's political influence.[99] Far more cases have been brought under vote dilution claims than vote denial claims,[100] and the Supreme Court has not decided a vote denial case under the "results" language of section 2.[101] "The legislative history of the 1982 amendments thus shows that Congress was almost exclusively focused on vote dilution claims,"[102] but the language in the Senate Report prohibiting

93. U.S. CONST. amend. XV, § 1.

94. The VRA's efficacy was immediate. Within four years, the percentage of African Americans registered to vote skyrocketed from 6.7% to 66.5% in Mississippi, 19.3% to 61.3% in Alabama, and 27.4% to 60.4% in Georgia, and 31.6 to 60.8% in Louisiana. ALEXANDER, *supra* note 58, at 38.

95. Voting Rights Act of 1965 § 2.

96. *See* Montano v. Suffolk Cnty. Legis., 268 F. Supp. 2d 243, 261 (E.D.N.Y. 2003) ("[Section 2] bars the enactment of election districts which minimize or cancel out the voting strength of minorities . . . .") (E.D.N.Y. 2003) (citing Allen v. State Bd. of Elections, 393 U.S. 544, 555–56 (1969)).

97. *See* Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 442 (2015).

98. *Id.*

99. *Id.* For example, redistricting plans that "either weaken or keep minorities' voting strength weak." Simmons v. Galvin, 575 F.3d 24, 29 (1st Cir. 2009).

100. Tokaji, *supra* note 97.

101. *Id.* at 445. *See infra* Part IV for further discussion of the "results" language.

102. *Simmons*, 575 F.3d at 40 (quoting Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 707 (2006)). *See infra* note 118 and accompanying text.

"all voting rights discrimination" that "result[s] in the denial of equal access to any phase of the electoral process for minority group members"[103] affirms the applicability of the VRA to vote denial cases.

To combat concerns that the results test[104] would be understood to mandate proportional representation, the 1982 amendments added qualifying language in section (b):

> A violation of [§ 2] 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 [§ 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[105]

After the 1982 amendments, *Thornburg v. Gingles*[106] established the test for vote dilution claims, by which plaintiffs must satisfy three preconditions[107] and then show deprivation of an opportunity to participate in the political process by electing chosen representatives in the "totality of the circumstances."[108] *Gingles* also illuminated the essence of a section 2 claim: "[T]hat a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[109] This essence illuminates the principle which should also guide the test for whether felon disenfranchisement laws constitute vote denial of African Americans as a protected class in violation of section 2.[110]

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

104. *See infra* notes 115–19 and accompanying text.

105. 52 U.S.C. § 10301(b).

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

107. Tokaji, *supra* note 97, at 445 (summarizing the *Gingles* preconditions: "(1) the minority group must be sufficiently 'large and geographically compact to constitute a majority in a single-member district'"; (2) the group must be 'politically cohesive'; and (3) there must be racial bloc voting by whites, so as to defeat minority candidates (quoting *Thornburg*, 478 U.S. at 50–51)).

108. *Id.* at 446.

109. *Gingles*, 478 U.S. at 47.

110. In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), the majority (written by Justice Alito, joined by Chief Justice Roberts and Justices Thomas, Gorsuch, Kavanaugh, and Barrett) found, "equal openness [is] the touchstone." 141 S. Ct. at 2338. Maybe so, but evaluating the openness to which the statute refers involves analysis of, among other factors—*including* data of statistical significance—how the voting practice or qualification interacts with social and historical conditions to determine whether there is causation between the practice and impaired opportunity to vote on account of race.

IV. DISPARATE IMPACT & THE POWER OF A VRA CHALLENGE: WHERE A SECTION 2 CHALLENGE CAN ACCOMPLISH WHAT FOURTEENTH AND FIFTEENTH AMENDMENT CHALLENGES COULD NOT

The Fourteenth and Fifteenth Amendments ban disparate treatment, marked by intent, on the basis of race, but not disparate impact.[111] Disparate impact is "an adverse, disproportionate impact [that] is brought about by decision making criteria or practices that operate to harm individuals on the basis of a protected status characteristic,"[112] such as race. Disparate impact is often best discernable through evidence of statistical disparities.[113] However, courts have shown increasing skepticism of reliance on statistical analysis without more,[114] making proof of a causal connection between a policy or law and discriminatory result critical yet challenging to prove.[115]

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111. Roger Clegg & Hans A. von Spakovsky, *"Disparate Impact" and Section 2 of the Voting Rights Act*, 85 MISS. L.J. 1357, 1361 (2016).

112. Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1473 (2005).

113. *See* Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 773 (2009) (discussing disparate impact claims under Title VII, the Age Discrimination in Employment Act, the Equal Credit Opportunity Act, the Faith Housing Act, and claims brought under state antidiscrimination laws). "Statistics are generally plaintiffs' primary evidence in establishing a prima facie case of disparate impact discrimination." *Id.*

114. As noted in the state of Massachusetts' opposition brief to Petitioner's Writ of Certiorari, at least five circuit courts have found statistical evidence of disparity alone "insufficient as a matter of law to establish a VRA § 2 claim of vote denial on account of race." *See* Brief in Opposition at 13–14, Simmons v. Galvin, 575 F.3d 24 (2009) (No. 09-920) (first citing Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 588–89, 595–96 (9th Cir. 1997); then citing Ortiz v. City of Phila. Off. of the City Comm'rs Voter Registration Div., 28 F.3d 306, 307–15 (3d Cir. 1994); then citing Salas v. Sw. Tex. Junior Coll. Dist., 964 F.2d 1542, 1556 (5th Cir. 1992); then citing Irby v. Va. State Bd. of Elections, 889 F.2d 1352, 1358–59 (4th Cir. 1989); and then citing Wesley v. Collins, 791 F.2d 1260–62 (6th Cir. 1986)). "These cases stand for the principle that a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry.'" Salt River, 109 F.3d at 595. "[T]here must be some causal connection between the challenged electoral practice and the alleged [racial] discrimination that results in a denial or abridgement of the right to vote." Ortiz, 28 F.3d at 310.

115. Because the totality of the circumstances is the appropriate test, *see infra* notes 222–23 and accompanying text, disparate impact will not be determinative in every case, but it may be determinative in a case in which the evidence presented is so compelling, so statistically significant, that disparate impact is undeniable. While perfectly acceptable to give weight to some factors more than others, no general rule can be established as to

Initially, section 2 challenges required only proof of a discriminatory effect, but in 1980 the Supreme Court required plaintiffs to also prove discriminatory intent, like Fourteenth and Fifteenth Amendment claims.[116] The Court's decision prompted Congress to swiftly take legislative action to recraft the language and effect of the VRA.[117] The 1982 amendments removed the intent requirement imposed by the Court's interpretation of section 2 to read:

> 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 citizens of the United States to vote on account of race or color.[118]

Now, unlike an equal protection challenge,[119] the VRA does not require plaintiffs to prove that the "contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose."[120] Instead, the VRA prohibits disparate impact resulting from a racially disproportionate result or effect.[121] This focus on discriminatory

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which factors should have the greatest weight. The *Brnovich* decision should not be read to destroy the possibility that disparate impact data can win a section 2 case, because the totality of the circumstances test must inherently cleave to the facts of each specific case. Put differently, because each case must receive individual consideration in the totality of the circumstances, *Brnovich* has limited precedential value except to exceptionally analogous cases. *See infra* note 123.

116. City of Mobile v. Bolden, 446 U.S. 55, 60–61, 67 (1980) (finding plaintiff's Voting Rights section 2 claim no different from the Fifteenth Amendment claim where the court's review of legislative history led the court to agree with Senator Dirksen's characterization of section 2 during Senate hearings as "almost a rephrasing of the 15th Amendment"), *superseded by statute*, Voting Rights Act § 2(a), 42 U.S.C. § 1973(a), *as recognized in* Thornburg v. Gingles, 478 U.S. 30 (1986). *Thornburg* provided the Supreme Court's first occasion to construe the 1982 Voting Rights Act amendments to section 2. *See generally Thornburg*, 478 U.S. 30.

117. *Thornburg*, 478 U.S. at 35 ("The amendment was largely in response to this Court's plurality opinion in *Mobile* . . . .").

118. 52 U.S.C. § 10301(a) (emphasis added).

119. *Mobile*, 446 U.S. at 56 ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation" and the Equal Protection Clause is only violated if there is "purposeful discrimination"); *see also* Hunter v. Underwood, 471 U.S. 222, 227–28 (1985) ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause" (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977))).

120. *Thornburg*, 478 U.S. at 35.

121. Clegg & Spakovsky, *supra* note 111, at 1361; *see also* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2325 (2021). Although the Supreme Court found the disparity in *Brnovich* insignificant and insufficient to establish disparate impact under section 2, *see Brnovich*, 141 S. Ct. at 2348, the plaintiffs in *Brnovich* at least had the opportunity to present their case and evidence of disparate impact. Convicted felons currently have no such luxury—no nationally recognized cause of action. Once section 2

effect, otherwise known as the "results test," is the power behind the VRA.[122]

VRA challenges are recognized for individuals with prior felony conviction(s), as this Comment urges, every measure should be taken to identify how plaintiffs can, and should, present evidence of disparate impact to win section 2 cases. Simply put, once the Court heeds the call of this Comment, plaintiffs need a blueprint to corral evidence sufficient to make a prima facie case of disparate impact. Developing a blueprint to win cases will not be easy. Even the two circuits that recognize section 2 challenges to state felon disenfranchisement laws have not yet recognized a successful case of proven disparate impact. But the absence of a success in jurisdictions that recognize section 2 challenges in this context cannot and should not be understood to diminish the importance of providing the opportunity for a challenge to be brought in the event disparate impact can be proven; after all, "the demographics and political geography of States vary widely and Section 2's application depends upon place-specific facts." *Brnovich*, 141 S. Ct. at 2364 (Kagan, J., dissenting).

122. *See* Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 716 (1983) ("The new language of section 2 reinvigorates efforts of minority Americans to overcome discriminatory barriers to a meaningful vote."). However, the Supreme Court has made winning disparate impact claims under the VRA difficult. A majority of the current Court are traditionalist justices, and traditionalists attempt to restrict the disparate impact theory of liability because they strongly believe that, with the end of legalized racial discrimination (Jim Crow) in the early 1970s, race no longer matters in our society, and fear this theory of liability stokes racial division by giving plaintiffs a license to go fishing for and exaggerate racism where none exists. *See* ROY L. BROOKS, THE RACIAL GLASS CEILING: SUBORDINATION IN AMERICAN LAW AND CULTURE 39 (2017) (discussing the concept of "traditionalism"); *see also id.* at 51–53 (discussing traditionalist take on *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009), where the traditionalist majority rejects the city's attempt to remedy the disparate impact of its test for firefighter promotions); Tex. Dep't of Hous. & Comty. Affs. v. Inclusive Cmtys., 576 U. S. 519, 558 (2015) (Alito, J., dissenting) (opining that disparate impact claims should *not* be cognizable under the Fair Housing Act (FHA) notwithstanding the FHA's results-oriented language and the Court's interpretation of similar language in Title VII and ADEA). *Brnovich* continues the conservative assault on disparate impact. Although the racial disparity at issue in this case may have been small, that is no reason to suggest that small racial disparities are not actionable under the VRA. *Brnovich***,** 141 S. Ct at 2345 ("The District Court found that among the counties that reported out-of-precinct ballots in the 2016 general election, roughly 99% of Hispanic voters, 99% of African-American voters, and 99% of Native American voters who voted on election day cast their ballots in the right precinct, while roughly 99.5% of non-minority voters did so." (citing Democratic Nat'l Comm. V. Reagan, 329 F. Supp. 3d 824, 872 (2018))). Justice Kagan correctly notes in dissent what may appear a "smallish number" of votes "can matter" for purposes of section 2 because "elections are often fought and won at the margins" and "a small group of voters" can "influence the outcome of an election." *Id.* at 2367. My sincerest thanks to Earl Warren Distinguished Professor of Law, Roy Brooks, for his substantial contributions to the development of this footnote and his pioneering work in the area of critical process in jurisprudence.

A. Racially Discriminatory Effect of Felon Disenfranchisement Statutes

In some communities, the constitutionality of felon disenfranchisement has an effect contrary to the intent of the Fifteenth Amendment and the VRA. For example, states with lifetime disqualification laws like Alabama and Florida disenfranchise nearly a third of the Black male population, and nearly a quarter are barred from voting in Iowa, Mississippi, Virginia, and Wyoming.[123] As of 2020, at a rate more than four times that of non-African Americans, one in every sixteen Black adults nationwide could not vote as the result of a felony conviction,[124] and in Florida, Kentucky, Tennessee, and Virginia, the number of Black adults disenfranchised from a felony conviction was greater than one in seven.[125] The proportions are even higher for Black men: In 2010, one-third[126] of Black men were estimated to have felony convictions; an increase from 6%[127] in 1980.[128] The waters are muddied by the complexity of factors resulting in this disparity—namely, racial discrimination along every point of the criminal justice system, from arrests and charging[129] to sentencing.[130]

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123. Karlan, *supra* note 74, at 1157.

124. CHUNG, *supra* note 56, at 2.

125. *Id.*

126. Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1807 (2017). Compare with about 12% for all adult men in the same year. *Id.*

127. *Id.* Compare with 2% for all adult men in 1980 and 5.6% in 2010. *Id.*

128. *Id.* Significantly, just because plaintiffs lost in *Brnovich* does not mean that felon plaintiffs will also be unable to prove disparate impact under the method employed by the majority: in fact, given such disproportionally outrageous percentages of the general population of black voters disenfranchised relative to white voters—far beyond the 1-2% disparity dismissed as insignificant by the *Brnovich* majority—formerly convicted felon plaintiffs may be able to present compelling evidence of statistical disparity under either the majority's test, the dissent's test, or both. *See* Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2344–45 (2021).

129. *See generally* Dominique Camm, *Reversing the Standard: The Difficulty in Proving Selective Prosecution*, 31 N.C. CENT. L. REV. 93 (2008) (discussing the near impossibility of proving discriminatory intent in selective prosecution on the basis of race).

130. In *McCleskey v. Kemp*, the Supreme Court acknowledged the systemic racism in the criminal justice system and, as usual, motioned to the legislature as the appropriate venue to effectuate change. *See* McCleskey v. Kemp, 481 U.S. 279, 312–18 (1987) (acknowledging the veracity of the Baldus report evidencing racial disparity in sentencing yet finding disparities in sentencing to be an inevitable part of our criminal justice system). For an example of extreme racial disparity in arrests and sentencing, see also COUNCIL ON CRIME & JUST., AFRICAN AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (documenting racial disparity in Hennepin County in Minnesota from 1999 to 2001). The report found that in 2000, although only 3.5% of the state's population was African American, 37.2% of prisoners were African American, and that "African Americans [were] 21 times more likely to be arrested for violent crimes than whites." *Id.* at 1.

Although felon disenfranchisement laws have a long history in the Western World[131] and predated Reconstruction,[132] post-Reconstruction southern states tailored disenfranchisement laws to target crimes believed to be most committed by the Black population for the purpose of undermining the Black vote.[133] Today, "more Black men are disqualified [from voting] by the operation of criminal disenfranchisement laws than were actually enfranchised by the passage of the Fifteenth amendment."[134]

B. Discriminatory Intent vs. Discriminatory Effect

The discriminatory intent requirement has made equal protection and Fifteenth Amendment challenges to felon disenfranchisement nearly impossible to prove.[135] Absent explicit statements evincing discriminatory intent, most cases fail to win equal protection challenges in a criminal context.[136] *Hunter v. Underwood* was the rare case where plaintiff felons succeeded not only in showing a racially discriminatory effect, but discriminatory intent within the state's disenfranchisement law.[137] In the only Supreme

131. Christina Beeler, *Felony Disenfranchisement Laws: Paying and Re-Paying a Debt to Society*, 21 U. PA. J. CONST. L. 1071, 1076 (2019). "Civil death," the revocation of civil rights such as the right to vote from citizens who committed crimes, dates back to ancient Greece. *Id.* at 1076; *see also infra* notes 41–43.

132. *See* Richardson v. Ramirez, 418 U.S. 24, 48 (1974) ("[A]t the time of the adoption of the [Fourteenth] Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes.").

133. CHUNG, *supra* note 56, at 3.

134. Karlan, *supra* note 74, at 1157 & n.48 ("According to the 1870 census, there were approximately 1,083,484 black men in the United States over the age of 20 . . . Given then-existing restrictions on the franchise (e.g., property holding and poll tax requirements, pauper exclusions, and other disqualifications), some proportion of these men would have been ineligible to vote even after the Fifteenth Amendment prohibited racial discrimination in the franchise and thus the total number of black men sets an upper boundary on the number of potential black voters." (internal citations omitted)).

135. *See McCleskey*, 481 U.S. at 280 (finding "exceptionally clear proof" is required before court will find discriminatory intent).

136. *Id.* (finding general statistics, without more, is insufficient to prove discriminatory intent). *See generally* Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp*—and Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018) (discussing restriction of the use of statistics to prove discriminatory purpose and the reticence of the judiciary to consider social science evidence of bias in the criminal justice system).

137. Hunter v. Underwood, 471 U.S. 222, 229 (1985) ("The delegates to the all-white [Alabama State constitutional] convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: 'And what is it

Court case to date to address felon disenfranchisement aside from *Richardson,* and by unanimous decision, the Court struck down Alabama's felon disenfranchisement provision.[138] For the first time,[139] the Court had occasion to consider whether the felon disenfranchisement provision, despite being presumptively constitutional, was nonetheless unconstitutional as a racially discriminatory violation of equal protection.[140] Although Article VIII, § 182, of the Alabama Constitution of 1901—providing for the disenfranchisement of persons convicted of certain enumerated felonies and misdemeanors, including "any . . . crime involving moral turpitude" —was racially neutral on its face, the court of appeals found the evidence of discriminatory impact indisputable.[141] The enumerated crimes included, inter alia, vagrancy, adultery, and wife beating—crimes thought to be more commonly committed by Blacks—as well as "crimes of moral turpitude."[142]

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that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.'" (quoting 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21, 1901 TO SEPTEMBER 3, 1901, at 8 (1901))).

138. Nathan P. Litwin, *Defending an Unjust System: How* Johnson v. Bush *Upheld Felon Disenfranchisement and Perpetuated Voter Inequality in Florida,* 3 CONN. PUB. INT. L.J. 236, 254 (2003) ("The Alabama law at issue in *Hunter* originally had clear racial motivation behind its enactment. The Alabama legislature had removed the more blatantly discriminatory sections . . . [and] argued that the removal of these discriminatory sections sufficiently changed the law to make the remaining provisions valid.") However, the Supreme Court found that "despite the removal of the worst provisions of the original law, Alabama's disenfranchisement law still contained original language enacted with discriminatory intent," and despite being "facially neutral," was invalid "because the language had been enacted with discriminatory intent." *Id.*

139. In *Richardson*, the Court did not have occasion to rule on allegations of intentional discrimination because the California Supreme Court had not made a finding on that issue. Liles, *supra* note 35, at 620. Lower courts subsequently found that *Richardson* left open the possibility that intentional racial discrimination could cause an otherwise constitutional law to be unconstitutional. *Id.*

140. *Hunter*, 471 U.S. at 233 ("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 Alabama constitutional provision providing for felon disenfranchisement] which otherwise violates § 1 of the Fourteenth Amendment.").

141. *Id.* at 227 ("The registrars' expert estimated that by January 1903 section 182 had disfranchised approximately ten times as many Blacks as whites. This disparate effect persists today. In Jefferson and Montgomery Counties Blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses." (quoting Underwood v. Hunter, 730 F.2d 614, 620 (11th Cir. 1984))).

142. *Id.* at 226–27 (citing *Underwood*, 730 F.2d at 620 n.13) (finding of fact made by the Eleventh Circuit noted that more serious crimes more commonly committed by whites fell outside the scope of the disenfranchisement law while less serious offenses fell under the broad category "crimes involving moral turpitude").

Acknowledging that "proving the motivation behind official action is often a problematic undertaking,"[143] the Supreme Court nevertheless agreed with the court of appeals that discriminating against Blacks was a motivating factor for the provision.[144] *Hunter* affirmed a presumptively constitutional felon disenfranchisement law is unconstitutional if violative of equal protection.[145]

The *Hunter* victory was short-lived. Just over ten years later in 1996, Alabama passed an amendment to the state constitution that essentially duplicated the law denying the right to vote to individuals convicted of crimes involving moral turpitude previously struck down by the Supreme Court in *Hunter* on equal protections grounds.[146] Felons brought a class action challenging the statutory disenfranchisement scheme.[147] The district court found that the Eleventh Circuit's decision in *Johnson v. Governor of the State of Florida*[148] foreclosed the plaintiffs' claim under section 2 of the VRA, and that was that; the case ended there.[149]

The result in *Thompson v. Alabama* warns of the inadequacy of constitutional challenges to root out felon disenfranchisement statutes with a racially discriminatory effect. Plaintiffs in the circuits that fail to recognize the legitimacy of a VRA challenge are without a remedy when the disenfranchisement statutes have a racially discriminatory effect, because a state can carefully and identically reenact a statute found to have a racially discriminatory effect as long as the state carefully maneuvers to avoid the appearance of any discriminatory intent.[150] In other words,

143. *Hunter,* 471 U.S. at 228 (citing Rogers v. Lodge, 458 U.S. 613 (1982)).

144. *Id.* at 229. The Court found unconvincing the state's argument that the purpose behind the section was to disenfranchise poor whites as well as Blacks; such dual purpose did not dilute the purpose of the provision to discriminate against Blacks. *Id.* at 230.

145. *Id.* at 227–28 ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977))).

146. Thompson v. Alabama, 293 F. Supp. 3d 1313, 1318 (M.D. Ala. 2017).

147. *See, e.g.*, *id.*

148. Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005).

149. *Thompson*, 293 F. Supp. 3d at 1324–25. This outcome—finding an actionable claim for intentional discrimination under the Fourteenth Amendment's Equal Protection Clause and the Fifteenth Amendment but not under the VRA—is ironic given that the standards for a VRA claim are lower. *Id.*

150. *See id.* at 1325 ("[P]laintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law based on the operation of a state's criminal justice system must at least show that the criminal justice system is infected by *intentional* discrimination or that

without the threat of a VRA challenge, a state can white-wash the motivations for enacting its felon disenfranchisement statutes, which will survive despite having a discriminatory effect.[151] This result mocks the aims of the Fifteenth Amendment: Not because the Fifteenth Amendment contemplated felons voting, but because in some communities, felon disenfranchisement laws are a de facto abridgement or denial of the right to vote on account of race.[152] It is for precisely this reason that the VRA, which requires proof of a discriminatory result without proof of discriminatory intent, is crucial to striking down discriminatory felon disenfranchisement laws that would otherwise stand.[153] Regardless of the standard it ultimately adopts for a VRA challenge, the Supreme Court should overrule the decisions causing the perverse result embodied in *Thompson*.

V. STATUS OF THE CIRCUIT SPLIT

Courts are split as to whether the VRA is even a viable challenge to state felon disenfranchisement laws in the first place.[154] Only the Sixth and Ninth circuits acknowledge the validity of a section 2 challenge,[155] while the First, Second, and Eleventh circuits have categorically rejected section 2 challenges.[156] Despite recognizing section 2 challenges, neither the Sixth nor Ninth circuit has found a state felon disenfranchisement law actually in violation of section 2.[157]

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the felon disenfranchisement law was enacted with such intent." (quoting *Farrakhan III*, 623 F.3d 990, 993 (9th Cir. 2010)).

151. *See id*. at 1321 (noting that the Supreme Court's two-step procedure for analyzing whether a disenfranchisement law violates the Equal Protection Clause permits states to defend a discriminatory intent so long as it demonstrates "that the law would have been enacted without" such intent).

152. In general, the Alabama law at issue in *Thompson* was de facto abridgement of the right to vote in that it barred any individual who committed a felony involving moral turpitude, and as already shown, these laws targeted Black men. *See generally id.* at 1316; sources cited *supra* notes 129–31, 139.

153. *See id.* at 1324 n.5 (discussing Congress's prior amendments to the VRA in response to case law).

154. *Id*. at 1325 (citing cases that demonstrate the different holdings courts have reached when deciding a VRA challenge to a state disenfranchisement law).

155. *See generally* Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986); Farrakhan v. Washington (*Farrakhan I*), 338 F.3d 1009 (9th Cir. 2003).

156. *See* sources cited *infra* note 165.

157. *See Wesley*, 791 F.2d at 1262–63; *Farrakhan I*, 338 F.3d at 1022.

A. Wesley v. Collins*: Recognizing the Validity of a Section 2 Challenge to Felon Disenfranchisement Laws in the Right Case*

The Sixth Circuit in *Wesley v. Collins*[158] was the first federal court of appeal to address the intersection of felon disenfranchisement and a section 2 challenge.[159] The district court granted the state's motion for summary judgment, concluding that Tennessee's disenfranchisement of felons did not result in an unlawful dilution of the Black vote in violation of the VRA.[160] The circuit court affirmed, finding the Tennessee felon disenfranchisement law did not violate the VRA, but only because the facts did not support the claim—not because the challenge could not proceed legally.[161] This case recognized the validity of the VRA challenge and its "totality of the circumstances" test under the Senate Factors,[162] but held that the Tennessee statute did not violate section 2 because: (1) The state has a compelling rationale for disenfranchising individuals with certain convictions and such laws are constitutional, and (2) the law does not disenfranchise on account of race or a protected class; rather, it is an individual's choice to commit the act that resulted in the loss of voting rights.[163] However, the Sixth Circuit left open the possibility a VRA challenge could strike down the state's felon disenfranchisement statutes in the right case. Nevertheless,

158. *Wesley*, 791 F.2d at 1255.

159. Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875, 1898–99 (2005).

160. *Wesley,* 791 F.2d at 1257 ("The district court granted defendants' motion concluding that Tennessee's disenfranchisement of felons did not result in an unlawful dilution of the black vote in violation of the Voting Rights Act.").

161. *Id.* at 1262 ("For these reasons, this court concludes that the disproportionate impact suffered by black Tennesseans does not 'result' from the state's qualification of the right to vote on the account of race or color and thus the Tennessee Act does not violate the Voting Rights Act.").

162. *Id.* at 1259–60. In *Brnovich*, the majority acknowledged the case addressed the particular facts before it, "declin[ing] . . . to announce a test to govern all VRA § 2 claims involving rules, like those at issue [in Brnovich], that specify the time, place, or manner for casting ballots." Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2336 (2021). So, although that majority rejected the Senate Factors for use in its analysis of the two specific Arizona time, place, and manner restrictions at issue, the Court should extend the traditional Senate Factors to the analysis of felon disenfranchisement section 2 challenges, rather than the contrived five factor test it proffered in *Brnovich*. After all, the Court acknowledged the "'Senate' factors grew out of and were designed for use in vote-dilution cases." *Id.* at 2340.

163. *Wesley,* 791 F.2d at 1261–62.

no state statute has yet been found to violate section 2 of the Voting Rights Act.[164]

B. First, Second, and Eleventh Circuit Categorical Rejection of Section 2 Challenges to Felon Disenfranchisement Laws Under the Clear Statement Rule

In the wake of *Collins*, three circuit courts declined to permit VRA challenges to state felon disenfranchisement laws.[165] All have done so on the same basis: The clear statement rule of statutory interpretation.[166] A shockingly simplistic tool, the clear statement rule requires Congress to clearly state its intent when creating laws that could interfere with authority traditionally left to the states.[167] The Court has increasingly used the clear statement rule to navigate the limits of Congress's legislative authority when in tension with state sovereignty.[168] In the context of felon disenfranchisement, these circuits have simplified the analysis down to the absence of a clear statement from Congress to find that protection under the VRA does not extend to felons because if Congress had intended it to, it would have said so.

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164. Liles, *supra* note 35, at 625.

165. *See, e.g.*, Baker v. Pataki (*Baker III*), 85 F.3d 919 (2d Cir. 1996); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005); Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009).

166. The clear statement rule is also referred to as the plain statement rule. *See* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) ("This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."). "If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Id.* at 460–61 (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

167. Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1959 (1994) ("[T]he Supreme Court has increasingly relied upon clear statement rules in determining whether federal legislation applies to state governments."). However, the rule "operate[s] to foreclose a particular interpretation of a statute even though consideration of the legislative text alone—its language and structure—might point to a different meaning than the one dictated by the rule." *Id.* In other words, the clear statement rule serves as an "initial presumption[] that erect[s] potential barriers to the straightforward effectuation of legislative intent." *Id.*

168. *See id.*

1. Baker v. Pataki*: Second Circuit Rejects Section 2 Challenge Absent Clear Statement*

Of all circuit courts, the Second Circuit had the first occasion to address application of the VRA in this context.[169] The plaintiffs in *Baker v. Cuomo*[170] appealed the Southern District of New York's holding that the VRA did not apply to felon disenfranchisement laws.[171] Although the Second Circuit initially ruled the plaintiffs should be given an opportunity to submit evidence that the law had a disproportionate racial impact violative of the VRA,[172] on rehearing, the Second Circuit split in a five to five vote en banc regarding the validity of a VRA challenge.[173] The tie affirmed the lower court decision declining to apply the VRA to felon disenfranchisement, reasoning that doing so "would raise serious constitutional questions regarding the scope of Congress' authority to enforce the Fourteenth and Fifteenth Amendments . . . [by altering] the 'usual constitutional balance between the States and the Federal government'"[174] and because it was "not unmistakably clear" that "Congress intended [the "results" test] be applicable to felon disenfranchisement statutes."[175] Four other judges joined Judge Wilfred Feinberg in criticizing the application of the clear statement rule as improper because the Reconstruction Amendments "fundamentally altered the balance of state and federal power struck by the Constitution" and "[t]he Civil War Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty."[176] Having failed to definitely resolve the issue of section 2 applicability in this split en banc decision,[177] the Second Circuit concluded in another en banc decision a decade later that Congress did not intend the VRA to apply to felon disenfranchisement statutes.[178] Absent clear intent from Congress, the court held application of the VRA in the felon disenfranchisement

169. Baker v. Cuomo (*Baker I*), 842 F. Supp. 718 (S.D.N.Y. 1993).
170. *Id.* at 718–19.
171. *Baker III*, 85 F.3d 919 (2d Cir. 1996).
172. Baker v. Cuomo (*Baker* II*)*, 58 F.3d 814, 824 (2d Cir. 1995).
173. *Baker III*, 85 F.3d. at 921.
174. *Id.* at 922 (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).
175. *Id.*
176. *Id.* at 938 (first quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996); and then quoting City of Rome v. United States, 446 U.S. 156, 179 (1980)).
177. The ten judges sitting en banc were evenly divided as to the merits of the case. *Id.* at 921.
178. Hayden v. Pataki, 449 F.3d 305, 305 (2d Cir. 2006).

context would inappropriately alter the balance between state and federal government.[179]

2. Johnson v. Governor of Florida*: Eleventh Circuit Rejects Section 2 Challenge Absent Clear Statement*

The Eleventh Circuit also heavily relied on the clear statement rule.[180] In *Johnson v. Bush*,[181] plaintiffs, convicted felons, initiated a class action against the state clemency board and Governor Jeb Bush alleging the permanent felony disenfranchisement provisions in the state's constitution and statutes denied plaintiffs voting rights on account of race in violation of section 2 of the VRA.[182] The lower court granted defendant's motion for summary judgment[183] and the Eleventh Circuit reversed and remanded the vote denial claims,[184] but the Eleventh Circuit in an en banc decision vacated the reversal, affirming summary judgment,[185] and effectively held the VRA did not apply to felony disenfranchisement laws.[186] The court summarily rejected a VRA challenge on the grounds the legislative history of section 2 showed no indication that Congress intended for its provisions and protections to apply to felons.[187]

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179. *Id.* at 310 (recognizing that "this case poses a complex and difficult question that, absent Congressional clarification, will only be definitively resolved by the Supreme Court").

180. Johnson v. Governor of Fla., 405 F.3d 1214, 1229 (11th Cir. 2005) ("It is a 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."). In this case, the constitutional question being an interpretation of the Voting Rights Act as limiting the right of the states under section 2 of the Fourteenth Amendment to deny the right to vote to convicted felons. *Id.* at 1229.

181. Johnson v. Bush, No. 00-3542-CIV-KING, 2001 U.S. Dist. LEXIS 27468 (S.D. Fla. Jan. 29, 2001).

182. *Id.* at *6–7. In this unreported opinion, Judge King found that the plaintiff felons had "satisfied the minimal pleading requirements" to survive a motion to dismiss and to proceed with claims of violations of the VRA, in addition to the Fourteenth and Fifteenth Amendments. *Id.* at *7–8. Then, just over a year and a half later, the defendant's motion for summary judgement was granted. *See* Johnson v. Bush, 214 F. Supp. 2d 1333, 1343–44 (S.D. Fla. 2002).

183. *Johnson*, 214 F. Supp. 2d at 1343–44.

184. Johnson v. Governor of Fla., 353 F.3d 1287, 1308 (11th Cir. 2003).

185. Johnson v. Governor of Fla., 405 F.3d 1214, 1235 (11th Cir. 2005).

186. *Id.* at 1234. "Felon disenfranchisement laws are unlike other voting qualifications. These laws are deeply rooted in this Nation's history and are a punitive device stemming from criminal law." *Id.* at 1228 (footnote omitted).

187. *Id.* at 1233–34. "Instead of a clear statement from Congress indicating that the plaintiffs' interpretation is correct, the legislative history indicates just the opposite—that Congress never intended the Voting Rights Act to reach felon disenfranchisement provisions." *Id.* at 1232.

3. Simmons v. Galvin*: First Circuit Rejects Section 2 Challenge Absent Clear Statement*

The First Circuit's subsequent decision in *Simmons v. Galvin* adopted the Eleventh Circuit's reasoning to categorically bar the application of section 2 to felon disenfranchisement laws.[188] In 2001, several incarcerated felons in state custody challenged a Massachusetts law disqualifying currently incarcerated felons[189] from voting in certain elections, claiming that the disenfranchisement provisions violated section 2 of the VRA because the percentage of imprisoned felons who are Hispanic or African–American was greater than the percentages of those groups in the population of the state.[190] Specifically, plaintiffs claimed that past practices in the Massachusetts criminal justice system[191] produced inmate populations which, in combination with the disqualification of inmates imprisoned for felonies, resulted in disproportionate disqualification of minorities from voting.[192] The court once again relied on the absence of a clear statement

188. Simmons v. Galvin, 575 F.3d 24, 26 (1st Cir. 2009) ("We think it clear from the language, history, and context of the VRA that Congress never intended § 2 to prohibit the states from disenfranchising currently incarcerated felons.").

189. Prior to 2000, Massachusetts permitted incarcerated felons to vote, like its sister states Maine and Vermont. Peter Wagner, *Massachusetts Disenfranchises its Prisoners*, PRISON POL'Y INITIATIVE (Nov. 30, 2000), https://www.prisonpolicy.org/blog/2000/11/30/mavote/ [https://perma.cc/TA9G-GBQU]. On November 7, 2000, 60% of voters passed a constitutional amendment to prohibit incarcerated felons from voting in elections governed by the state constitution. *Id.*; *see also Timeline of Massachusetts Incarcerated Voting Rights*, EMANCIPATION INITIATIVE, https://emancipationinitiative.org/ballots-over-bars/returning-the-right-to-vote/ [https://perma.cc/T7GH-2S4U].

190. *Simmons*, 575 F.3d at 26. "This is a claim based purely on the allegation that Article 120 has a disparate impact on minorities by disqualifying from voting imprisoned felons." *Id.* at 29.

191. Specifically, plaintiffs alleged, "There is a race-based disparity in the conviction rate and sentence type in both the State of Massachusetts and the Commonwealth of Massachusetts" and that "African–Americans and Hispanic–Americans make up a disproportionate percentage of the approximately 12,000 or more persons, incarcerated in the State of Massachusetts [and] have been historically and systematically discriminated against by and within the criminal justice system of the State of Massachusetts and the Commonwealth" because "African-Americans and Hispanic-Americans are more likely than whites to be imprisoned for the commission of the same offense [and] more likely than white to be denied parole for conviction of the same offense." Complaint at 8–9, Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009) (No. 1:01-CV-11040-MLW).

192. *Id.* The Petitioners "made no allegation" that Massachusetts "acted with racially discriminatory intent or purpose," did not claim that "Massachusetts has any history of using laws, rules, practices, tests or devices to restrict, impede, or discourage voting by racial minorities," and did not allege that Massachusetts disenfranchised certain "felonies

from Congress applying the VRA to felon disenfranchisement and traditional state power to set voting eligibility criteria only limited by certain federal restrictions.[193]

C. Rejection of the Clear Statement Rule: Ninth Circuit Permits Section 2 Challenges to State Felon Disenfranchisement Laws Under the Totality of the Circumstances

The Ninth Circuit properly interpreted the plain meaning of section 2 of the VRA, rejected a clear statement analysis, and embraced the VRA-recommended totality of the circumstances test.[194] This divergence from the clear statement analysis arose in the Eastern District of Washington when plaintiffs,[195] all convicted of felonies, challenged Washington's felon disenfranchisement scheme as improper race-based vote denial in violation of section 2 of the VRA.[196] The district court correctly found the clear statement rule followed by other jurisdictions does not apply to the VRA.[197] Instead, the court found that section 2 of the VRA is applicable to a felon disenfranchisement law with a racially discriminatory effect because the plain meaning of the VRA itself prohibits any voting qualification, test, or device that denies the vote on the basis of race, and "felon disenfranchisement is a voting device."[198] Despite recognizing Washington's felon disenfranchisement scheme disproportionately discriminated against minorities, including African Americans, the district court found the cause of the disparate impact

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that had higher conviction rates for minorities than for whites." Brief in Opposition at 2, Simmons v. Galvin, 575 F.3d 24 (2009). Rather, the Petitioners' claim was one of "disparate impact on minorities by disqualifying from voting imprisoned felons." *Id.* Their claim rested principally upon the statistical reality that Hispanic and African Americans were disproportionately convicted of felonies when compared with the corresponding percentage of Hispanics and African Americans in the state population. *Id.* at 2–3; *see supra* note 166.

193. *Simmons*, 575 F.3d at 26. "Under the U.S. Constitution, the states generally set the eligibility criteria for voters." *Id.* at 31.

194. *Farrakhan I*, 338 F.3d 1009, 1017 (9th Cir. 2003).

195. All plaintiffs were African American, American Indian, and Hispanic American. Farrakhan v. Locke, 987 F. Supp. 1304, 1307 (E.D. Wash. 1997).

196. *Id.*

197. *Id.* at 1309 ("The Court does not agree that the plain statement rule applies to the VRA. The Civil War Amendments to the United States Constitution have already changed the usual constitutional balance between the states and the federal government. The remedial clause of the Fourteenth Amendment was specifically created so that the federal government could police states for violations of the constitutional rights of racial minorities . . . The Supreme Court has consistently recognized that Congress has the power to enforce the Fourteenth and Fifteenth Amendments through the VRA, 'despite the burdens those measures placed on the states.'" (citation omitted) (quoting City of Boerne v. Flores, 521 U.S. 507, 518 (1997))).

198. *Id.* at 1308–09.

external to the felon disenfranchisement provision inadequate to "provide the requisite causal link between the voting qualification and the prohibited discriminatory result"[199] and granted the state's motion for summary judgment.[200] When the felons appealed, the Ninth Circuit correctly agreed with the district court that section 2 of the VRA was applicable to felons because "[f]elon disenfranchisement is a voting qualification and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA."[201]

The Ninth Circuit properly found that the district court had improperly ignored evidence of discrimination in the criminal justice system and surrounding social and historical circumstances that could show a causal connection between the disenfranchisement provision and disproportionate impact on minorities' ineligibility to vote.[202] The Ninth Circuit remanded for the district court "to consider how a challenged voting practice *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," holding that section 2 requires consideration of these factors, including "evidence of discrimination within the criminal justice system . . . ."[203] Although the district court subsequently rejected petitioning felons' claim after reconsideration of evidence of discriminatory effect under the totality of the circumstances test,[204] and the Ninth Circuit affirmed that denial, the Ninth Circuit properly upheld its previous holding that challenges to felon disenfranchisement laws are cognizable under section 2 of the VRA.[205]

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199. *Farrakhan I*, 338 F.3d at 1011 (describing *Farrakhan v. Locke*).
200. *Id.*
201. *Id.* at 1016.
202. *Id.* at 1016, 1019.
203. *Id.* at 1011–12 (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)). Because the *Brnovich* majority did not properly contextualize disparate impact as consideration of the totality of the circumstances requires, Congress should overturn the Court's interpretation of section 2 by amending the statute to clarify how openness, *see* 52 U.S.C. § 10301(b), must be analyzed when evaluating the causal link between the voting qualification and racially discriminatory impact in voting. This would not be the first time the Court's interpretation of section 2 required Congress to take remedial action. *See supra* notes 116–17 and accompanying text.
204. Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *6, *9 (E.D. Wash. July 7, 2006).
205. *Farrakhan III*, 623 F.3d 990, 993 (9th Cir. 2010); *see also* Jonathan Sgro, *Intentional Discrimination in* Farrakhan v. Gregoire*: The Ninth Circuit's Voting Rights Act Standard "Results in" the New Jim Crow*, 57 VILL. L. REV. 139, 172–73 (2012).

VI. PLAIN MEANING TRUMPS CLEAR STATEMENT: THE PLAIN MEANING OF SECTION 2 PROSCRIBES ANY VOTING QUALIFICATION THAT HAS A DISCRIMINATORY EFFECT, INCLUDING FELON DISENFRANCHISEMENT LAWS

The Supreme Court should unequivocally reject the analysis applied by the First, Second, and Eleventh Circuits and decline to apply the clear statement rule. This rule has resulted in simplistic decisions grounded upon an "initial presumptio[n] that erect[s] potential barriers to the straightforward effectuation of legislative intent,"[206] and its application to section 2 claims undermines a more sound interpretation under the most basic cardinal canon of statutory interpretation: plain meaning.[207] The Supreme Court should apply the plain meaning statutory interpretation tool as applied in *Farrakhan* to overrule the First, Second, and Eleventh Circuits and find section 2 challenges applicable to felon disenfranchisement laws.[208]

Under a plain language analysis of section 2, any voting qualification that has a discriminatory effect violates section 2 of the VRA.[209] The question is then whether a felon disenfranchisement law is a voting qualification covered by section 2. Both current Supreme Court Justice Sonia Sotomayor and renowned judge and historian Guido Calabresi,[210] dissenting in the

206. *Clear Statement Rules, Federalism, and Congressional Regulation of States*, *supra* note 167, at 1959.

207. *See id.*

208. *See* Handelsman, *supra* note 159, at 1898. "The plain language of the VRA is unambiguous. Section 2 of the VRA clearly applies to 'any citizen.' 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." *Id.* at 1936 (footnotes omitted). "VRA challenges to felon disenfranchisement statutes must be permitted to proceed." *Id.* at 1939.

209. Hayden v. Pataki, 449 F.3d 305, 365 (2d Cir. 2006) (Calabresi, J., dissenting) ("[T]he language of § 2(a) makes perfectly plain that such discriminatory disenfranchisement *is* barred.").

210. Judge Calabresi graduated first in his class from Yale Law School and returned as a law professor and dean prior to his 1994 appointment to the Second Circuit, where he served until 2009. *Guido Calabresi: Sterling Professor Emeritus of Law and Professional Lecturer in Law*, YALE L. SCH., https://law.yale.edu/guido-calabresi [https://perma.cc/T3CF-MLNH]. He continues to lecture at Yale. *Id.* Among his many honors, awards, and accomplishments, he clerked for Justice Hugo Black of the United States Supreme Court, received more than fifty honorary degrees from universities across the world, and authored seven books and hundreds of articles. *Id.* Often quoted, he is known for his pioneering work in tort law and economics. Yuval Sinai & Benjamin Shmueli, *Calabresi's and Maimonides's Tort Law Theories—A Comparative Analysis and a Preliminary Sketch of a Modern Model of Differential Pluralistic Tort Liability Based on the Two Theories*, 26 YALE J.L. & HUMANS. 59, 60 (2014). Former students include Supreme Court Justices Alito, Thomas, and Sotomayor. Dionne Searcey, *Portrait of the Judge . . . as a First-Year Torts Student*, WALL ST. J. (May 27, 2009, 3:46 PM), https://www.wsj.com/articles/BL-LB-13445 [https://perma.cc/7MXL-AJF2].

Second Circuit decision *Hayden v. Pataki,* unequivocally said, "yes." Writing in dissent, Sotomayor stated:

> It is plain to anyone reading the Voting Rights Act that it applies to all 'voting qualification[s].' And it is equally plain that § 5–106 disqualifies a group of people from voting. These two propositions should constitute the entirety of our analysis. Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage. The duty of a judge is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created.[211]

An analysis of legislative intent is woefully insufficient to make a legal determination as to whether section 2 should apply to felon disenfranchisement laws, and a clear statement by Congress can cut both ways in interpreting whether section 2 should or should not apply to felon disenfranchisement laws.[212] As noted by Sotomayor, "the [*Hayden*] majority's 'wealth of persuasive evidence' that Congress intended felony disenfranchisement laws to be immune from scrutiny under § 2 of the Act . . . includes not a single legislator actually saying so."[213]

Joining in the dissent, Judge Robert Katzmann agreed not only that the statute was facially unambiguous in prohibiting any voting qualification —including a qualification regarding felons—that results in vote abridgement or denial on account of race, but also that there was "no precedent for *not* following the plain language under these circumstances."[214] This was not "that rare situation where 'the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters' . . . because we have literally no evidence as to the intention of the drafters of the 1982 provision specifically with respect to felon disenfranchisement policies."[215] That is why the most basic statutory interpretation canon, plain meaning, should be used to construe section 2 as extending to felon disenfranchisement.

In the absence of a clear statement from Congress clarifying its intent regarding felon disenfranchisement, a refusal to adopt the plain meaning of the statute would have the perverse effect of reading the statute contrary to its most basically understood meaning.[216] As posited by Justice Sotomayor,

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211. *Hayden*, 449 F.3d at 367–68 (Sotomayor, J., dissenting).
212. *See Farrakhan III*, 623 F.3d 990, 992–93 (9th Cir. 2010).
213. *Hayden*, 449 F.3d at 368 (Sotomayor, J., dissenting).
214. *Id.* at 369 (Katzmann, J., dissenting) (emphasis added).
215. *Id.* (quoting United States v. Ron Pair Enters., 489 U.S. 235, 242, (1989)).
216. The "essential import [of section 2's interlocking provisions, (a) and (b)] is plain: Courts are to strike down voting rules that contribute to a racial disparity in the

"if Congress had doubts about the wisdom of subjecting felony disenfranchisement laws to the results test of § 2, I trust that Congress would prefer to make any needed changes itself, rather than have courts do so for it."[217] Judge Katzmann agreed, noting, Congress "is free to amend § 1973(a) accordingly."[218] Judge Calabresi, also dissenting, noted that if Congress wishes to amend the VRA to permit discriminatory felon disenfranchisement, "it will be able to do so easily," but that nothing suggests "the 97th Congress, which was responsible for the 'dramatic substantive transformation' of the Voting Rights Act in 1982, meant the expansive prohibition of discriminatory results it enacted to apply in any other way than precisely as written."[219] Therefore, under a reading of plain meaning, section 2 applies to state felon disenfranchisement laws.

The Supreme Court should also decline to extend the majority's argument in *Hayden* that the statute as a whole did not intend to disrupt state use of felon disenfranchisement laws. The legislative history for section 4(c) suggested the section, which categorically prohibits the use of any "test or device" including "good moral character" requirements, was not intended to prevent states from implementing felon disenfranchisement laws.[220] Section 4 prohibited good moral character requirements regardless of "*whether or not* they can be shown to have discriminatory results."[221] But the amended section 2 explicitly prohibits discriminatory results. Therefore, the legislative intent of section 2 must be read and interpreted distinctly from section 4. Judge Calabresi correctly asserted:

> The majority makes much of legislative history showing that Congress did not intend § 4(c) to forbid felon disenfranchisement. True enough. Felon disenfranchisement is *not* prohibited in the absence of a showing that it brings about discriminatory results. But the statements in legislative history that felon disenfranchisement is not banned by § 4(c) cannot be taken to imply a wholesale carve-out that exempts felon disenfranchisement from Voting Rights Act scrutiny altogether, as the majority asserts. Rather, such legislative statements simply make the uncontroversial point that felon disenfranchisement laws are not 'good moral character' requirements within the meaning of § 4(c). That, however, is not the issue before us. The fact that race-

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opportunity to vote, taking all the relevant circumstances into account." Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2357 (2021) (Kagan, J., dissenting). The sweeping language in section 2 is "applica[ble] to every conceivable kind of voting rule," and felon disenfranchisement is no exception. *Id.* at 2361.

217. *Hayden*, 449 F.3d at 368 (Sotomayor, J., dissenting).

218. *See id.* at 369 (Katzmann, J., dissenting).

219. *Id.* at 366–67 (Calabresi, J., dissenting) (quoting Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1347 (1983)).

220. 52 U.S.C. § 10303(c); *see* S. REP. NO. 89–162, at 24 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2565; H.R. REP. NO. 89-439, at 25–26 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2457.

221. *Hayden*, 449 F.3d at 364 (Calabresi, J., dissenting).

> neutral felon disenfranchisement is permissible under § 4(c) tells us nothing at all about whether § 2 allows *racially discriminatory* felon disenfranchisement.[222]

Section 2 cannot be read to exclude felon disenfranchisement from the protections against racially discriminatory effects. Doing so would ignore the plain meaning of section 2 prohibiting denial of the right to vote on account of race as a result of any voter qualification.

VII. THE PROPER TEST AND ITS APPLICATION

Because section 2 applies to felon disenfranchisement laws under the plain language analysis, the Supreme Court should adopt the totality of the circumstances test articulated in section II of the Voting Rights Act for two reasons. First, it is the test articulated by the legislature as the proper analysis for the effects or results test.[223] Second, no other test will address discriminatory effects "root and branch."[224]

The totality of the circumstances analysis should be the beginning and end of the inquiry for a section 2 challenge of a state's felon disenfranchisement law. The Senate Judiciary Committee majority report accompanying the amendments outlined nine typical factors[225] that tend to show a section 2 violation. A case should be dismissed only if the petitioner fails to make

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222. *Id.* at 364–65.

223. *See* 52 U.S.C. § 10301(b) ("A violation . . . is established if, based on the totality of circumstances . . . ."). The Senate Report envisioned a "flexible, fact-intensive test . . . ." Thornburg v. Gingles, 478 U.S. 30, 46 (1986).

224. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (quoting Green v. Cnty. Sch. Bd., 391 U.S. 430, 437–38 (1968)). "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of Brown II." *Id.* Green charged school authorities "with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.'" *Green*, 391 U.S. at 437–38.

225. (1) Any history of official discrimination; (2) the extent of racial polarization in voting; (3) the use of voting practices that enhance opportunities for discrimination; (4) whether minorities have been denied access to any candidate slating process; (5) the effects of discrimination in areas other than voting, such as education, employment, and health on minority political participation; (6) the use of racial appeals in political campaigns; (7) the success of minorities in being elected to office; (8) a lack of official responsiveness to minorities' needs; (9) whether the purported justification for the voting qualification, standard, practice, or prerequisite is tenuous. *Gingles*, 478 U.S. at 36–37 (citing S. REP. NO. 97-417, at 28–29 (1982)). These nine factors are referred to as the "Senate factors." *See* Democratic Nat'l Comm. v. Hobbs, 948 F.3d 989, 1016–17 (2020).

a prima facie[226] showing that the felon disenfranchisement law has a discriminatory effect when considering the totality of the circumstances. Any showing of racially discriminatory effect beyond a mere prima facie case should go to trial where the petitioner bears the burden to show that the factors weigh in their favor[227] unless the facts are undisputed, and the court can rule on a motion for summary judgment as a matter of law.[228]

A. The Supreme Court Should Adopt the Test Applied in Farrakhan but Clarify its Proper Application Because the Ultimate Decision in Farrakhan was Wrong

In its 2003 and January, 2010[229] opinions, the Ninth Circuit provided a framework for the totality of the circumstances test that the Supreme Court should adopt for section 2 challenges to felon disenfranchisement laws.[230] The interplay between the district court's initial grant of summary judgment, Ninth Circuit remand, district court handling of the remand, and initial[231] Ninth Circuit reversal of summary judgment for state defendants

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226. *Farrakhan II*, 590 F.3d 989, 1003–04 (9th Cir. 2010) (defining properly a prima facie case where a felon disenfranchisement law violates section 2 as proving (1) significant racial disparities in the operation of the criminal justice system (2) that cannot be explained as race neutral and (3) those non-race-neutral disparities in the criminal justice system directly result in significant racial disparities in the qualification to vote).

227. *See* Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *8 (E.D. Wash. July 7, 2006) (requiring plaintiffs to show that the Senate factors weigh in their favor).

228. For summary judgment, the ultimate question of law the court determines is whether the undisputed facts presented by the petitioners sufficiently prove that the state's felon disenfranchisement laws have a discriminatory effect. *See, e.g.*, *Farrakhan II*, 590 F.3d at 1004. If the state is the party moving for summary judgment, the state "need only point out that there is an absence of evidence to support the nonmoving party's case," but if "the State fails to demonstrate that there is an absence of evidence to support [the p]laintiffs' case, then the State's summary judgment motion must be denied." *Id.* at 1003. In considering the motion for summary judgment, the judge must weigh and consider all of the enumerated factors relevant to the case. *Id.* at 1004. Factors that are not relevant to the case for which plaintiffs provide no evidence should not be counted against the plaintiffs, and sufficiently compelling evidence of a single factor may be sufficient if the evidence proves the discriminatory effect of the state felon disenfranchisement law on protected minorities by a preponderance of the evidence. *Id. Compare Farrakhan*, 2006 WL 1889273, at *8.

229. The Author specifies the month to distinguish the *Farrakhan* January, 2010 panel decision from the en banc decision in October, 2010.

230. *Farrakhan I*, 338 F.3d 1009, 1019 (9th Cir. 2003); *Farrakhan II*, 590 F.3d at 996.

231. The en banc majority that same year reversed the panel's decision by improperly reinjecting the requirement to prove intentional racial discrimination that the 1982 amendments unequivocally rejected. *See Farrakhan III*, 623 F.3d 990, 994 (9th Cir. 2010). This ultimate decision of *Farrakhan*, commonly referred to as *Farrakhan III*, completely missed the issue and not only misapplied the correct test but ignored the explicit will of

with instructions to enter summary judgment for plaintiff felons illuminates both proper and improper application of the totality of the circumstances test. In 2003, the Ninth Circuit panel correctly remanded *Farrakhan* for failure to consider all external factors within the totality of the circumstances analysis.[232] On remand in *Farrakhan v. Gregoire*, rather than focus on factors 5 and 9,[233] which plaintiffs asserted were the only factors here applicable to vote denial, the district court correctly agreed with state defendants that all the factors must be considered.[234]

However, there is no requirement that any particular number of factors be proven, and these factors are not to be understood as exhaustive or exclusive.[235] Although factor 5 was simply one factor in the totality of the circumstances the Court must consider when evaluating the plaintiffs' claim, the district court does not seem to have directly considered that factor 5 alone could be sufficient to succeed on a section 2 challenge.[236] Because no specific weight can be accorded each factor and each factor may take on greater or lesser significance in the context of each case, the plaintiffs' inability to meet certain factors must not be automatically construed to weigh in the state's favor.[237] The government may attack the sufficiency of the plaintiffs' evidence or present countervailing evidence tending to question or negate the factors tending to show a racially discriminatory effect, but may not simply argue that an inability to satisfy multiple factors justifies a finding for the state. A strong showing of one factor, or compelling evidence of a racially discriminatory effect from a non-enumerated factor, may still satisfy a showing of a violation of section 2 where the state fails to contradict or disprove the plaintiffs' evidence, or prove the plaintiffs' evidence insufficient to show a discriminatory effect.

Congress to excise the intent requirement from the Voting Rights Act. *See generally* S. REP. NO. 89-162, at 21 (1965). In this final decision, the court, without proper justification or precedent, reinserted the intent requirement and expressed skepticism that felon disenfranchisement laws could be challenged under section 2, without actually finding that section 2 could not apply to a felon disenfranchisement law. *See Farrakhan III*, 623 F.3d at 993–94.

232. *See Farrakhan I*, 338 F.3d at 1011–12, 1120; *Farrakhan*, 2006 WL 1889273, at *3–4.

233. *Farrakhan*, 2006 WL 1889273, at *7.

234. *Id.*

235. *See Farrakhan I*, 338 F.3d at 1019.

236. *See Farrakhan*, 2006 WL 1889273, at *7.

237. *Id*. at *8.

This is where the district court once again got the analysis wrong on remand, as rightly recognized by the majority opinion on the second Ninth Circuit panel in January, 2010.[238] After the 2003 remand, and despite its conclusion that the "evidence of racial bias in Washington's criminal justice system [was] compelling,"[239] the district court concluded the plaintiffs failed to meet their burden to show that the Senate Factors weighed in their favor because "the remaining Senate Factors weigh[ed] in Defendants' favor."[240] The finding of "compelling" evidence of racial bias should have been sufficient to defeat the defendant's motion for summary judgment. Instead, the court granted defendant's motion for summary judgment, finding that the totality of the circumstances did not support a finding that Washington's felon disenfranchisement law resulted in discrimination on account of race despite no showing by the state that the felons had failed to demonstrate sufficient evidence.[241]

In January, 2010, the Ninth Circuit panel majority rightly disagreed with the district court's application of the totality of the circumstances analysis and considered the evidence of discrimination in the criminal justice system under factor 5[242] sufficient to show "that the discriminatory impact of Washington's felon disenfranchisement is attributable to racial discrimination in Washington's criminal justice system."[243] Accordingly, the Ninth Circuit panel found "that Washington's felon disenfranchisement law violates § 2 of the VRA," thereby reversing the district court's grant of the state defendant's motion for summary judgment with instructions to grant plaintiff's summary judgment on remand.[244] This Ninth Circuit majority opinion correctly recognized that a single factor could, on its own, provide sufficient evidence upon a sufficient showing of a single factor that has not been refuted by the defendants.[245] However, as noted

238. *Farrakhan II*, 590 F.3d 989, 1004 (9th Cir. 2010) ("We agree with Plaintiffs for the reason that, given the strength of their Factor 5 showing, the district court erred in requiring them to prove Factors that had little if any relevance to their particular vote denial claim.").

239. *Farrakhan*, 2006 WL 1889273, at *9.

240. *Id*. at *8 (finding that factor 1 favored defendants; that plaintiffs "failed to present any substantial evidence regarding" factors 2, 3, 4, 6, 7 and 8; that factor 9 favored defendants, not because defendants had explained or presented evidence as to how or why the state's disenfranchisement of felons fulfilled a legitimate state interest, but because the Constitution explicitly recognizes state power to disenfranchise felons; and finding that factors 1 and 9 cut towards summary judgment for defendants in spite of the compelling evidence presented by plaintiffs under factor 5).

241. *Id.* at *9.

242. *Farrakhan II*, 590 F.3d at 995–96, 1004.

243. *Id.* at 1016.

244. *Id.*

245. *Id.* at 1004. "Reviewing the reports of Plaintiffs' expert witnesses, the district court found that Plaintiffs had presented 'compelling evidence of racial discrimination and

by dissenting Judge M. Margaret McKeown, the Ninth Circuit overstepped the role of the district court as factfinder by not remanding for reconsideration of the plaintiffs' motion for summary judgment under proper application of the totality of the circumstances test, considering all Senate Factors "and perhaps additional relevant considerations" holistically, rather than a check-the-box balancing of factors.[246] This first section 2 victory for disenfranchised felons was defeated that same year when an en banc court agreed to rehearing at the state's request and reversed the January panel's decision while narrowing the possibility of a future victory under section 2 by, nonsensically, requiring a showing of intentional discrimination[247]—the very court finding the 1982 congressional amendments sought to prevent.[248]

Accordingly, the Supreme Court should reject the majority's improper conclusion in the en banc decision in *Farrakhan III*, but should adopt the totality of the circumstances analysis as properly applied by the Ninth Circuit panel in January, 2010.

B. The Supreme Court Should Not Permit Burden Shifting

The proper test should require plaintiffs to prove by a preponderance of the evidence that, under the totality of the circumstances, the felon disenfranchisement law impermissibly results in vote denial of African Americans as a protected class. Other authors have suggested that, in section 2 vote denial cases, defendants should still prevail even after a plaintiff has carried their burden of production if able to demonstrate that

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bias in Washington's criminal justice system.' . . . Moreover, 'contrary to Defendants' assertion that these reports are based solely on statistics and are thus insufficient evidence for a VRA claim,' the district court found that 'these experts' conclusions, drawn from the available statistical data, are admissible, relevant, and persuasive.' . . . The district court also found it significant that Defendants had not 'presented any evidence to refute Plaintiffs' experts' conclusions.' . . . Thus, the district court concluded that it was 'compelled to find that there is discrimination in Washington's criminal justice system on account of race,' . . . and that such discrimination 'clearly hinders the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic.'" *Id.* at 995 (quoting *Farrakhan*, 2006 WL 1889273, at *6).

246. *Id.* at 1018, 1020 (McKeown, J., dissenting).

247. *Farrakhan III*, 623 F.3d 990, 993 (9th Cir. 2010).

248. *See* Hayden v. Pataki, 449 F.3d 305, 366–67 (2d Cir. 2006) (Calabresi, J., dissenting).

the state interests outweigh the burden on voters.[249] Although the "weight, as well as tenuousness, of the state's interest is a legitimate factor in analyzing the totality of circumstances,"[250] permitting this type of burden shifting that allows the state to explain away its discriminatory practice defeats the purpose and spirit of both the Fifteenth Amendment and the VRA.[251] Arguments that section 2 of the Fourteenth Amendment supersedes the Fifteenth Amendment and VRA are baseless: Granting states full power to deny the right to vote to felons cannot be said to also permit enactment of felon disenfranchisement laws that result in denial of the right to vote on account of race.[252] The promise of *Hunter*—that a presumptively constitutional felon disenfranchisement law is unconstitutional if violative of equal protection[253]—should extend by similar logic to section 2 of the VRA to find that felon disenfranchisement laws with racially discriminatory results in voting disqualification impermissibly violate the VRA and cannot stand. No compelling state interest can overcome an impermissibly racially discriminatory effect.[254] In the circumstances of a discriminatory effect, burden shifting should be rejected as impermissible tolerance of justifying discrimination. To allow a state to show a compelling state interest justifying policies with a discriminatory effect denies the foundational impermissibility of the discriminatory effect in the first place.

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249. *See* Sgro, *supra* note 205, at 173–74 (suggesting that, after plaintiffs make a prima facie case of disparate impact on minority voters and "show that racial bias in the criminal justice system contributed to the disproportionate disenfranchisement of minority voters," the burden shifts to the state "to show that the practice is narrowly tailored to a compelling state interest." More specifically, the state "would have to show that there is a race-neutral explanation for the disparate effects in the criminal justice system, not just that the law itself is facially race-neutral"); *see also* Tokaji, *supra* note 102, at 692–93 (recommending a "burden-shifting test" for section 2 vote denial claims whereby, after plaintiffs meet the initial burden "to show that the challenged practice interacts with social and historical conditions" to "resul[t] in the disproportionate denial of minority votes," the state "would then have the opportunity to show that the practice is narrowly tailored to serve a compelling interest").

250. Although *Fairley* is a vote dilution case, its analysis of factor 9 bears on its similar application in a vote denial case. Fairley v. Hattiesburg, 122 F. Supp. 3d 553, 578 (S.D. Miss. 2015) (citing Clark v. Calhoun Cnty., 88 F.3d 1393, 1401 (5th Cir. 1996)).

251. *Farrakhan II*, 590 F.3d at 997 ("Congress enacted the VRA of 1965, pursuant to its enforcement power under § 2 of the Fifteenth Amendment, for the 'broad remedial purpose of ridding the country of racial discrimination in voting.'" (quoting *Farrakhan I*, 338 F.3d 1009, 1014 (9th Cir. 2003)).

252. *Farrakhan I* defined the "on account of" requirement as being met when "the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances," including the state's criminal justice system. *Farrakhan I*, 338 F.3d at 1019–20.

253. Hunter v. Underwood, 471 U.S. 222, 222–24, 227–28 (1985).

254. Although a state can justify its decision to disenfranchise felons by virtue of the Fourteenth Amendment, it cannot justify doing so when the result is discriminatory.

Because the discriminatory effect itself is statutorily impermissible,[255] no state interest can justify it.

C. Federalism Arguments Should be Dismissed as an Attempt to Relitigate What has Already Been Litigated

Authors argue that Congress has exceeded its enforcement power granted by the Fifteenth Amendment in a manner that cannot permissibly "circumvent" the Fourteenth Amendment sanction of state felon disenfranchisement laws.[256] But section 2 of the VRA does not limit the authority and sovereignty of states to craft felon disenfranchisement laws;[257] it only strikes down those laws that have an impermissibly discriminatory effect. This is precisely what the authority granted to Congress by the Fifteenth Amendment was intended to accomplish, and precisely why the VRA was enacted by Congress to begin with.[258] Permitting section 2 challenges to state felon disenfranchisement laws is not incompatible with the federalist principles safeguarding state sovereignty to have felon disenfranchisement laws.[259] A section 2 challenge no further curtails state sovereignty than to set any other voter qualification. As with any other voter qualification that a state may adopt, section 2 only prohibits a racially discriminatory effect, not the adoption of felon disenfranchisement laws *per se*. Judge Calabresi pointed out the majority opinion in *Hayden v. Pataki* incorrectly read the VRA to *per se* ban felon disenfranchisement when all that the VRA prohibits is "felon disenfranchisement *laws that result in the denial or dilution of voting rights on the basis of race*."[260] Judge Calabresi asserted that the majority missed the issue entirely by failing to distinguish between race-neutral felon disenfranchisement and racially discriminatory felon disenfranchisement when it is clear that the VRA has no bearing on the former but proscribes the latter.[261]

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255. *See supra* notes 107, 198 and accompanying text.
256. Clegg, Conway III & Lee, *supra* note 45, at 14–15.
257. *See id*. at 14 ("The text of the VRA makes no clear statement about felon disenfranchisement. Therefore, it cannot be construed . . . [to prohibit] felon disenfranchisement.").
258. *See supra* note 39 and accompanying text.
259. *See* Clegg, Conway III & Lee, *supra* note 45, at 14 ("The Constitution provides that the States have the primary, if not exclusive, authority to decide whether felons should vote.").
260. Hayden v. Pataki, 449 F.3d 305, 363 (2d Cir. 2006) (Calabresi, J., dissenting).
261. *Id.* at 362–65.

Thus, section 2 does not threaten *Richardson*, nor does section 2 threaten state sovereignty in any impermissibly meaningful manner. The suggestion that section 2 may "incur significant 'federalism costs'" ignores the well-established principle that state sovereignty is necessarily limited when states discriminate against a protected class.[262] There should be no "safe harbor"[263] for racial discrimination, and that must include felon disenfranchisement statutes that result in racially discriminatory vote denial.

D. Mass Incarceration of African Americans Since Slavery: State Felon Disenfranchisement Laws May Violate Section 2 by Having a Disparate Impact on African Americans as a Protected Class

The First, Second, and Eleventh Circuits' use of historical arguments to justify denial of a section 2 challenge is a double-edge sword. These circuits properly interpret and situate the general history of felon disenfranchisement as long-accepted and long-established but fail to grapple with the nexus of felon disenfranchisement and racially discriminatory effect in the context of disproportionate incarceration of African Americans. There is an inherent tension in using history to justify continuance of a practice that may once *not* have had an impermissible racially discriminatory effect but now has had a racially discriminatory effect under increasingly disproportionate criminalization of African Americans in more recent history over the past half century.[264] Consider this: The lifetime risk of incarceration of African Americans has doubled since the decision in *Brown v. Board of Education*.[265] These changed circumstances have changed history and require reevaluation of history as a continued justification for felon disenfranchisement laws.

In the past fifty years, the U.S. prison population rose from a steady, level 200,000 in the early 1900s to just over 1.4 million in 2018.[266] The rising trend began in the 1980s when the Reagan Administration commenced

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262. *See, e.g.*, U.S. CONST. amend. XV, § 1; 52 U.S.C. § 10301(a). *See generally* Romer v. Evans, 517 U.S. 620 (1996) (striking down a Colorado state constitutional amendment denying judicial, legislative, and executive protections from discrimination based on "homosexual, lesbian or bisexual orientation, conduct, practices or relationships"); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (striking down a California statute forbidding issuance of commercial fishing licenses to aliens "ineligible to citizenship").

263. *Hayden*, 449 F.3d at 365.

264. *See* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 46–47 (2012); Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 627–28 (2004).

265. *See* Forman, *supra* note 264, at 22.

266. THE SENT'G PROJECT, *supra* note 58, at 1.

the War on Drugs.[267] As of July 1, 2019, the U.S. Census reported that the national white population was 60% in comparison with 13% Black;[268] yet, in 2018, only an estimated 6% of sentenced white males in state and federal prisons were ages 18 to 24, compared to 12% of Black prisoners.[269] "Black males ages 18 to 19 were 12.7 times as likely to be imprisoned as white males of the same ages . . . ."[270] That means not only that African American young adults are disproportionately incarcerated, but that they are losing the right to vote as soon as they obtain it at a significantly higher rate, and therefore losing the right to vote for a significantly longer period of their life than white males. One in three Black men born in 2001 is likely to be imprisoned in their lifetime, as compared to 1 in 17 white men.[271]

Nationally, African Americans are disproportionately penalized at every stage of the criminal justice system, from arrest, to charging, to jury representation, to sentencing.[272] The result: Higher rates of felony conviction for African Americans, despite data showing that Black crime is not higher than crime by other groups.[273] However, it is unlikely that indisputable statistical evidence will invalidate all felon disenfranchisement laws. There may be states whose disenfranchisement laws are found to have no racially discriminatory effect where plaintiffs fail to provide compelling

267. ALEXANDER, *supra* note 58, at 60. The discriminatory results of the drug war are clear; in seven states, 80–90% of imprisoned drug offenders are Black, although the disparities cannot be explained by disproportionate drug use given that Black drug use does not exceed that of any other racial group. Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1048 (2010).

268. *Quick Facts: People*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/3VZG-XVZJ].

269. E. ANN CARSON, U.S. DEP'T JUST., PRISONERS IN 2018, at 15 (2020). Overall, the imprisonment rate for Black males was 5.8 times that of white males in 2018. *Id.* at 16.

270. *Id.* at 17.

271. THE SENT'G PROJECT, *supra* note 58, at 5.

272. Arthur H. Garrison, *Disproportionate Incarceration of African Americans: What History and the First Decade of Twenty-First Century Have Brought*, 11 J. INST. JUST. & INT'L STUD. 87, 100–05 (2011).

273. *See* Camille Caldera, *Fact Check: Rates of White-on-White and Black-on-Black Crime Are Similar*, USA TODAY (Sept. 29, 2020, 5:10 PM), https://www.usatoday.com/story/news/factcheck/2020/09/29/fact-check-meme-shows-incorrect-homicide-stats-race/5739522002/ [https://perma.cc/8WDD-6RUB]; Troy L. Smith, *Stop Using "Black-on-Black" Crime to Deflect Away from Police Brutality*, CLEVELAND (June 14, 2020, 6:57 AM), https://www.cleveland.com/news/2020/06/stop-using-black-on-black-crime-to-deflect-away-from-police-brutality.html [https://perma.cc/789V-7VL6].

non-statistical evidence that the felon disenfranchisement laws cause a racially discriminatory effect.[274] However, where there is indisputable evidence of racial discrimination in the criminal justice system, plaintiff felons should, as in *Farrakhan v. Washington*, be permitted to show that a state's felon disenfranchisement scheme has a racially discriminatory effect and violates section 2.

VIII. CONCLUDING REMARKS

Some states are recognizing the role race impermissibly plays in disenfranchisement laws that do not acknowledge discriminatory intent on their face. However, state self-reflection is not enough; it is not a remedy for petitioners who have a right to protections under the VRA as a protected class. The ability of a petitioner with a felony conviction to bring a section 2 challenge is as important today as ever to recognize the intent of the Fifteenth Amendment and prevent felon disenfranchisement from being another vestige of racial discrimination.

Further, denying the right to vote to ex-felons does not best serve community interests.[275] Restoring the right to vote incentivizes civic engagement, and social science data suggests that permitting ex-felons to vote may reduce recidivism;[276] conversely, states that do disenfranchise felons see higher rates of recidivism.[277] Mr. Windham described the importance of being able to vote from his perspective as a previously

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274. *See supra* notes 114 and 115 and accompanying text.

275. Rather, "denying ex-offenders the vote impedes their reintegration into society by stigmatizing them as second-class citizens." Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1113. James Jeter, the founder of the Dwight Hall Civic Allyship Initiative, explained in a webinar that "people coming home seek redemption. They want to prove that they have value. And [being able to vote] gives them that right to be active civilly which empowers them to believe in themselves." *See* ABA Section of Civil Rights and Social Justice, *Restoration of Voting Rights: The Elimination of Felony Disenfranchisement*, YOUTUBE (Feb. 11, 2021), https://www.youtube.com/watch?v=hHJ5UVVAY7U [perma.cc/X5RH-DS8X]. To learn more about Mr. Jeter, who worked with at-risk youth, raised money for local food banks, and addressed gun violence with the Hartford, Connecticut Police Chief during his nearly twenty years incarcerated at Cheshire Correctional Institution, see *Leadership*, YALE PRISON EDUC. INITIATIVE, https://www.yaleprisoneducationinitiative. org/team [https://perma.cc/2U9F-HWBR].

276. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 212–15 (2004). In this Minnesota study analyzing the effect of voting behavior on recidivism rates, those with past felony convictions who voted in 1996 were more than half as likely to be arrested from 1997 to 2000 as those who did not vote. *Id.* at 204–06.

277. *See* Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 429 (2012).

incarcerated Black man with a felony conviction. "Without (the right to vote), I have no say. I'm just locked out of the system and can't vote on the laws that ensnared me.[278] It's a voice. For years, I had no voice. My brothers in prison right now have no voice."

Mr. Windham was politically active while incarcerated,[279] and he could not wait to vote when he was released. He was crushed when he was told: "'You are on parole, but you can't vote.' I felt like the star player at the Superbowl sent home with my football before I could even play."[280] He described taking his wife and son to the post office and sitting outside while they voted: a painful reminder of second-class citizenship.[281] Thanks to the passage of Prop 17,[282] he cast his first vote ever in California's September recall election.[283] "The good thing is you (the people of California) empowered me with the power to vote, so I will go back to my community now and teach them the power of the vote," he said. "I care what's happening in my community."[284]

Others similarly situated to Mr. Windham in states that have not relaxed felon disenfranchisement laws will have to wait longer than their next election to cast their vote. Until states decide to recognize that felon disenfranchisement laws frustrate rather than further state interests, when a state law violates section 2, the state must remedy it.

278. Telephone Interview with John Windham, *supra* note 3. For Mr. Windham, voting gives him a platform to counteract the injustices he has experienced. *Id.* When asked how race plays a factor in people's resistance to letting people with a felony record vote, Mr. Windham replied, "Look at the majority of people incarcerated. The vast majority is people of color. So, if you take away my right to vote, I don't have a leg to stand on for housing or employment." *Id.*

279. Despite not having the right to vote until the passage of Prop. 17, Mr. Windham engaged Governor Gavin Newsom in conversation and spearheaded letter writing campaigns to congressional representatives while incarcerated. *Id.*

280. *Id.*

281. *Id.*

282. *See supra* note 9 and accompanying text.

283. Telephone Interview with John Windham (Nov. 12, 2021). "It was a liberating experience," he said. *Id.*

284. *See supra* note 9 and accompanying text.