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Constitutional Coexistence: Preserving Felon Disenfranchisement Litigation under Section Two of the Voting Rights Act

Michael A. Wahlander

CONSTITUTIONAL COEXISTENCE: PRESERVING FELON DISENFRANCHISEMENT LITIGATION UNDER SECTION TWO OF THE VOTING RIGHTS ACT

Michael A. Wahlander*

I. INTRODUCTION

Rodney King's brutal beating, a Georgia trial judge referring to a black defendant as a "colored boy,"[1] jurors in the same case speaking of black people as "colored" or "niggers,"[2] a Florida trial judge's reference to a black defendant's parents as "niggers,"[3] prosecutorial bias in charging decisions,[4] and longer average sentences for blacks than whites[5] all epitomize racial bias in our criminal justice system. Not only does this racial bias have the effect of usurping minority defendants' liberty, racial bias in the criminal justice system destroys another fundamental right for minority defendants: the right to vote.[6] Forty-eight states deny convicted felons the right to vote through felon disenfranchisement statutes.[7] Based on the prevalence of

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* Managing Editor, Santa Clara Law Review, Volume 48; J.D. Candidate 2008, Santa Clara University School of Law; B.A. Political Science and Public Policy minor, *cum laude*, University of California, Los Angeles. Thank you to my family for their perpetual support. In addition, I wish to thank all of the editors of the Santa Clara Law Review for their hard work and dedication. Lastly, I would like to thank Professor Angelo Ancheta for his guidance and insight.

1. Dobbs v. Zant, 720 F. Supp. 1566, 1578 (N.D. Ga. 1989), *aff'd*, 963 F.2d 1403 (11th Cir. 1991), *rev'd*, 506 U.S. 357 (1993).

2. *Id.* at 1576.

3. Peek v. State, 488 So. 2d 52, 56 (Fla. 1986).

4. Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 521 (1995).

5. *Id.* at 521-22 (noting that average sentences for blacks are ten percent greater than those imposed on whites).

6. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

7. Hayden v. Pataki, 449 F.3d 305, 317 (2d Cir. 2006); *Developments in the*

these laws and the presence of racial bias in the criminal justice system, the potential for abuse against minorities is high.[8]

Fortunately, an option may exist to lessen the sting of these convictions: Section 2 of the Voting Rights Act (Section 2).[9] Section 2 states that "[n]o voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."[10] When coupled with racial bias in the criminal justice system, felon disenfranchisement statutes deny minority citizens the right to vote.[11] Accordingly, when racial bias results in an unjustified felony conviction, a violation of Section 2 follows.[12]

Unfortunately for affected minority felons, federal appeals courts have not unanimously recognized a vote denial claim under Section 2 based on the effect of racial bias in the criminal justice system.[13] In *Farrakhan v. Washington*, the Ninth Circuit held that a vote denial claim is cognizable under Section 2 of the Voting Rights Act.[14] In his dissent from a denial of a petition for rehearing en banc, however, Judge Kozinski cast doubt on the Ninth Circuit's holding in *Farrakhan* when he noted several constitutional concerns about applying the Voting Rights Act to felon disenfranchisement statutes.[15] Similarly, the Second and the Eleventh Circuits held in *Hayden v. Pataki* and *Johnson v. Governor of Florida* that Section 2 does not encompass felon disenfranchisement statutes.[16]

Law: One Person, No Vote: The Laws of Felon Disenfranchisement, 115 HARV. L. REV. 1939, 1942 (2002).

8. Only Maine and Vermont do not have laws disenfranchising felons. *Hayden*, 449 F.3d at 317.

9. 42 U.S.C. § 1973 (2006).

10. *Id.* § 1973(a).

11. *See* Farrakhan v. Washington, 338 F.3d 1009, 1014 (9th Cir. 2003).

12. *See id.* at 1016.

13. *See id.* (holding that Section 2 of the Voting Rights Act applied to felon disenfranchisement statutes). *But see* Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (concluding that Section 2 did not apply to Florida's felon disenfranchisement scheme); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (holding that Section 2 did not apply to Florida's felon disenfranchisement scheme).

14. *Farrakhan*, 338 F.3d at 1016.

15. 359 F.3d 1116, 1121-24 (9th Cir. 2004) (Kozinski, J., dissenting).

16. *Hayden*, 449 F.3d at 328; *Johnson*, 405 F.3d at 1234.

Significantly, the courts came to their conclusions through very different approaches. In *Farrakhan*, the Ninth Circuit arrived at its conclusion through an analysis of the plain language of Section 2 of the Voting Rights Act.[17] No lengthy discussion of constitutionality, congressional intent, or Congress's enforcement powers occurred in the *Farrakhan* opinion.[18] In contrast, while dissenting from the Ninth Circuit's denial of a petition for rehearing en banc of *Farrakhan*, Judge Kozinski argued that Section 2 does not cover felon disenfranchisement statutes because Congress never intended it to cover them and that interpreting Section 2 in such a manner jeopardizes the Section 2's constitutionality.[19] In *Johnson,* the Eleventh Circuit reversed itself and concluded, like Judge Kozinski, that Section 2 does not encompass felon disenfranchisement statutes by analyzing the possibility of constitutional conflict, examining Congress's intent, and reviewing Congress's enforcement power under the Fourteenth Amendment.[20] Similarly, in *Hayden*, the Second Circuit concluded that Section 2 does not cover felon disenfranchisement statutes by probing the constitutional conflict and examining Congress's intent regarding the scope of the Voting Rights Act.[21]

This comment explores the split among the Ninth, Eleventh, and Second circuits on whether a cognizable vote denial claim under the Voting Rights Act exists when applied to felon disenfranchisement statutes in light of racial bias in the criminal justice system.[22] Part II of this comment reviews the background of the problem and the rationale of the cases giving rise to the circuit split.[23] Part III identifies the problem as the circuit split, potential constitutional conflicts, and the need for clarity in the law so that Section 2 serves its purpose.[24] With the background and problem in mind, Part IV examines each major legal issue involved in these

17. *Farrakhan*, 338 F.3d at 1014-16

18. *Id.* at 1009-22.

19. Farrakhan v. Washington, 359 F.3d 1116, 1120-25 (9th Cir. 2004) (Kozinski, J., dissenting).

20. Johnson v. Governor of Fla., 405 F.3d 1214, 1229-34 (11th Cir. 2005).

21. *Hayden*, 449 F.3d at 310-29.

22. *See infra* Part II.C-F.

23. *See infra* Part II.

24. *See infra* Part III.

decisions.[25] Lastly, this comment advocates for a resolution to the problem that calls for a revision of remedies sought and the adoption of specific uses of statistical evidence to prove racial bias in the criminal justice system.[26]

II. BACKGROUND: HOW DID WE GET TO WHERE WE ARE TODAY?

Enacted in 1965 and amended in 1982 to its present day language, Section 2 of the Voting Rights Act contains broad language prohibiting states from creating voting qualifications that deny the right to vote because of race.[27] Since 1986, applying Section 2 to felon disenfranchisement laws has created confusion over whether Section 2 encompasses such laws because of the potential conflict between Section 2's broad language and the Constitution.[28]

A. Section 2 of the Voting Rights Act and the Totality of the Circumstances Test

Congress enacted the Voting Rights Act in 1965 for the broad remedial purpose of ridding the country of racial discrimination in voting.[29] Section 2 of the Voting Rights Act, currently codified as 42 U.S.C. § 1973,[30] prohibits states from

25. *See infra* Part IV (discussing the broad language of the statute, the clear statement rule, constitutional conflicts, and congressional intent).

26. *See infra* Part V.

27. *See* 42 U.S.C. § 1973(a) (2006).

28. *Compare* Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (assuming without concluding that Section 2 encompasses felon disenfranchisement laws), Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003) (concluding that a cognizable claim exists under the Voting Rights Act with respect to felon disenfranchisement statutes), *and* Johnson v. Governor of Fla., 353 F.3d 1287 (11th Cir. 2003) (holding that Section 2 may encompass felon disenfranchisement laws and that the district court therefore erred in disregarding evidence of discrimination in the criminal justice system at the summary judgment stage), *with* Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (denying coverage under the Voting Rights Act for felon disenfranchisement statutes), Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (reversing its earlier conclusion that a claim exists), *and* Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004) (concluding that Section 2 does not apply to a New York felon disenfranchisement statute because of constitutional conflicts).

29. South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

30. Section 2 currently states:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on

imposing any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race."[31] In 1982, Congress enacted 42 U.S.C. § 1973(b).[32] This provision, known as "the totality of circumstances test," states that a violation of Section 2 of the Voting Rights Act is established if, based on the totality of the circumstances, it is shown that members of protected minority groups have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[33]

Several factors, known as the "Senate factors," determine whether, by the totality of the circumstances, a voting requirement violates Section 2.[34] Notably, Congress did not

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account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (2006).

31. *Id.* § 1973(a).

32. *Id.* § 1973(b).

33. *Id.* Section 2 does not require proof of discriminatory intent. *Id.*

34. The list of "typical factors" from the Senate Report include:

(1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

(2) the extent to which voting in the elections of the state or political subdivision is racially polarized;

(3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to

intend for this list to be exclusive or exhaustive, nor did it require plaintiffs to prove a particular number of factors.[35] Instead, courts must consider how the challenged law "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[36] Under this framework, claimants challenge felon disenfranchisement statutes under the Voting Rights Act.[37]

B. Wesley*: The Sixth Circuit Assumes a Claim Exists But Does Not Decide*

In *Wesley v. Collins,* the Sixth Circuit first considered whether a vote dilution claim existed under Section 2 of the Voting Rights Act when statistical evidence suggested that Tennessee's felon disenfranchisement statute disproportionately affected blacks.[38] In addition to challenging the validity of the statute under Section 2, the plaintiff, a black citizen of Tennessee, challenged the statute under the Fourteenth and Fifteenth Amendments of the U.S. Constitution.[39] The *Wesley* court assumed, without expressly deciding, that the Voting Rights Act applied and evaluated the plaintiff's vote dilution claim.[40]

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participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction;

(8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

(9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. REP. NO. 97-417, at 28-29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.

35. *Id.* at 29.

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

37. *See, e.g.*, Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (challenging New York's felon disenfranchisement scheme); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (challenging Florida's felon disenfranchisement scheme); Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003) (challenging Washington's felon disenfranchisement scheme).

38. Wesley v. Collins, 791 F.2d 1255, 1260-61 (6th Cir. 1986).

39. *Id.* at 1257.

40. *See id.* at 1259-63.

First, the *Wesley* court examined the language of Section 2 and noted that plaintiffs establish a violation if, based upon the totality of the circumstances, the challenged legislation results in unlawful vote dilution.[41] Next, the court observed that the 1982 amendment to Section 2 eliminated the requirement of proving discriminatory intent and explained that, in order to establish a Section 2 violation, plaintiffs must either prove discriminatory intent or demonstrate that the challenged system or practice in the context of all the circumstances in the jurisdiction results in minorities being denied equal access to the political process.[42] Additionally, the court noted that courts should apply the "Senate factors" when determining whether the challenged practice violates Section 2.[43] Notably, the *Wesley* court stated that "[t]he determination of whether a plaintiff has proven that the challenged legislation results in vote dilution under Section 2 based on the 'totality of the circumstances' requires a highly individualistic inquiry."[44]

Turning to the plaintiff's main argument that Tennessee's law "disproportionately impacts . . . blacks because a significantly higher number of black Tennesseeans [sic] are convicted of felonies than whites,"[45] the court explained that proof of a disproportionate racial impact alone did not establish a per se violation of the Voting Rights Act.[46] In addition to considering the disparate impact evidence, the court explained that it was under an obligation to review the interaction of the challenged legislation with historical, social, and political factors generally probative of vote dilution.[47] Reviewing these factors, the court concluded that, under the totality of the circumstances, Tennessee's felon disenfranchisement statute did not violate the Voting Rights Act.[48] In support of its conclusion, the *Wesley* court alluded to social contract rationales and the states' constitutional right to disenfranchise convicted felons under the Fourteenth

41. *Id.* at 1259-60.
42. *Id.* at 1260.
43. *Id.*
44. *Wesley*, 791 F.2d at 1260.
45. *Id.*
46. *Id.* at 1260-61.
47. *Id.* at 1261.
48. *Id.*

Amendment.[49]

In sum, the *Wesley* court assumed that Section 2 applied to felon disenfranchisement statutes and concluded that, under the totality of the circumstances presented by the plaintiff, Tennessee's law did not violate Section 2.[50] The Sixth Circuit did not expressly hold that Section 2 applied to felon disenfranchisement statutes.[51] Future courts analyzed this problem much differently.

C. Farrakhan: *The Ninth Circuit Recognizes the Claim*

As the first to recognize a felon disenfranchisement vote denial claim under Section 2, the Ninth Circuit, in *Farrakhan v. Washington*,[52] concluded that when felon disenfranchisement statutes result in denial of the right to vote because of race, Section 2 of the Voting Rights Act provides disenfranchised felons a means to seek redress.[53] In *Farrakhan*, convicted felons of several racial minority groups[54] challenged both the felon disenfranchisement provision of Washington's Constitution and Washington's method of restoring voting rights to felons who completed their sentences as violating Section 2 of the Voting Rights Act.[55] More specifically, the plaintiffs sought both declaratory and injunctive relief to enjoin the State of Washington and the other defendants from applying the felon disenfranchisement provisions to *all* felons.[56] In support of their claim, the plaintiffs offered statistical evidence showing disparities in arrest, pre-trial release rates, charging decisions, and sentencing outcomes in Washington's criminal justice system.[57] In addition to the statistical evidence, the plaintiffs offered expert declarations and evidence of discriminatory intent that guided the enactment of felon

49. *Id.* at 1261-62.
50. *Wesley*, 791 F.2d at 1261.
51. *Id.* at 1255-61.
52. Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003).
53. *Id.* at 1016.
54. *Id.* at 1012 n.2. The plaintiffs were African American, Native American, and Hispanic American. *Id.*
55. *Id.* at 1012. The defendants were the State of Washington, Washington Governor Gary Locke, Washington Secretary of State Sam Reed, and Secretary of the Washington State Department of Corrections Joseph Lehman. *Id.*
56. *Id.*
57. *Id.* at 1013.

disenfranchisement laws.[58]

Beginning its analysis, the *Farrakhan* court recognized that Congress enacted the Voting Rights Act to rid the country of racial discrimination in voting.[59] Second, the court explained that Congress amended Section 2 in 1982 intending to remove the requirement of proving discriminatory intent.[60] Next, the *Farrakhan* court reviewed the amended version of Section 2,[61] noted the presence of the language "based on the totality of the circumstances"[62] and concluded that a plaintiff "may establish a Section 2 violation by showing that, based on of [sic] the totality of the circumstances, the challenged voting practice results in discrimination on account of race."[63] Like the *Wesley* court, the *Farrakhan* court discussed the nine "Senate factors" that may be relevant in determining whether, in the totality of the circumstances, Section 2 has been violated.[64] Lastly, the Ninth Circuit recognized that under *Thornburg v. Gingles*,[65] courts must consider how the challenged practice interacts with social and historical conditions to produce "inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[66]

After making the above observations, the *Farrakhan* court concluded that Section 2 creates a cognizable vote denial claim for felon disenfranchisement statutes operating to deny of the right to vote on account of race.[67] In reaching this conclusion, the court observed that "Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the [Voting Rights Act]."[68] The *Farrakhan* court reasoned that felon disenfranchisement statutes are included in the meaning of Section 2 because felon disenfranchisement is a voting

58. *Farrakhan*, 338 F.3d at 1013.
59. *Id.* at 1014 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966)).
60. *Id.*
61. *Id.* at 1014-15.
62. *Id.* at 1015.
63. *Id.*
64. *Farrakhan*, 338 F.3d at 1015.
65. Thornburg v. Gingles, 478 U.S. 30 (1986).
66. *Farrakhan*, 338 F.3d at 1016 (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).
67. *Id.*
68. *Id.*

qualification.[69] In support of its conclusion that Section 2 applies to felon disenfranchisement statutes, the court followed the U.S. Supreme Court's holding that states cannot use felon disenfranchisement as a mechanism to discriminate based on race.[70] Additionally, the court supported its conclusion by explaining that Congress purposefully amended the Voting Rights Act to ensure that, under all the circumstances in a particular jurisdiction, "any disparate racial impact of facially neutral voting requirements did not result from racial discrimination."[71] Finally, the court argued that the policy of allowing felons to challenge felon disenfranchisement laws that deny the right to vote because of race "animates the right that every citizen has of protection against racially discriminatory voting practices."[72]

Thus, *Farrakhan* pioneered the view that a cognizable claim exists under Section 2 for felon disenfranchisement statutes that result in vote denial because of race.[73] Others disagreed.

D. Judge Kozinski Dissents and Casts Doubt on the Claim

After the Ninth Circuit denied a petition for rehearing en banc,[74] Judge Kozinski submitted a detailed dissenting opinion expressing concerns about the use of statistical evidence in vote denial claims,[75] the constitutionality of interpreting Section 2 to apply to felon disenfranchisement,[76] Congress's intent,[77] and the consequences of allowing vote denial claims to be established by disparate impact evidence.[78]

Judge Kozinski began his dissenting opinion by evaluating the plaintiffs' statistical evidence.[79] First, he concluded that the plaintiffs' evidence established only

69. *Id.*
70. *Id.* (citing Hunter v. Underwood, 471 U.S. 222, 233 (1985)).
71. *Id.*
72. *Farrakhan*, 338 F.3d at 1016.
73. *See id.*
74. Farrakhan v. Washington, 359 F.3d 1116, 1116 (9th Cir. 2004).
75. *Id.* at 1117-19 (Kozinski, J., dissenting).
76. *Id.* at 1121-25.
77. *Id.* at 1120-21.
78. *Id.* at 1125-26.
79. *Id.* at 1117.

statistical disparities and not intentional discrimination.[80] Next, he expressed concerns about the reliability of statistical evidence by noting that the plaintiffs' own expert admitted that statistical disparities have complex causes.[81] Judge Kozinski argued that statistical disparities alone are not enough to establish a vote denial claim under Section 2.[82] To support this view, he reviewed case law from other circuits on the same issue and maintained that the other circuits had not recognized statistical disparities as sufficient to establish a vote denial claim under the Voting Rights Act.[83]

In addition to expressing concerns about statistical evidence, Judge Kozinski explained that a violation of Section 2 is established by evaluating the totality of the circumstances under which the challenged law operates to determine whether the plaintiffs have been denied the right to vote based on their race.[84] Judge Kozinski asserted that the plaintiffs did not provide evidence relating to any of the nine "Senate factors."[85] Next, he concluded that the plaintiffs did not meet their burden of producing evidence showing vote denial on account of race.[86] In support of his conclusion, Judge Kozinski explained that plaintiffs in other circuits have lost their Section 2 vote claims with stronger evidence and argued that the panel's decision tried to "pass off evidence of disparities as evidence of intentional discrimination."[87] Significantly, he admitted that intentional discrimination in the criminal justice system could result in illegal vote denial on account of race if it interacts with a voting practice.[88]

After arguing that the totality of the circumstances test was not satisfied, Judge Kozinski turned to Congress's

80. Farrakhan v. Washington, 359 F.3d 1116, 1117 (9th Cir. 2004) (Kozinski, J., dissenting).

81. *Id.* The inference from the expert's admission is that a factor other than racial discrimination caused the statistical disparities in felon disenfranchisement among minorities and non-minorities.

82. *Id.*

83. *Id.* at 1118-19.

84. *Id.* at 1119.

85. *Id.*

86. Farrakhan v. Washington, 359 F.3d 1116, 1119 (9th Cir. 2004) (Kozinski, J., dissenting).

87. *Id.*

88. *Id.* The admission implicitly recognizes a cognizable claim under Section 2 for felon disenfranchisement statutes.

intended scope of the Voting Rights Act.[89] First, he observed that when Congress originally enacted the Voting Rights Act in 1965, it exempted felon disenfranchisement statutes from another section of the Voting Rights Act.[90] Additionally, he explained that when Congress amended the Voting Rights Act in 1982, it made no mention of felon disenfranchisement laws.[91] Judge Kozinski also noted that Congress enacted other laws that aid states in disenfranchising felons.[92] Finally, he concluded that Congress was not concerned about felon disenfranchisement when it enacted the Voting Rights Act.[93]

Next, Judge Kozinski expressed his concern about the constitutionality of extending the Voting Rights Act to apply to felon disenfranchisement laws.[94] Congress's power to enforce the Fourteenth and Fifteenth Amendments and a conflict with the text of the Fourteenth Amendment concerned him the most.[95] Judge Kozinski observed that the Fourteenth Amendment expressly endorses felon disenfranchisement laws,[96] that felon disenfranchisement laws are presumptively constitutional,[97] and that only when states enact felon disenfranchisement laws "with an invidious, racially discriminatory purpose" are they unconstitutional.[98] Additionally, he explained that unconstitutional enactments of felon disenfranchisement laws are "exceedingly rare."[99]

After noting the conflict with the text of the Fourteenth Amendment, Judge Kozinski turned to Congress's enforcement powers under the Fourteenth and Fifteenth Amendments.[100] He explained that courts must review the

89. *Id.* at 1119-20.

90. *Id.* at 1120 (discussing the content and legislative history of 42 U.S.C. § 1973b(c), a different section than Section 2 of the Voting Rights Act).

91. *Id.*

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

93. *Id.*

94. *Id.*

95. *Id.* at 1121-24.

96. *Id.* at 1121.

97. *Id.*

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

99. *Id.*

100. *Id.* at 1122.

"congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end" in order to ensure that Congress does not alter a substantive right in an attempt to enforce it.[101] Reviewing Congress's record, Judge Kozinski found no evidence of constitutional violations, and concluded that extending the Voting Rights Act to felon disenfranchisement laws fails the "congruence and proportionality test."[102] In conclusion, he affirmed his constitutional avoidance view by explaining that courts "have a duty to recognize limitations on congressional power and avoid interpreting statutes in a way that would extend those powers beyond constitutional limits."[103]

Concluding his dissent, Judge Kozinski feared that the consequences of extending Section 2 to felon disenfranchisement laws reached too far.[104] In support of this assertion, he argued that the panel's decision "require[s] states to erect voting booths in prisons."[105] For additional support, he noted the prevalence of felon disenfranchisement laws in the circuit,[106] and argued that allowing statistical disparities to prove Section 2 violations could potentially invalidate many voting regulations.[107]

Significantly, Judge Kozinski's dissent would influence other circuits' conclusions about extending the Voting Rights Act to reach felon disenfranchisement laws.[108]

E. Johnson*: The Eleventh Circuit Reverses Its Position*

Reconsidering its initial decision in *Johnson v. Governor*

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101. *Id.* (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)). This language, known as the "congruence and proportionality test," examines whether a law exceeds Congress's authority to enforce the Fourteenth and Fifteenth Amendments. *See Flores*, 521 U.S. at 519-20.

102. Farrakhan v. Washington, 359 F.3d 1116, 1123-24 (9th Cir. 2004) (Kozinski, J. dissenting).

103. *Id.* at 1125.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 1125-26.

108. *See, e.g.*, Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (reversing an earlier decision that recognized a cognizable claim under Section 2 for felon disenfranchisement laws). Notably, Judge Kravitch, who authored the opinion, dissented on substantially similar grounds when the Eleventh Circuit initially considered this question. *See* Johnson v. Governor of Fla., 353 F.3d 1287, 1314-19 (11th Cir. 2003) (Kravitch, J., dissenting).

of Florida,[109] the Eleventh Circuit granted a rehearing en banc.[110] Like Judge Kozinski, the en banc court concluded that Section 2 of the Voting Rights Act does not apply to felon disenfranchisement laws.[111]

Beginning its review, the Eleventh Circuit mentioned the circuit split over whether Section 2 applies to felon disenfranchisement laws.[112] After briefly noting that Congress's purpose in enacting the Voting Rights Act was to eliminate racially discriminatory voting practices,[113] the court recognized that Section 2 prohibits voting practices that deny minorities the right to vote because of race and allows plaintiffs to prove violations by examining the totality of the circumstances.[114] Next, the Eleventh Circuit began to explore potential constitutional conflicts.[115]

Searching for constitutional conflicts in applying Section 2 to felon disenfranchisement laws, the *Johnson* en banc court examined the language of Section 2 of the Fourteenth Amendment pertaining to felon disenfranchisement.[116] The court recognized that "the exclusion of felons from the vote has an affirmative sanction in section 2 of the Fourteenth Amendment."[117] In light of this language, the *Johnson* en banc court concluded that interpreting Section 2 to deny a state the discretion to disenfranchise felons raised a constitutional issue because that interpretation allows a federal statute to override the text of the Constitution.[118]

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109. Johnson v. Governor of Fla., 353 F.3d 1287 (11th Cir. 2003). The Eleventh Circuit previously concluded that Section 2 could apply to felon disenfranchisement statutes. *Id.* at 1306. To support its initial conclusion, the Eleventh Circuit noted the broad language of Section 2. *Id.* at 1303.

110. *Id.* at 1287, *reh'g en banc granted*, 377 F.3d 1163, 1163-64 (11th Cir. 2004).

111. Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005). The plaintiffs sought to invalidate Florida's felon disenfranchisement scheme. *Id.* at 1216. In addition to following Judge Kozinski's reasoning, the Eleventh Circuit also adhered to an earlier Second Circuit decision disapproving of a claim under the Voting Rights Act for felon disenfranchisement statutes. *See* Muntaqim v. Coombe, 366 F.3d 102, 130 (2d Cir. 2003).

112. *Johnson*, 405 F.3d at 1227.

113. *Id.*

114. *Id.* at 1227-28.

115. *Id.* at 1228-31.

116. *Id.* at 1228 (noting the words "except for participation in rebellion, or other crime" in Section 2 of the Fourteenth Amendment).

117. *Johnson*, 405 F.3d at 1228-29 (quoting Richardson v. Ramirez, 418 U.S. 24, 54 (1974)).

118. *Id.* at 1229.

Realizing this conflict, the Eleventh Circuit turned to an analysis of the clear statement rule.[119] After noting the conflict with Section 2 of the Fourteenth Amendment, the *Johnson* en banc court explained that Congress's enforcement powers under Section 5 of the Fourteenth Amendment may conflict with applying Section 2 of the Voting Rights Act to felon disenfranchisement laws.[120] The court expressed concerns about the "congruence and proportionality" of applying the Voting Rights Act to ban felon disenfranchisement laws because a federal statute would be read as limiting a state's constitutionally delegated power.[121] Supporting this concern, the *Johnson* en banc court recognized that "[f]or Congress to enact proper enforcement legislation, there must be a record of constitutional violations."[122] After finding that there was a complete absence of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters, the court, analogizing to *Oregon v. Mitchell*,[123] concluded that applying Section 2 to Florida's felon disenfranchisement law would force the court to consider whether Congress exceeded its enforcement powers under the Fourteenth and Fifteenth Amendments.[124]

Since the *Johnson* en banc court found that applying Section 2 to felon disenfranchisement laws created constitutional concerns with respect to the text of the Fourteenth Amendment and Congress's enforcement powers,[125] it moved on to examine, under the clear statement rule, the question of whether Congress intended such a conflict.[126] Like Judge Kozinski, the court reviewed the legislative history of the Voting Rights Act's original enactment in 1965 and found that Congress intended to

119. *See id.* The "clear statement rule" states that "[i]f 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." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

120. *See* Johnson v. Governor of Fla., 405 F.3d 1214, 1230 (11th Cir. 2005).

121. *Id.*

122. *Id.* at 1231.

123. Oregon v. Mitchell, 400 U.S. 112 (1970). In *Mitchell*, the Court concluded that Congress had made no legislative findings that states used an age requirement to disenfranchise voters on account of race. *Id.*

124. *Johnson*, 405 F.3d at 1231.

125. *Id.* at 1230-31.

126. *Id.* at 1232.

exempt felon disenfranchisement statutes from Section 4 of the Voting Rights Act.[127] Also like Judge Kozinski, the en banc court reviewed the legislative history from the 1982 amendment to the Voting Rights Act and found no mention of felon disenfranchisement.[128] Accordingly, the *Johnson* en banc court concluded that Section 2 does not apply to felon disenfranchisement laws because Congress expressed its intent to exclude such laws from coverage under the Voting Rights Act.[129]

F. Hayden*: The Second Circuit Double Checks*

Reviewing an earlier decision, *Muntaqim v. Coombe*,[130] the Second Circuit reconsidered its view on applying Section 2 to felon disenfranchisement laws in *Hayden v. Pataki*.[131] The Second Circuit consolidated *Hayden* and *Muntaqim* and heard both appeals en banc.[132] In *Hayden*, the plaintiffs challenged New York's felon disenfranchisement law with both a vote denial claim and a vote dilution claim under Section 2 of the Voting Rights Act.[133] They sought to have the statute invalidated.[134]

Turning to the issue of felon disenfranchisement, the Second Circuit began its discussion by reviewing the language of Section 2.[135] The *Hayden* court noted Section 2's broad language prohibiting any voting qualification or standard that results in the denial of the right to vote on account of race.[136] Despite this broad language, the court concluded that Congress did not intend Section 2 to include felon disenfranchisement laws for several reasons.[137]

Among these reasons were the text of Section 2 of the

127. *Id.* at 1232-33.
128. *Id.* at 1233-34.
129. *Id.* at 1234.
130. Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004). In *Muntaqim*, the Second Circuit concluded that Section 2 does not apply to felon disenfranchisement laws. *Id.* at 130. In reaching this conclusion, the *Muntaqim* court evaluated the language of Section 2, the clear statement rule, constitutional conflicts, and Congress's intent. *Id.* at 115-28.
131. Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006).
132. *Id.* at 312.
133. *Id.* at 311.
134. *Id.*
135. *Id.* at 313.
136. *Id.*
137. *Hayden*, 449 F.3d at 315-16.

Fourteenth Amendment and the long history of disenfranchising felons. First, the *Hayden* court reviewed the words "except for participation in rebellion, or other crime" in the Fourteenth Amendment.[138] Next, the court explained that, because of this language, the Supreme Court has held that felon disenfranchisement statutes are presumptively constitutional.[139] Lastly, the *Hayden* court reviewed the history of felon disenfranchisement and found that the practice was prevalent in ancient Greece, Medieval continental countries, the early American Colonies, and present day America.[140] Based on the Constitution's text and the history of felon disenfranchisement, the Second Circuit concluded that it was unlikely that Congress intended to amend Section 2 in a way that would bring felon disenfranchisement laws within its scope.[141]

Moving to a review of Congress's intent, the *Hayden* court examined the legislative history of the 1965 enactment of the Voting Rights Act, attempts to amend the Voting Rights Act to include felon disenfranchisement laws expressly, the legislative history of the 1982 amendments to the Voting Rights Act, and subsequent congressional acts regarding felon disenfranchisement.[142] To start, the court explained that Congress enacted the Voting Rights Act to banish racial discrimination in voting.[143] Turning to the 1965 enactment, the Second Circuit observed that Congress specifically excluded felon disenfranchisement from Section 4 of the Voting Rights Act.[144] Arguing that Congress did not understand Section 2 to encompass felon disenfranchisement laws, the court recognized Congress's unsuccessful attempts to amend Section 2 to include felon disenfranchisement laws.[145] Additionally, the Second Circuit explained that Congress enacted a felon disenfranchisement statute in the District of Columbia shortly after the passing of the Voting Rights Act and concluded that it was unlikely that Congress would pass a felon disenfranchisement law shortly after it

138. *Id.* at 316.
139. *Id.*
140. *Id.* at 316-17.
141. *Id.* at 317.
142. *Id.* at 317-22.
143. *Hayden*, 449 F.3d at 317-18.
144. *Id.* at 318.
145. *Id.* at 319-20.

allegedly forbade it on the national level.[146] The *Hayden* court then argued that the absence of any indication that the Voting Rights Act applied to felon disenfranchisement statutes in the 1982 amendments to the Voting Rights Act indicates that Congress did not intend such statutes to be covered.[147] Lastly, the court contended that subsequent congressional actions, such as making it easier for states to exclude convicted felons from lists of eligible voters,[148] demonstrate that Congress assumed that the Voting Rights Act did not apply to felon disenfranchisement statutes.[149] Based on these observations, the *Hayden* court concluded that Congress did not intend the Voting Rights Act to cover felon disenfranchisement statutes.[150]

To confirm its conclusion that Section 2 does not apply to felon disenfranchisement laws, the Second Circuit examined "the clear statement rule."[151] The Second Circuit explained that Congress must "make its intent 'unmistakably clear' when enacting statutes that would alter the usual constitutional balance between the Federal Government and the States."[152] Next, the *Hayden* court observed that applying Section 2 to felon disenfranchisement would alter the constitutional balance by contradicting the text of the Fourteenth Amendment, and by interfering with the states' regulation of the franchise, the states' authority to craft its criminal law, and the regulation of correctional institutions.[153] The court then considered whether Congress made a clear statement of its intention to alter the federal balance and concluded, in light of its discussion of the legislative history of the Voting Rights Act, that Congress made no such statement.[154]

Based on the above reasons, the *Hayden* court affirmed its holding in *Muntaqim* that Section 2 of the Voting Rights Act does not apply to felon disenfranchisement statutes.[155]

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146. *Id.* at 320.
147. *Id.* at 320-21.
148. *Id.* at 322.
149. *Hayden*, 449 F.3d at 322.
150. *Id.*
151. *Id.* at 323-24.
152. *Id.* (citing Gregory v. Ashcroft, 501 U.S. 452 (1991)).
153. *Id.* at 326-28.
154. *Id.* at 328.
155. *Hayden*, 449 F.3d at 328.

III. THE PROBLEM: TODAY THE CIRCUITS ARE SPLIT, BUT WHY DO WE CARE?

The preceding discussion illustrates that the state of the law on this subject is far from settled. While the Ninth Circuit accepts the application of Section 2 to felon disenfranchisement laws,[156] the Second and Eleventh Circuits do not recognize the application of Section 2 to such laws.[157] The inter-circuit tension arises from a conflict between the broad statutory text, the constitutional guarantees of rights to the states, and Congress's intent to create such a conflict.[158] Resolving the conflict between the circuit courts will clarify the meaning of Section 2 of the Voting Rights Act for litigants and judges. Importantly, such a resolution must promote the purpose of the Voting Rights Act while navigating through the constitutional problems. Resolving this conflict could have a profound impact on future elections.

IV. ANALYSIS: IS THERE REALLY A CONSTITUTIONAL PROBLEM HERE?

The main points of contention between the circuits are Section 2's broad language and the constitutionality of applying Section 2 to felon disenfranchisement statutes. Fortunately, litigants advocating for individual remedies overcome every potential constitutional barrier.

A. Broad Language + Totality of the Circumstances = A Cognizable Claim

Section 2 prohibits states from imposing or applying any voting qualification in a manner "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[159] Felon disenfranchisement laws are a voting qualification because being qualified to vote requires that the citizen have no felony conviction that would trigger the application of the felon disenfranchisement statute.[160] If felon disenfranchisement is triggered by a felony

156. Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003), *reh'g en banc denied*, 359 F.3d 1116 (9th Cir. 2004).

157. *Hayden*, 449 F.3d at 328; Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005).

158. *See supra* Part II.A-F and accompanying notes.

159. 42 U.S.C. § 1973(a) (2006).

160. *Farrakhan*, 338 F.3d at 1016.

conviction marred by racial discrimination, the felon disenfranchisement law denies the felon the right to vote on account of race.[161] Therefore, felon disenfranchisement laws functioning in such a manner violate Section 2 of the Voting Rights Act.

Significantly, Section 2 contemplates showing evidence of racial bias in the criminal justice system to prove a violation. In relevant part, Section 2 states that plaintiffs establish a violation if, based on the totality of the circumstances, it is demonstrated that minorities have less opportunity than other citizens to participate in elections.[162] To determine whether the "totality of the circumstances test" has been satisfied, the Senate provided a list of factors for courts to consider.[163] Significantly, the list of factors is not exclusive.[164] Therefore, courts can consider evidence of racial bias in the criminal justice system even if such evidence is not included within the purview of factor five.[165] Furthermore, the Supreme Court directed courts to consider how the law "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[166] Accordingly, courts should allow evidence of racial bias in the criminal justice system to establish a violation of Section 2.[167]

Since a plain reading of Section 2's language encompasses felon disenfranchisement laws and the totality

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161. *See id.*

162. 42 U.S.C. § 1973(b) (2006).

163. S. REP. NO. 97-417, at 28-29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. Perhaps most relevant to racial bias in the criminal justice system, factor five allows courts to consider "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Id.* at 29. This factor demonstrates Congress's intent to allow courts to review surrounding social circumstances. *See Farrakhan*, 338 F.3d at 1019.

164. S. REP. NO. 97-417, at 29 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207.

165. *See id.* Factor five allows courts to consider "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *Id.*

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

167. *See Farrakhan*, 338 F.3d at 1020 (noting that evidence of racial bias in the criminal justice system is in fact encompassed within the scope of factor five).

of the circumstances test allows consideration of evidence of racial bias in the criminal justice system, a cognizable claim exists under Section 2 for felon disenfranchisement laws that disenfranchise minorities because of racial bias in the criminal justice system. However, depending on the remedy sought by the litigant, such an application may create constitutional conflicts that prevent courts from applying Section 2 to felon disenfranchisement laws.

B. Clear Statement Rule

When an interpretation of a federal statute would alter the constitutional balance between the states and the federal government, the clear statement rule requires Congress to make its intention to do so unmistakably clear.[168]

1. Constitutional Conflicts

When litigants attempt to invalidate felon disenfranchisement laws under Section 2 of the Voting Rights Act, constitutional conflicts arise from the text of the Fourteenth Amendment,[169] Congress's enforcement power with respect to the Fourteenth and Fifteenth Amendments,[170] and other areas designated for state regulation.[171]

a. The Fourteenth Amendment

Section 2 of the Fourteenth Amendment states "when the right to vote at any election . . . is denied to any male inhabitants of such State . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced."[172] Based on this language, the Supreme Court has explained that "the exclusion of felons from the vote has an affirmative sanction in section 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the

168. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

169. Hayden v. Pataki, 449 F.3d 305, 326 (2d Cir. 2006).

170. Farrakhan v. Washington, 359 F.3d 1116, 1122-24 (9th Cir. 2004) (Kozinski, J., dissenting) (discussing concerns about Congress's enforcement power in applying Section 2 to felon disenfranchisement laws).

171. *Hayden*, 449 F.3d at 326-28 (discussing the conflict between applying Section 2 to felon disenfranchisement laws and the important state interest in regulating the franchise, the state's criminal law, and its correctional facilities).

172. U.S. CONST. amend. XIV, § 2.

franchise which were invalidated . . . ."[173] As a result, felon disenfranchisement laws are presumptively constitutional.[174]

When litigants seek to invalidate felon disenfranchisement statutes under Section 2 of the Voting Rights Act, a constitutional conflict arises because litigants ask courts to interpret Section 2 as allowing a federal statute to deprive the states of constitutionally guaranteed discretion to disenfranchise felons.[175] Accordingly, the clear statement rule requires that Congress make an affirmative statement that it intended such a conflict.[176] In contrast, if litigants seek an alternative remedy that does not require the statute to be invalidated, no conflict between Section 2 of the Voting Rights Act and Section 2 of the Fourteenth Amendment exists because the two statutes would be able to coexist. The felon disenfranchisement statute can function in a manner that does not violate Section 2, and Section 2 can function in a manner that does not conflict with the states' constitutionally guaranteed discretion to disenfranchise felons.[177]

When litigants advocate for the abrogation of felon disenfranchisement laws under Section 2 of the Voting Rights Act, Congress's enforcement powers under the Fourteenth and Fifteenth Amendments also come into question.

b. Congress's Enforcement Powers

Congress enacted Section 2 pursuant to the Fourteenth and Fifteenth Amendments.[178] Importantly, both the Fourteenth and the Fifteenth Amendments grant Congress the power to enforce the rights they confer by enacting appropriate legislation.[179] For legislation to be an appropriate

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

174. *See id.*

175. *Hayden*, 449 F.3d at 316; Johnson v. Governor of Fla., 405 F.3d 1214, 1229 (11th Cir. 2005); Muntaqim v. Coombe, 366 F.3d 102, 122 (2d Cir. 2004) (observing the presumptive constitutionality of state felon disenfranchisement laws).

176. *Hayden*, 449 F.3d at 323-24.

177. *See id.* at 362-63 (Calabresi, J., dissenting) (observing the difference between a categorical ban on felon disenfranchisement statutes and a ban on such statutes that result in the denial of voting rights on the basis of race).

178. *See infra* note 186.

179. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."); U.S. CONST. amend. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.").

exercise of Congress's enforcement power, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[180] In addition to congruence and proportionality, the Supreme Court has required Congress to support its enforcement legislation by a record of constitutional violations.[181] Based on this framework, some courts have concluded that applying Section 2 of the Voting Rights Act would exceed Congress's enforcement powers.[182]

To support this argument, these courts observed a lack of a congressional record of a vast use of felon disenfranchisement statutes by states to deny minorities the opportunity to vote[183] and Supreme Court decisions invalidating enforcement legislation due to the absence of a record of constitutional violations.[184] Notably, these Supreme Court cases dealt with age and disability discrimination.[185] None of these cases dealt directly with racial discrimination in voting. Accordingly, they are not necessarily relevant in the case of applying Section 2 to felon disenfranchisement laws. Furthermore, focusing all the attention on the congruence and proportionality test ignores additional constitutional authority Congress used to enact Section 2 and the 1982 amendments: Article I, Section 4.[186]

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180. City of Boerne v. Flores, 521 U.S. 507, 520 (1997). The Court has described Congress's Fifteenth Amendment enforcement powers as parallel to its Fourteenth Amendment enforcement powers. *See id.* at 518.

181. Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

182. Muntaqim v. Coombe, 366 F.3d 102, 118-26 (2d Cir. 2004); Johnson v. Governor of Fla., 405 F.3d 1214, 1231 (11th Cir. 2005).

183. *E.g.*, *Johnson*, 405 F.3d at 1231.

184. Bd. of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 374 (2001) (finding that the Americans with Disabilities Act was an invalid attempt to enforce the Fourteenth Amendment because Congress did not make findings of irrational job discrimination by the states); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that Congress failed to compile evidence of irrational age discrimination to apply the Age Discrimination in Employment Act to the States); Oregon v. Mitchell, 400 U.S. 112, 130 (1970) (observing a lack of findings that the twenty-one year-old voting requirement was used by states to disenfranchise voters on account of race).

185. *See* cases cited *supra* note 184. This observation is significant because the prohibition against racial discrimination in voting is textual in the Fifteenth Amendment. U.S. CONST. amend. XV, § 1 ("The right of the 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.").

186. In addition to enforcing the Fourteenth and Fifteenth Amendments, Congress also designed the Voting Rights Act to enforce Article 1, Section 4.

Furthermore, if litigants sought an alternative remedy to invalidating the disenfranchisement law, concerns over "congruence and proportionality" and the lack of findings diminish. For example, if litigants seek to have their right to vote reinstated because their disenfranchisement resulted from racial bias in the criminal justice system, applying Section 2 in such a case is consistent with Congress's original finding of a vast history of racial discrimination in voting rights.[187] Moreover, an individual remedy is congruent and proportional to the Voting Rights Act's purpose of ridding the country of racial discrimination in voting because it affords felons a remedy to the injury of disenfranchisement due to racial bias in the criminal justice system.[188]

c. *Interference with Other State Interests*

In addition to the aforementioned concerns, the *Hayden* court argued that applying Section 2 to felon disenfranchisement laws alters the constitutional balance by implicating the regulation of the franchise, the states' authority to craft its criminal law, and the regulation of correctional institutions.[189] Although the court mentioned no constitutional provisions, it appears that the *Hayden* court referred to the "Times, Places and Manner" Clause[190] and the general powers given to the states under the Tenth Amendment.[191] As with the other constitutional concerns, when litigants advocate for the categorical ban of felon disenfranchisement laws as a remedy under Section 2, a conflict between the Voting Rights Act and the states' right to

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H.R. REP. NO. 89-439, 1 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437. The 1982 amendments of Section 2 also relied on Article 1, Section 4 in creating the totality of circumstances test and eliminating the discriminatory intent requirement. S. REP. NO. 97-417, 39 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 217; Daniel Martin Katz, *Article I Section 4 of the Constitution, the Voting Rights Act and the Restoration of the Congressional Portion of the Election Ballot: The Final Frontier of Felon Disenfranchisement Jurisprudence?*, 10 J.L. & SOC. CHANGE (forthcoming manuscript, *available at* SSRN: http://ssrn.com/abstract=962385).

187. *Muntaqim*, 366 F.3d at 121 (noting that Congress had a record of racial discrimination when it enacted the Voting Rights Act and lacked a record when it enacted the Religious Freedom Restoration Act).

188. *See* South Carolina v. Katzenbach, 383 U.S. 301, 315-16 (1966).

189. Hayden v. Pataki, 449 F.3d 305, 326 (2d Cir. 2006).

190. U.S. CONST. art. I, § 4, cl. 1.

191. U.S. CONST. amend. X.

regulate the time, place, and manner of elections arises because it takes away the states' control over the franchise. Similarly, such a remedy creates a conflict between Section 2 and the states' authority over its criminal law and its prisons because the states traditionally regulate these two areas.

As with the other constitutional concerns, litigants can alleviate the conflicts by advocating for an alternative remedy that does not require invalidation of the felon disenfranchisement law. The application of Section 2 to felon disenfranchisement laws can coexist with the states' constitutional rights. If the states do not enact or administer laws that deny the right to vote on account of race and if the Section 2 litigant requests an alternative remedy that does not mandate invalidation of the felon disenfranchisement law, then the states retain their right to regulate the franchise, fashion their criminal law, and regulate their prisons. Significantly, felons who have lost their right to vote due to the interaction of racial bias in the criminal justice system and felon disenfranchisement statutes also retain a remedy under Section 2. In other words, the constitutional balance remains intact while a Section 2 remedy exists.

In sum, a different remedy avoids the application of the clear statement rule. Accordingly, consideration of whether Congress made a "clear statement" is unnecessary. However, assuming that it is necessary, Congress's intent must be examined.

2. Congress's Intent

Under the "clear statement rule," once a court determines that a particular interpretation of a federal statute would alter the constitutional balance between the state and federal governments, it must also determine whether Congress has made its intent to do so unmistakably clear.[192] After determining that applying Section 2 to felon disenfranchisement laws alters the constitutional balance, courts have tried several approaches to show Congress's intent. For example, some courts examined the legislative history of the 1965 enactment of the Voting Rights Act,[193]

192. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

193. *Hayden*, 449 F.3d at 318; Johnson v. Governor of Fla., 405 F.3d 1214, 1232-33 (11th Cir. 2005); Muntaqim v. Coombe, 366 F.3d 102, 128 (2d Cir.

subsequent attempts by Congress to expressly include felon disenfranchisement laws,[194] and the 1982 amendments of the Voting Rights Act.[195] Other examples used by courts include the enactment of a felon disenfranchisement law by Congress in the District of Columbia[196] and recent laws allowing states to remove convicted felons from their lists of eligible voters.[197] Based on the above information, these courts concluded that Congress never intended Section 2 to cover felon disenfranchisement statutes.[198] Such a conclusion does not logically follow.

When discussing Section 4(c) of the Voting Rights Act,[199] which bans "tests or devices" that limit the ability to vote to citizens with "good moral character,"[200] the Senate Judiciary Committee stated that the section "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting . . . be free of conviction of a felony or mental disability."[201] Based on that statement, some courts have found this to be evidence that Congress did not intend Section 2 to include felon disenfranchisement statutes.[202]

Several assumptions embed themselves in this conclusion. To start, such a conclusion assumes that a statement about one section of a statute applies to all sections. Furthermore, such a position violates several well-established statutory interpretation doctrines.[203] Moreover, it

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2004).

194. *Hayden*, 449 F.3d at 322.

195. *Id.* at 320-21; *Johnson*, 405 F.3d at 1233-34; *Muntaqim*, 366 F.3d at 128.

196. *Hayden*, 449 F.3d at 320.

197. *Id.* at 322.

198. *Id.*; *Johnson*, 405 F.3d at 1234; *Muntaqim*, 366 F.3d at 128.

199. 42 U.S.C. § 1973b(c) (2006).

200. *Id.*

201. S. REP. NO. 89-162, at 24 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2562.

202. *See, e.g.*, *Hayden*, 449 F.3d at 318-19 (discussing the exclusion of felon disenfranchisement laws in Section 4 as evidence that Congress did not intend Section 2 to apply to felon disenfranchisement laws).

203. First, courts taking this approach misuse legislative history. An analysis of legislative history is proper only to solve, but not to create, an ambiguity. Hamilton v. Rathbone, 175 U.S. 414, 421 (1899); Blum v. Stenson, 465 U.S. 886, 896 (1984). Section 2's language is not ambiguous. Thus, courts misuse the Voting Rights Act's legislative history to conclude that Congress did not intend Section 2 to reach felon disenfranchisement statutes. Second, such an approach imputes the language and legislative history of Section 4(c) into Section 2. However, "[i]t is a general principle of statutory construction that

assumes that all sections of the Voting Rights Act have the same purpose and scope. In fact, they do not. Section 2 and Section 4 have different purposes, language, and scope.[204] Thus, the legislative history of Section 4 is not necessarily applicable to Section 2. Finally, such reasoning ignores the plausible conclusion that Congress intended Section 2 to include felon disenfranchisement because it expressly excluded it from Section 4 and made no such exclusion in Section 2.

One court construed subsequent attempts in the 1970's by legislators to amend the Voting Rights Act as evidence that Congress did not understand the Voting Rights Act to apply to felon disenfranchisement laws.[205] This conclusion ignores alternative explanations for the attempts to amend the statute. Despite its broad language, it is entirely plausible that these legislators wanted to eliminate any possible confusion about applying Section 2 to felon disenfranchisement statutes. Furthermore, none of the proposed amendments passed, which suggests that Congress did not feel that the amendments were necessary.[206] Accordingly, it does not necessarily follow that attempts to amend the statute to include felon disenfranchisement laws demonstrates Congress's belief that such laws were not already included.

Congress amended Section 2 in 1982 to allow plaintiffs to establish violations by the "totality of the circumstances test."[207] Several courts observed that, during this amendment process, Congress gave no indication that it intended Section 2 to apply to felon disenfranchisement laws.[208] Based on this observation, such courts reason that the absence of a statement is evidence that Congress did not intend Section 2

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when one statutory section includes particular language that is omitted in another section of the same Act, it is presumed that Congress acted intentionally and purposely." Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 439-40 (2002). Since courts taking this approach add Section 4(c)'s language and purpose into Section 2, they violate this fundamental rule.

204. *See* Johnson v. Governor of Fla., 353 F.3d 1287, 1306 n.27 (11th Cir. 2003) (arguing that Section 2 applies nationally to prohibit a broader range of practices than the "tests and devices" covered by Section 4).

205. *Hayden*, 449 F.3d at 319-20.

206. *Id.* (describing the bills as proposed).

207. 42 U.S.C. § 1973(b) (2006).

208. *Hayden*, 449 F.3d at 320; Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005); Muntaqim v. Coombe, 366 F.3d 102, 128 (2d Cir. 2004).

to encompass felon disenfranchisement statutes.[209] Again, this conclusion is not necessarily true. One could understand the absence of an express statement that such laws are included as evidence that Congress already understood felon disenfranchisement laws to be covered. Therefore, the absence of a statement that Congress intended Section 2 to apply to felon disenfranchisement laws is not conclusive evidence that Congress did not understand Section 2 to cover such laws.

Additionally, the *Hayden* court understood the congressional acts of passing a felon disenfranchisement law for the District of Columbia,[210] allowing a criminal conviction as a basis for removing names from eligible voter lists,[211] and directing states to remove disenfranchised felons from eligible voter lists[212] as evidence that Congress does not believe Section 2 covers felon disenfranchisement laws.[213] Significantly, these acts also support the assertion that Congress actually understands Section 2 to cover felon disenfranchisement statutes. More specifically, a conclusion based on these acts ignores the possibility that Congress understands that felon disenfranchisement laws applied without racial bias do not violate Section 2 and those applied with such racial bias violate Section 2.

Despite arguments to the contrary, Congress made a clear statement in the language of Section 2 of the Voting Rights Act that it intends to include felon disenfranchisement statutes. Section 2's language is extremely broad.[214] Furthermore, the method of establishing a violation is all-encompassing.[215] Broad language coupled with an all-encompassing "totality of the circumstances test" indicates that Congress contemplated a situation where a law, such as a felon disenfranchisement statute, could interact with racial bias in the criminal justice system to deny minorities the

209. *See Hayden*, 449 F.3d at 320-21; *Johnson*, 405 F.3d at 1234; *Muntaqim*, 366 F.3d at 128.

210. *Hayden*, 449 F.3d at 320.

211. *Id.* at 322.

212. *Id.*

213. *Id.*

214. *See* 42 U.S.C. § 1973(a) (2006) (banning any voting qualification that denies the right to vote on account of race).

215. *See id.* § 1973(b) (providing that a violation is established based on the totality of the circumstances).

right to vote on account of their race.[216]

Based on the foregoing, the requirements of the clear statement rule are not satisfied. A remedy that does not require invalidation of the felon disenfranchisement statute avoids constitutional conflicts. Moreover, Congress already made a clear statement of inclusion for such statutes with the broad language of Section 2. Notwithstanding this conclusion, others object to Section 2's application to felon disenfranchisement statutes because, as a practical matter, it requires the use of disparate impact statistics to demonstrate vote denial on account of race.[217]

V. PROPOSAL: HOW DO WE FIX IT?

Since constitutional conflicts arise when litigants seek the invalidation of felon disenfranchisement statutes under Section 2, an alternative remedy is necessary. Instead of seeking to invalidate the felon disenfranchisement laws, litigants should seek re-enfranchisement individually by proving that racial bias in the criminal justice system resulted in their individual felony conviction. Such a remedy allows states to disenfranchise felons in a non-discriminatory manner while affording litigants a remedy under the Voting Rights Act because it avoids the constitutional conflicts and the effects of the clear statement rule. Furthermore, the words "any citizen"[218] indicate that the plain language of Section 2 contemplates an individual remedy.

Although seeking individual reinstatement of the right to vote avoids constitutional concerns, proving that an individual felony conviction resulted from racial bias in the criminal justice system remains difficult because direct evidence of discrimination is rarely available. Therefore, litigants must rely on statistical evidence in a similar manner to the proposed Racial Justice Act.[219] To be consistent with

216. *See Hayden*, 449 F.3d at 358-59 (Parker, J., dissenting) (arguing that the broad language of Section 2 is a clear statement by Congress that it intended felon disenfranchisement laws to be covered by Section 2).

217. *E.g.*, Farrakhan v. Washington, 359 F.3d 1116, 1117-19 (9th Cir. 2004) (Kozinski, J., dissenting) (criticizing the use of statistical evidence to prove vote denial claims).

218. § 1973(a).

219. *See* Chemerinsky, *supra* note 4, at 529-33 (advocating for the passage of the Racial Justice Act, which allowed for proof of discrimination in death penalty sentences through the use of statistics).

other areas of discrimination, individual litigants seeking to have their right to vote reinstated should prove a pattern of felony convictions in the jurisdiction of their own conviction which cannot be explained by any reason other than racial discrimination.[220] Although relevant, showing that the criminal justice system convicts minorities of felonies more often than whites should not be enough.[221] Litigants should show racial bias in their particular felony conviction.

For example, litigants could compare cases in their jurisdiction with substantially similar facts to see if a disparity exists in prosecutor charging decisions. Such an inquiry would focus on whether prosecutors charge minorities with more serious crimes than whites on substantially similar facts. Additionally, litigants could demonstrate a disparity in sentences between minorities and whites that would make their convictions felonies. Of course, all statistical evidence must take into account factors that may aggravate or mitigate such disparities. Ultimately, litigants must produce enough evidence to support an inference of racial bias in their particular conviction.

Significantly, the use of statistics to demonstrate racial bias in the criminal justice system is consistent with an accepted procedure in discrimination cases. For example, in *Smith v. City of Jackson*, the United States Supreme Court held that disparate impact evidence is sufficient to establish a claim under the Age Discrimination in Employment Act.[222] Perhaps more importantly, Section 2 contemplates the use of such evidence in the "totality of the circumstances test."[223]

Although seeking individual reinstatement of the right to vote alleviates constitutional issues and affords felons a remedy when the felon disenfranchisement law denies their

220. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

221. In fact, this is a difficult claim to prove through statistics. *See* Farrakhan v. Gregoire, 2006 U.S. Dist. LEXIS 45987, at *29 (E.D. Wash. 2006) (granting the defendants' motion for summary judgment because the lack of evidence of racial discrimination in the electoral process counterbalanced the evidence of racial bias in the criminal justice system).

222. Smith v. City of Jackson, 544 U.S. 228, 232 (2005) (concluding that a disparate impact claim existed under the Age Discrimination in Employment Act).

223. § 1973(b). In addition, this remedy under Section 2 is preferable to a challenge under the Equal Protection Clause because Section 2 does not require proof of a discriminatory purpose. *See Arlington Heights*, 429 U.S. at 265.

right to vote because of their race, a few concerns arise. First, individual claims do not promote judicial economy. However, recognizing such a claim promotes the policy behind the Voting Rights Act by ridding the country of racial discrimination in voting.[224] Second, a concern arises that allowing an individual claim will result in the end of felon disenfranchisement laws. Such a concern is unfounded because permitting an individual claim still allows states to disenfranchise felons unless the litigant can prove discrimination.[225] Finally, concerns over the reliability or allowance of statistical evidence are unfounded in light of the United States Supreme Court's approval of such evidence.[226]

VI. CONCLUSION: HAVE YOUR CAKE AND EAT IT TOO

Reconciling the disagreement among the circuits requires litigants to seek an alternative remedy. In seeking to establish a claim under Section 2 of the Voting Rights Act for felon disenfranchisement statutes that deny the right to vote because of race, litigants should seek individual re-enfranchisement rather than seeking to invalidate the felon disenfranchisement law. Doing so avoids constitutional concerns about altering the balance between the state and federal governments. Accordingly, the clear statement rule would be inapplicable. To prove such a claim in the absence of direct evidence of racial bias, litigants must focus on specific statistical disparity evidence to support the inference that the differences result from racial bias. Significantly, with over two million African Americans disenfranchised and Latinos also disproportionately affected,[227] this claim could

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

225. Others may be concerned that an individual remedy allows felons another means to challenge their convictions. However, defendants must make most racial challenges before trial. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 83-99 (1986) (holding that prosecutors cannot use peremptory challenges to exclude jurors solely because of race and detailing the procedure to challenge a prosecutor's decision before trial). Moreover, this remedy does not deny that the litigant committed a crime. The remedy only re-enfranchises plaintiffs and does not overturn convictions. Thus, it merely examines whether race played a substantial role in the litigant's *felony* conviction and disenfranchisement. In fact, this remedy reinforces the United States Supreme Court's holding that states cannot use felon disenfranchisement as a mechanism to discriminate based on race. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

226. *See Smith*, 544 U.S. at 232.

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have a substantial impact on the outcome of close elections. Most importantly, permitting this type of vote denial claim under Section 2 allows the Voting Rights Act to achieve its purpose of ridding the country of racial discrimination in voting.

CLINIC, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY, BARRIERS TO DEMOCRACY: A PETITION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS FOR A THEMATIC HEARING ON FELONY DISENFRANCHISEMENT PRACTICES IN THE UNITED STATES AND THE AMERICAS 8 (2007).