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# Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act

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# LET'S NOT JUMP TO CONCLUSIONS: APPROACHING FELON DISENFRANCHISEMENT CHALLENGES UNDER THE VOTING RIGHTS ACT

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*Section 2 of the Voting Rights Act of 1965 invalidates voting qualifications that deny the right to vote on account of race or color. This Article confronts a split among the federal appellate courts concerning whether felons may rely on Section 2 when challenging felon disenfranchisement laws. The Ninth Circuit Court of Appeals allows felon disenfranchisement challenges under Section 2; however, the Second and Eleventh Circuits foresee unconstitutional consequences and thus do not. After discussing the background of voting rights jurisprudence, history of felon disenfranchisement laws, and evolution of Section 2, this Article identifies the points of contention among the disagreeing courts.*

*The crux of this Article is that both sides of the debate have erred. Both sides wrongly assume that the consequences of accepting these vote denial challenges are predictable. However, because a standard approach to vote denial challenges under Section 2 does not currently exist, no court can foresee the results of allowing such challenges to felon disenfranchisement laws. Therefore, predicting the constitutional implications of accepting these challenges without first identifying an appropriate analysis is impossible.*

*This Article concludes by proposing an analysis for consideration. The proposed approach is a tailored version of sliding scale scrutiny—an analysis that the United States Supreme Court, following* Burdick v. Takushi, *now applies to constitutional voting rights claims. Using this adapted approach, the Supreme Court can resolve the current split in authority and find that Section 2 is a viable vehicle for challenging racially-discriminatory felon disenfranchisement laws.*

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## INTRODUCTION

Federal courts are jumping to conclusions about the constitutionality of allowing felon disenfranchisement challenges under section 2 of the Voting Rights Act ("VRA"). In the midst of their leaps, these courts have skipped over a crucial analytical step, leading to potential misapplications of the VRA. Because of their flawed analyses, some federal courts may silently be condoning infringements of certain citizens' right to vote—precisely the harm the VRA seeks to prevent.[1]

1. Voting Rights Act § 2, 42 U.S.C. § 1973 (2007). The right to vote, although under-exercised and seemingly under-appreciated by many Americans, is an undeniably fundamental aspect of American citizenship. *See* Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979) (stating that voting is of most fundamental significance under our constitutional structure); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) (requiring a careful explanation of statutes regulating voting because such statutes constitute foundation of representative society); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (declaring that unabridged right to vote is fundamental because voting preserves other basic rights); *see also* Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 197, 205 (Bernard Grofman & Chandler Davidson eds., 1992) (discussing problems with minority voter turnout and suspecting that they reflect lingering effects of discrimination).

Through section 2 of the VRA, Congress granted courts the power to strike down laws that disproportionately burden minorities' voting rights.[2] Presently, however, federal courts disagree about whether felons may challenge state felon disenfranchisement statutes under that section. The current split of authority threatens to prevent challenges to statutes that disenfranchise felons, even though such statutes often have disproportionate effects on minorities.[3] The Ninth Circuit Court of Appeals allows challenges to felon disenfranchisement statutes under section 2.[4] The Second Circuit Court of Appeals, however, prohibits challenges to felon disenfranchisement statutes under section 2 because of concerns that allowing such challenges violates constitutional provisions.[5]

Importantly, an analytical flaw exists within these federal courts' decisions. Both courts have ignored an important question in their analyses: how would courts approach section 2 challenges to felon disenfranchisement laws? Instead, these courts simply presume an ability to foresee the juridical effects and constitutional implications of allowing these challenges.

This Article addresses and responds to the courts' flawed reasoning. Specifically, this Article asserts that a uniform approach to section 2 challenges must exist before courts can determine the constitutionality of allowing section 2 challenges to felon disenfranchisement laws.[6] Currently, however, there is no uniform approach.[7] This Article responds to the flawed reasoning by proposing a workable approach to felon disenfranchisement challenges under section 2.

Part I discusses the emergence of voting protections, the history of felon disenfranchisement laws, and the evolution of section 2 of the VRA.

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2. 42 U.S.C. § 1973 (2007); *see* discussion *infra* Part I.D. Congress and federal courts reject voting regulations that disproportionately burden minority voting rights in other contexts as well. *See generally* U.S. CONST. amend. XXIV (prohibiting poll taxes); U.S. CONST. amend. XV (prohibiting states from denying right to vote on account of race, color, or previous condition of servitude); Hunter v. Underwood, 471 U.S. 222, 233 (1985) (striking Alabama felon disenfranchisement law because of invidious legislative intent); Guinn v. United States, 238 U.S. 347 (1915) (striking Oklahoma grandfather clause that exempted most whites from literacy test).

3. *Compare* Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003) (allowing felon disenfranchisement challenge under section 2), *and* Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (holding, implicitly, that challenge is sustainable by applying section 2 analysis to challenged felon disenfranchisement law), *with* Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (precluding felon disenfranchisement challenge under section 2), *and* Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005) (precluding felon disenfranchisement challenge under section 2).

4. *See infra* Part II.A.

5. *See infra* Part II.B.

6. *See infra* Part III.

7. *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 709 (2006) (discussing lack of standard approach to vote denial claims under section 2).

Part II examines the current circuit split regarding whether plaintiffs can challenge felon disenfranchisement laws under section 2 of the VRA. Part III analyzes the need for a standard approach to these challenges and argues that a variation of sliding scale scrutiny is the best approach.

## I. BACKGROUND

Statutes denying a felon the right to vote are conceptually basic. Upon conviction of a felony, a person loses his right to vote for a specific duration.[8] However, challenges to these laws combine many legal principles.[9] In order to appreciate how these principles interact, one should understand felon disenfranchisement laws' place in the history and future of voting rights jurisprudence.

### A. *The Right to Vote*

Under Chief Justice Earl Warren the United States Supreme Court made significant advancements in identifying and protecting the right to vote.[10] Prior to these advancements, many citizens found little assistance in the struggle to obtain voting rights.[11] The Warren Court began protecting

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8. *See, e.g.*, VA. CONST. art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.").

9. These challenges inextricably combine multiple legal doctrines such as fundamental rights and suspect class protection, or vote denial and vote dilution claims. *See* Hayden v. Pataki, 449 F.3d 305, 309 (2d Cir. 2006) (confronting challenge to New York's felon disenfranchisement statute as both vote denial and vote dilution); *cf.* City of Mobile v. Bolden, 446 U.S. 55, 113 (1980) (Marshall, J., dissenting) (discussing difference between fundamental rights protection and suspect class protection as applied to race based voting rights challenges).

10. *See generally* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (striking regulation preventing resident from voting in school board election); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (striking state statute imposing poll tax); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964) (holding that majority of citizens cannot vote to abridge minority's voting rights); Reynolds v. Sims, 377 U.S. 533 (1964) (mandating reapportionment of Alabama districting scheme).

11. Courts traditionally interpreted the original Constitution as a document of negative restrictions, failing to guarantee anyone the affirmative right to vote. *See, e.g.*, Minor v. Happersett, 88 U.S. 162, 170–78 (1874) (holding that Constitution does not grant any citizen affirmative right to vote). The text of the original Constitution only required an election for the members of the House. U.S. CONST. art I, § 4, cl. 1. Gradually, the notion of a protected right to vote emerged through the amendment process. *See* U.S. CONST. amends. XIV, XVII, IXX, XXIV, XXVI (specifically referring to "right to vote" and prohibiting poll taxes). Further frustrating citizens' efforts to attain the right to vote was the Court's disposition to avoid voting claims by invoking the political question doctrine. *See* Colegrove v. Green, 328 U.S. 549, 552 (1946) (holding that a claim of inadequate representation and responsiveness was a political question and thus non-justiciable).

the right to vote by identifying voting as a fundamental right,[12] thereby allowing the Fourteenth Amendment to serve as a vehicle for challenging statutes that abridge the right to vote.[13] Consistent with the Supreme Court's fundamental rights jurisprudence, these challenges invoked strict scrutiny review.[14]

After recognizing a fundamental right to vote, the Supreme Court began identifying those entitled to this right. Gradually, the Court defined a core electorate of those individuals who satisfied the age, residency, citizenship, and non-felon status requirements set by their state legislatures.[15] Absent a compelling state interest, the Supreme Court required states to enfranchise all individuals who satisfied these requirements.[16] Accordingly, statutes disenfranchising members of the core electorate triggered strict

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12. *See Kramer*, 395 U.S. at 626; *Reynolds*, 377 U.S. at 561–62 (stating that right to vote is fundamental in free and democratic society).

13. *See, e.g.*, Bd. of Estimate v. Morris, 489 U.S. 688, 690 (1989) (pursuing Fourteenth Amendment voting rights challenge to representation on local board); Dunn v. Blumstein, 405 U.S. 330, 331–32 (1972) (pursuing Fourteenth Amendment challenge to durational residency voting restriction); *Lucas*, 377 U.S. at 713 (pursuing Fourteenth Amendment voting rights challenge to Colorado districting scheme).

14. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (applying strict scrutiny to statute abridging fundamental right to familial living situation); *Dunn*, 405 U.S. at 337, 342 (applying strict scrutiny to Tennessee's durational residency voting qualification); *Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972) (applying strict scrutiny to statute abridging fundamental right to familial custody); *Kramer*, 395 U.S. at 626–27 (applying strict scrutiny to statute abridging fundamental right to vote); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (applying strict scrutiny to statute abridging fundamental right to marry).

15. *See* Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259, 313–14 (1992) (discussing and defining term "core electorate"); *see also Cabell v. Chavez-Salido*, 454 U.S. 432, 439–40 (1982) (holding that formal citizenship can be prerequisite to voting rights); *Richardson v. Ramirez* 418 U.S. 24, 56 (1974) (holding that state can disenfranchise felons pursuant to constitutional authority); *Dunn*, 405 U.S. at 360 (holding that Tennessee's durational residency requirement for voting was unconstitutional); *Oregon v. Mitchell*, 400 U.S. 112, 130–31 (1970) (holding that Congress could not force states to enfranchise eighteen-year-olds); *Carrington v. Rash*, 380 U.S. 89, 96–97 (1965) (holding that Texas could not deny members of Army voting rights when members were bona fide residents of town).

16. *See Kramer*, 395 U.S. at 628–29. A sole exception to this principle emerged through the development of the one person/one vote doctrine. *See also Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973) (recognizing that special purpose of district allowed for unequal vote weighing). When a local governing body is not part of the core government, associated electoral schemes that deny one person/one vote representation do not trigger strict scrutiny. *See Ball v. James*, 451 U.S. 355, 370 (1981) (finding one acre/one vote scheme permissible when irrigation district did not possess traditional government powers); *Salyer*, 410 U.S. at 728 (finding one acre/one vote scheme permissible when district had a special, limited purpose and disproportionate impact); Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 362–67 (1993) (discussing one person/one vote doctrine and exceptions for local governments).

scrutiny because those members had a fundamental right to vote.[17] Under strict scrutiny, a challenged statute is only valid if it is necessary in achieving a compelling state interest.[18] Statutes disenfranchising non-members, however, triggered only rational basis review because people outside of the core electorate do not have a fundamental right to vote.[19] Under rational basis review, such statutes are valid if they are rationally related to achieving a legitimate state interest.[20]

Despite conforming to fundamental rights jurisprudence, applying strict scrutiny to every restriction of the core electorate's right to vote proved unworkable.[21] In the early 1990s, the Supreme Court realized that any statute regulating elections theoretically imposes some restriction on voting rights.[22] If the Court applied strict scrutiny to all election statutes, many would be found unconstitutional.[23] For fear of infringing states' autonomy in controlling elections, the Court sought a new approach that did not employ strict scrutiny irrespective of the voting restriction's severity.[24] Instead, the Court believed that adjusting the level of scrutiny relative to the severity of the voting restriction better respected states' autonomy.[25]

### B. *Burdick v. Takushi*

In *Burdick v. Takushi*, the Supreme Court adopted sliding scale scrutiny as a workable approach to voting rights claims under the Fourteenth Amendment.[26] In *Burdick*, a registered voter filed suit against the Hawaii Director of Elections to challenge Hawaii's write-in candidacy prohibition.[27] The plaintiff framed the challenge as one of voting rights infringement because the prohibition prevented him from voting for the person he wished to elect.[28] The District Court for the District of Hawaii

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17. *See, e.g., Dunn*, 405 U.S. at 337, 342 (using strict scrutiny to sustain challenge to residency restriction by plaintiff who was bona fide resident).

18. BLACK'S LAW DICTIONARY 1462 (8th ed. 2004) (defining "strict scrutiny").

19. *See, e.g.*, Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 70 (1978) (using rational basis review to deny challenge to residency restriction by non-resident plaintiff).

20. BLACK'S LAW DICTIONARY 1290 (8th ed. 2004) (defining "rational-basis test").

21. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (discussing how applying strict scrutiny to every state voting regulation would unacceptably tie hands of states trying to operate elections efficiently).

22. *See id.* (acknowledging that election laws invariably impose some amount of burden on voters).

23. *See id.* at 433–34.

24. *See id.*

25. *See id.* at 433.

26. *Id.* at 434.

27. *Id.* at 430.

28. *Id.* at 430–32.

granted summary judgment for the plaintiff.[29] On appeal, the Ninth Circuit Court of Appeals reversed this decision, holding that Hawaii's ban on write-in candidacy served a legitimate state interest.[30] The Supreme Court granted certiorari to decide whether and when a state's power to regulate elections could justify infringing a core electorate member's voting rights.[31]

The Supreme Court held that Hawaii's interest in regulating elections outweighed the minimal burden on the plaintiff's right to vote.[32] In reaching this conclusion, the Court adopted the sliding scale approach used in cases regarding a candidate's ability to appear on a ballot.[33] Using this approach, the *Burdick* Court found a minimal burden on the plaintiff's voting rights because a candidate of choice could easily access the ballot.[34] The Court then identified several legitimate state interests that sufficiently justified the minimal burden on the plaintiff's right to vote.[35]

In cases following *Burdick*, the Court began adjusting the level of scrutiny based on how severely the challenged regulation burdened the right to vote.[36] Under this approach, a statute imposing a slight burden on voting rights triggers rational basis review.[37] However, a statute imposing a severe burden receives strict scrutiny.[38] Thus, before applying the appropriate level of scrutiny, a court confronting a voting rights challenge must first determine the severity of the burden.[39] This analysis became the accepted judicial approach to voting rights claims under the Fourteenth Amendment.[40]

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29. Burdick v. Takushi, 737 F. Supp. 582, 592 (D. Haw. 1990).

30. Burdick v. Takushi, 937 F.2d 415, 422 (9th Cir. 1991).

31. Burdick v. Takushi, 504 U.S. 428, 432 (1992).

32. *Id.* at 439 (discussing state's interest in avoiding "possibility of unrestrained factionalism at the general election" (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986)).

33. *See id.* at 434; Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983) (applying sliding scale scrutiny to ballot access claim). The Court justified borrowing this approach from candidates' rights cases because one cannot easily separate the rights of voters and candidates. *Burdick*, 504 U.S. at 438 *(citing* Bullock v. Carter, 405 U.S. 134, 143 (1972)).

34. *Burdick*, 504 U.S. at 434–39.

35. *Id.* at 439–40.

36. *See* cases cited *infra* notes 44–47.

37. *See Burdick*, 504 U.S. at 438–39 (applying relaxed standard of review because burden is slight); Werme v. Merrill, 84 F.3d 479, 485–86 (1st Cir. 1996) (applying rational basis review).

38. *See* Duke v. Smith, 13 F.3d 388, 395 (11th Cir. 1994) (applying strict scrutiny because burden is severe); Ayers-Schaffner v. DiStefano, 860 F. Supp. 918, 921 (D.R.I. 1994) (applying strict scrutiny).

39. *See Burdick*, 504 U.S. at 434.

40. *See generally* Werme, 84 F.3d at 483–84, (applying *Burdick* analysis to voting rights claim); Schulz v. Williams, 44 F.3d 48, 55–56 (2d Cir. 1994) (applying *Burdick* analysis to voting rights claim); Partnoy v. Shelley, 277 F. Supp. 2d 1064, 1073 (S.D. Cal. 2003) (applying *Burdick* analysis to voting rights claim). However, in *Bush v. Gore*, a relatively modern

### C. *Felon Disenfranchisement Laws in the United States*

Borrowing from European models, statutes disenfranchising citizens as punishment for a crime date back to colonial times in the United States.[41] Over time, these laws became both more common and more severe.[42] That is, as the number of states enacting such laws increased, the durations of disenfranchisement increased as well.[43]

Today, four categories of felon disenfranchisement laws exist, imposing burdens of varying degrees on a felon's ability to vote.[44] First, fourteen states and the District of Columbia prevent a felon from voting only for the duration of the felon's incarceration.[45] Second, five states extend the voting restrictions beyond incarceration and prohibit voting while a felon is on parole.[46] Third, thirty states disenfranchise felons beyond parole and prevent a felon from voting during the probationary period.[47] Finally, two states prevent a felon from voting forever.[48]

The statutory language of felon disenfranchisement laws also varies. While some laws disenfranchise citizens upon conviction for a felony offense, others disenfranchise citizens upon conviction for crimes of moral turpitude.[49] Such differences in statutory language allow two states to en-

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case, the Supreme Court addressed a voting rights claim without referring to *Burdick*. 531 U.S. 98, 110–11 (2000). One can read this opinion as threatening the accepted practice of applying sliding scale scrutiny to voting rights claims. *See, e.g.*, Stewart v. Blackwell, 444 F.3d 843, 859–62 (6th Cir. 2006) (discussing approach to voting rights challenge following *Bush v. Gore* and *Burdick*, and deciding that *Bush v. Gore* was proper approach). However, some judges and scholars question the continued validity of the *Bush* opinion as binding precedent on voting rights jurisprudence. *See Stewart*, 444 F.3d at 887–89 (Gilman, J., dissenting); Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 380–92 (2001) (discussing reasons for not taking *Bush v. Gore* seriously).

41. For a thorough analysis of the history of these laws, *see* Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004).

42. *Id.* at 237–38.

43. *Id.*

44. *See* THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 3 (Sept. 2008), *available at* http://sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf; *see also* Behrens, *supra* note 41, at 239 (discussing four categories of modern felon disenfranchisement statutes). Only Vermont and Maine do not disenfranchise felons, allowing even those currently incarcerated to vote. *See* Behrens, *supra* note 41, at 239; THE SENTENCING PROJECT, *supra*.

45. *See* THE SENTENCING PROJECT, *supra* note 44.

46. *See id.*

47. *See id.*

48. These states are Kentucky and Virginia. *See id.*

49. *See, e.g.*, ALASKA STAT. § 15.05.030 (2006) (disenfranchising persons upon conviction of felony involving moral turpitude). Recently, a federal district court dismissed, on other grounds, a challenge to that state's felon disenfranchisement statute because it contained such language. Gooden v. Worley, No. CV-2005-5778-RSV (N.D. Ala. May 26,

force otherwise comparable laws imposing equal durations of disenfranchisement in different manners.[50] For example, when applying their state's statutory language, courts in one state may permanently disenfranchise citizens upon conviction for any felony.[51] At the same time, courts in another state may permanently disenfranchise citizens only upon conviction of certain crimes—quite possibly those of which minorities are more commonly convicted.[52] In fact, some bygone state legislatures have intentionally manipulated the statutory language of felon disenfranchisement laws to have this effect.[53]

### 1. The Impact of Felon Disenfranchisement Laws

Felon disenfranchisement laws deny over 5.3 million otherwise qualified voters the opportunity to elect their governmental representatives.[54] These laws deny more American citizens the right to cast a ballot than any other voting restriction.[55] In states imposing a lifetime ban, some experts estimate that forty percent of the next generation of African American males may eventually suffer permanent disenfranchisement.[56]

Despite racially neutral language, felon disenfranchisement statutes disproportionately affect racial minority groups.[57] In 2004, one in twelve African Americans could not vote because of felon disenfranchisement

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2006), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/order5-26-06.pdf.

50. *See* Bailey Figler, Comment, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 738–39 (2006) (discussing how language of some felon disenfranchisement has intentional racially disparate application); discussion of *Gooden supra* note 49.

51. *See, e.g.*, Ky. Const. § 145.

52. *See* Katharine Mieszkowski, *Barred From Voting*, SALON, Oct. 19, 2006, at 2, available at http://www.salon.com/news/feature/2006/10/19/felons (discussing racially biased application of disenfranchisement statutes in Alabama and Mississippi); *see, e.g.*, Hunter v. Underwood, 471 U.S. 222, 226–27 (1985) (striking Alabama felon disenfranchisement law that applied to crimes of moral turpitude because of invidious intent).

53. *See Hunter*, 471 U.S. at 226–27.

54. *See* Behrens, *supra* note 41, at 231; Ryan S. King, THE SENTENCING PROJECT, A DECADE OF REFORM: FELON DISENFRANCHISEMENT POLICY IN THE U.S., in THE SENTENCING PROJECT 1 (2006), *available at* http://www.sentencingproject.org/pdfs/FVR_Decade_Reform.pdf.

55. *See* Behrens, *supra* note 41, at 231.

56. *See* THE SENTENCING PROJECT, *supra* note 44.

57. *See* Behrens, *supra* note 41, at 244–47; RYAN S. KING, THE SENTENCING PROJECT, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997–2008 3 (Sept. 2008), *available at* http://sentencingproject.org/Admin/Documents/publications/fd_statedisenfranchisement.pdf.

laws.[58] In contrast, these laws prevent only about one in sixty non-African Americans from voting.[59]

This disproportionate impact is the result of minority overrepresentation among felons in most states.[60] Many scholars believe that this is the result of unequal treatment of minorities throughout the criminal justice system.[61] In many states, the government disproportionately stops, searches, arrests, books, charges, convicts, and sentences minorities as compared to non-minorities.[62]

Because this unequal treatment varies by state, felon disenfranchisement statutes in some states more severely affect minorities than do similar statutes in other states. For example, in Connecticut, Pennsylvania, and Illinois, the disenfranchisement rate of African Americans is more than seventeen times greater than that of non-African Americans.[63] By contrast, Hawaii disenfranchises proportionally fewer African Americans than non-African Americans.[64] Consequently, the degree to which felon disenfranchisement statutes result in a racially skewed impact on voting rights also varies by state.

### 2. Richardson v. Ramirez

After the Warren Court began protecting voting rights, felons attempted to challenge the statutes that disenfranchised them.[65] In *Ramirez*,

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58. *See* KING, *supra* note 57, at 2 (2006).

59. *Id.*

60. *See* Behrens, *supra* note 41, at 244–45.

61. *See id.* at 244–45; *see also* CORAMAE RICHEY MANN, UNEQUAL JUSTICE (1993); MARC MAUER, RACE TO INCARCERATE 126–36 (1999) (discussing connection between incarceration rates and race); John Hepburn, *Race and the Decision to Arrest: An Analysis of Warrants Issued*, 15 J. RES. CRIME & DELINQ. 54, 66 (1978). *But see* Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259, 1280–81 (1982) (suggesting that overrepresentation of minorities in prison population may be result of higher rates of crime commission among minorities); John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC'Y REV. 357, 378 (1974) (concluding that race was statistically insignificant factor in non-capital cases).

62. *See* ENGEN ET AL., RACIAL AND ETHNIC DISPARITIES IN SENTENCING OUTCOMES FOR DRUG OFFENDERS IN WASHINGTON STATE: FY1996 TO FY1999 52–59 (1999); OJMARRH MITCHELL & DORIS L. MACKENZIE, THE RELATIONSHIP BETWEEN RACE, ETHNICITY, AND SENTENCING OUTCOMES: A META-ANALYSIS OF SENTENCING RESEARCH 125–28 (2004).

63. *See* KING, *supra* note 57, at 18.

64. *See* ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 11 (2006) (listing disenfranchisement rates by race and state).

65. *See supra* Part I.A; *see, e.g.*, Hunter v. Underwood, 471 U.S. 222, 223–24 (1985) (challenging state's felon disenfranchisement statute under Fourteenth Amendment); Richardson v. Ramirez, 418 U.S. 24, 27 (1974) (challenging state's felon disenfranchisement statute under Fourteenth Amendment); Allen v. Ellisor, 664 F.2d 391, 395 (4th Cir. 1981) (challenging state's felon disenfranchisement statute under Fourteenth Amendment).

felons from California challenged that state's disenfranchisement statute under the Equal Protection Clause of the Fourteenth Amendment.[66] The felons invoked original jurisdiction in the Supreme Court of California by seeking a writ of mandate compelling election officials to register them to vote.[67] The California Supreme Court held that the challenged statute violated the Equal Protection Clause, and the state subsequently appealed to the United States Supreme Court.[68]

Despite the clear impact on felons' voting rights, the Supreme Court sustained the law without employing strict scrutiny.[69] Instead, the Court found authorization for felon disenfranchisement statutes in Section 2 of the Fourteenth Amendment.[70] This section explicitly exempts states from reduced representation in the House of Representatives when disenfranchising citizens for participation in rebellion or other crime.[71] By declining to subject felon disenfranchisement laws to strict scrutiny, the *Ramirez* Court ended the Fourteenth Amendment's potential as a vehicle for challenges to these laws.[72] Following *Ramirez*, courts now routinely apply rational basis review to Fourteenth Amendment felon disenfranchisement challenges and find legitimate justifications for such laws.[73]

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66. *Richardson*, 418 U.S. at 27.

67. Ramirez v. Brown, 9 Cal. 3d 199, 202–03 (1973).

68. *Id.* at 216–17; *see* Richardson v. Ramirez, 414 U.S. 816, 816 (1973) (granting certiorari).

69. *Richardson*, 418 U.S. at 41–42, 54; *see* U.S. CONST. amend. XIV, § 2.

70. *Richardson*, 418 U.S. at 41–42, 54 (finding affirmative authorization for felon disenfranchisement statutes in Section 2 of Fourteenth Amendment); *see* U.S. CONST. amend. XIV, § 2.

71. U.S. CONST. amend. XIV, § 2.

72. *Richardson*, 418 U.S. at 54–55; *see also* Allen v. Ellisor, 664 F.2d 391, 395 (4th Cir. 1981) (stating that *Richardson* decision closed door to equal protection challenges to felon disenfranchisement statutes). Several years later, the Court held that the equal protection doctrine was not entirely unavailable to felons wishing to challenge the laws that disenfranchise them. Hunter v. Underwood, 471 U.S. 222, 233 (1985) (holding that when plaintiff can establish invidious legislative intent, statute will be subject to strict scrutiny). Without direct evidence of invidious intent, plaintiffs are currently unable to invoke heightened scrutiny of felon disenfranchisement challenges under the Fourteenth Amendment. *See Hunter*, 471 U.S. at 230–31.

73. *See* Baker v. Cuomo, 58 F.3d 814, 820–21 (2d Cir. 1995) (applying rational basis review to felon disenfranchisement challenge and discussing social contract justification for such laws); Williams v. Taylor, 677 F.2d 510, 514 (5th Cir. 1982) (employing rational basis review to deny Fourteenth Amendment challenge to felon disenfranchisement statute); Mixom v. Commonwealth 759 A.2d 442, 449, 451–52 (Pa. Commw. Ct. 2000) (upholding felon disenfranchisement statute under rational basis review and discussing valid state interest in ensuring that those who obey society's rules make them).

### D. *Section 2 of the Voting Rights Act and the 1982 Amendments*

In 1965, Congress enacted the VRA to protect the voting power of minorities in the United States.[74] Due to the historical clash between state legislatures and the federal government when regulating or protecting voting rights, the VRA is an intentionally broad and prophylactic statute that prevents discriminatory voting regulations.[75] Consistent with that intent, the Supreme Court requires that courts interpret and apply this Act as broadly as possible.[76]

Section 2 of the VRA prohibits states from denying or abridging the right to vote on account of race or color.[77] There are two traditional categories of challenges under section 2.[78] In vote dilution challenges, plaintiffs allege that a voting scheme—commonly a districting arrangement—diminishes minorities' political influence without denying them the opportunity to vote.[79] In vote denial challenges, by contrast, plaintiffs allege that a voting regulation disproportionately diminishes minorities' ability to cast ballots.[80]

In 1980, the Supreme Court faced a redistricting challenge that questioned the proper judicial approach to section 2 claims.[81] In *City of Mobile v. Bolden* the Court decided that section 2 paralleled the Fifteenth Amendment and provided no additional voting protection for minori-

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74. Voting Rights Act, 42 U.S.C. § 1973 (2007); *see* U. S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., VOTING SECTION, INTRODUCTION TO FED. VOTING RIGHTS LAWS: THE VOTING RIGHTS ACT OF 1965, http://www.usdoj.gov/crt/voting/intro/intro_b.htm (last visited Feb. 12, 2007).

75. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 566–67 (1969) (discussing broad legislative intent of VRA); Hayden v. Pataki, 449 F.3d 305, 361–62 (2d Cir. 2006) (Parker, J., dissenting) (discussing historical struggle between federal government and creatively oppressive state legislatures, and need for VRA to be broad and prophylactic). The series of cases known as the white primary cases, in which the Supreme Court protected black Texas citizens' right to vote, exemplifies this struggle. *See* Terry v. Adams, 345 U.S. 461, 470 (1953) (holding that private political association could not disenfranchise black citizens); Smith v. Allwright, 321 U.S. 649, 664–66 (1944) (holding that Texas Democratic Party could not prevent black citizens from voting in primary elections); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (holding that Texas legislature could not disenfranchise black citizens).

76. *See* Chisom v. Roemer, 501 U.S. 380, 403 (1990) (Warning that even if courts foresee problems in applying congressionally mandated totality of circumstances approach, courts cannot adopt judicially created limitation on coverage of VRA); *Allen*, 393 U.S. at 566–67 (requiring broad interpretation of VRA).

77. 42 U.S.C. § 1973.

78. *See* Tokaji, *supra* note 7, at 691–92.

79. *See id.*

80. *See id.*

81. *See* City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980) (holding that use of multimember district scheme did not violate section 2 of VRA).

ties.[82] As such, plaintiffs would need to establish invidious legislative intent to prevail on any claim under section 2 of the VRA.[83] This approach imposed a seemingly insurmountable burden on plaintiffs that neither Congress nor civil rights activists accepted.[84]

In response to the Court's decision *in City of Mobile*, the Senate emphasized section 2 during re-enactment proceedings for section 4 of the VRA, which lists universally prohibited state voting prerequisites and devices.[85] Congress ultimately decided that, while Fifteenth Amendment voting rights challenges require proof of actual discriminatory legislative intent, challenges grounded in section 2 do not.[86] Instead, Congress mandated a "totality of circumstances" analysis for section 2 purposes and identified seven appropriate factors of this analysis.[87] Congress mandated this approach to ensure that section 2 reaches all laws resulting in discriminatory voting rights infringement, instead of only the intentionally discriminatory laws.[88]

Recently, plaintiffs have begun interpreting section 2 of the VRA as a plausible vehicle for challenging felon disenfranchisement laws.[89] These plaintiffs argue that because felon disenfranchisement laws have a racially disparate impact on voting rights, they fall within the scope of section 2.[90]

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82. *Id.*

83. *Id.* at 62.

84. *See* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1378, 1413–14 (1983).

85. *See id.* at 1407; Voting Rights Act § 4, 42 U.S.C. § 1973 (2007).

86. S. REP. NO. 97-417, at 15–19 (1982). Requiring invidious intent would render section 2 useless because if plaintiffs can prove invidious intent, actions under the Fourteenth and Fifteenth Amendments are already available. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222, 233 (1985) (allowing felon disenfranchisement challenge under Fourteenth Amendment when plaintiff can establish invidious intent). The amended section 2 prohibits voting qualifications that result in denial or abridgement of the right to vote on account of race or color. Voting Rights Act § 2, 42 U.S.C. § 1973.

87. Voting Rights Act § 2(b), 42 U.S.C. § 1973; S. REP. NO. 97-417, at 28–29 (1982) (identifying non-exhaustive list of seven factors for analysis, including extent to which minorities suffer discrimination in education, employment, and health).

88. *See* S. REP. NO. 97-417, at 30 (emphasizing that amended language shows that plaintiffs need only show that system or practice results unequal minority access to political process, and not invidious intent). *But see City of Mobile v. Bolden*, 446 U.S. 55, 60–62 (employing an intent test in analyzing section 2 challenge before 1982 amendments).

89. *See* Hayden v. Pataki, 449 F.3d 305, 309 (2d Cir. 2006) (pursuing section 2 challenge to felon disenfranchisement law); Johnson v. Bush, 405 F.3d 1214, 1216 (11th Cir. 2005) (pursuing section 2 challenge to felon disenfranchisement law); Farrakhan v. Washington, 338 F.3d 1009, 1011 (9th Cir. 2003) (pursuing section 2 challenge to felon disenfranchisement law); Wesley v. Collins, 791 F.2d 1255, 1257 (6th Cir. 1986) (pursuing section 2 challenge to felon disenfranchisement law).

90. *See, e.g.*, *Hayden*, 449 F.3d at 310–12 (featuring section 2 challenge to felon disenfranchisement statute); Muntaqim v. Coombe, 366 F.3d 102, 103–06 (2d Cir. 2004) (featuring section 2 challenge to felon disenfranchisement statute); Johnson v. Bush 214 F. Supp. 2d 1333, 1335, 1341-42 (S.D. Fla. 2002) (featuring section 2 challenge to felon

However, under the current interpretation of the VRA, it is unclear if a given court will sustain a challenge to these laws under section 2.

## II. THE CURRENT SPLIT OF AUTHORITY

Despite its broad language and Congress's expansive intent, courts disagree about section 2's ability to reach felon disenfranchisement statutes.[91] The Ninth Circuit Court of Appeals has found that section 2 is a plausible vehicle for challenges to felon disenfranchisement laws.[92] The Second Circuit Court of Appeals, however, has held that plaintiffs simply cannot challenge felon disenfranchisement laws under section 2.[93] Considering this split in authority, review by the Supreme Court appears to be both necessary and probable.[94]

### A. *The Ninth Circuit Allows VRA Challenges*

In *Farrakhan v. Washington*, ex-felons in Washington challenged their disenfranchisement, asserting that the state's felon disenfranchisement provision violated section 2 of the VRA.[95] The District Court for the Eastern

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disenfranchisement statute); Farrakhan v. Locke, 987 F. Supp. 1304, 1307-08 (E.D. Wash. 1997) (featuring section 2 challenge to felon disenfranchisement statute); Wesley v. Collins, 605 F. Supp. 802, 804 (M.D. Tenn. 1985) (featuring section 2 challenge to felon disenfranchisement statute).

91. *Compare Farrakhan*, 338 F.3d 1009 (allowing felon disenfranchisement challenge under section 2), *and* Wesley v. Collins, 791 F.2d 1255, 1259–60 (6th Cir. 1986) (holding, implicitly, that courts can sustain challenge by applying section 2 analysis to challenged felon disenfranchisement law), *with Hayden*, 449 F.3d 305 (precluding felon disenfranchisement challenge under section 2), *and* Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005) (precluding felon disenfranchisement challenge under section 2).

92. *See Farrakhan*, 338 F.3d at 1016. *See generally Wesley*, 791 F.2d 1255 (engaging in analysis of felon disenfranchisement challenge brought under section 2).

93. *See Hayden*, 449 F.3d at 328; *Johnson*, 405 F.3d at 1234–35.

94. Some courts have discussed the need for Supreme Court review of this issue. *See Hayden*, 449 F.3d at 310 (noting circuit split and discussing need for Supreme Court review); Muntaqim v. Coombe, 366 F.3d 102, 104 (2d Cir. 2004) (noting circuit split and discussing need for Supreme Court review). Following the Ninth Circuit's decision in *Farrakhan*, the State of Washington immediately filed a motion for certiorari in the United States Supreme Court, but the Court denied this motion. Locke v. Farrakhan, 543 U.S. 984, 984 (2004). Some scholars believe that the Court denied certiorari for lack a final judgment, given that the Ninth Circuit remanded the case for further analysis. *See* Edward B. Foley, *Felon Disenfranchisement Reaches the Supreme Court*, ELECTION LAW AT MORITZ, http://moritzlaw.osu.edu/electionlaw/ebook/part1/eligibility_felon02.html (last visited Feb. 12, 2007) [hereinafter Foley, *Voter Eligibility*]. After another district court judgment for the state, the case is currently facing a second appellate review by the Ninth Circuit. Farrakhan v. Gregoire, 2006 WL 1889273 (E.D. Wash. July 7, 2006). After final review by Ninth Circuit, it is likely that the Supreme Court will grant certiorari either in *Farrakhan* or in a similar felon disenfranchisement case. *See* Foley, *Voter Eligibility*, *supra*.

95. 338 F.3d at 1016, 1011–12 (9th Cir. 2003); *See* WASH. CONST. art. VI, § 3.

District of Washington held that, although section 2 allows such challenges, the challenged law did not violate that provision.[96] On appeal, the Ninth Circuit Court of Appeals confirmed that section 2 permits challenges to felon disenfranchisement statutes, but remanded the case for proper analysis.[97]

The Ninth Circuit initially emphasized that the text of section 2 proscribes voting qualifications that result in a racially disparate infringement on voting rights.[98] The court recognized that, by definition, felon disenfranchisement laws impose a voting qualification on the electorate.[99] Thus, the Ninth Circuit ultimately concluded that a felon disenfranchisement law can violate the VRA if it results in a racially disparate denial of voting rights.[100]

The Ninth Circuit also recognized the policy implications of denying felon disenfranchisement challenges under section 2.[101] The court acknowledged that all citizens, even ex-felons, have the right to be free from racially discriminatory voting regulations.[102] Mindful of this right, the Ninth Circuit allowed the plaintiffs to challenge Washington's felon disenfranchisement law under section 2.[103]

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96. *Farrakhan*, 338 F.3d at 1011.

97. *Id.* at 1016, 1020. Unlike the District Court, the Ninth Circuit found that internal biases in the criminal justice system should be part of the totality of circumstances analysis. *Id.* at 1020. Consequently, the Ninth Circuit remanded the case, and instructed the district court to consider this evidence when analyzing the claim. *Id.*

98. *Farrakhan*, 338 F.3d at 1014–16; *see* Voting Rights Act § 2, 42 U.S.C. § 1973(a) (2007). The Supreme Court has held that this is the proper approach when interpreting a statute. *See* Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (citing Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)) (stating that in all cases involving statutory construction, courts must start their analysis by looking at language employed by Congress).

99. *See Farrakhan*, 338 F.3d at 1016 (declaring that felon disenfranchisement statute is voting qualification, and section 2 clearly proscribes any voting qualification that denies citizen's right to vote in discriminatory manner).

100. *See id.* at 1016–17. Courts opposed to allowing these challenges find some ambiguity in the statutory language of the VRA in order to justify looking beyond the plain text. *See, e.g.*, Johnson v. Bush, 405 F.3d 1214, 1229 n.30 (11th Cir. 2005) (finding some ambiguity in language of section 2). For example, the Eleventh Circuit finds that the phrase "on account of race or color" is ambiguous. *Id.* However, when faced with the same issue, the Second Circuit failed to identify any ambiguity within the text. *See* Hayden v. Pataki, 449 F.3d 305, 346 (2d Cir. 2006) (Parker, J., dissenting). Instead, that court justified looking beyond the text when interpreting section 2 because it was not convinced that the language is unambiguous. *See id.*

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

102. *Id.*

103. *Id.*

### B. *The Second Circuit Rejects VRA Challenges*

The Second Circuit Court of Appeals has held that challenges to felon disenfranchisement laws cannot succeed under the VRA.[104] In *Hayden v. Pataki*, ex-felon citizens of New York and non-felon minority citizens filed suit to challenge New York's felon disenfranchisement law.[105] The District Court for the Southern District of New York granted judgment on the pleadings for the defendants, ruling that plaintiffs cannot challenge the law under section 2.[106] On appeal, the Second Circuit Court of Appeals affirmed the district court's decision.[107] Instead of analyzing the merits of the claim, this court focused on the consequences of allowing courts to accept felon disenfranchisement challenges under section 2.[108]

The Second Circuit predicted that allowing felon disenfranchisement challenges would create a series of unintended constitutional problems for the VRA.[109] First, allowing courts to strike these laws under the VRA could result in an unconstitutionally broad use of Congress's enforcement powers.[110] That is, Congress passed the VRA under authority of the enforcement powers granted in Section 2 of the Fifteenth Amendment, which affords Congress the power to enact appropriate statutes to enforce the Amendment.[111] To constitute a valid use of this power, however, an enacted statute must be "congruent and proportional" to the

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104. *See Hayden*, 449 F.3d at 309-10. The Eleventh Circuit Court of Appeals has faced a similar challenge to Florida's felon disenfranchisement law, and also rejected the challenge under section 2. *Johnson*, 405 F.3d at 1234 (holding that felon disenfranchisement laws are immune from VRA challenges).

105. *Hayden*, 449 F.3d at 311. The plaintiffs in *Hayden* included non-felon minorities in order to pursue both a vote denial and vote dilution challenge under section 2. *Id.* at 310–11; *see also* discussion of vote denial and vote dilution challenges under section 2 *supra* Part I.D.

106. Hayden v. Pataki, No. 00 Civ. 8586(LMM), 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004).

107. *Hayden*, 449 F.3d at 328.

108. *See id.*; *see also Johnson*, 405 F.3d at 1234 (rejecting section 2 challenge because of constitutional concerns).

109. *See Hayden*, 449 F.3d at 328; *see also Johnson*, 405 F.3d at 1234 (rejecting section 2 challenge because of constitutional concerns).

110. *See Hayden*, 449 F.3d at 335–37 (Walker, J., concurring); *see also Johnson*, 405 F.3d at 1230–32. Under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, Congress may enact "appropriate legislation" to enforce those amendments. U.S. CONST. amend. XIV, § 5, amend. XV, § 2.

111. *See* U.S. CONST. amend. XV, § 2; City of Rome v. United States, 446 U.S. 156, 173 (1980) (stating that Congress passed VRA under authority of the Fifteenth Amendment's enforcement clause); South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966) (discussing Congress's use of Fifteenth Amendment's enforcement clause when enacting VRA). *But see Hayden*, 449 F.3d at 358 (Parker, J., dissenting) (stating that Congress enacted VRA under enforcement powers in both Fourteenth and Fifteenth Amendments).

record of evil.[112] The Second Circuit acknowledged that prior to enacting the VRA, Congress did not develop a specific record of racial discrimination resulting from felon disenfranchisement laws.[113] In the absence of a specific record, the court predicted that the VRA will exceed Congress's enforcement powers if courts accept felon disenfranchisement challenges.[114]

Second, the Second Circuit found that allowing these challenges would unconstitutionally alter the balance of power between the federal and state governments.[115] Recognizing states' broad powers to regulate elections, the Second Circuit concluded that allowing the VRA to cover felon disenfranchisement laws would restrict this power.[116] Accordingly, the court held that section 2 of the VRA cannot cover such statutes absent a clear statement of intent to alter the federal-state balance.[117]

Finally, the Second Circuit reasoned that allowing felon disenfranchisement challenges under section 2 of the VRA conflicts with the Fourteenth Amendment.[118] Similar to the *Ramirez* Court, the Second

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112. *See* City of Boerne v. Flores, 521 U.S. 507, 520, 530 (1997).

113. *See Hayden*, 449 F.3d at 335–37 (Walker, J., concurring); *Johnson*, 405 F.3d at 1230–32.

114. *Hayden*, 449 F.3d at 335-36. While this argument lacks merit absent a standard, predictable approach to vote denial claims, there are potential flaws to this argument even at first glance. *See* discussion *infra* Parts III.A., III.C. First, the Supreme Court has not required that the congressional record be entirely specific relative to the breadth of Congress's resulting action. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727–28 (2003) (acknowledging that Congress may enact prophylactic legislation that proscribes facially constitutional conduct in order to prevent subsequent unconstitutional conduct). Furthermore, the Court has also held that when Congress is using this power to protect the interests of a suspect class, the scope of this power is great. *See Boerné*, 521 U.S. at 526 (affirming the necessity of using strong remedial and preventive means of responding to America's significant history of racial discrimination). Additionally, the scope of the defined evil significantly affects the merits of this rationale. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639–40 (1999) (discussing need for court to identify purported evil before determining if Congress exceeded enforcement powers). While The VRA was not a response to a significant record of intentionally discriminatory felon disenfranchisement statutes, Congress was responding to countless discriminatory voting restrictions. *See Behrens*, *supra* note 41, at 244–47.

115. *Hayden*, 449 F.3d at 310–11, 323; *see also Johnson*, 405 F.3d at 1232 n.35.

116. *Hayden*, 449 F.3d at 326; *see* U.S. CONST. art. I, § 4, cl. 1 (declaring, "The Times, Places, and Manner of holding Elections ... shall be prescribed in each state by the Legislature thereof"); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (stating that Constitution grants states broad power to prescribe times, places, and manner of elections and that this results in significant state control over elections); *supra* Part I.A (discussing federal judicial protection of the right to vote). However, this power is not unlimited. *See* Foster v. Love, 522 U.S. 67, 69 (1997) (discussing ability of Congress to preempt state voting regulations); discussion *infra* Part III.C.

117. *Hayden*, 449 F.3d at 310–11, 323, 326–28; *see also* VOTING RIGHTS ACT § 2, 42 U.S.C. § 1973 (2007).

118. *See Hayden*, 449 F.3d at 316; *see also Johnson*, 405 F.3d at 1228. The Supreme Court has previously held that Section 2 of the Fourteenth Amendment expressly affirms

Circuit found affirmative authorization for these laws in Section 2 of the Fourteenth Amendment.[119] If section 2 of the VRA were to reach felon disenfranchisement laws, then, the court foresaw a conflict because the VRA could strike state laws that the Constitution validates.[120] In order to avoid this constitutional conflict with the Fourteenth Amendment, the Second Circuit precludes felon disenfranchisement challenges under the VRA.[121]

## III. SOLUTION: DEVELOPING A NEW APPROACH TO VRA VOTE DENIAL CHALLENGES TO FELON DISENFRANCHISEMENT LAWS

Currently, there is no standard judicial approach to reviewing felon disenfranchisement challenges under section 2 of the VRA.[122] The Supreme Court has developed an approach to vote dilution claims brought under section 2.[123] However, the Court has not developed a

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states' ability to disenfranchise felons. *See* U.S. CONST. amend. XIV, § 2 (declining to reduce state's representation when state denies right to vote for participation in rebellion or other crime); Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (holding that Section 2 of Fourteenth Amendment allows states to disenfranchise felons).

119. *See Richardson*, 418 U.S. at 54; *Hayden*, 449 F.3d at 316; *see also Johnson*, 405 F.3d at 1228; see discussion *supra* Part I.C.2. These courts hold that Section 2 of this Amendment affirms states' right to disenfranchise felons by declining to reduce a state's representation for doing so. *See* U.S. CONST. Amend. XIV, § 2; *Hayden*, 449 F.3d at 316.

120. *See Hayden*, 449 F.3d at 316; *see also Johnson*, 405 F.3d at 1228-29.

121. *Hayden*, 449 F.3d at 316; The canon of constitutional avoidance is a valid approach to statutory interpretation. *See, e.g.,* Clark v. Martinez, 543 U.S. 371, 381–84 (2005) (discussing avoidance canon); Oregon v. Mitchell, 400 U.S. 112, 131 (1970) (discussing need to interpret statute in way to avoid constitutional conflict); Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1960–61 (1997) (discussing need to interpret statute in way to avoid constitutional conflict). However, the argument is faulty. *See infra* Part III.B.2.

122. This is true when the plaintiff frames the challenge as a vote denial claim. *See* Tokaji, *supra* note 7, at 709 (discussing well-established approach to vote dilution claims and acknowledging lack of comparable approach to vote denial claims). This Article looks specifically at these challenges when framed as vote denial claims, despite the fact that plaintiffs could rationally challenge these laws as resulting in vote dilution. *See Hayden* 449 F.3d at 309 (challenging New York's felon disenfranchisement statute under both vote denial and vote dilution frameworks); KING, *supra* note 54, at 19.

123. *See* Tokaji, *supra* note 7, at 708–09. Vote dilution claims allege the abridgment of a minority's ability to participate effectively in the political process, despite having the opportunity to cast a ballot. *See generally* Thornburg v. Gingles, 478 U.S. 30 (1986) (facing vote dilution challenge for first time after 1982 amendments to section 2 and developing clear, bright line approach to these claims); League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006) (applying *Gingles* approach to vote dilution challenge to Texas redistricting plan); Holder v. Hall, 512 U.S. 874 (1994) (attempting to apply *Gingles* approach to vote dilution challenge); Johnson v. De Grandy, 512 U.S. 997 (1994) (applying *Gingles* approach to vote dilution challenge to Florida districting scheme).

standard approach to vote denial claims, which include most VRA challenges to felon disenfranchisement laws.[124]

Until the Court adopts an approach to vote denial claims, the constitutionality of extending the VRA to felon disenfranchisement laws is unclear. If courts apply strict scrutiny to all vote denial claims, they will likely invalidate many state voting regulations.[125] If courts do invalidate these regulations, the VRA would impinge states' powers to regulate elections and would transcend the congressional record of discriminatory voting regulations.[126] Thus, such an approach would suggest that the VRA unconstitutionally alters the federal-state balance of powers and exceeds Congress's Fifteenth Amendment enforcement powers.[127] However, if courts apply only rational basis review to all claims, the VRA will not invalidate any felon disenfranchisement statute that does not already violate the Fourteenth Amendment.[128] In this case, the VRA would neither alter the federal-state balance of powers nor exceed Congress's enforcement powers; therefore, it would be constitutional.[129] Thus, the VRA's constitutionality if courts accept felon disenfranchisement challenges under section 2 depends entirely on how courts review vote denial

124. *See* Tokaji, *supra* note 7, at 704–09 (contrasting clear approach to vote dilution claims with lack of clear approach to vote denial claims); *see, e.g.*, Johnson, 405 F.3d 1214 (11th Cir. 2005) (pursuing vote denial cause of action under section 2); Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003) (pursuing vote denial cause of action under section 2). The Court must identify an approach to vote denial claims because section 2 addresses both racially biased vote denial and vote dilution. *See* Voting Rights Act § 2, 42 U.S.C. 1973 (2007) (proscribing denial of right to vote on account of race or color); *Hayden*, 449 F.3d at 367–78 (Sotomayor, J., dissenting). In fact, some Supreme Court justices have suggested that the VRA should only address vote denial claims, and not claims of vote dilution. *See Holder*, 512 U.S. at 893 (Thomas, J., dissenting) (arguing that section 2 only reaches state regulations that reduce citizens access to ballot).

125. *See* 16B AM. JUR. 2D *Constitutional Law* § 815 (2006) (referring to strict scrutiny as heavy burden of justification on state).

126. *See* discussion of constitutional concerns *supra* Part II.B.

127. *See* discussion of constitutional concerns *supra* Part II.B.

128. Because there are so many plausible state interests in denying felons' voting rights, felon disenfranchisement laws will uniformly pass traditional rational basis review. *See, e.g.*, *Hayden*, 449 F.3d at 326 (mentioning three plausible state interests that support felon disenfranchisement statutes); Owens v. Barnes, 711 F.2d 25, 28 (3d Cir. 1983) (discussing rational justifications for felon disenfranchisement statutes); Green v. Bd. of Elections, 380 F.2d 445, 451–52 (2d Cir. 1967) (discussing possible justifications for felon disenfranchisement statutes). Under modern Fourteenth Amendment jurisprudence, felon disenfranchisement challenges trigger rational basis review, suggesting that this amendment is no longer an effective vehicle for such challenges. *See* Johnson v. Bush, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002) (deciding that felon disenfranchisement statutes are incapable of violating either Fourteenth Amendment's Equal Protection or Due Process clauses). *But see* Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1623–27 (2004) (suggesting that Fourteenth Amendment may still have power for felon disenfranchisement challenges).

129. *See* discussion of enforcement powers *supra* pp. 34–35.

claims.Accordingly, the Supreme Court cannot determine whether the VRA may constitutionally reach felon disenfranchisement laws until it decides how to approach vote denial claims. The following section proposes a variation of *Burdick*'s sliding scale scrutiny as an approach to vote denial challenges to felon disenfranchisement laws under the VRA.[130]

### A. *The Mechanics of the New Sliding Scale Approach to Felon Disenfranchisement Challenges*

As described in *Burdick*, there are two prongs of sliding scale scrutiny analysis.[131] First, a court must determine the severity of the burden a challenged statute imposes on voting rights.[132] Second, a court must then select and apply the appropriate level of scrutiny to the statute.[133] Courts applying the *Burdick* form of sliding scale scrutiny have failed to establish clear requirements for fulfilling each prong.[134] However, characteristics of felon disenfranchisement challenges allow courts to identify specific evidentiary requirements that plaintiffs must satisfy.

#### 1. Establishing a Vote Denial Challenge to a Felon Disenfranchisement Statute

The proposed form of sliding scale scrutiny requires a plaintiff to prove three elements in order to establish a vote denial claim under section 2.[135] First, a plaintiff must show that he cannot vote because of the

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130. *See* Burdick v. Takushi, 504 U.S. 428, 433–34 (1992); *see infra* Part III.A.

131. *See Burdick*, 504 U.S. at 433–34.

132. *See id.* at 434.

133. *See id.*

134. The *Burdick* form of this analysis fails to guide courts specifically in the threshold determination of the severity of the burden. *See id.* at 434 (instructing courts to weigh character and magnitude of burden, without identifying specific factors of this analysis). While some courts require significant statistical evidence to show the burden is severe, many courts seem to determine the severity of the burden instinctively. *Compare* Bullock v. Carter, 405 U.S. 134, 142–45 (1972) (using intuition to decide if burden is severe), *with* Cal. Democratic Party v. Jones, 530 U.S. 567, 578–82 (2000) (relying on plaintiff's evidence to determine that burden is severe).

135. By combining factors that courts and scholars currently discuss when addressing felon disenfranchisement challenges, the proposed approach simplifies the required totality of the circumstances analysis. Voting Rights Act § 2b, 42 U.S.C. 1973 (2007) (requiring totality of circumstances analysis for section 2 claim); *see* Hayden v. Pataki, 449 F.3d 305, 314 n.7 (2d Cir. 2006) (mentioning that challenged New York statute was narrower in scope than felon disenfranchisement statutes in other states); Farrakhan v. Washington, 338 F.3d 1009, 1013 (9th Cir. 2003) (discussing plaintiff's evidence of racial bias in state's criminal justice); Tokaji, *supra* note 7, at 724 (proposing that section 2 plaintiffs must be able to trace voting rights infringement to bias in social and historical conditions). The three threshold elements are theoretically analogous to the approach to vote dilution chal-

state's felon disenfranchisement statute.[136] This requirement is critical in characterizing the claim as one of vote denial—as opposed to vote dilution—under section 2.[137]

Second, a plaintiff must develop a record of statistical data suggesting racial bias in the state's criminal justice system.[138] Because it is theoretically possible for minorities to commit felonies more frequently than non-minorities, evidence showing only minority over-representation among felons fails to establish *de jure* bias.[139] However, a plaintiff can establish bias through a combination of evidence that the state disproportionately stops, searches, arrests, charges, convicts, and/or severely sentences minorities.[140]

Finally, a plaintiff must demonstrate a connection between the denial of his right to vote and the statistical racial bias in the criminal justice system.[141] A plaintiff can demonstrate this connection by showing that his race—or, at least, the racial category in which society places him—faces

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lenges, in that they are necessary, and not sufficient, elements. *See* discussion of approach to vote dilution challenges *supra* note 123.

136. *See, e.g.*, Mixom v. Commonwealth, 759 A.2d 442, 453 (Pa. Commw. Ct. 2000) (holding disenfranchisement statute must prevent plaintiff from voting to confer standing, even in vote dilution challenge).

137. While a disenfranchised felon may theoretically pursue both a vote dilution and vote denial claim, a non-disenfranchised felon could not pursue a vote denial claim. *See* Tokaji, *supra* note 7, at 691–92 (contrasting vote denial and vote dilution claims under section 2); *supra* notes 78–80 and accompanying text.

138. It is important that a plaintiff need not prove that his individual status as a felon is the result of tangible incidents of racial bias. *See* Tokaji, *supra* note 7 at 724 (stating that section 2 plaintiffs need not prove intentional discrimination by state actor to establish a vote denial claim). Such a requirement would present an insurmountable burden on plaintiffs and would contradict the 1982 section 2 amendments and the totality of the circumstances approach. *See supra* Part I.D. Furthermore, should a plaintiff prove specific incidents of racial bias, the plaintiff would have a cause of action under the Fourteenth and Fifteenth Amendments. *See supra* note 72 and accompanying text; *infra* note 214.

139. *See* 16B AM. JUR. 2D *Constitutional Law* § 815 (stating that although disparate impact may be relevant evidence of racial discrimination, standing alone, this evidence is insufficient); Tokaji, *supra* note 7, at 724–25 (suggesting that mere showing of overrepresentation among felons should not suffice to establish section 2 claim).

140. In *Johnson v. Bush*, the unsuccessful plaintiffs established no more than a discrepancy between minorities' representation in Florida's population and their representation among Florida's felons. 405 F.3d 1214, 1235 (11th Cir. 2005) (Tjoflat, J., concurring). One justice in *Johnson* wrote separately to acknowledge that, even if section 2 applied, the plaintiffs failed to establish bias in the criminal justice system. *Id.* In contrast, the Ninth Circuit has suggested that plaintiffs may prove bias through statistics showing racial disparities at multiple stages of the criminal justice system. Farrakhan v. Washington, 338 F.3d 1009, 1013–14 (9th Cir. 2003). Thus, when facing these challenges today, the plaintiff's ability to provide such statistical evidence seems to have an effect on the court's analysis. *Compare Johnson*, 405 F.3d at 1235 (discussing unsuccessful plaintiffs' inability to prove racial bias through statistical evidence), *with Farrakhan*, 338 F.3d at 1013–14 (discussing successful plaintiffs' ability to prove racial bias through statistical evidence).

141. *See* Tokaji, *supra* note 7, at 724 (proposing that section 2 plaintiffs must be able to trace voting rights infringement to bias in social and historical conditions).

bias in the criminal justice system.[142] Importantly, citizens from this group must also suffer disproportionate rates of disenfranchisement.[143]

While fulfilling the three required elements establishes a prima facie vote denial challenge to felon disenfranchisement laws under section 2, it does not guarantee success.[144] Under the proposed approach, a court only applies heightened scrutiny—which is most advantageous to plaintiffs—if the plaintiff can show that the statute substantially burdens voting rights.[145] Accordingly, the second prong of the sliding scale approach requires a court to determine the level of scrutiny to apply based on the severity of the burden.[146]

### 2. Determining the Appropriate Level of Scrutiny

After a plaintiff establishes a prima facie vote denial claim under section 2 of the VRA, the court must determine the appropriate level of scrutiny.[147] In order to do so, the court must characterize the magnitude of the statute's burden on the plaintiff's voting ability using a two-factor analysis.[148] The first factor of the analysis is the severity of the racial bias in

142. Because victims of racism suffer this primarily because of appearance, this approach does not require a biological connection with the discriminated-against race. *See* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 1–5 (1994) (discussing how central appearance is to racial identification and relative legal implications). For example, that a plaintiff is not biologically Middle Eastern is irrelevant if a prejudiced society would nonetheless perceive him and treat him as such. *See* Ken Davison, Note and Comment, *The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII*, 12 ASIAN L.J. 161, 161–62 (2005) (stating that using physical features to determine race leads to racial miscategorization and results in misapplied prejudices). This plaintiff's experience with the criminal justice system would inevitably mirror that of a person of Middle Eastern dissent. *See id.* Ultimately, this plaintiff may still lose the right to vote on account of race or color. *See* Voting Rights Act § 2, 42 U.S.C. 1973 (2007).

143. *See* Tokaji, *supra* note 7, at 724 (proposing that plaintiffs prove disparate impact on minority voters to establish section 2 vote denial claim).

144. The proposed factors seek to demonstrate that the felon disenfranchisement law results in discriminatory vote denial, based on the totality of the circumstances. Voting Rights Act § 2b. The text of section 2 identifies this consideration as the standard for establishing a violation. *Id.* (mandating a totality of the circumstances analysis for section 2 claims).

145. *See* Burdick v. Takushi, 504 U.S. 428, 433–34 (1992) (discussing requirement that court adjusts level of scrutiny relative to demonstrated burden on voting rights); 16B AM. JUR. 2D *Constitutional Law* § 815 (2006) (referring to strict scrutiny as heavy burden of justification on state).

146. *Id.*

147. *See id.* (discussing requirement that court adjusts level of scrutiny relative to demonstrated burden on voting rights).

148. *Id.*

the state's criminal justice system, as evidenced by statistics.[149] The second factor is the scope of the state's disenfranchisement statute.[150] The statute's scope is narrow when it disenfranchises a felon only during incarceration, yet it is most expansive when it disenfranchises a felon for life.

A plaintiff's ability to prove racial bias combined with the scope of the law are the primary factors in determining the level of scrutiny.[151] When a plaintiff establishes significant racial bias and the challenged statute is expansive in scope, courts should apply strict scrutiny.[152] Conversely, when a plaintiff fails to show significant bias and the law is limited in scope, courts should apply rational basis review to the statute.[153] If both the level of racial bias and the scope of the law are moderate, courts should apply intermediate scrutiny.[154] Courts should

149. The Ninth Circuit discussed this consideration when allowing a challenge to felon disenfranchisement laws under section 2. Farrakhan v. Washington, 338 F.3d 1009, 1013 (9th Cir. 2003) (referring to plaintiff's evidence of racial bias in state's criminal justice system as compelling).

150. The Second Circuit mentioned this consideration in its analysis of the section 2 challenge. Hayden v. Pataki, 449 F.3d 305, 314 n.7 (2d Cir. 2006) (distinguishing claim at bar from claims addressed in *Farrakhan* and *Johnson* because *Hayden* plaintiff challenged New York statute that was much more limited in scope).

151. *See Burdick*, 504 U.S. at 434 (requiring courts to determine level of scrutiny relative to magnitude of burden on voting rights).

152. According to the *Burdick* Court, laws that impose severe restrictions on voting rights must be narrowly drawn to advance a compelling state interest. *Id.*; *see also* Norman v. Reed, 502 U.S. 279, 289 (1992); BLACK'S LAW DICTIONARY 1462 (8th ed. 2004) (defining "strict scrutiny").

153. According to the *Burdick* Court, when an election law imposes only reasonable, nondiscriminatory restrictions on voting rights, the state's regulatory interests generally justify the restrictions. 504 U.S. at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). Although arguably ambiguous, later courts have interpreted this statement to require rational basis review when the burden imposed is slight. *See, e.g.*, Werme v. Merrill, 84 F.3d 479, 485–86 (1st Cir. 1996) (following *Burdick* and applying rational basis review because burden imposed is slight).

154. When applying the *Burdick* variation of sliding scale scrutiny, courts disagree about if or when something between strict scrutiny and rational basis review should apply. *Compare* Fulani v. Krivanek, 973 F.2d 1539, 1544, 1546–47 (11th Cir. 1992) (applying intermediate scrutiny to statute that resulted in burden that is neither severe nor slight), *and* Pilcher v. Rains, 853 F.2d 334, 337 (5th Cir. 1988) (applying intermediate scrutiny to statute that resulted in burden that is neither severe nor slight), *with* Schrader v. Blackwell, 241 F.3d 783, 788–91 (6th Cir. 2001) (applying simple balancing test to statute imposing intermediate burden), New Alliance Party of Ala. v. Hand, 933 F.2d 1568, 1576 (11th Cir. 1991) (employing balancing test to statute imposing "not insurmountable" burden). Under the proposed approach, however, statutes imposing intermediate burdens on voting rights should have to be reasonably necessary to further a legitimate state interest. *See Fulani*, 973 F.2d at 1544–47 (using sliding scale scrutiny, and applying intermediate scrutiny to statute imposing intermediate burden on plaintiff's rights); BLACK'S LAW DICTIONARY 833 (8th ed. 2004) (defining "intermediate scrutiny").

also apply intermediate scrutiny when the racial bias is severe but the scope of the law is limited, or vice versa.[155]

While these two factors will control the analysis, a court should have discretion to adjust the result relative to additional evidence of a severe burden.[156] Such evidence may include vague statutory language or evidence establishing any of the factors Congress codified during the 1982 amendment process.[157] These factors include, among others, the extent to which official discrimination and prejudice in social institutions affects minorities' ability to vote.[158] Allowing this adjustment serves two purposes. First, this discretion allows courts to incorporate additional, unanticipated evidence of a severe burden into their analyses.[159] Second, this discretion allows courts to comply with the congressionally mandated totality of the circumstances analysis.[160]

### B. *The Proposed Approach Should Apply to VRA Felon Disenfranchisement Challenges*

The proposed approach to felon disenfranchisement challenges under section 2 of the VRA is an adaptation of *Burdick*'s sliding scale scrutiny, which now applies to voting rights challenges brought under the Fourteenth Amendment.[161] Because the *Burdick* approach currently applies to other voting rights cases, the Court would not be unfounded in adopting

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155. In these situations, the burden on voting rights is also intermediate. *See supra* note 154 and accompanying text.

156. Excluding potentially relevant evidence beyond that which fulfills the threshold factors would contradict the totality of the circumstances analysis required by section 2. Voting Rights Act § 2b, 42 U.S.C. § 1973 (2007).

157. S. REP. NO. 97-417, at 28–29 (1982); *see also* White v. Regester, 412 U.S. 755, 765–70 (1973) (using several factors to strike multimember district scheme); Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (discussing numerous factors, adopted from *Regester*, that courts should use to find constitutional violation where plaintiff has not shown invidious intent); discussion of varying statutory language *supra* Part I.C.1.

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

159. The flexibility to accept additional evidence beyond the threshold requirements is important because, when targeting racially discriminatory voting regulations, bright line rules are not desirable. *See* Bush v. Vera, 517 U.S. 952, 984 (1996) (stating that bright line rules are not available when confronting claims of racially discriminatory districting scheme). While the approach to vote dilution challenges features similar threshold evidentiary requirements, the Supreme Court supplements these factors by analyzing additional evidence of discriminatory impact. *See* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986) (describing appropriate approach to vote dilution claims under section 2 of the VRA); Johnson v. De Grandy, 512 U.S. 997, 1011–12 (1994) (deciding that full totality of circumstances analysis must follow bright line *Gingles* preconditions for vote dilution challenge).

160. *See* Voting Rights Act § 2, 42 U.S.C. § 1973 (2007); *see also* discussion of amendments to section 2, *supra* Part I.D.

161. *See, e.g.*, Weber v. Shelley, 347 F.3d 1101, 1106 (9th Cir. 2003); Werme v. Merrill, 84 F.3d 479, 483–84 (1st Cir. 1996); Schulz v. Williams, 44 F.3d 48, 55–56 (2d Cir. 1994).

a similar analysis for VRA claims.[162] The proposed variation of sliding scale scrutiny enables courts to confront felon disenfranchisement challenges uniformly, in a manner consistent with both judicial precedent and legislative intent.

### 1. Consistent Judicial Application of Sliding Scale Scrutiny

The proposed approach to felon disenfranchisement challenges under section 2 of the VRA will allow courts to approach these challenges in a consistent manner. An important function of the Supreme Court is to settle splits of authority so that federal laws apply uniformly to all citizens.[163] However, the *Burdick* Court failed to achieve this goal when it inadequately delineated the correct analysis of a statute's burden on voting rights under sliding scale scrutiny.[164] As a result, courts have struggled to apply the *Burdick* variation of sliding scale scrutiny consistently.[165] While some courts require plaintiffs to provide statistical evidence showing a severe burden on voting rights, other courts rely on intuition when weighing the burden.[166] By contrast, the proposed form of sliding scale scrutiny identifies specific factors included in this analysis, thus allowing courts to confront felon disenfranchisement challenges consistently.

To ensure judicial consistency, the proposed approach exploits the common characteristics of felon disenfranchisement challenges brought under section 2. These claims unvaryingly allege that racial bias in a state's criminal justice system results in voting rights infringement via the state's disenfranchisement statute.[167] Incorporating these commonalities into

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162. *See* Burdick v. Takushi, 504 U.S. 428, 432–34 (1992); Anderson v. Celebrezze, 460 U.S. 780, 789–90 (1983). *Anderson* is a ballot access case, but the Court has acknowledged that laws that affect candidates have at least some indirect effect on voters. Bullock v. Carter, 405 U.S. 134, 143 (1972). In *Burdick*, the Court believed employing the approach used in ballot access cases was appropriate for voting rights cases, due to the similarity between these claims. 504 U.S. at 433. It would be at least as appropriate, then, to adopt a form of the analysis used in Fourteenth Amendment voting rights cases to apply to VRA cases.

163. *See* THE FEDERALIST No. 80 (Alexander Hamilton) (stating that mere necessity of uniformity in national laws decides question of federal judicial powers); Joel S. Flaxman, *Steven's Ratchet: When the Court Should Decide Not to Decide*, 105 MICH. L. REV. FIRST IMPRESSIONS 94, 94, 96 (2006), http://www.michiganlawreview.org/firstimpressions/vol105/flaxman.pdf (discussing uniform application of federal laws as motivating factor for granting certiorari); *see, e.g.*, Burlington N. & Santa Fe Ry. Co. v. White, 126 U.S. 2405, 2408 (2006) (resolving circuit split about interpretation of employment discrimination statute's language); Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 340 (2005) (resolving circuit split about requirements for proving economic loss in securities fraud claims).

164. *See supra* note 134 and accompanying text.

165. *See supra* note 134 and accompanying text.

166. *See supra* note 134 and accompanying text.

167. *See, e.g.*, Hayden v. Pataki, 449 F.3d 305, 310–12 (2d Cir. 2006) (featuring section 2 challenge to felon disenfranchisement statute); Muntaqim v. Coombe, 366 F.3d 102,

specific evidentiary requirements ensures that courts throughout the country will approach felon disenfranchisement challenges similarly. Not only will future plaintiffs know exactly what evidence they must provide, but they will also anticipate the scrutiny their claims will elicit.[168]

### 2. Consistency with Precedent and Legislative Intent

The Supreme Court has demanded the broadest possible interpretation and application of the VRA, warning that no judicially created limitation on its coverage is acceptable.[169] However, absent a statutory exemption for felon disenfranchisement laws, precluding such challenges would result in a judicially created limitation on the VRA's coverage.[170] Therefore, only an approach that allows courts to accept felon disenfranchisement challenges under section 2 honors the Supreme Court's VRA jurisprudence.[171] The proposed approach allows courts to hear these section 2 challenges effectively and constitutionally.[172]

The proposed form of sliding scale scrutiny also allows courts to apply the VRA in a manner consistent with legislative intent. When amending section 2 in 1982, Congress identified seven factors signifying a denial or abridgement of voting rights based on the totality of circumstances.[173] One of these factors is the extent to which the minority group suffers discrimination in social institutions such as education, employment, and health.[174] These institutions are similar in that they substantially impact the quality of citizens' lives and accordingly face some amount of federal government regulation.[175] The same is true for the criminal justice

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103–06 (2d Cir. 2004) (featuring section 2 challenge to felon disenfranchisement statute); Johnson v. Bush, 214 F. Supp. 2d 1333, 1335 (S.D. Fla. 2002) (featuring section 2 challenge to felon disenfranchisement statute); Farrakhan v. Locke, 987 F. Supp. 1304, 1307 (E.D. Wash. 1997) (featuring section 2 challenge to felon disenfranchisement statute); Wesley v. Collins, 605 F. Supp. 802, 804 (M.D. Tenn. 1985) (featuring section 2 challenge to felon disenfranchisement statute).

168. *See* Jedna Bednar, *Judicial Predictability and Federal Stability: Strategic Consequences of Institutional Imperfection*, 16 J. OF THEORETICAL POL. 423, 425 (2004) (discussing problems associated with imperfect and unpredictable court, and ramification on plaintiffs).

169. *See* Chisom v. Roemer, 501 U.S. 380, 403 (1990).

170. *Id.*

171. *See id.*; *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 566–67 (1969).

172. *See infra* Part III.C (discussing constitutional considerations).

173. S. REP. NO. 97-417, at 28–29 (1982); Boyd, *supra* note 84, at 1400 n.260 (discussing that codified factors were meant to adopt factors used in Court's analysis in White v. Regester, 412 U.S. 755, 765–70 (1973)).

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

175. *See* United States Department of Education, http://www.ed.gov (last visited Feb. 12, 2007); United States Department of Health and Human Services, http://www.dhhs.gov (last visited Feb. 12, 2007); United States Department of Labor, http://www.dol.gov (last visited Feb. 12, 2007).

system.[176] Thus, bias in this institution satisfies a specified factor of the congressionally mandated totality of the circumstances analysis.[177] Therefore, ignoring bias in the criminal justice system would contradict Congress's intent when enacting the VRA.[178] However, the proposed approach complies with legislative intent by allowing courts to analyze historical evidence of bias in the criminal justice system.

Those opposed to courts accepting challenges to felon disenfranchisement statutes under section 2 might claim that Congress excluded these laws from the VRA.[179] When amending section 4 of the VRA, which lists absolutely prohibited voting regulations, Congress chose not to add felon disenfranchisement statutes to this list.[180] Furthermore, one Senator emphasized that the amended section 4 would not invalidate felon disenfranchisement laws.[181] This argument suggests that, by excluding felon disenfranchisement laws from section 4, Congress intended to exclude these voting regulations from all sections of the VRA.[182]

However, this argument fails because the legislative history of one section of the VRA does not represent Congress's intent in another section.[183] By not adding felon disenfranchisement statutes to section 4,

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176. *See* United States Department of Justice, http://www.usdoj.gov (last visited Feb. 12, 2007).

177. *See* S. REP. NO. 97-417, at 28–29 (1982); GARY LAFREE, LOSING LEGITIMACY: STREET CRIME AND THE DECLINE OF SOCIAL INSTITUTIONS IN AMERICA 152 (Westview Press 1998) (emphasizing education and criminal justice as two of three social institutions of increasing importance); INSTITUTE OF MEDICINE, COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION, RISKS AND OPPORTUNITIES: SYNTHESIS OF STUDIES ON ADOLESCENCE 20–29 (Michael D. Kipke ed., 1999) (Juxtaposing education, healthcare, and criminal justice systems as major social institutions involved in adolescents' lives).

178. *See* Voting Rights Act, 42 U.S.C. § 1973 (2007).

179. *See, e.g.*, Hayden v. Pataki, 449 F.3d 305, 318–319 (2d Cir. 2006) (deciding that Congress intended to exclude felon disenfranchisement laws from purview of entire VRA).

180. Voting Rights Act, 42 U.S.C. § 1973b (2007). This is a point emphasized by both the Senate Judiciary Committee and the House Judiciary Committee. H.R. REP. No. 89-439, at 24–26 (1965).

181. 111 CONG. REC. S8366 (daily ed. Apr. 23, 1965) (statement of Sen. Tydings).

182. This argument focuses on the fact that Congress had the opportunity to include felon disenfranchisement statutes among the state practices uniformly prohibited by section 4. *See, e.g.*, *Hayden*, 449 F.3d at 318–319 (discussing argument that Congress intended to exclude felon disenfranchisement laws from scope of VRA). By declining to do so, Congress may have demonstrated its intent to exclude felon disenfranchisement statutes from the VRA's purview. *See id.*

183. *See id.* at 352–53 (Parker, J., dissenting) (stating that legislative history of one section of expansive statute such as VRA is of no value when attempting to understand other section); Johnson v. Bush, 405 F.3d 1214, 1249 (11th Cir. 2005) (Barkett, J., dissenting) (discussing that decision to not add felon disenfranchisement statutes to list of per se violations does not show intent to exempt these laws from VRA); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory*

Congress merely declined to characterize these laws as per se violative of the VRA.[184] This decision does not signify that felon disenfranchisement laws can never violate any section of the VRA. Instead, section 2 addresses voting regulations that are not per se invalid under section 4 but nonetheless result in a racially disparate impact on voting rights.[185] Thus, allowing felon disenfranchisement challenges under section 2 comports with the legislative intent of the VRA.

### C. *The Proposed Approach Addresses the Second Circuit's Constitutional Concerns*

The Supreme Court must delineate an approach to felon disenfranchisement challenges under section 2 before addressing the Second Circuit's constitutional concerns.[186] By adopting the proposed approach, the Court can address these concerns and affirm the VRA's constitutionality. Because this approach allows courts to alter the scrutiny relative to the burden on voting rights, it assuages the Second Circuit's fears of unconstitutional consequences.[187]

First, contrary to the Second Circuit's predictions, the VRA will remain a valid use of Congress's enforcement powers under the Fifteenth Amendment. Specifically, under the proposed approach the VRA will remain a congruent and proportional response to the record of racially discriminatory voting rights legislation.[188] Instead of targeting specific racially biased voting regulations, Congress drafted the VRA as a general prophylactic statute to prevent even unpredicted forms of this evil.[189] As such, providing an exhaustive list of specific state ploys used to restrict minority voting rights was both impossible and illogical.

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*Interpretation*, 76 VA. L. REV. 1295, 1300–01 (1990) (presenting textualist argument that even legislative history of statute is not accurate indicator of intent for same statute).

184. *See Hayden*, 449 F.3d at 364–66 (Calabresi, J., dissenting) (stating that although felon disenfranchisement statutes are not per se invalid under section 4, issue is if they violate section 2 when having discriminatory effect); *Johnson*, 405 F.3d at 1249 (Barkett, J., dissenting) (stating that decision to not invalidate all felon disenfranchisement laws under section 4 does not mean that these laws are free from any attacks).

185. Section 2 instructs the judiciary on how to determine whether a non-prohibited regulation nonetheless results in a VRA violation. Voting Rights Act, 42 U.S.C. § 1973 (2007).

186. *See supra* Part II.B (discussing the Second Circuit's constitutional concerns); *supra* pp. 36-40 (discussing the need to adopt an approach to vote denial claims under section 2 before addressing these concerns.

187. *See supra* Part III.A.2 (discussing the court's ability to adjust the level of scrutiny).

188. *See* City of Boerne v. Flores, 521 U.S. 507, 520, 532-33 (1997).

189. *See* Hayden v. Pataki, 449 F.3d 305, 361–62 (2d Cir. 2006) (Parker, J., dissenting) (discussing historical struggle between federal government and creatively oppressive state legislatures, and need for VRA to be broad and prophylactic).

In the absence of a specific and exhaustive record of discriminatory felon disenfranchisement statutes that the VRA targets, one must consider the VRA's constitutionality relative to the general record and history of discriminatory voting regulations.[190] Because section 2 targets discriminatory ends and not means in order to pre-empt states in their attempts to infringe minority voting rights, the VRA will remain constitutional if it targets only voting restrictions with racially burdensome effects.[191] Such statutes, in whatever form they may take, definitively fall within the purview of the Fifteenth Amendment.

The proposed approach protects the VRA as a valid use of enforcement powers by narrowly focusing the judiciary's power to strike felon disenfranchisement statutes. Much like an anticipatory warrant in criminal procedure jurisprudence, the proposed approach proactively identifies a set of factors that suggest racial bias.[192] Accordingly, should these factors exist, a challenged statute likely falls within the record and history of racially oppressive voting restrictions. However, courts will not have the power to strike statutes until the identified factors are fulfilled. Thus, the proposed approach allows courts to strike racially biased voting restrictions that are within the purview of the Fifteenth Amendment, without forcing Congress to update constantly its specific record of racially discriminatory voting regulations. Requiring Congress to do so would cause significant delay in invalidating racially restrictive voting statutes, and give state legislatures a substantial head start in the formidable cat and mouse game.

Second, the proposed approach prevents section 2 from impermissibly altering the balance between the federal and state governments, as the Second Circuit surmises.[193] Under the United States system of federalism, states are largely sovereign and enjoy significant power to regulate elections.[194] However, numerous Amendments show that this power is

190. *See id.* (arguing that there is "no evidence in the record before Congress of a history and pattern of invidious felon disenfranchisement by the states"). *But see id.* at 330–37 (Walker, J., concurring). The Supreme Court has acknowledged that this record is significant. *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 373 (2001) (discussing record of substantially discriminatory state voting regulations preceding VRA); South Carolina v. *Katzenbach*, 383 U.S. 301, 308–15 (1966) (discussing, at length, history of state-imposed racially discriminatory voting regulations).

191. However, there is some evidence of intentionally discriminatory felon disenfranchisement laws. *See* Behrens, *supra* note 41, at 244–47 (discussing connection between felon disenfranchisement laws and history of discriminatory legislative intent).

192. *See, e.g.*, United States v. Grubbs, 547 U.S. 90, 96-97 (2006) (holding that anticipatory warrants may be valid, so long as probable cause exists that: i) triggering events will occur, and ii) if triggering events occur, target of search will be found).

193. *See supra* Part II.B.

194. *See* U.S. CONST. art. I, § 4, cl.1 (declaring that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . ."); U.S. CONST. amend. X (affording states all powers not delegated to federal government by Constitution); Cook v. Gralike, 531 U.S. 510, 523 (2001)

not entirely free from federal control.[195] For example, the Fifteenth Amendment restrains states from denying citizens the right to vote based on their race, thus altering the federal-state balance of powers.[196] The VRA, which Congress passed to enforce this amendment, merely enforces this legitimate federal constraint.[197] If the application of section 2 to felon disenfranchisement laws corresponds with the Fifteenth Amendment's purpose, the VRA will not further alter the federal-state balance.[198]

The approach to felon disenfranchisement challenges under section 2 will determine if the VRA impermissibly exaggerates the Fifteenth Amendment's alteration of federal-state powers. Allowing courts to strike statutes that are racially neutral both facially and in application would significantly increase this alteration. However, the proposed approach avoids this result by allowing courts to target only felon disenfranchisement laws that impose a substantial burden on minorities' voting rights.[199] This quality would thus allow courts to avoid impermissibly altering the federal-state balance by enforcing the Fifteenth Amendment in a way that is consistent with that Amendment's protection of minority voting rights.[200]

However, those opposed to allowing felon disenfranchisement challenges might argue that the Fourteenth Amendment affirms a state's power to disenfranchise citizens who commit felonies.[201] Echoing the

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(discussing states' broad authority to regulate elections); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (discussing states' broad authority to regulate elections).

195. *See supra* Part I.A (discussing judicial voting rights protection); *see also* U.S. CONST. amends. XII, XIV § 2, XV, XVII, XIX, XXIV, XXVI (regulating elections through federal law).

196. U.S. CONST. amend. XV; *see* Hayden v. Pataki, 449 F.3d 305, 358 (2d Cir. 2006) (Parker, J., dissenting) (noting that Reconstruction Amendments intentionally altered federal-state balance, and VRA merely enforces this alteration).

197. *See* U.S. CONST. amend. XV. However, this does not signify that all laws passed under Congress's enforcement powers will not unconstitutionally alter the federal-state balance. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647 (1999) (holding that Congress violated enforcement power by abrogating states' sovereign immunity using Section 5 of Fourteenth Amendment). *See generally* Donald Francis Donovan, *Toward Limits on Congressional Enforcement Power Under the Civil War Amendments*, 34 STAN. L. REV. 453 (1982) (discussing history of enforcement power doctrine and limitations to powers with thorough case law analysis).

198. The purpose of the Fifteenth Amendment was to guarantee that African American voting rights were both national and permanent. *See* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 272 (2004) (discussing legislative intent of Fifteenth Amendment).

199. *See* discussion of the mechanics of the proposed approach *supra* Part III.A.

200. *See* discussion of this concern *supra* pp. 29–30.

201. *See* Richardson v. Ramirez, 418 U.S. 24, 41–42, 54 (1974) (finding affirmative authorization for felon disenfranchisement statutes in Section 2 of the Fourteenth Amendment); Hayden v. Pataki, 449 F.3d 305, 316 (discussing approval for felon disenfran-

Second Circuit's stance, some argue that Section 2 of the Fourteenth Amendment authorizes these laws by withholding punishment when states disenfranchise felons.[202] Accordingly, this argument suggests that if courts strike any felon disenfranchisement laws under the VRA, the Act impermissibly alters the federal-state balance.[203]

This argument is flawed, however, because the Fourteenth Amendment does not grant states an unconditional power to disenfranchise felons.[204] Instead, Section 2 of the Fourteenth Amendment allows states to disenfranchise felons without federal punishment only when doing so is legally valid.[205] However, when felon disenfranchisement laws disproportionately affect minorities' voting rights, the VRA provides that these statutes are not legally valid.[206] Accordingly, courts applying the VRA to felon disenfranchisement challenges should only strike statutes that are not within the Fourteenth Amendment's limited authorization for these laws.[207]

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chisement statutes in Section 2 of Fourteenth Amendment); Johnson v. Bush, 405 F.3d 1214, 1228 (11th Cir. 2005) (discussing approval for felon disenfranchisement statutes in Section 2 of Fourteenth Amendment). *But see* Chin, *supra* note 198, at 260 (suggesting that Congress repealed Section 2 of Fourteenth Amendment by enacting Fifteenth Amendment).

202. *See* U.S. CONST. amend. XIV, § 2; *Richardson*, 418 U.S. at 41–42, 54 (finding affirmative authorization for felon disenfranchisement statutes in Section 2 of the Fourteenth Amendment); *Hayden*, 449 F.3d at 316 (discussing approval for felon disenfranchisement statutes in Section 2 of Fourteenth Amendment); *Johnson*, 405 F.3d at 1228 (discussing approval for felon disenfranchisement statutes in Section 2 of Fourteenth Amendment).

203. *See Hayden*, 449 F.3d at 326 (deciding that, because of explicit approval for felon disenfranchisement statutes in Section 2 of Fourteenth Amendment, VRA would alter federal-state balance if it covered these laws).

204. U.S. CONST. amend. XIV, § 2. *See Johnson*, 405 F.3d at 1240 (Wilson, J., dissenting) (discussing proper interpretation of Section 2 of Fourteenth Amendment). *But see* discussion of Richardson v. Ramirez *supra* Part I.C.2.

205. Section 2 of the Fourteenth Amendment punishes states for denying voting rights to eligible citizens by reducing the state's representation in the federal legislature. U.S. CONST. amend. XIV, § 2. According to the text, states are not subject to this punishment for denying the right to vote for participation in rebellion or other crime. U.S. CONST. amend. XIV, § 2.

206. *See* Voting Rights Act, 42 U.S.C. § 1973 (2007); discussion of section 2 *supra* Part I.D; *see also* Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003) (stating that although states may disenfranchise felons without violating Fourteenth Amendment, when these statutes infringe voting rights in discriminatory manner, VRA is vehicle for redress). Interpreting the Fourteenth Amendment as blanket authorization for felon disenfranchisement laws would lead to an incongruent consequence. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 251–61 (2002) (discussing enactment of Fourteenth Amendment and racial considerations). This reconstruction amendment, passed to strengthen minority rights, would then provide states with a tool to enact racially discriminatory voting legislation without repercussion. *See id.*

207. *See* U.S. CONST. amend. XIV, § 2 (Withholding punishment of reduced representation when state disenfranchises for participation in rebellion or other crime).

The proposed approach enables courts to distinguish the legally valid laws from the impermissible laws by focusing on the burden imposed on minority voting rights.[208] This distinction enables section 2 of the VRA to parallel the Fourteenth Amendment's minority rights protection, while respecting that Amendment's limited authorization for felon disenfranchisement.[209] Thus, allowing courts to strike specific felon disenfranchisement statutes under the VRA would neither conflict with the Fourteenth Amendment, nor unconstitutionally alter the federal-state balance.[210]

### D. *The Proposed Approach Allows Use of the VRA as the Only Plausible Avenue for Redress*

Adopting the proposed approach to felon disenfranchisement statutes under section 2 of the VRA will re-open the courthouse doors to disenfranchised minorities seeking judicial redress.[211] It is a fundamental function of the judiciary to afford citizens the ability to challenge laws that violate their rights.[212] As the Ninth Circuit Court of Appeals acknowledged in *Farrakhan*, even ex-felons have the right to challenge racially discriminatory voting regulations.[213] Unfortunately, the Supreme Court's use of rational basis review for felon disenfranchisement challenges under the Fourteenth Amendment has precluded felons from effectively challenging felon disenfranchisement laws.[214] However, section 2 of the VRA may provide felons with an

208. *See* discussion of the mechanics of the proposed approach *supra* Part III.A.

209. For a discussion of the enactment of the Fourteenth Amendment and racial considerations, see FONER, *supra* note 206, at 251–61.

210. *See supra* notes 195–202 and accompanying text (discussing proposed approach's effect on federal-state balance of powers); *supra* notes 206–211 and accompanying text (describing section 2's compatibility with Fourteenth Amendment if applied to felon disenfranchisement laws).

211. *See* discussion of Richardson v. Ramirez, which held that Constitution expressly allows felon disenfranchisement laws *supra* Part I.C.2.

212. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162–63 (1803) (declaring that very essence of civil liberty is to afford every plaintiff remedy for violation of rights); THE FEDERALIST No. 78 (Alexander Hamilton) (describing function of judicial branch as essential safeguard against ill humors of society, including protecting private rights of citizens against unjust and partial laws); THE FEDERALIST No. 80 (Alexander Hamilton) (opining that spirit behind fraudulent state laws will survive constitutional safeguards, and that federal judiciary must have control over state practices); *see also* Taxier v. Sweet, 2 Dall. 81, 82 (Pa. 1766) (stating that if plaintiffs were without remedy at law, court would provide some remedy to redress plaintiffs' injury).

213. Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003) (stating that permitting even a convicted felon to challenge felon disenfranchisement laws enforces right that every citizen has to challenge racially discriminatory voting regulations).

214. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (holding that strict scrutiny applies to felon disenfranchisement statute when plaintiffs establish invidious intent);

alternative means to challenge felon disenfranchisement laws, but the Court must first develop an effective approach to these claims that protects the VRA's constitutionality.[215] The Court should adopt the proposed approach because it protects the constitutionality of the VRA while providing felons with an effective vehicle to challenge disenfranchisement laws.[216]

## CONCLUSION

Despite their opposite conclusions, the Ninth and Second Circuits share a commonality when analyzing challenges to felon disenfranchisement laws under section 2 of the VRA: they both jump to conclusions. These circuits assume that they can foresee the consequences of allowing such challenges, yet disagree about the constitutionality of those consequences. The irony is that both circuits are wrong.

Both the Ninth and Second Circuits overlook that courts do not currently have the analytical tools to consider vote denial challenges under section 2. Accordingly, the constitutional implications of accepting felon disenfranchisement challenges under section 2 are unforeseeable. When and if the Supreme Court addresses this split of authority, it must first establish a standard approach to vote denial claims under section 2.[217] Only then can the Court determine the merits of each circuit's rationale.[218]

This Article proposed a variation of sliding scale scrutiny as an effective approach to felon disenfranchisement challenges under section 2.[219] Such an approach allows courts to address felon disenfranchisement challenges uniformly and in a manner consistent with Supreme Court precedent and legislative intent.[220] Furthermore, this approach protects the constitutional validity of the VRA, while affording courts the authority to

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Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974) (holding that states can disenfranchise felons due to affirmative authorization for such laws in section 2 of Fourteenth Amendment); *see also* Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1624–27 (2004) (discussing lack of effective challenge to felon disenfranchisement laws under Equal Protection Clause).

215. Voting Rights Act § 2, 42 U.S.C. § 1973 (2007); *see* discussion *supra* Parts I.D, III.

216. *See supra* Part III.C.

217. *See supra* notes 122–129 and accompanying text.

218. *See* Tokaji, *supra* note 7, at 732–33 (stating that while individuals may argue over best approach to section 2 vote denial claims, important thing is for courts to develop some workable standard).

219. *See* discussion *supra* Part III.A.

220. *See* discussion *supra* Part III.B.

regulate felon disenfranchisement statutes under section 2.[221] Finally, the proposed approach enables disenfranchised felons to challenge potentially racially discriminatory laws that prevent them from voting.[222] Under the current application of the law, however, felons may have lost their ability to protect their voting rights because federal courts have jumped to conclusions.

221. *See* discussion *supra* Part III.C.

222. *See* discussion *supra* Part III.D.