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THE CASE FOR FELON DISENFRANCHISEMENT STATUTES

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New York City patrolmen Waverly Jones and Joseph A. Piagentini seemed like police partners from a Hollywood movie: Jones, a thirty-three-year old African-American, lived in the Bronx, while Piagentini, twenty-eight and white, grew up in Long Island. Both had graduated from the same Police Academy class and joined the force on the same

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day, and were assigned to the same squad car. And they would die together on the streets of Harlem on the same warm spring evening in 1971.[1]

After responding to a domestic violence call at a housing project, Jones and Piagentini were walking back to their car when Anthony Bottom and an accomplice snuck up behind them and began shooting at point-blank range. Jones was dead before he hit the ground, .45-caliber slugs having ripped through his skull, his spine, his diaphragm, and one of his kidneys. One of the gunmen shot Piagentini several times with a long-barreled .38 and continued to fire as the officer lay writhing on the ground. When the gun ran out of bullets, Piagentini was still alive. So his assailant grabbed Piagentini's loaded service revolver and fired it at him until that weapon, too, was empty. Patrolman Piagentini died on the way to Harlem Hospital.[2]

A New York County jury convicted Bottom on two counts of murder in the first degree. At trial, Bottom and his co-defendants declared that "they were at war with the United States."[3] Bottom received two concurrent prison terms of twenty-five years to life, and he has since been denied parole. While incarcerated in an upstate New York prison, Bottom has waged an eleven-year legal battle challenging New York's felon disenfranchisement statute on the ground that its alleged discriminatory effect on racial minorities violates the Voting Rights Act of 1965 ("VRA"). In 2002, a panel of the United States Court of Appeals for the Second Circuit affirmed the district court's denial of Bottom's claim that he has the right to vote while incarcerated.[4] The Second Circuit denied rehearing en banc, and the Supreme Court then denied his writ of certiorari. In a highly unusual action after the denial of certiorari, however, the Second Circuit granted an en banc hearing, and oral arguments were heard in June 2004.[5] Legal observers again expect a very close vote, noting that the Second Circuit en banc panel had previously split five-five on this very same

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1. *See, e.g.*, *[Two] Slain Patrolmen Joined Department on Same Day*, N.Y. TIMES, May 23, 1971, at 57.

2. *See, e.g.*, Joseph P. Fried, *[Two] Policemen Slain by Shots in Back; [Two] Men Are Sought*, N.Y. TIMES, May 22, 1971, at 1; ROBERT K. TANENBAUM & PHILIP ROSENBERG, BADGE OF THE ASSASSIN 3-5 (E.P. Dutton ed., 1979); *Former Black Panthers Lose Bid to Vacate 1975 Murder Convictions:* People v. Bell, N.Y.L.J., Nov. 12, 1998, at 25 (N.Y. County Sup. Ct. Nov. 12, 1998).

3. Marvine Howe, *[Three] Seek New Trial in 70's Police Killings*, N.Y. TIMES, Dec. 26, 1989, at B3.

4. *See* Muntaqim v. Coombe, 366 F.3d 102, 130 (2d Cir. 2002) (declining to apply § 1973 to the felon disenfranchisement statutes because doing so would alter the constitutional balance between the states and the federal government).

5. *See* Hayden v. Pataki, No. 00-8586, 2004 U.S. Dist. LEXIS 10863 (S.D.N.Y. 2004) (consolidating another felon disenfranchisement case with the en banc appeal by Bottom, who also goes by the name Jalil Abdul Muntaqim).

issue in 1996.[6]

INTRODUCTION

Today, from the bluest of the blue to the reddest of the red, almost every single state in the Union—forty-eight out of fifty—forbids felons from voting to varying degrees.[7] The District of Columbia also has a felon disenfranchisement law on its books.[8] And although some states have restored the franchise to felons who have finished serving their sentences, the vast majority of states have continued to retain and adopt laws that prohibit felons from voting during their terms in prison. For example, convicts in Massachusetts could vote, even while in jail, until 2000. That November, however, the Bay State's voters faced a ballot question on a proposed state constitutional amendment to take away the incarcerated felons' franchise.[9] The amendment passed by a landslide, with sixty percent voting yes and only thirty-four percent voting no.[10] So, too, with Utah. Incarcerated felons had the right to vote there until 1998, when the state's voters similarly approved a constitutional amendment taking away the felons'

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6. *See, e.g.*, Posting of Happy Fun Lawyer to Appellate Law & Practice (noting the 5-5 split in *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc)), http://appellate.typepad.com/appellate/2004/12/index.html (Dec. 30, 2004, 9:15 EST).

7. *See* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIOLOGICAL REV. 777, 781-82 (2002) (noting that only Vermont and Maine permit incarcerated felons to vote). Of the forty-eight states that bar felons from voting, thirteen of them continue to disenfranchise felons who have been released or are on parole, while the remaining states permit the reinstatement of felons' voting rights if they have finished their prison terms or are on probation. *Id.*

8. The current felon disenfranchisement laws in D.C., which is sixty percent African-American (JESSE MCKINNON, U.S. CENSUS BUREAU, THE BLACK POPULATION: 2000 (2001), http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf), were enacted by its own locally elected Council after the introduction of home rule in 1974, and they were submitted to, and not objected to, by the Congress of the United States, the very body claimed here to have outlawed felon disenfranchisement. Before granting home rule to the District, Congress established permanent disenfranchisement of felons there (D.C. Election Act, Pub. L. No. 83-376, § 2(2)(C), 69 Stat. 699 (1955)) but later permitted felons to vote upon probation, parole, pardon or the expiration of a fixed period after release from incarceration (Act of Dec. 23, 1971, Pub. L. 92-220, § 4, 85 Stat. 788). With home rule, Congress gave the D.C. Council plenary power over voter qualifications in the District (D.C. CODE ANN. § 1-207.52 (2005)) but reserved the power to disapprove the Council's enactments on any subject (*id.* at § 1-233(c)(1)). The D.C. Council amended the election code to disenfranchise felons only during incarceration. *Id.* at §§ 1-1001.02(7)(A)-(B), 1-1001.07(k)(1), (3)-(4).

9. *See* MASS. CONST. amend. III, *as amended by* MASS. CONST. amend. CXX (rendering "persons who are incarcerated in a correctional facility due to a felony conviction" ineligible to vote); *see also* MASS. GEN. LAWS ch. 51, § 1 (2001) (decreeing the same law).

10. *See* Elections Division, Mass. Statewide Ballot Measures: 2000, http://www.sec.state.ma.us/ele/elebalm/balmpdf/balm2000.pdf (last visited Sept. 6, 2005) (stating the results of the aforementioned referendum under Question Number Two).

franchise.[11] The proposition passed virtually by acclamation, eighty-two percent to eighteen percent.[12]

Although forty-eight states have already spoken in their support for felon disenfranchisement, the legal and political left has championed felon voting rights as its latest cause célèbre. The issue gained additional traction recently after several academics noted that Democratic presidential candidate Al Gore would have triumphed in Florida in 2000 and won the presidency had felons been permitted to vote in that state.[13] And the bid by Anthony Bottom, the convicted double-cop-killer, to vote in prison has the support of over a dozen amici curiae, consisting of many prominent liberal and left-wing organizations such as the ACLU, the NAACP Legal Defense Fund, and the Brennan Center for Justice.

Despite the volume of Bottom's support, the case for letting him and other felons vote is unconvincing and problematic both as a legal and policy matter. As explained in Section I of this Article, felon disenfranchisement laws have long been accepted in the American legal system and easily pass constitutional muster. Indeed, the Fourteenth Amendment explicitly permits states to adopt disenfranchisement statutes, and many such laws were enacted long *before* African-Americans enjoyed suffrage. Section II explains why these laws are beyond the reach of the Voting Rights Act of 1965. The legislative history of the VRA and its 1982 amendments, as well as common sense, makes it perfectly clear that the statute was not intended to cover felon disenfranchisement laws. As detailed in Section III, the VRA cannot be construed to encompass felon disenfranchisement laws because it would then exceed the enforcement powers of the Fourteenth and Fifteenth Amendments. Finally, Section IV discusses the policy rationales for such laws: society deems felons to be less trustworthy than non-felon citizens, and those who cannot follow the law should not participate in the passing of laws that govern law-abiding citizens.

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11. *See* UTAH CONST. art. IV, § 6 (declaring that "any person convicted of a felony . . . may not be permitted to vote . . . until the right to vote . . . is restored as provided by statute"); *see also* UTAH CODE ANN. § 20A-2-101.5 (1953) (permitting restoration of franchise to felons on probation, discharged from incarceration, or paroled).

12. *See* http://governor.state.ut.uslt_gover/98GenPropView.htm (detailing the election results for statewide proposition number four).

13. *See, e.g.*, Uggen & Manza, *supra* note 7, at 789-90 (explaining that because felons are disproportionately from portions of the population that tend to vote for Democratic candidates, such as the poor and African-Americans, their inability to vote impacts the outcome of elections).

I. THE RACE-NEUTRAL HISTORY AND CONSTITUTIONALITY OF FELON DISENFRANCHISEMENT LAWS

About a month before the 2004 presidential election, the Associated Press ran a newswire article stating that felon disenfranchisement laws "have roots in the post-Civil War [nineteenth] century and were aimed at preventing black Americans from voting."[14] Numerous other media outlets, including the *New York Times*, *Washington Post* and *USA Today*, also made similar statements about the origins of felon disenfranchisement statutes.[15] But there was one problem with such statements—they simply were not true.

Contrary to the perceived wisdom of the mainstream media, felon disenfranchisement laws are deeply rooted in the Western tradition as well as American history. As Judge Henry Friendly explained, the Lockean notion of a social compact undergirds laws preventing felons from voting: someone "who breaks the laws" may "fairly have been thought to have abandoned the right to participate" in making them.[16] Alexander Keyssar, a Harvard professor and a critic of felon disenfranchisement laws, has acknowledged that such laws have "a long history in English, European, and even Roman law."[17] Similarly, a report issued by the Sentencing Project and Human Rights Watch conceded that "[d]isenfranchisement in the U.S. is a heritage from ancient Greek and Roman traditions carried into Europe."[18] And in recently upholding Florida's statute barring felons from voting, the en banc Eleventh Circuit observed that "[f]elon disenfranchisement laws are unlike other voting qualifications" in that they are "deeply rooted in this Nation's history."[19]

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14. *Millions locked out of US election*, AUSTL. FIN. REV., Sept. 23, 2004, *available at* http://afr.com/articles/2004/09/23/1095651422800.html. After co-author Roger Clegg contacted the Associated Press, it corrected the erroneous statement.

15. *See* Roger Clegg, *Perps and Politics,* NAT'L REV. ONLINE, Oct. 18, 2004, *available at* https://www.nationalreview.com/clegg/clegg200410180844.asp (quoting the *New York Times*, *Washington Post* and *USA Today* as attributing the creation of felon disenfranchisement laws to racist attempts at disenfranchisement of blacks).

16. Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967).

17. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 62-63 (Basic Books ed., 2000); *see also* NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 45 (2001), http://millercenter.virginia.edu/programs/natl_commissions/final_report.html (noting that "the practice of denying the vote to individuals convicted of certain crimes is a very old one that existed under English law, in the colonies, and in the earliest suffrage laws of the states").

18. THE SENTENCING PROJECT & HUMAN RIGHTS WATCH, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (1998), http://www.hrw.org/reports98/vote/index.html.

19. Johnson v. Governor of Fla., 405 F.3d 1214, 1228 (11th Cir. 2005) (en banc).

In the late eighteenth century, several states began incorporating felon disenfranchisement statutes. Between 1776 and 1821, eleven states disenfranchised persons convicted of certain "infamous" crimes.[20] For instance, New York's Constitution of 1821 authorized the Legislature to pass laws "excluding from the right of suffrage persons who have been, or may be, convicted of infamous crimes."[21] By the eve of the Civil War, more than two dozen states out of thirty-four had enacted laws preventing those convicted of committing serious crimes from casting a vote.[22] And by the time the Fourteenth Amendment was adopted, twenty-nine states had established felon disenfranchisement laws.[23]

That long history refutes any suggestion that felon disenfranchisement provisions are racially motivated.[24] Their antebellum origins show that they were aimed at whites and were maintained for race-neutral reasons: before the ratification of the Fourteenth Amendment, the states were free to, and the vast majority did, impose direct and express racial qualifications on the franchise.[25] As the en banc Eleventh Circuit observed in upholding Florida's felon disenfranchisement law, "at that time, the right to vote was not extended to African-Americans, and, therefore, they could not have been the targets of any [felon] disenfranchisement law."[26] Over seventy percent of the states in the Union in 1861 had felon disenfranchisement laws—at a time when most African-Americans were still enslaved and did not have the right to vote. The pre-Civil War source of these laws "indicates that felon disenfranchisement was not an attempt to evade the requirements of the Civil War

20. KEYSSAR, *supra* note 17, at 63.

21. N.Y. CONST. of 1821, art. II, § 2.

22. KEYSSAR, *supra* note 17, at 63.

23. *Accord* Richardson v. Ramirez, 418 U.S. 24, 48 (1974); Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967).

24. *See* KEYSSAR, *supra* note 17, at 162 (arguing that late nineteenth century disenfranchisement laws outside the South "lacked socially distinct targets and generally were passed in matter-of-fact fashions"); Uggen & Manza, *supra* note 7, at 795 (explaining that some southern states from 1890 to 1910 did act with racial intent in passing laws that disenfranchised persons who were convicted of crimes, but by that time, over eighty percent of the states in the U.S. already had felon disenfranchisement laws); Alexander Keyssar, *Did States Restrict the Voting Rights of Felons on Account of Racism?*, HIST. NEWS NETWORK, Oct. 4, 2004, http://hnn.us/articles/7635.html (noting that even in some states in the post-Civil War South, "felon disenfranchisement provisions were first enacted [by] . . . Republican governments that supported black voting rights").

25. *See* KEYSSAR, *supra* note 17, at 55-56 & Figure 3.1 (explaining that by 1855, twenty-five of the thirty States had express "race exclusions" that prevented blacks from voting, and the five that did not "contained only [four] percent of the free black population").

26. Johnson v. Governor of Fla., 405 F.3d 1214, 1218 (11th Cir. 2005) (en banc).

Amendments or to perpetuate racial discrimination forbidden by those amendments."[27]

The framers of the Civil War Amendments saw nothing racially discriminatory about felon disenfranchisement. To the contrary, they expressly *recognized* the power of the states to prohibit felons from voting. Section 2 of the Fourteenth Amendment provides that a state's denial of voting rights "for participation in rebellion, or other crime" could not serve as a basis for reducing their representation in Congress.[28] As the Supreme Court held in *Richardson v. Ramirez*, Section 2 is thus "an *affirmative sanction*" by the Constitution of "the exclusion of felons from the vote"—even felons who, like the plaintiffs in *Ramirez*, had finished their sentences.[29] This conclusion

> rests on the demonstrably sound proposition that §1 [the Equal Protection Clause], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which §2 imposed for other forms of disenfranchisement.[30]

Thus, Section 2 of the Fourteenth Amendment "*expressly* permits states to disenfranchise convicted felons."[31]

Nor did the Reconstruction Congresses see any conflict between felon disenfranchisement and the Fifteenth Amendment. As the Supreme Court observed at length in *Ramirez*, Congress, in readmitting states to the Union, consistently approved state constitutions that excluded felons from the franchise.[32] In fact, the Fortieth Congress—*the very same Congress that proposed the Fifteenth Amendment*—approved such constitutions, and the next Congress did so both before *and after* the Fifteenth Amendment was ratified.[33]

In light of their historical origin, felon disenfranchisement laws

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27. Baker v. Pataki, 85 F.3d 919, 928 (2d Cir. 1996) (en banc).

28. U.S. CONST. amend. XIV, § 2.

29. 418 U.S. 24, 54 (1974) (emphasis added).

30. *Id.* at 55.

31. *Johnson*, 404 F.3d at 1217 (emphasis added).

32. *Accord id.* at 1218 (discussing the long history of Florida's criminal disenfranchisement); *see Ramirez*, 418 U.S. at 48-52 (noting the approving congressional attitude toward state constitutional disenfranchisement provisions at the time of the Reconstruction).

33. *See Ramirez,* 418 U.S. at 51-52 (citing readmission statutes enacted in June 1868 and January, February, March, and May 1870). The Fifteenth Amendment was passed on February 26, 1869 by the Fortieth Congress (which began on March 4, 1867 and ended on March 3, 1869), and was ratified on February 3, 1870 during the Forty-First Congress. *See* Lexisnexis.com, Timeline for Ratifications of Constitutional Amendments, http://www.lexisnexis.com/constitution/amendments_timeline.asp (last visited Sept. 3, 2005).

easily pass constitutional muster. As any student of constitutional law knows, the Constitution bars only laws that are facially discriminatory or are motivated by intentional discrimination.[34] But it appears that all of the felon disenfranchisement statutes on the books today were enacted or amended with a race-neutral purpose.[35] Not surprisingly, the Supreme Court has consistently held not only that "the states had both a right to disenfranchise [felons and] ex-felons," but also that they had "a compelling interest in doing so."[36] As early as 1890, for example, the Supreme Court held that a territorial legislature's statute that "exclude[d] from the privilege of voting . . . those who have been convicted of certain offenses" was "not open to any constitutional or legal objection."[37] A unanimous Warren Court decision recognized that a "criminal record" is one of the "factors which a State may take into consideration in determining the qualifications of voters."[38] Today's Court agrees: the holding "that a convicted felon may be denied the right to vote" remains "unexceptionable."[39] And federal circuit courts recently have rejected constitutional challenges to felon disenfranchisement laws based on racially disparate impact arguments.[40]

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34. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that the Fourteenth Amendment bars only intentional discrimination by the state). This same standard almost certainly applies to its sister Reconstruction Amendment, the Fifteenth Amendment. *Id.*; *see also, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 62-65 (1980) (plurality opinion) (holding that the Fifteenth Amendment "prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote on account of race, color, or previous condition of servitude").

35. *See* KEYSSAR, *supra* note 17, at 63 (explaining that a felon disenfranchisement law that is facially non-discriminatory can still be unconstitutional if it was motivated by racial discrimination); *cf.* Hunter v. Underwood, 471 U.S. 222, 226-27 (1985) (striking down a Jim Crow-era, misdemeanant disenfranchisement statute in Alabama that had been enacted with the intent to discriminate against blacks).

36. *See* KEYSSAR, *supra* note 17, at 162 (discussing the rationale and widespread support for the disenfranchisement laws).

37. *See* Davis v. Beason, 133 U.S. 333, 345-47 (1890) (holding that territorial legislatures had a right to impose "reasonable qualifications" on voters so long as they were "not inconsistent with the constitution or laws of the United States").

38. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51 (1959) (comparing the use of constitutionally allowable factors, such as a criminal record, with the constitutionality of using literacy as a voting requirement).

39. *See* Romer v. Evans, 517 U.S. 620, 634 (1996) (finding that while some voting requirements are no longer constitutional, a convicted felon still may be denied the right to vote); *see also, e.g.*, Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967) (noting that the Supreme Court "frequently recognized" "propriety of excluding felons from the franchise," and citing cases in support).

40. *See, e.g.*, Johnson v. Governor of Fla., 405 F.3d 1214, 1230 (11th Cir. 2005) (holding that the disenfranchisement provisions were not intended to discriminate against minority voters and that there was no evidence that the Voting Rights Act was intended to reach the disenfranchisement provisions); *see also, e.g.*, Muntaqim v. Coombe, 366 F.3d 102, 130 (2d Cir. 2004) (deciding that the Voting Rights Act did not apply to the New York disenfranchisement statutes).

II. THE VOTING RIGHTS ACT'S NON-APPLICATION TO FELON DISENFRANCHISEMENT LAWS

A. The Legislative History of the Voting Rights Act and Its Amendments

Federal circuit courts are split as to whether the Voting Rights Act of 1965 (as amended by the 1982 amendment) can invalidate felon disenfranchisement statutes on the grounds that such laws have a racially disproportionate impact on minorities. While the Ninth Circuit has expressly held that the VRA can cover felon disenfranchisement laws,[41] the en banc Eleventh Circuit has ruled that it does not reach such laws.[42] The more sensible and reasonable interpretation of the VRA is that Congress did not intend it to apply to felon disenfranchisement statutes.

Congress passed the VRA to address various exclusionary practices that had been historically employed in the South to prevent blacks from voting. There is no reasonable indication in either the language or the legislative history of the original VRA that it was intended to cover felon disenfranchisement statutes. The only provision of the Act that Congress thought could even remotely implicate felon disenfranchisement was Section 4, which prohibits any requirement of "good moral character" to vote. But the Senate Judiciary Committee's report—joined by Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott and Javits—took pains to note that even *that* provision "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony."[43] On the floor, Senator Tydings repeated the point: the law would not bar states from imposing "a requirement that an applicant for voting or registration be free of conviction of a felony . . . . These grounds for disqualification are objective, easily applied, and

41. *See* Farrakhan v. Washington, 338 F.3d 1009, 1019-20 (9th Cir. 2003) (finding that felons can challenge disenfranchisement statutes under the Voting Rights Act); *see also* Wesley v. Collins, 791 F.2d 1255, 1259-61 (6th Cir. 1986) (assuming that the Voting Rights Act applies to disenfranchisement laws but finding no violation); *cf.* Howard v. Gilmore, 205 F.3d 1333, 1333 (4th Cir. 2000) (unpublished) (dismissing suit for failure to state claim but assuming without discussion that the Voting Rights Act could be applied to felon disenfranchisement statute).

42. *See Johnson*, 405 F.3d at 1234 (holding that the Voting Rights Act does not cover felon disenfranchisement statutes). The Second Circuit reached the same result, but as noted previously, the court has agreed to rehear the issue en banc. *See Muntaqim*, 366 F.3d at 130.

43. *See* S. REP. NO. 89-162, Pt. 3, 24 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (identifying felon disenfranchisement laws as an exception to the rule which prohibits use of tests or devices that are used to abridge the right to vote on the basis of race or color).

do not lend themselves to fraudulent manipulation."[44] The House Judiciary Committee report agreed: "[The VRA] does not proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony . . . ."[45]

These are the *only* references to felon disenfranchisement made in reports to the Voting Rights Act of 1965.[46] Thus, its legislative history shows that: "Congress did not intend . . . the Voting Rights Act to cover felon disenfranchisement provisions[;]" "tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not[;]" "legislators intended to *exempt* the voting restrictions of felons from the statute's coverage[;]" "the Voting Rights Act was not designed to reach felon disenfranchisement provisions[;]" and "neither house of Congress intended to include felon disenfranchisement within the statute's scope."[47]

In 1982, Congress amended Section 2 of the VRA to bar procedures that "result" in the denial or abridgment of voting rights "on account of race or color."[48] The purpose of this amendment was to overrule certain Supreme Court decisions that Congress believed were contrary to the original intent of the statute. The amended statutory text, however, is notably ambiguous, and so "[u]nfortunately, it 'is exceedingly difficult to discern what [Section 2] means.'"[49] While the

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44. *See* 111 CONG. REC. S8366 (1965) (statement of Sen. Tydings) (clarifying that the felon disenfranchisement laws are allowed, because they are objective means of determining qualifications for voting and are not subjective such as the good moral character requirement).

45. H.R. REP. NO. 89-439, 25-26 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2437, 2457.

46. *See Johnson*, 405 F.3d at 1233 (reviewing congressional statements in the House and Senate reports for the Voting Rights Act's application to states' disenfranchisement provisions).

47. *Id.* at 1231-34 (emphasis in original).

48. The 1982 amendments to the Voting Rights Act changed the statute such that it now reads:

> No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision *in a manner which results* in a denial or abridgment of the right of any citizen of the United States to vote *on account of race or color*.

42 U.S.C. § 1973(a) (1982) (emphasis added). It has previously read: "No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

49. *Accord Johnson*, 405 F.3d at 1229 (discussing the ambiguity in Section 2 of the Voting Rights Act in its application to the felon disenfranchisement provisions); *see* Muntaqim v. Coombe, 366 F.3d 102, 116 (2d Cir. 2004) (analyzing the scope of the Voting Rights Act to determine if it encompasses states' disenfranchisement provisions and thereby creates a constitutional question) (quoting Goosby v. Town Bd., 180 F.3d 476, 499 (2d Cir. 1999)) (Leval, J., concurring).

introduction of the word "result" arguably indicates that it might cover state actions not motivated by racial animus, the statute also incorporates the critical language in the Fifteenth Amendment's prohibition of intentional racial discrimination—"den[ial] or abridg[ment]" of the right to vote "*on account of* race [or] color."[50] As discussed more fully in Section II.B., the use of the words "'on account of'" means that "'[t]he existence of some form of racial discrimination . . . remains the cornerstone of [Section 2] claims,'" and shows that "Congress did not wholly abandon its focus on purposeful discrimination when it amended the Voting Rights Act in 1982."[51]

The tension between "results in" and "on account of" renders the provision ambiguous. Indeed, it is precisely because of this ambiguity that the Supreme Court relied upon the 1982 legislative history to come up with the so-called *Gingles* factors[52] in order to give content to Section 2. Ironically, the litigants who have launched VRA challenges to felon disenfranchisement laws seek to rely on this legislative history, which does not specifically deal with felon disenfranchisement, while ignoring the extensive legislative history that specifically dealt with the subject.

The legislative history of the 1982 amendments reflects not the slightest suggestion that Congress changed the original intent to preserve felon disenfranchisement. Indeed, even though it "details many discriminatory techniques used by certain jurisdictions," "[t]here is simply *no* discussion of felon disenfranchisement in the legislative history surrounding the 1982 amendments."[53] Given that forty-six states in 1982 had felon disenfranchisement laws, it seems inconceivable that Congress would *sub silentio* amend the Voting Rights Act to invalidate the laws of forty-six states, many of which have had such statutes since the founding of the Republic.[54]

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50. U.S. CONST. amend. XV (emphasis added).

51. *See Muntaqim*, 366 F.3d at 117 (reasoning that the Congress did not abandon its focus on purposeful racial discrimination with the amendment in 1982) (quoting Nipper v. Smith, 39 F.3d 1494, 1515 (11th Cir. 1994)).

52. *See* Thornburgh v. Gingles, 478 U.S. 30, 44-45 (1986) (establishing the following factors in determining validity of challenges under Section 2: the extent to which minority group members have been elected to public office and the extent to which voting in the state or political subdivision is racially polarized). The Court also recognized that other supportive factors may exist, but that these are not essential to a minority voter's claim of dilution. *Id.*

53. *See Johnson*, 405 F.3d at 1233-35 (emphasis added) (analyzing congressional records to find legislative intent for the Voting Rights Act's application to felon disenfranchisement provisions).

54. *See, e.g.*, *Muntaqim*, 366 F.3d at 123-24 (noting prevalence of felon disenfranchisement as a form of punishment in most states throughout U.S. history), *quoted in Johnson*, 405 F.3d at 1234 ("considering the prevalence of felon disenfranchisement in every region of the country since the Founding, it seems unfathomable

Overturning felon disenfranchisement remains unfathomable to Congress to this very day. The VRA's utterly "one-sided legislative history is buttressed by subsequent Congressional acts. Since 1982, Congress has made it *easier* for states to disenfranchise felons."[55] The National Voter Registration Act of 1993 not only provides that a felony conviction may be the basis for canceling a voter's registration, but requires federal prosecutors to notify state election officials of federal felony convictions.[56] The Help America Vote Act of 2002 actually *instructs* state election officials to purge disenfranchised felons "on a regular basis" from their computerized voting lists.[57] The enactment of these provisions plainly "suggests that Congress did not intend to sweep felon disenfranchisement laws within the scope of the VRA."[58]

Not only that, in considering what ultimately became the Help America Vote Act, the Senate actually voted on a floor amendment that would have required states to allow felons to vote after they had completed their terms of incarceration, parole, or probation.[59] The proposal would only have applied to *federal* elections—and its sponsors emphasized they had *no* quarrel with denying the franchise to convicts who were still serving their sentences. In the words of the principal sponsor, Senator Reid, who was then the majority whip,

> We have a saying in this country: "If you do the crime, you have to do the time." I agree with that . . . . [T]he amendment . . . is narrow in scope. It does not extend voting rights to prisoners. I don't believe in that. It does not extend voting rights to ex-felons on parole, even though eighteen States do that.[60]

Despite being "narrow in scope," the amendment was *rejected* by a large bipartisan majority: thirty-one yeas, sixty-three nays.[61]

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that Congress would silently amend the Voting Rights Act in a way that would affect them").

55. *See Johnson*, 405 F.3d at 1234 (emphasis in original).

56. 42 U.S.C. §§ 1973gg-6 (2002) (requiring the U.S. attorney to give written notice of any felony convictions in federal courts to the chief state election official).

57. 42 U.S.C. § 15483(a)(2)(A)(ii)(I) (2002) (instructing the election officials to coordinate state computerized voter registration list with state agency records on felony status for the purpose of removing names of ineligible voters).

58. *Johnson*, 405 F.3d at 1234 n.39 (discussing the various laws that Congress has enacted making it easier for states to disenfranchise felons); *accord* Farrakhan v. Washington, 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting from denial of rehearing en banc).

59. *See* 148 CONG. REC. S797-98 (Feb. 14, 2002) (proposed amendment 2879 to S. 565).

60. *See* 148 CONG. REC. S801-02 (statement of Sen. Reid) (speaking in favor of the amendment which, aside from its narrow scope, could serve as an example to states); *see also* 148 CONG. REC. S804-05 (statement of co-sponsor Sen. Specter).

61. *See id.* at S809 (noting that twenty-three Democrats and forty Republicans voted "nay").

Since then, bills have been repeatedly introduced in Congress that essentially copy Senator Reid's proposal verbatim—but not one has so much as been voted out of committee.[62] This legislative record belies the contention that Congress has ever sought to do away with felon disenfranchisement in any form. At the very least, submission of the Reid amendment and the follow-on bills would have made absolutely no sense "if Congress has the clear understanding that the Voting Rights Act currently covers those cases."[63] The fact is, Congress has never had any such understanding, ever.

B. The "Results" Test and the Claim of Disparate Impact

As set forth above, there is absolutely no indication in the legislative history of the 1982 amendments of the Voting Rights Act that the introduction of the word "results" was intended to create a simple disparate impact test. And the very language of the VRA as well as common sense undercuts any such claim of disparate impact: the continued requirement in the statute that the denial or abridgement of the right to vote be "*on account of race or color*" mimics the key phrase used in the Fifteenth Amendment's prohibition of intentional racial discrimination.[64] Indeed, the plain meaning of "on account of" is "for the sake of" or "by the reason of"[65]—underscoring that "Congress did not wholly abandon its focus on purposeful discrimination when it amended the Voting Rights Act in 1982."[66]

The inclusion of the phrase "on account of race or color" appears to modify the word "results," thereby requiring some causational link between intentional racial discrimination and "results." Simply put, felon disenfranchisement laws may have a disproportional impact on certain racial minorities, but they do not violate the VRA because the impact is not on "account of," "for the sake of," or "by the reason of"

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62. *See* Count Every Vote Act of 2005, S. 450, 109th Cong. § 701(d) (2005) (using identical language as that in Senator Reid's proposal to establish voting rights for ex-felons who have served their sentences); *see also* Ex-Offenders Voting Rights Act of 2005, H.R. 663, 109th Cong. (2005) (aiming to secure federal voting rights for qualified ex-offenders who have served their sentences); Ex-Offenders Voting Rights Act of 2003, H.R. 1433, 108th Cong. (2003); Civic Participation and Rehabilitation Act of 2003, H.R. 259, 108th Cong. § 3 (2003).

63. *See* Johnson v. Governor of Fla., 353 F.3d 1287, 1318 n.15 (11th Cir. 2003) (Kravitch, J., dissenting), *panel opinion vacated and reh'g en banc granted*, 377 F.3d 1163 (11th Cir. 2004), *judgment of district court aff'd*, 405 F.3d 1214 (11th Cir. 2005) (en banc majority opinion by Kravitch, J.) (upholding Florida's permanent disenfranchisement statute).

64. U.S. CONST. amend. XV (emphasis added).

65. *See* MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.m-w.com (last visited Aug. 15, 2005) (defining "on account of").

66. *See* Muntaqim v. Coombe, 366 F.3d 102, 117 (2d Cir. 2004) (analyzing the language of the 1982 amended Voting Rights Act to determine the legislative intent).

race or color. As the Sixth Circuit said in rejecting a disparate impact-type VRA claim, felons are not "disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment."[67] Likewise, the Eleventh Circuit explained that Section 2 of the VRA

> explicitly retains racial bias as the gravamen of a . . . claim. The existence of some form of racial discrimination therefore remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color. The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color,' not on account of some other racially neutral cause.[68]

Accordingly, because "the causation of the denial of the right to vote to felons . . . consists entirely of their conviction, not their race,"[69] it "does not 'result' from the state's qualification of the right to vote *on account of race or color* and thus . . . does not violate the Voting Rights Act."[70] The "mere fact that many incarcerated felons happen to be black and [L]atino is insufficient grounds to implicate the Fifteenth Amendment and the Voting Rights Act," even under Section 2.[71]

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67. A*ccord* Johnson v. Bush, 214 F. Supp. 2d 1333, 1341 (S.D. Fla. 2002) (holding that disenfranchisement provisions do not deny people a right to vote due to an immutable characteristic, but because of their criminal acts), *aff'd in part and rev'd in part*, 353 F.3d 1287, 1303 (11th Cir. 2003) (holding that a fact-finder could conclude under the totality of circumstances test that the plaintiff's evidence demonstrates intentional racial discrimination behind Florida's felon disenfranchisement provisions), *vacated and reh'g en banc granted*, 377 F.3d 1163 (11th Cir. 2004), *aff'd*, 405 F.3d 1214 (11th Cir. 2005) (en banc) (holding that the Voting Rights Act's prohibition against voting qualifications that result in abridgment of the right to vote on account of race does not apply to Florida's felon disenfranchisement provisions); *see* Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (concluding that the disproportionate impact on Tennessee's black population did not result from Tennessee's qualification of the right to vote on account of race or color); *see also* Jones v. Edgar, 3 F. Supp. 2d 979, 981 (C.D. Ill. 1998) (holding that the plaintiff failed to show any connection between historical discrimination against blacks and the felon disenfranchisement provisions).

68. Nipper v. Smith, 39 F.3d 1494, 1515 (11th Cir. 1994) (quoting League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 850 (5th Cir.1993) (en banc)).

69. *See* Johnson v. Governor of Fla., 405 F.3d 1214, 1239 (11th Cir. 2005) (Tjoflat, J., specially concurring) (holding that the facts presented in this case show no other causation than the criminal activity of the ex-felons for the denial to their right to vote).

70. *Wesley*, 791 F.2d at 1262 (emphasis added).

71. *See Jones*, 3 F. Supp. 2d at 981.

So, if statistics showing racial disparities alone are insufficient to establish a Section 2 violation even when the disparities *directly* relate to the electoral process, then statistics that are at least one step *removed* from that must also, by definition, be insufficient. Yet the case against felon disenfranchisement laws is based upon the assumption that "'race-based disparities *in sentencing*'"—"that, *as a result of racial discrimination in sentencing*, black and Hispanic felons are more likely to be sentenced to a term of imprisonment . . . and are therefore more likely to be disenfranchised."[72] But the case law establishes clearly that "[e]vidence of statistical disparities in an area external to voting, which then result in statistical disparities in voting," do not prove a Section 2 violation.[73] For example, in *Wesley v. Collins*, the court upheld Tennessee's felon disenfranchisement provision against a Section 2 claim that was based, as here, on statistical disparities in conviction rates;[74] the Third Circuit in *Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division* rejected a Section 2 claim that a statute purging voter registrations of those who did not vote for two years had a disparate statistical impact on minorities;[75] the court in *Salas v. Southwest Texas Junior College District* rejected a Section 2 claim that an at-large voting system harmed minorities because of statistical disparities in voter turnout;[76] and in *Irby v. Virginia State Board of Elections*, the Fourth Circuit rejected a Section 2 claim premised on disparities in the rates at which blacks and whites sought appointive positions.[77]

Indeed, to ignore these cases here would lead to an absurdity: felons would be allowed to prove a denial of voting rights as a result of racial discrimination in sentencing on the basis of evidence *legally insufficient* to establish an actual claim of racial discrimination in sentencing. In *McCleskey v. Kemp*, the Supreme Court held that statistical disparities cannot be the basis for a Fourteenth Amendment

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72. *See, e.g.*, Muntaqim v. Coombe, 366 F.3d 102, 118 (2d Cir. 2004) (emphasis by the Court) (quoting felon-appellant's brief).

73. *See* Farrakhan v. Washington, 359 F.3d 1116, 1117 (9th Cir. 2004) (Kozinski, J., dissenting) (arguing that statistical disparities are not enough to establish vote denial under Section 2 of the Voting Rights Act).

74. 791 F.2d at 1262.

75. *See* 28 F.3d 306, 314-15 (3d Cir. 1994) (finding that no evidence was presented to show that the neutral vote purging law discriminates against a particular class).

76. *See* 964 F.2d 1542, 1556 (5th Cir. 1992) (holding that the plaintiff failed to link low voter turnout by the Hispanic population to past official discrimination).

77. *See* 889 F.2d 1352, 1358-59 (4th Cir. 1989) (deciding that the disparities between whites and blacks in representative positions does not in itself show that discrimination played a role in the selection or election process).

claim to overturn a criminal conviction or sentence; a defendant must show that *he himself* or *she herself* suffered discrimination on the basis of race, and must show that on the basis of things that happened *in his or her case*.[78] "Because discretion is essential to the criminal justice process," statistical evidence "is clearly insufficient to support any inference that any of the decision-makers in [a particular] case acted with discriminatory purpose."[79] This is so even in a capital case, as *McCleskey* was.

If the Voting Rights Act were construed to ban felon disenfranchisement, then convicted felons could invoke the very same racial statistics that they *cannot* invoke to assert the right to walk the streets. That result alone would be odd, to say the least. And this "logic" moves swiftly from the incongruous to the unimaginable: the VRA would probably abolish capital punishment nationwide because if similar statistical disparities appear in capital sentences, then the execution of such sentences, which plainly effect a permanent denial of the right to vote, would necessarily "result[] in a denial or abridgment of the right . . . to vote on account of race or color."[80]

C. Any Prima Facie Showing of Adverse "Results" Is Easily Rebutted

Even assuming for the sake of argument that the 1982 amendments to the Voting Rights Act established some form of a pure disparate impact standard, states could easily rebut any prima facie case of disproportional impact because of their strong and legitimate interests in maintaining their own electoral laws.[81] As discussed in Section IV, states have substantial reasons to limit the right to vote to persons deemed trustworthy, and thereby exclude children, aliens, the mentally incompetent, and those who have been convicted of serious crimes.

The Supreme Court has held that "the State's interest in maintaining an electoral system . . . is a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a [Section] 2 violation [of the 1965 Act] has occurred."[82] Thus, for example, the en banc Fifth Circuit rejected a

78. *See* 481 U.S. 279, 313 (1987) (ruling that the evidence failed to show that any decision maker in defendant's case acted with a discriminatory purpose, and that the statistical racially-correlated discrepancy did not show a significant risk of racial bias in Georgia's capital sentencing process).

79. *Id.* at 297.

80. 42 U.S.C. § 1973(b) (1982).

81. *See, e.g.*, Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 173 (2001) (discussing the lack of constitutional or VRA violations in felon disenfranchisement provisions).

82. Houston Lawyers' Ass'n v. Attorney Gen. of Tex., 501 U.S. 419, 426 (1991).

challenge to Texas's county-wide election system for its district court judges—notwithstanding alleged disproportionate impact on minority candidates—on the grounds that the state had a "substantial interest" in linking jurisdiction and electoral base, and thereby promoting "the fact and appearance of judicial fairness."[83]

There is little doubt that the states have an equally substantial interest in preventing felons, especially those still incarcerated, from voting and potentially affecting elections. Thus, the Sixth Circuit held that the state's "legitimate and compelling interest" in disenfranchising felons outweighed any supposed racial impact.[84] Indeed, the Framers of the Reconstruction Amendments found state authority to disenfranchise felons to be of such importance that they expressly permitted it in the text of the Fourteenth Amendment."[85] As the Supreme Court put it, "*[n]o* function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county and municipal offices . . . ."[86]

D. The Clear Statement Rule: A Caution Against Preemption of States' Powers

An expansive and unreasonable reading of the Voting Rights Act to cover felon disenfranchisement statutes not only is contrary to the intent of Congress, but it also upsets the delicate balance between federal and state powers. The "clear statement" rule—which applies when the statutory text is ambiguous as in the case of the VRA—cautions courts to tread lightly in interpreting vague statutes to avoid impinging upon the traditional spheres of the states: "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention *unmistakably clear* in the language of the statute . . . . [Congress must] make its intention *clear and manifest* if it intends to pre-empt the historic powers of the States."[87]

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83. League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 868-69 (5th Cir. 1993) (en banc).

84. *See* Wesley v. Collins, 791 F.2d 1255, 1260-61 (6th Cir. 1986) (holding that when the felon disenfranchisement law is viewed in context of "totality of circumstances," it is apparent that the law does not violate the VRA).

85. *See* Johnson v. Governor of Fla., 405 F.3d 1214, 1232 (11th Cir. 2005) (analyzing the constitutional implications of applying the Voting Rights Act to state felon disenfranchisement provisions).

86. *See* Oregon v. Mitchell, 400 U.S. 112, 125 (1970) (emphasis added) (discussing the constitutional objective of preserving states' rights and governing autonomy).

87. Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (emphasis added; citations and internal quotation marks omitted).

This rule of construction controls whenever a federal statute touches on "traditionally sensitive areas, such as legislation affecting the federal balance."[88] And when it applies, the rule requires that, absent a clear statement, courts must "interpret a statute to preserve rather than destroy the States' 'substantial sovereign powers.'"[89]

In *Gregory v. Ashcroft*, the Supreme Court faced the question of whether the Age Discrimination in Employment Act prohibited Missouri from enforcing a mandatory retirement age for state judges.[90] The Court held that it did not. It applied the clear statement rule because the case implicated "the authority of the people of the States to determine the qualifications of their government officials."[91] The fact that Congress's intent on the issue was "at least ambiguous" was enough to resolve the question: under the clear statement rule, it could not "give the state-displacing weight of federal law to mere congressional *ambiguity.*"[92]

Felon disenfranchisement involves authority that is at least as important as the State's power to determine "the qualifications of their government officials," as it involves the power to determine who gets to *choose* those officials and their qualifications. If defining the qualifications of important government officials lies at the heart of representative government, then surely defining who decides what those qualifications will be is equally, if not more, important. That by itself suffices to require a clear statement, but even more is involved here: the fundamental state power to "defin[e] and enforc[e] the criminal law," for which, of course, "the States possess primary authority."[93]

The confluence of these two fundamental lines of state authority, indeed, expressly appears in the Constitution's text. Thus, not only does the Constitution defer to the States to set voter qualifications even for *federal* elections,[94] but, as noted above, the Constitution *affirmatively sanctions* the States' historic authority to disenfranchise

88. *Id.* at 461 (citations and internal quotation marks omitted).

89. Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 209 (1998) (quoting *Gregory*, 501 U.S. at 460-61).

90. *See generally Gregory*, 501 U.S. 452.

91. *See id.* at 463.

92. *Id.* at 464, 467 (emphasis in original; citation and internal quotation marks omitted).

93. United States v. Lopez, 514 U.S. 549, 561 n.3 (1995); *see also* Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in judgment) (noting the longstanding tradition of deference to a state legislature's role in criminal justice matters).

94. *See* U.S. CONST. art. I, sec. 2, cl.1 (requiring that those who elect United States Representatives "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislatures").

people "for participation in rebellion, *or other crime*."[95] The States have the primary, if not exclusive, authority to decide whether felons should vote. That is what the Constitution provides.

Accordingly, if it is to disturb the federal-state balance in the area of voter qualifications, Congress must be clear—*unmistakably clear*—about it. And Congress certainly knows how to be quite clear when it comes to voting rights: it was clear about literacy tests,[96] clear about educational-attainment requirements,[97] clear about knowledge tests,[98] clear about moral character tests,[99] clear about vouching requirements,[100] clear about English-language requirements,[101] clear about English-only elections,[102] and clear about poll taxes[103] to give just a few examples.

But the text of the VRA makes no unmistakably clear statement—it makes no statement at all—about felon disenfranchisement. And so it cannot be construed "to pre-empt the historic powers of the States"[104] and "to destroy the States' 'substantial sovereign powers'"[105] by prohibiting felon disenfranchisement.

III. THE ENFORCEMENT POWERS OF THE FOURTEENTH AND FIFTEENTH AMENDMENTS

There is yet another reason why Section 2 of the Voting Rights Act cannot be read to bar felon disenfranchisement laws: such an interpretation would exceed Congress's enforcement powers under

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

96. *See* 42 U.S.C. § 1971(a)(2)(C) (2005) (prohibiting states from conducting literacy tests as a qualification for voting unless it is administered to all voters, is wholly in writing, and answers are provided to voters within twenty-five days upon request); *id.* at § 1971(a)(3)(B) (defining "literacy test" as "any test of the ability to read, write, understand, or interpret any matter"); *see also* 42 U.S.C. § 1973b(c)(1) (2005) (explaining that the phrase "test or device" shall mean "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter").

97. *Id.* at § 1973b(c)(2) (explaining that literacy tests include tests to "demonstrate any educational achievement or his knowledge of any particular subject").

98. *Id.*

99. *Id.* at § 1973b(c)(3).

100. *Id.* at § 1973b(c)(4).

101. *See id.* at § 1973b(e)(1) (prohibiting the States from conditioning the right to vote upon the ability to understand the English language).

102. *See id.* at § 1973(b)(f)(1) (forbidding the States from holding English-only elections because of widespread discrimination of citizens who do not speak English).

103. *Id.* at § 1973(h)(a) (finding that poll taxes have no relation to the electoral process, prevent poor citizens from voting and have been used as a means to deter minorities from voting).

104. Gregory v. Ashcroft, 501 U.S. 452, 461(1991).

105. Pa. Dep't of Corrections v. Yeskey, 524 U.S. 206, 209 (1998) (quoting *Gregory*, 501 U.S. at 460-61).

the Fourteenth and Fifteenth Amendments.

These two Reconstruction Amendments contain parallel grants of power to Congress to "enforce" the amendments' substantive provisions "by appropriate legislation."[106] But as the Supreme Court has emphasized in recent years, Congress cannot rewrite the constitutional provisions, as "Congress does not enforce a constitutional right by changing what that right is."[107] It has no power to engage in a "substantive redefinition of the . . . right at issue,"[108] and can only "enact prophylactic legislation"—legislation that "proscribes facially constitutional conduct"—to the extent necessary "in order to *prevent and deter un*constitutional conduct."[109]

Accordingly, the Supreme Court has insisted that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[110] To meet that test, Congress must do two things: (1) "identify conduct transgressing . . . substantive provisions" of the amendments and (2) "tailor its legislative scheme to remedying or preventing such conduct."[111]

The first requirement demands that Congress develop a "legislative record" that demonstrates a "history and pattern" of unconstitutional state conduct.[112] In other words, "[f]or Congress to enact proper enforcement legislation, there must be a record of constitutional violations."[113] To meet the second requirement, the purportedly prophylactic legislation must not be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[114] Congress thus must narrowly "tailor its legislative scheme to remedying or preventing such conduct."[115]

There can be no dispute: Section 2 would fail both tests if it were construed to prohibit felon disenfranchisement. To begin with, "when Congress enacted the VRA and its subsequent amendments, there was a *complete absence* of congressional findings that felon

106. U.S. CONST. amend. XIV, § 5; *id.* at amend. XV, § 2.

107. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

108. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000).

109. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727-28 (2003) (emphasis added).

110. *Flores*, 521 U.S. at 520.

111. Fla. Prepaid Postsecondary Educ. Bd. v. Coll. Savs. Bank, 527 U.S. 627, 639 (1999).

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

113. Johnson v. Governor of Fla., 405 F.3d 1214, 1231 (11th Cir. 2005) (en banc).

114. *Flores*, 521 U.S. at 532.

115. *Coll. Savs. Bank*, 527 U.S. at 628.

disenfranchisement laws were used to discriminate against minority voters."[116] That is enough to doom any construction of Section 2 that reaches felon disenfranchisement. In *Oregon v. Mitchell*, for example, the Supreme Court struck down the 1970 amendments to the VRA that, among other things, tried to lower from twenty-one to eighteen the minimum voting age throughout the Nation.[117] The Court struck down the voting-age provision to the extent it applied to state elections. In announcing the Court's judgment, Justice Black noted that "Congress made *no legislative findings* that the twenty-one-year-old vote requirement was used by the States to disenfranchise voters on account of race."[118] Congress has not made any such legislative findings about felon disenfranchisement, either.[119]

Not only has Congress *not* found that felon disenfranchisement has produced "any significant pattern of unconstitutional discrimination,"[120] and not only does "the legislative record . . . simply fail[] to show that Congress did in fact identify such a pattern,"[121] the record actually shows that Congress found the opposite. Congress saw nothing wrong with the "frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony,"[122] because it found that this requirement was "objective, easily applied, and do[es] not lend [itself] to fraudulent manipulation."[123] It found that "tests for literacy or good moral character should be scrutinized, but felon disenfranchisement provisions should not."[124] In short, "not only has Congress failed ever to make a legislative finding that felon disenfranchisement is a pretext . . . for racial discrimination[,] it has

116. *Johnson*, 405 F.3d at 1231 (emphasis added).

117. 400 U.S. 112 (1970).

118. *Id.* at 130 (emphasis added).

119. *See* Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) (striking down application of the Americans with Disabilities Act against State employers because "[t]he legislative record . . . simply fails to show that Congress did in fact identify a pattern" of unconstitutional discrimination by States against the disabled); United States v. Morrison, 529 U.S. 598, 626 (2000) (striking down civil remedy for gender-motivated violence because "Congress's findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States"); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (striking down application of the Age Discrimination in Employment Act against State employers because of "Congress's failure to uncover any significant pattern of unconstitutional discrimination here").

120. *Kimel*, 528 U.S. at 91.

121. *Garrett*, 531 U.S. at 369.

122. S. REP. NO. 162, 89th Cong., 1st Sess., Pt. 3, at 24 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 2508, 2562.

123. 111 CONG. REC. S8366 (1965) (remarks of Sen. Tydings).

124. Johnson v. Governor of Fla., 405 F.3d 1214, 1233 (11th Cir. 2005) (en banc).

effectively determined that it is not."[125]

To apply Section 2 to strike down all felon disenfranchisement laws, including those enacted and enforced without a discriminatory purpose, would be "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[126] Instead, it would "attempt a substantive change in constitutional protections"[127]—something the Constitution simply does not allow.[128]

IV. THE POLICY REASONS FOR FELON DISENFRANCHISEMENT

During a 2000 presidential debate in Iowa, the frontrunner candidate explicitly endorsed the ban on felon voting: "The principle that convicted felons do not have a right to vote is an old one, it is well-established," he said, adding that "felonies—certainly heinous crimes—should result in a disenfranchisement."[129]

That candidate was Vice President Al Gore, and, as set forth below, he had good policy reasons for supporting the ban on felon voting. But this issue has become heavily politicized in recent years, in large

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125. Baker v. Pataki, 85 F.3d 919, 929 (2d Cir. 1996).

126. City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

127. *Id.* at 509.

128. The Supreme Court's decision in *Hunter v. Underwood*, 471 U.S. 222 (1985), does not change the analysis here. Even apart from the fact it came *after* the 1982 Voting Rights Act amendments, *Hunter* actually demonstrates that the congruence and proportionality test could *never* be met in the context of felon disenfranchisement laws. *Hunter* was *not* a felon disenfranchisement case. It was a *misdemeanant* disenfranchisement case. It struck down a Jim Crow-era provision, unquestionably enacted and applied by Alabama with racial animus and discriminatory intent, that denied the franchise to those who committed "any . . . crime involving moral turpitude," a phrase that referred to "many misdemeanors," including "[v]arious minor nonfelony offenses such as presenting a worthless check and petty larceny," offenses specifically "selected for inclusion" by Alabama's 1901 constitutional convention because they "were believed by the delegates to be more frequently committed by blacks." *Id.* at 226-27. It was *that* sort of provision, not a traditional felon disenfranchisement provision, that was challenged and invalidated in *Hunter* as being an "enactment . . . motivated by a desire to discriminate against blacks." *Id.* at 233.

Even the findings of racial animus in *Hunter* could not possibly support the construction of Section 2 to include felon disenfranchisement laws: it would go far beyond a remedy for the specific form of intentional discrimination found in one Southern state in *Hunter*. "Given that racial minorities are overrepresented in the felon population" throughout the Nation, "the plaintiffs' theory would cast into doubt most felon disenfranchisement laws in this country." *Johnson*, 405 F.3d at 1231. But that case, involving a completely different kind of provision in a single State, simply cannot be "sufficient to support the regulation of *felon* disenfranchisement scheme[s] in *all* fifty states." Muntaqim v. Coombe, 366 F.3d 102, 126 (2d Cir. 2002) (emphasis added in part). For under the congruence and proportionality test, Congress may not create "remedies . . . appl[ying] uniformly throughout the Nation" when unconstitutional conduct "does not exist in all States, or even most States." United States v. Morrison, 529 U.S. 598, 626 (2000).

129. Transcript of Jan. 17, 2005 Democratic Primary Debate, *available at* http://www.gwu.edu/~action/primdeb/primdeb0117tr.html.

part due to the contested results in Florida in 2000. However, if it is soberly analyzed outside the prism of partisan politics, there are reasonable justifications for felon disenfranchisement, particularly for those who have committed serious crimes or are still incarcerated.

First, felon disenfranchisement laws are justified on the basis of the Lockean notion of a social contract: as Judge Henry Friendly once put it, someone "who breaks the laws" may "fairly have been thought to have abandoned the right to participate" in making them.[130] Furthermore,

> it can scarcely be deemed unreasonable for a state to decide that that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.[131]

That same reasoning motivated Massachusetts then-governor Paul Celluci in 2000 to support a ballot initiative stripping incarcerated felons of the right to vote after prisoners began to organize a political action committee.[132] A Massachusetts state legislative leader commented about the State's now-abolished practice of allowing incarcerated felons to vote: "It makes no sense. We incarcerate people and we take away their right to run their own lives and leave them with the ability to influence how we run *our* lives?"[133]

Second, disenfranchisement has traditionally been deemed a part of a punishment for committing a crime.[134] Criminal punishment can be meted out in various ways, including imprisonment, fines, probation, and, yes, the withdrawal of certain rights and privileges. In the American system, it has long been established that "the States possess primary authority for defining and enforcing the criminal law."[135]

Third, society considers convicts, even those who have completed their prison terms, to be less trustworthy than non-convicted citizens.[136] In other areas of the law, full rights and privileges are not

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130. Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967).

131. *Id.*

132. Clegg, *supra* note 81, at 172-73.

133. *Id.* at 172 (emphasis added; quoting Editorial, *Jailhouse Vote*, WALL ST. J., Dec. 7, 1999, at A26 (quoting Massachusetts State Rep. Francis Marini)).

134. *See, e.g.*, Todd F. Gaziano, Election Reform, THE HERITAGE FOUNDATION, Mar. 14, 2001, *available at* http://www.heritage.org/Research/GovernmentReform/Test031401.cfm (noting that felon disenfranchisement is permitted under Section 2 of the Fourteenth Amendment).

135. *See* United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (internal quotation marks omitted).

136. Clegg, *supra* note 81, at 174.

always restored to convicts, even though they may have "paid their debt to society."[137] For example, federal law prohibits the possession of a firearm for anyone indicted for or convicted of a felony punishable by at least one year in prison.[138] Also under federal law, anyone who has a "charge pending" or has been convicted of a crime punishable by imprisonment for one year or more cannot serve on a jury.[139] So if someone who has a "charge pending" against him is deemed incapable of sitting in judgment of the fate of a single litigant, it hardly seems unreasonable to say that someone convicted of a felony cannot help shape the fate of a city, a state, or the entire nation. Even outside the realm of civic rights and privileges, society recognizes that an ex-convict may be less reliable than others. For example, employers routinely ask prospective employees whether they have been arrested (let alone convicted of a felony) because they suspect that the mere fact of an arrest may be an indication of untrustworthiness.

Critics of felon disenfranchisement laws note that these laws have a disproportionate impact on certain racial minority groups.[140] While society can be sensitive to such concerns, it is not a sufficient reason to abolish longstanding and justifiable laws in the attempt to achieve some form of racial balance. As W.E.B. DuBois once wrote, "Draw lines of crime, of incompetency, of vice, as tightly and uncompromisingly as you will, for these things must be proscribed; but a color-line not only does not accomplish this purpose, but thwarts it."[141] In fact, the abolition of felon disenfranchisement laws may have the unintended effect of creating "anti-law enforcement" voting blocs and victimizing the vast majority of law-abiding minority citizens who live in high-crime urban areas.[142] Ultimately the real solution is to deter and prevent the crimes from being committed, not to create loopholes and exceptions for punishments.

Yet there may be some room for reasonable compromise on the issue of felon franchise. Not all crimes are equal, and some crimes are more reprehensible and more likely to suggest

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137. *Id.*

138. 18 U.S.C. § 922(d)(1), (g)(1) (2004).

139. 28 U.S.C. § 1865(b)(5) (2000).

140. *See, e.g.*, The Sentencing Project, Felony Disenfranchisement, http://www.sentencingproject.org/issues_03.cfm (last visited Oct. 16, 2005); NAACP, Re-Enfranchisement, ttp://www.naacp.org/programs/vote/vote_reenfranchiment. html (last visited Oct. 16, 2005); Brennan Center for Justice, Voting Rights Restoration, http://www.brennancenter.org/programs/dem_vr_fvr.html (last visited Oct. 16, 2005).

141. Clegg, *supra* note 81, at 176.

142. *Id.* at 177.

untrustworthiness.[143] One can make a convincing case that someone who has committed a relatively minor crime and who has exhibited good behavior for an extended period of time upon the completion of his prison or parole term can request that his right to vote be restored.[144] Indeed, the National Commission on Federal Election Reform—a bipartisan, blue-ribbon panel chaired by former Presidents Ford and Carter—has made a similar recommendation.[145] The restoration of an ex-convict's voting right should be done on a case-by-case basis through an administrative mechanism because it would be difficult to draft a statute that draws a bright-line rule taking into account factors such as the seriousness of the crime, the potential for recidivism, and the number of prior offenses.

CONCLUSION

Serving his sentence in an upstate New York prison for the murders of Patrolmen Piagentini and Waverly, Anthony Bottom issued a statement on the twenty-fifth anniversary of their deaths. His statement began: "A month ago this very day some [twenty-five] years ago something happened that consequently directly impacted my life."[146] But nowhere in his statement did Bottom mention the patrolmen that he murdered. Rather, the "something" that "directly impacted his life" was the death of political radical George Lester Jackson at the San Quentin prison.[147] Bottom expressed no remorse for his crimes, and instead implied that he was a "political

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143. *Id.* at 174.

144. *Id.*

145. *See* NAT'L COMM'N ON FED. ELECTION REFORM, *supra* note 17, at 45 (emphasis added) (recommending disenfranchisement until felons have fully served their sentences, including any term of probation or parole, or alternatively a lifetime disenfranchisement that nonetheless permits a clemency-like mechanism for restoring the franchise, in "particular cases"); *see also* NAT'L COMM'N ON FED. ELECTION REFORM, *Building Confidence in U.S. Elections*, Sept. 2005, at 4.6.1, *available at* http://www.american.edu/ia/cfer/report/full_report.pdf. The Commission recommends that:

> States should allow for restoration of voting rights to otherwise eligible citizens who have been convicted of a felony (other than for a capital crime or one which requires enrollment with an offender registry for sex crimes) once they have fully served their sentence, including any term of probation or parole.

Id.

146. *See* Jalil Abdul Muntaqim, *August 1971, 25 Years Later*, http://prisonactiist.org/pps+pows/jalil-muntaqim/August71.html (last visited Aug. 27, 2005) (stating that according to the website's Editor's Note: "(t)his statement was written by New African political prisoner Jalil Muntaqim—Anthony Jalil Bottom—for the September 21, 1996 rally of the kNOw INJUSTICE Coalition, held at Dolores Park in San Francisco, 1996").

147. *Id.*

prisoner."[148]

The people of New York, as well as forty-seven other states, have made their voices clear in support of laws that disenfranchise felons like Anthony Bottom. As explained in this Article, neither the Constitution nor the Voting Rights Act of 1965 provides plausible grounds to invalidate the felon disenfranchisement laws that are on the books today. And it would be a crime to distort the Constitution or the intent of Congress to overturn the will of the people of forty-eight states via judicial fiat.

148. *Id.*