GUILTY BEYOND A REASONABLE VOTE: CHALLENGING FELONY DISENFRANCHISEMENT UNDER SECTION 2 OF THE VOTING RIGHTS ACT

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"History is not the past. It is the present. We carry our history with us. We are our history. If we pretend otherwise, we are literally criminals."

James Baldwin

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INTRODUCTION

Desmond Meade, president of the Florida Rights Restoration Coalition, made the most critical decision of his life in August 2005.[1] Recently paroled and homeless, Meade, standing in front of a set of railroad tracks, wanted to end his life by diving in front of an oncoming train.[2] But the train never arrived; Meade eventually sought drug treatment and earned his law degree, even though his felony convictions barred him from sitting for the Florida Bar.[3] His felony convictions also restricted his ability to vote in Florida, due to the state's felon disenfranchisement laws denying his voting rights for life.[4] Intent on overcoming this restriction, Meade, along with his advocacy organization, organized a campaign to overturn Florida's felony restrictions through Amendment 4.[5] Florida citizens, in November 2018, successfully approved the amendment to Florida's Constitution, restoring voting rights to 1.4 million Florida residents.[6]

1. Ari Berman, *"This Is What Democracy Is All About": Florida Ex-Felons Can Finally Register to Vote*, MOTHER JONES (Jan. 8, 2019), https://www.motherjones.com/politics/2019/01/florida-voting-rights-ex-felons-register-amendment-four-voting-rights-act [https://perma.cc/MSP7-ZKKM].

2. *Id.*

3. *Id.*

4. *See id.*; Sam Levine, *Florida Officially Changes Jim Crow-Rooted Felon Disenfranchisement Policy*, HUFFPOST (Jan. 8, 2019, 5:45 AM), https://www.huffingtonpost.com/entry/florida-felon-disenfranchisement-reform_us_5c33d3c6e4b01e2d51f5fb5f [https://perma.cc/5ZRV-45M5].

5. Berman, *supra* note 1.

6. Levine, *supra* note 4. The enactment of Amendment 4, which restored voting rights to convicted felons that had completed their sentences, has been mired in controversy. The Florida legislature subsequently passed a bill to clarify the amendment's language, requiring felons to pay all court-ordered fines and fees before the restoration of voting rights. Arian Campo-Flores, *Kentucky's New Governor Restores Voting Rights to Nonviolent Felons*, WALL ST. J. (Dec. 12, 2019, 4:03 PM), https://www.wsj.com/articles/kentuckys-new-governor-plans-to-restore-voting-rights-to-nonviolent-felons-11576152000 [https://perma.cc/72E6-VQW4]. Civil rights groups filed a lawsuit over this requirement claiming it was analogous to a poll tax, and a federal judge temporarily blocked the law in October 2018. Florida officials have appealed this ruling. While the ruling only applies to the seventeen plaintiffs that brought the suit, the decision would require Florida to change this policy for restoring voting rights if it stands. Michael Wines, *Judge Temporarily Blocks Florida Law Restricting Voting by Ex-Felons*, N.Y. TIMES (Oct. 18, 2019), https://www.nytimes.com/2019/10/18/us/felons-vote-fine-florida.html [https://perma.cc/4WS5-385H].

State actors hold excessive amounts of discretion in the enactment and administration of local laws and procedures.[7] Specifically, election procedures, like felon disenfranchisement, justified under the guise of race-neutrality have historically provided a convenient loophole for state legislatures to disenfranchise Blacks after the Fourteenth and Fifteenth Amendments extended citizenship to newly-freed slaves and protected the voting rights of these citizens.[8] Although voter suppression might seem like an election buzzword,[9] vote suppression through wide-scale disenfranchisement schemes has been a concern for courts since Reconstruction.

State felony disenfranchisement laws—a race-neutral form of voter suppression—restrict the voting rights of 6.1 million citizens.[10] Felony exclusion disproportionately denies minority individuals access to fundamental voting rights.[11] While felony disenfranchisement finds its roots

7. *See generally* CAROL ANDERSON, ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY 1–43 (2018) (describing numerous instances in which state and local actors wielded local laws and procedures to suppress Black voting).

8. *Id.*

9. Voter Suppression is an umbrella term connoting the patchwork of election legislation and procedures including Voter ID Laws, exact match systems, purged voter rolls, and gerrymandering that decrease voter registration and turnout. *See generally id.* Media reports often focus on lawsuits filed in myriad jurisdictions to combat voter suppression efforts leading up to national elections. *See* Ari Berman, *The GOP's Attack on Voting Rights Was the Most Under-Covered Story of 2016*, NATION (Nov. 9, 2016), https://www.thenation.com/article/the-gops-attack-on-voting-rights-was-the-most-under-covered-story-of-2016 [https://perma.cc/MX2E-HNR9] ("I want to salute the people that did cover voting rights doggedly, including Rick Hasen of the Election Law Blog; Michael Wines of *The New York Times*; Sari Horwitz of *The Washington Post*; Alice Ollstein, Kira Lerner, and Ian Millhiser of *Think Progress*; Tierney Sneed of *Talking Points Memo*; Zack Roth, Joy Reid, Chris Hayes, Rachel Maddow and Al Sharpton of MSNBC; Mark Joseph-Stern and Jamelle Bouie of *Slate*; David Graham of *The Atlantic*; Brad Friedman of The Brad Blog, in addition to great local reporters like Bryan Lowry of the *Wichita Eagle*; Patrick Marley of the *Milwaukee Journal-Sentinel*; and Colin Campbell of the Raleigh *News & Observer*."). For current court challenges, the Fourth Circuit Court of Appeals struck down a North Carolina ID Law as unconstitutional and scathingly described the law as an effort to "target African Americans with almost surgical precision" in 2016. N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) ("Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist."). Conversely, the Supreme Court allowed North Dakota to require a residential address to vote—a requirement which disproportionately affects Native American voters. Brakebill v. Jaeger, 139 S. Ct. 10, 10 (2018) (denying application to vacate the stay of residential address requirement entered by 8th Circuit); *see also* Brakebill v. Jaeger, 932 F.3d 671, 677–81 (8th Cir. 2019) (vacating district court's preliminary injunction against residential address requirement).

10. CHRISTOPHER UGGEN ET AL., 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016 3 (2016), https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf [https://perma.cc/6Z4M-XTVX].

11. In particular, the African American adult disenfranchisement rate has reached 20 percent in four states—higher than the 2.47 percent rate of all individuals disenfranchised. *See id.* at 15–16. The four states exceeding 20 percent are Kentucky (26.15 percent), Virginia (21.90 percent), Florida (21.35 percent), and Tennessee (21.27 percent). *Id.* at 16.

in Section 2 of the Fourteenth Amendment,[12] the Constitution also protects voting rights from race-based restrictions, which Congress affirmed, and extended in subsequent amendments, in the comprehensive Voting Rights Act of 1965 (the "VRA" or "the Act").[13]

The VRA suspended literacy tests and directed the Attorney General to challenge the use of poll taxes,[14] both of which had discriminatory effects on voting rights. Congress further requires preclearance in section 5 of the VRA to implement election policy changes in states with a history of racially discriminatory voting barriers to prevent new disenfranchisement laws in these states in section 4. The 1982 amendment to the VRA prohibited voting restrictions with a racially discriminatory impact regardless of intent.[15]

Though felony disenfranchisement laws have held up to Supreme Court scrutiny under the Fourteenth Amendment,[16] section 2 of the VRA provides another means to challenge felon disenfranchisement laws—especially in the context of racial discrimination in the criminal justice system. This Note argues that the Court requires a showing of disparate impact for section 2 claims—purposeful race discrimination is not the standard. This Note posits that, following the 1982 amendments to the VRA ("1982 amendment"), the court should use a *Results Test* (to assess such claims), which connects the challenged voting procedure to the social and historical conditions affecting minority opportunities to participate in the political process.

Section II.A examines the historical origins of felon disenfranchisement laws in the United States as well as the broader trend of racial disenfranchisement after the Civil War. Section II.B details the legal background of the VRA and congressional amendments. Section II.B subsequently argues the standard for discrimination is disparate impact under section 2 due to the 1982 amendment, which the Supreme Court affirmed through the seminal case *Thornburg v. Gingles*.[17] The final portions of Part II cover felony disenfranchisement challenges under the Fourteenth Amendment, comparing two cases—*Richardson v. Ramirez* and *Hunter v. Underwood.*[18] Part II concludes by focusing on the inconsistent application of the VRA to felon disenfranchisement statutes by federal courts.

12. U.S. CONST. amend. XIV, § 2 (stating the right to vote shall not be "abridged, except for participation in rebellion, *or other crime*" (emphasis added)).

13. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C. (2018)).

14. Pub. L. No. 89–110, §§ 4, 10, 79 Stat. at 438–39, 442–43.

15. Lauren Handelsman, Note, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 FORDHAM L. REV. 1875, 1876 (2005).

16. *E.g.*, Richardson v. Ramirez, 418 U.S. 24, 55–56 (1974).

17. *See* Thornburg v. Gingles, 478 U.S. 30, 32 (1986).

18. Hunter v. Underwood, 471 U.S. 222 (1985).

Section III.A posits that, despite a circuit division on the issue, convicted felons have standing to bring section 2 challenges of felony disenfranchisement statutes before the courts. Section III.B suggests a proper application of the Results Test to felon disenfranchisement statutes. The Note focuses on the disparate impact the criminal justice system has on minority civil rights, in Section III.B.1, and the use of racial campaign tactics through "tough on crime" policies, in Section III.B.2.

I. BACKGROUND

A. FELON DISENFRANCHISEMENT: HISTORICAL ORIGINS AND ADOPTION IN THE UNITED STATES

1. Origins of Felon Voting Restrictions

Voting rights are essential to participating in the democratic process and, arguably, distinctly demarcate free persons in a republic.[19] The racially bifurcated expansion of suffrage in the United States, however, produced a dialectic between legislation designed to increase civic participation among white men[20] while establishing a comingling patchwork of race-neutral restrictions whose burden fell on minorities.[21] Before the nineteenth century, white men experienced class-based voting barriers in many states through "property ownership or payment of certain taxes."[22] As the size of the democracy increased, driven by a growing working class with minimal property ownership,[23] most states began to cease the property requirements.[24] State legislatures followed this suffrage expansion for certain white men by creating exceptions to the development of voting rights. Statutes expressly denied women and nonwhites the right to vote.[25] Facially neutral restrictions also began appearing in state election procedures. Lawmakers' simultaneous authority to create the "felon" status, through

19. *See, e.g.*, Gerald L. Neuman, *Rhetorical Slavery, Rhetorical Citizenship*, 90 MICH. L. REV. 1276, 1278 (1992) (reviewing JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991)) ("[T]he history of women's suffrage confirms the primarily symbolic function of the franchise as a badge of citizenship.").

20. References to only "men" in this section is representative only of the fact that women did not have the right to vote at this point.

21. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 20–30 (2012) (discussing systematic efforts to intentionally disenfranchise Blacks after the Civil War while minimizing the burden on white voting rates); *see generally* ANDERSON, *supra* note 7, at 1–43 (discussing the effect of race-neutral statutes on white, as well as Black, disenfranchisement and the utilization of loopholes to increase white voter registration).

22. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 52–56 (2006).

23. *See, e.g.*, *id.*

24. *See, e.g.*, *id.*

25. *See, e.g.*, *id.*

criminal statutes, and to restrict voting rights of those the state determined "felons," which provided one means of unlimited discretion in restricting voting, delivered a catalyst for the pervasive implementation of felony disenfranchisement statutes.[26]

Prior to the Civil War, proponents of felon disenfranchisement laws rested on defenses unrelated to an intentional vote denial based on race.[27] The states initially argued that the "purity of the ballot box" would be tarnished if those citizens marked by the "infamy of a felony" were allowed to vote.[28] For this reason, advocates argued, the states' interest in maintaining election integrity required the existence of these disenfranchisement statutes.[29] Theoretical justifications based in *social contract theory* followed,[30] arguing that the felon has broken the social contract and lacks the "moral competence" to participate in democratic society.[31] The earliest American versions of these laws, in the northeast, mirrored those in Europe, reserving restriction of voting rights to relatively few offenses.[32] The motivation for this first wave of felon disenfranchisement does not seem "plausibly tied to race" since most states did not allow African Americans to vote in the early nineteenth century.[33] Moreover, the criminal justice system was relatively undeveloped at this time; the current structure of policing, criminal statutes, and organized registration of offenders was mostly nonexistent.[34] The same cannot be said, however, about those restrictions passed during the second wave of felony disenfranchisement statutes, which began in the south after the Civil War.

2. Felony Disenfranchisement from the Civil War to the Civil Rights Era

The Civil War Amendments,[35] passed and ratified promptly after the end of the Civil War, transformed a reality entrenched in slavery into a

26. *Id.* at 55–56.

27. *See id.* at 53–55.

28. *See* Afi S. Johnson-Parris, Note, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 110–12 (2003).

29. *Id.* at 111.

30. Social contract theory was first outlined by philosopher Jean-Jacques Rousseau. *Id.* at 112 ("Social contract theory uses a contract 'to justify and/or to set limits to political authority,' thus analyzing political obligation as a contractual obligation.") (quoting MICHAEL LESSNOFF, SOCIAL CONTRACT 2 (1986)).

31. *Id.* at 111–12.

32. *See* MANZA & UGGEN, *supra* note 22, at 22–23.

33. *Id.* at 54.

34. *See id.* ("There were virtually no professional police forces before 1840, and few jurisdictions had criminal courts to deal with routine offenses. For example, Boston did not establish regular police officers until 1838, with New York City and Philadelphia following in 1845.").

35. This refers to the Thirteenth, Fourteenth, and Fifteenth Amendments. *See* ALEXANDER, *supra* note 21, at 29.

system that allowed political franchise and civic participation for Southern Blacks.[36] The Thirteenth Amendment abolished slavery—except for punishment of a crime.[37] Further, the Fourteenth Amendment extended citizenship to newly-freed Blacks in 1868,[38] and the Fifteenth Amendment provided "[t]he right of citizens of the United States to vote shall not be denied . . . on account of race, color, or previous condition of servitude" in 1870.[39] Consequently, hundreds of African Americans held elected positions in state legislatures within years.[40]

The rapid proliferation of Black civic participation evoked a strong response from white Southern Democrats.[41] Part of this reaction included enacting felon disenfranchisement statutes; a third of the states passed broad felony disenfranchisement laws that imposed disenfranchisement as a penalty for all felonies committed within twenty-five years of the Civil War ending.[42] Concurrent with the adoption of these laws, southern states began methodically enforcing and applying criminal codes in a racially discriminatory fashion.[43] The Black Codes, in reaction to the economic

36. During Reconstruction, electorates, due to these new voting citizens, elected many African Americans to legislatures for the first time. *See id*. at 29–30.

37. U.S. CONST. amend. XIII, § 1.

38. This extension of rights occurred quickly post-Civil War. U.S. CONST. amend. XIV, § 1.

39. U.S. CONST. amend. XV, § 1.

40. *See* ALEXANDER, *supra* note 21, at 29.

41. *Id*. at 30 ("The backlash against the gains of African Americans in the Reconstruction Era was swift and severe."). Many social scientists have written that pernicious racial stereotypes of Blacks as aggressive to depict former slaves as unworthy of freedom, however more deleterious was the response in state capitals that aimed directly at restricting Black access to franchise. *See generally* Jon Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 376–81 (1997) ("[I]n 'mock jury' trials, defendants who are African-American or Hispanic receive harsher judgments of guilt and punishment than white defendants, and are also seen as more likely to commit violent crimes in the future." (citation omitted)); Heather M. Kleider-Offutt et al., *Black Stereotypical Features: When a Face Can Get You in Trouble*, 26 CURRENT DIRECTIONS PSYCHOL. SCI. 28, 28–33 (2017) (demonstrating the prevalence of implicit bias towards African Americans); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GROUP DYNAMICS 101, 105–12 (2002); Mark Peffley et al., *Racial Stereotypes and Whites' Political Views of Blacks in the Context of Welfare and Crime*, 41 AM. J. POL. SCI. 30, 30–33 (1997) ("Whites . . . who continue to negatively stereotype [B]lacks—perceiving them to be 'lazy' or 'violent'—may be substantially more likely to oppose welfare payments or support 'get tough' policies on crime, especially when [B]lacks are the targets of such policies."); CalvinJohn Smiley & David Fakunle, *From "Brute" to "Thug:" The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV'T 350, 353–66 (2016) (detailing the historical transformation of Black stereotypes from slavery to the current era).

42. *See* MANZA & UGGEN, *supra* note 22, at 55–56. Important to note is that states have authority over state voting procedures—notwithstanding VRA preclearance in covered jurisdictions—and state legislatures determine the existence of felony disenfranchisement statutes. *See* U.S. CONST. amend. XIV, § 2.

43. ALEXANDER, *supra* note 21, at 28 (describing the various laws passed in the post-war south to maintain control over Black citizens). The use of criminality was central to subordinate African Americans both during slavery and after the Civil War. For more information on this, see generally BEN FOUNTAIN, BEAUTIFUL COUNTRY BURN AGAIN: DEMOCRACY, REBELLION, AND REVOLUTION 396–400

concerns of former slaveowners, attempted to perpetuate the previous slave-based labor system and retain control over the Black population.[44] Vagrancy laws, adopted by nine southern states,[45] criminalized unemployment and selectively targeted Blacks. Eight of these states implemented convict laws allowing plantation owners and private companies to hire convicts and prisoners for minimal pay.[46] These overlapping laws ensured the decreased mobility of the Black labor force—former slaves continued working for their old master out fear of vagrancy, or they would face criminal punishments producing the same outcome through the convict laws.[47] The mass arrest and incarceration of Blacks defined the last half of the nineteenth century.[48] The ostensible Black identity, in this period, transformed from *slave* to *criminal*.[49]

While racial criminalization and felon disenfranchisement statutes profoundly depressed the minority vote, state legislatures had developed race-neutral voting procedures that diluted the remaining vote with near perfection.[50] The *Mississippi Plan of 1890* directly attacked Black access[51] to the voting booth through an assortment of "poll taxes, literacy tests, understanding clauses, newfangled voter registration rules, and 'good character' clauses."[52] Lawmakers emphatically defended the voting

(2018) (detailing the racial use of policing by whites from slave patrols to current day to establish social control over Blacks); Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 11–17 (Angela J. Davis ed., 2017).

44. *See* ALEXANDER, *supra* note 21, at 28–30; Gary Stewart, Note, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2257–63 (1998).

45. ALEXANDER, *supra* note 21, at 28.

46. *See id.*

47. *See id.*

48. *See* Stevenson, *supra* note 43, at 12.

49. *See generally id.* at 3–30 ("More enduring was the mythology of [B]lack criminality and the way America's criminal justice system adopted a racialized lens which menaced and victimized people of color, especially [B]lack men. The presumptive identity of [B]lack men as 'slaves' evolved into the presumptive identity of 'criminal,' and we have yet to fully recover from this historical frame."). A separate analysis of the connection between Black criminalization and disenfranchisement efforts could focus on the use of violence and intimidation by both state forces and domestic terrorist organizations like the Ku Klux Klan ("KKK").

50. *See generally* ANDERSON, *supra* note 7, at 1–43 (explaining the different methods used in the South to lower Black voter turnout to *de minimis* levels, such as the Mississippi Plan, literacy tests, and understanding clauses.).

51. *Race and Voting in the Segregated South*, CONST. RTS. FOUND., http://www.crf-usa.org/black-history-month/race-and-voting-in-the-segregated-south [https://perma.cc/D3LK-JLZ3] ("In 1890, Mississippi held a convention to write a new state constitution to replace the one in force since Reconstruction. The white leaders of the convention were clear about their intentions. 'We came here to exclude the Negro,' declared the convention president. Because of the Fifteenth Amendment, they could not ban [B]lacks from voting. Instead, they wrote into the state constitution a number of voter restrictions making it difficult for most [B]lacks to register to vote.").

52. ANDERSON, *supra* note 7, at 3. ("[T]he Magnolia State passed the Mississippi Plan, a dizzying

restrictions by alleging the need to maintain the integrity of elections, similar to original felony disenfranchisement statutes.[53] After witnessing the plan's success, surrounding states adopted identical restrictions. As a result, the percentage of Black men registered to vote dropped to merely *three percent* in 1892, down from over ninety percent during Reconstruction.[54] Louisiana's Grandfather Clause, which the Supreme Court ultimately invalidated in *Guinn v. United States*,[55] extended franchise to all men eligible to vote before 1867[56] and the lineal descendants of current voters; this law, which many states adopted,[57] was an obvious method to circumvent the white disenfranchisement caused by the systematic, race-neutral efforts to deny Black suffrage.[58] These efforts proved successful—in Louisiana, for instance, the number of registered Black voters dropped from over 130,000 in 1896 to 1,342 by 1904.[59]

array of poll taxes, literacy tests, understanding clauses, newfangled voter registration rules, and 'good character' clauses—all intentionally racially discriminatory but dressed up in the genteel garb of bringing 'integrity' to the voting booth."). Anderson further details the racial impact of poll taxes stating:

> The power of the poll tax derived from several key components. First were the arcane rules about when and where to even pay the tax. The "procedures," C. Vann Woodward observed, were "artfully devised to discourage payment." And, as it was law enforcement that collected the poll tax, the intimidation factor was very real in many locales. Sheriffs, notorious in the [B]lack community for their racism and brutality, were now the gatekeepers to the franchise. . . . There was another built-in obstacle, as well. In most states, the tax was due months before the election. One man noted that "paying a poll tax in February to vote in November is to most folks in Texas like buying a ticket to a show nine months ahead of time, and before you know who's playing or really what the thing is all about. It is easy to forget to do, too."

Id. at 8–9.

53. *Id.* at 3.

54. *Race and Voting*, *supra* note 51.

55. Guinn v. United States, 238 U.S. 347, 364–68 (1915). However, the Black disenfranchisement symptomatic of the grandfather clauses remained and Black suffrage was mostly unchanged; Oklahoma, again taking advantage of a loophole, amended its Grandfather Clause to apply to those men eligible to vote before *Guinn*, which included mostly the same electorate covered by the original iteration of the Grandfather Clause in a self-fulfilling prophecy perpetuating Black disenfranchisement. This law stayed in effect until 1939. Alan Greenblatt, *The Racial History of the 'Grandfather Clause'*, NPR (Oct. 22, 2013, 9:44 AM), https://www.npr.org/sections/codeswitch/2013/10/21/239081586/the-racial-history-of-the-grandfather-clause [https://perma.cc/VVP3-58FX] ("The new law said those who had been registered in 1914 — whites under the old system — were automatically registered to vote, while African-Americans could only register between April 30 and May 11, 1916, or forever be disenfranchised.").

56. Uncoincidentally, this meant that no Blacks were able to avoid poll taxes and literacy tests since citizenship was only extended in 1868.

57. After Louisiana, a half-dozen states rapidly enacted grandfather clauses. Greenblatt, *supra* note 55.

58. *Id.* Some states attempted to increase white voter registration with more thinly veiled attempts, such as making poll tax exceptions for the poor and uneducated. *Id*.

59. ANDERSON, *supra* note 7, at 4. These match the disenfranchisement rates from most southern states at the time. John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME LAW. 105, 107 (1972) ("In Alabama, Mississippi and South Carolina disenfranchisement began earlier [than in Louisiana]. In 1883 in Alabama there were only 3,742 registered Negroes out of the 140,000 formerly registered. In South Carolina Negro registration decreased from 92,081 in 1876 to 2,823 in 1898. In Mississippi the decrease was from 52,705 in 1876 to 3,573 in 1898. Systematic exclusion continued up through the present time. Between 1920 and 1930 about 10,000 Negroes voted in Georgia

Poll taxes and literacy tests, along with the other purportedly race-neutral voting restrictions, depressed minority voting so effectively that lawmakers focused minimally on felony disenfranchisement statutes,[60] as did voting rights activists who focused efforts on more overtly discriminatory voting procedures.[61] Felon disenfranchisement efforts, likewise, found support from all dominant political ideologies.[62] Further, most states had already established felon disenfranchisement provisions, and, coupled with the unfettered discretion in determining who qualifies as a felon, felon voting restrictions could be altered dramatically without altering the disenfranchisement statute directly.[63] A few states made restrictive amendments or additions to their felon disenfranchisement statutes at the turn of the century—Oklahoma became the 46th state to add felon voting restrictions, Alabama disenfranchised for discretionary crimes of *moral turpitude*, and both Arizona and New Mexico permanently disenfranchised felons when they became states in 1912.[64] Rather than an influx of crime-based voting restrictions, laws that explicitly criminalized race and stark racial disparities in the enforcement of these crimes defined the early twentieth century.[65] Interrelated efforts to exploit the racialized criminal justice system and disenfranchise minority voters produced tens of thousands of arbitrary arrests of African Americans and a nonwhite voter registration rate around 5 percent in the eleven southern states.[66]

out of a potential Negro electorate of 369,511, and in Virginia the Negro vote at any time in that decade was 12,000 to 18,000 out of a voting-age-or-over and literate Negro population of 248,347.") (quoting BLACK PROTEST: HISTORY, DOCUMENTS, AND ANALYSES 111 (J. Grant, ed. 1968)).

60. *See* ANDERSON, *supra* note 7, at 1–9.

61. *See* Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559, 561–66 (2003).

62. *See* MANZA & UGGEN, *supra* note 22, at 27 ("For classical liberalism, disenfranchisement serves to prevent the illegitimate use of the ballot by [criminals] . . . ; for republicans, disenfranchisement screens out morally unworthy individuals; and, for racists, disenfranchisement laws can be used to target . . . racial . . . groups and reduce their political power.").

63. *See id.*

64. *Id.* at 56.

65. Important to note is the unescapable connection between lynching and the criminal justice system. Most of the Blacks lynched under accusation of rape and murder were demonstrably innocent. The criminal justice system did little to investigate or punish those responsible for the lynching. The threat of lynching drove the mass migration of millions into *urban ghettos*, which allowed for contained policing. The racial hierarchy lynching established permeates to the current era in profound ways. Stevenson, *supra* note 43, at 13–17 ("[T]he administration of criminal justice is tangled with the history of lynching in profound and important ways that continue to compromise the integrity and fairness of the justice system.").

66. *See* Lewis & Allen, *supra* note 59, at 108–09.

B. THE VOTING RIGHTS ACT: LEGAL BACKGROUND

1. Enactment and Initial Success of the VRA

Against the backdrop of competing domestic and international pressures,[67] on August 6, 1965, President Lyndon Johnson signed the VRA into law.[68] The VRA—which outlawed literacy tests, poll taxes, or any voting procedure that discriminates on the basis of race—dramatically altered the voting rights paradigm in the United States.[69] Rather than relying on implementation through private claims under section 2 of the Act,[70] the VRA, under sections 4 and 5, required federal government preclearance before states in the *covered jurisdiction* could make any changes to election laws or procedures.[71] Section 4 determined the states in the covered jurisdiction, and then section 5 mandated those states seek approval for election procedure changes.[72] The subsequent spike in the registration of minority voters showed the VRA was more than symbolic: in Alabama, Georgia, and Mississippi, the percentage of African Americans registered to vote increased from under 35 percent to over 60 percent within five years.[73] Civil rights advocates generally proclaimed the VRA the most effective voting rights legislation in the nation's history.[74]

Liberalizing voting rights through the Act, however, did little to dissolve the underlying institutions of racialized criminal justice or the voting restrictions for felons that commenced a century of disenfranchisement. Social conditions in the 1960s caused a societal focus on crime—specifically criminals—for an alternate reason.[75] Spiking crime

67. America faced a dilemma between priorities in her national and international policy—as U.S. leaders argued that we must stop the spread of communism and support democracy, the Soviet Union attempted to undermine these claims by spreading news reports that the United States did not even guarantee justice for minorities to its citizens. ANDERSON, *supra* note 7, at 17–20.

68. Andrew Glass, *LBJ Signs Voting Rights Act, Aug. 6, 1945*, POLITICO (Aug. 6, 2017), https://www.politico.com/story/2017/08/06/lbj-signs-voting-rights-act-aug-6-1965-241256 [https://perma.cc/ATE3-A9JE].

69. *See* ALEXANDER, *supra* note 21, at 37–39.

70. Section 2, as amended, provides, "No voting qualification or prerequisite to voting . . . shall be imposed . . . by any State . . . 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." 52 U.S.C. § 10301(a) (2018).

71. ANDERSON, *supra* note 7, at 22 (summarizing the effect of the preclearance formula and covered jurisdictions in Section 4 and 5 of the VRA) ("The VRA identified jurisdictions that had a long, documented history of racial discrimination in voting, and required that the Department of Justice or the federal court in Washington, D.C., approve any change to the voting laws or requirements that those districts wanted to make *before* it was enacted.")

72. *Id*.

73. ALEXANDER, *supra* note 21, at 38.

74. *See* ANDERSON, *supra* note 7, at 22 ("The VRA was nevertheless a seismic shift in thought, action, and execution for the U.S. government when compared with the Civil Rights Act of 1957 and its equally enfeebled companion legislation of 1960.").

75. *See generally,* JAMES FORMAN, JR., LOCKING UP OUR OWN: THE STORY OF RACE, CRIME, AND

rates in urban, economically-depressed communities, a byproduct of the rapid proliferation of heroin abuse, stirred anxiety across the United States.[76] Morale-stricken communities pleaded for government intervention to curb the crime wave.[77] The relief did not come in the form of community reinvestment or rehabilitation programs.[78] The federal response, instead, used punitive deterrents by overhauling the criminal justice system. This tripartite solution included stringent penalties, longer sentences, and increased ground-level policing.[79]

2. Constitutional Challenges to the VRA

Opponents of the legislation, particularly concerned that the Act was a constitutional overextension of Congress' enforcement power, immediately filed legal challenges to the VRA.[80] The Supreme Court's decision in *South Carolina v. Katzenbach*[81] upheld the constitutionality of the VRA under the Fifteenth Amendment and, further, affirmed the Act's purpose to "rid the country of racial discrimination in voting."[82] In the decade after *Katzenbach*, Congress twice extended the length of the coverage formula and preclearance requirements in sections 4 and 5 with little resistance—for five years in 1970 and seven years in 1975.[83] The 1975 reauthorization of the Act provided an opportunity for opponents to bring new constitutional challenges. In *City of Rome v. United States*,[84] the Court, again, held that the VRA was a lawful use of congressional power under the Fifteenth

JUSTICE IN THE NATION'S CAPITAL 17–46 (2017) (demonstrating how the War on Drugs illustrates the paradox that African-American communities are both over- and under-policed on crime).

76. *See id.* at 25–31.

77. *See id.*

78. *See id.* at 10–11.

79. And the trend towards punitiveness has only expanded between the War on Drugs, President Clinton's $30 billion crime bill, and the rise of the private prison system. ALEXANDER, *supra* note 21, at 54–57.

80. *See* Handelsman, *supra* note 15, at 1890–91.

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

82. *See id.* at 315; Handelsman, *supra* note 15, at 1890–91.

83. The coverage formula, in section 4 of the VRA, determined which states or political subdivisions were required to have new voting rules or laws precleared by the Department of Justice. This formula was whether, on November 1, 1964, the state maintained a test or device restricting the opportunity to register to vote, such as a literacy test, poll tax, or moral character requirement. Oluoma Kas-Osoka, *A New Preclearance Coverage Formula: Renewing the Promise of the Voting Rights Act*, 47 Wash. U. J.L. & Pol'y 151, 156–57 (2015). The VRA mandated for the section 4 and 5 preclearance and covered jurisdiction formulas to expire originally in 1970. The 1970 amendment extended the provisions for another five years. In 1975, the amendment extended them to seven years. Congress eventually extended them for twenty-five years in a subsequent amendment in 1982. The formula was also expanded to include more states into the covered jurisdiction. *Section 4 of the Voting Rights Act*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/section-4-voting-rights-act [https://perma.cc/6T9Z-AC5C]. A provision protecting *language minority status* was added to address Latinos, Asian Americans, and American Indians that faced barriers to voting through an inability to meet English-literacy requirements.

84. City of Rome v. United States, 446 U.S. 156 (1980).

Amendment, relying on the decision in *Katzenbach*.[85]

Congress reauthorized the VRA, which faced expiration, in 2006, extending sections 4 and 5 for twenty-five years, while simultaneously ending the lull in litigation challenging the Act's constitutionality.[86] Despite a reliance on a "legislative record that exceeded fifteen thousand pages" to determine racial discrimination in voting persists, both section 4 and 5 faced immediate constitutional challenges.[87] In *Northwest Austin Municipal Utility District Number One v. Holder*,[88] the plaintiffs, a small community in the covered jurisdiction, filed a lawsuit requesting permission to *bail out* from preclearance requirements in section 5.[89] The Court avoided broadly reviewing the constitutionality of section 5 by granting the section 4 *bailout* to Northwest Austin Municipal Number One ("NAMUD"),[90] though the decision signaled the Court's reluctance to see the coverage formula and preclearance requirements as *essential* to the VRA's success, as the Court did in *Katzenbach* and *City of Rome*.[91] A few years after *NAMUD*, the Court, rather than avoid the question, reviewed the constitutionality of section 4 in *Shelby County v. Holder*.[92] In holding the preclearance formula unconstitutional, the Court writes that Section 4 was rational when the Court upheld the VRA in *Katzenbach*, but that "our country has changed"[93] and no threat to the voting right exists that justifies preclearance, notwithstanding the record of abuses in the Congressional Record.[94] The *Shelby County* decision, though invalidating the covered jurisdiction and preclearance requirements,[95] did not limit plaintiffs' ability to bring claims under section 2.

3. The Structure of Section 2 Challenges

Section 2 claims require plaintiffs to establish that the "challenged election law, procedure, or practice has a racially disparate impact,"[96] and to

85. *Id.* at 175–80.
86. Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 400–03 (2008).
87. *See, e.g.*, *id.*; FOUNTAIN, *supra* note 43, at 405–11.
88. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009).
89. *Id.* at 196.
90. *See id.* at 205.
91. *See id.* at 196–97.
92. Shelby County v. Holder, 570 U.S. 529, 531–48 (2013).
93. FOUNTAIN, *supra* note 43, at 405 (quoting *Shelby County*, 570 U.S. at 557).
94. *See id.* at 405–11.
95. *See Shelby County*, 570 U.S. at 548.
96. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2148 (2015).

connect this impact to "social and historical conditions."[97] Before the Court's decision in *Mobile v. Bolden*,[98] the standard for section 2 claims required only a showing that the election law operated in a discriminatory fashion, but a plurality of the *Bolden* Court interpreted these claims to require intentional discrimination.[99] Intending to reestablish the pre-*Bolden* standard,[100] Congress amended section 2 to provide that a plaintiff could establish a section 2 violation if the challenged practice denied a racial minority an equal opportunity to participate in the political process under "the totality of the circumstances" of the electoral process ("Results Test").[101] The Senate Judiciary Committee included a report with the legislation that reinforced the breadth of the analysis required; the report outlined seven non-exhaustive factors to consider all relating to the historical interaction between race and the electoral process.[102] Through the inclusion of one particular factor, the extent to which members of the minority group bear the effects of discrimination, Congress stressed the fundamental connection between discrimination in non-electoral institutions—not overtly related to election laws—and access to the political process.[103] The plaintiffs, in Congress'

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

98. City of Mobile v. Bolden, 446 U.S. 55, 58–80 (1980).

99. The Supreme Court found in *City of Bolden* that the VRA was a restatement of the protections afforded by the Fifteenth Amendment—meaning the burden was on the plaintiff to prove that a standard, practice or procedure was enacted for a discriminatory purpose. *See* Roy A. McKenzie & Ronald A. Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 HARV. C.R.-C.L. L. REV. 155, 157–60 (1984).

100. Both *White v. Regester*, 412 U.S. 755, 766 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297, 1300 (5th Cir. 1973), showed no express discriminatory intent in the voting districts while relying on analytical factors in the decisions. *White v. Regester* involved the 1970 Texas legislative reapportionment scheme. The Court ruled that two Texas counties—Dallas County and Bexar County—must replace their multi-member districts with single-member districts. White, 412 U.S. at 756. The plaintiffs met the burden of showing that "the political processes leading to nomination and election were not equally open to participation by the group in question [and] that its members had less opportunity than did other residents in the [legislative] district to participate in the political processes and to elect legislators of their choice." *Id*. at 765–66. The court relied on bifurcated evidence by county to show racial discrimination in voting. Dallas County disenfranchised Blacks primarily; Bexar County barred Mexican Americans from the political process. *See id*. at 766–70. Following *White,* the Fifth Circuit rejected a similar apportionment scheme for Louisiana school boards and police juries in *Zimmer v. McKeithen*, deciding that the apportionment scheme "operate[d] to minimize or cancel out the voting strength of racial or political elements of the voting population." *See* Jennifer G. Presto, Note, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After* City of Boerne, 59 NYU ANN. SURV. AM. L. 609, 611–14 (2004).

101. *See* Presto, *supra* note 100, at 611–14. This test is called the "Results Test" because Congress amended section 2 to require a showing of discriminatory results or impact, rather than showing a true discriminatory purpose or intent, to prove a VRA violation. *Id*. at 610.

102. *Id.*

103. The Senate Judiciary Committee issued a report that accompanied the 1982 legislation recommending seven different factors that should be used in determining if a procedure applies to section 2. *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUST., (Sept. 14, 2018), https://www.justice.gov/crt/section-2-voting-rights-act [https://perma.cc/6T9Z-AC5C].

These factors include:

view, had no requirement to satisfy any particular enumerated factor or quantity of factors under section 2, as well.[104] At first opportunity, the Court affirmed, and later reaffirmed,[105] that the controlling standard was the Results Test in *Thornburg*.[106]

Responding to the "variety and persistence" of minority disenfranchisement laws,[107] congressional members structured this section broadly to include all practices or procedures that could influence the electoral process.[108] The courts have allowed both claims of vote dilution and vote denial, recognizing that "[t]he right to vote can be affected by a *dilution of voting power* as well as by an *absolute prohibition on casting a ballot*."[109] Federal courts, following the instruction from *Thornburg* for section 2 claims, began conducting "a totality of the circumstances analysis in a variety of voting practice challenges."[110] Methods of electing district judges and county *at-large* election schemes are two representative

> 1. the history of official voting-related discrimination in the state or political subdivision;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;.
>
> 3. the extent to which the state of political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
>
> 4. the exclusion of members of the minority group from candidate slating processes;
>
> 5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
>
> 6. the use of overt or subtle racial appeals in political campaigns; and
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id.

104. *See* Presto, *supra* note 100, at 611–14.

105. *E.g.*, Johnson v. De Grandy, 512 U.S. 997, 1009–11 (1994).

106. *E.g.*, Thornburg v. Gingles, 478 U.S. 30, 47 (1986) ("The essence of a [section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [B]lack and white voters to elect their preferred representatives.").

107. Shelby County v. Holder, 570 U.S. 529, 560 (2013) (Ginsburg, J., dissenting) ("Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable 'variety and persistence' of laws disenfranchising minority citizens." (quoting South Carolina v. Katzenbach, 383 U.S. 301, 311 (1966)).

108. Section 2(b) of the Voting Rights Act states: "A violation . . . is established if . . . it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of a class of citizens protected by [race or color or language minority status]." *See Thornburg*, 478 U.S. at 36.

109. Allen v. State Bd. Of Elections, 393 U.S. 544, 569 (1969) (emphasis added).

110. Handelsman, *supra* note 15, at 1893; *see also* text accompanying *supra* note 15.

examples.[111] In *Shaw v. Reno*,[112] the Supreme Court, additionally, invalidated a reapportionment statute that amounted to *racial gerrymandering*.[113] The ultimate question is whether the challenged procedure results in discriminatory effects based on race.

C. CHALLENGES TO FELON DISENFRANCHISEMENT STATUTES

1. Initial Challenges

Felon disenfranchisement statutes endured with little resistance until the last half of the twentieth century when the majority in *Richardson v. Ramirez* established that the Fourteenth Amendment expressly authorizes felon voting restrictions,[114] despite the requirement of the same Amendment not to deny equal protection of the laws to all citizens.[115] The Court concluded that the Fourteenth Amendment did not require states to show a compelling interest before denying felons the right to vote since section 2 states that "when the right to vote . . . is denied to any of the male inhabitants of such State . . . except for participation in rebellion, *or other crime*, the basis of representation therein shall be reduced."[116] Absent from the litigants' claim was an allegation of race discrimination—the dissent's focus on equal protection related to equal protection for *felons*.[117] Then, in *Hunter v. Underwood*, [118] the Supreme Court reviewed a felony disenfranchisement challenge alleging racial discrimination. The Court clarified its decision in *Ramirez* as well—Section 2 does not protect laws intended to discriminate on account of race—but also made clear that a disproportionate impact of the felony disenfranchisement law on a particular racial group, alone, does *not* meet the purposeful racial discrimination standard.[119]

Before the Act, and particularly the 1982 revision, those alleging race discrimination in felony disenfranchisement challenges faced the ultimate burden of showing discriminatory intent.[120] The evidentiary showing

111. League of United Latin Am. Citizens, Council No. 4434 v. Clements, 986 F.2d 728, 813 (5th Cir. 1993) (holding a method of electing district court judges violated section 2); McMillan v. Escambia County, 748 F.2d 1037, 1047 (5th Cir. 1984) (invalidating a county at-large election system under the VRA); United States v. Marengo Cty. Comm'n, 731 F.2d 1546, 1574 (11th Cir. 1984) (holding county at-large elections violated Section 2).

112. Shaw v. Reno, 509 U.S. 630 (1993).

113. *Id.* at 649.

114. Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

115. Justice Marshall argued that equal protection analysis applies to felon disenfranchisement statutes. *Id.* at 76–86 (Marshall, J., dissenting).

116. *See* MANZA & UGGEN, *supra* note 22, at 29–31 (emphasis added).

117. *Richardson*, 418 U.S. at 72–77 (Marshall, J., dissenting).

118. Hunter v. Underwood, 471 U.S. 222 (1985).

119. *Id.* at 233.

120. For the standard for section 2 challenges see *supra* Part II.B.3.

required by the *Hunter* plaintiffs to succeed was exacting; the Court found the express purpose to dilute the African American vote through these statutes in the legislative history. Following *Hunter*, courts routinely rejected *Richardson*'s rejection of strict scrutiny, but the intent standard was too cumbersome to serve as an efficient mechanism for these challenges. The Results Test, however, created an avenue to challenge felon disenfranchisement laws by alleging disparate impact, without disparate treatment.

2. Does Section 2 Apply to Felon Disenfranchisement?

Initial court decisions under the disparate impact standard operated under the assumption felons had section 2 standing, but subsequent federal court opinions have created a split between the circuits on the issue. [121] The Second Circuit addressed the novel issue in *Baker v. Pataki*; sitting en banc, a split panel concluded the use of section 2 in felon disenfranchisement challenges was not permissible.[122] Re-examining the issue later, in *Hayden v. Pataki*,[123] the Circuit again denied the plaintiffs' standing to challenge these statutes under the VRA.[124] Between these two Second Circuit opinions, the Ninth Circuit reasoned differently in *Farrakhan v. Washington*,[125] allowing a felon disenfranchisement claim to proceed.[126] The Eleventh Circuit initially reasoned similarly in *Johnson v. Governor*;[127] however, after a rehearing en banc, the Circuit followed the Second Circuit and denied the use of the VRA in these claims.[128] The Supreme Court denied certiorari in both *Baker* and *Farrakhan*.[129]

121. *See*, *e.g.*, Howard v. Gilmore, No. 99–2285, 2000 WL 203984 (4th Cir. Feb. 23, 2000); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986).

122. Baker v. Pataki, 85 F.3d 919, 921 (2d Cir. 1996).

123. This case was consolidated with *Muntaqim v. Coombe,* 366 F.3d 102 (2d Cir.), *cert. denied*, 543 U.S. 978 (2004) to determine the issue after the Supreme Court denied certiorari. Hayden v. Pataki, 449 F.3d 305, 309–10 (2d Cir. 2006).

124. *See id.* at 317–28 (holding Congress did not intend for the VRA to cover felon disenfranchisement statutes and did not make a clear statement to alter the federal balance of power).

125. Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003), *overruled in part by* Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (ruling on the narrow issue that plaintiffs bringing a section 2 claim must "at least show that the criminal justice system is infected by *intentional* discrimination or that the felon disenfranchisement law was enacted with such intent").

126. In *Farrakhan*, the Ninth Circuit Court of Appeals heard a claim by litigants who were convicted of felonies and subsequently barred from voting. *Farrakhan* involved three litigants convicted of felonies in the state of Washington, all of whom were then currently serving criminal sentences. The appellants argued that Washington's felony disenfranchisement statute "constitute[d] improper race-based vote denial in violation of [s]ection 2 of the [VRA]." *Id.* at 1011–16.

127. Johnson v. Governor of Fla., 353 F.3d 1287, 1303–07 (11th Cir. 2003), *vacated*, *reh'g granted*, 377 F.3d 1163 (11th Cir. 2004) (en banc).

128. Johnson v. Governor of Fla., 405 F.3d 1214, 1232 (11th Cir. 2005).

129. *See* Handelsman, *supra* note 15, at 1900–01.

The circuits disagreed primarily on issues of constitutional interpretation and federalism, with the Second and Eleventh Circuits determining that the application of these statutes to the VRA would disrupt the legal authority the Fourteenth Amendment grants to states to enact these laws.[130] Since the Constitution grants discretion to states over these laws,[131] the *Hayden* court argues, congressional legislation that would alter this balance of power requires a *clear statement* that makes its *intent unmistakably clear* ("clear statement rule").[132] Despite Section 2's broad language, the court believed the express inclusion of felony disenfranchisement in the Fourteenth Amendment differentiates these restrictions from typical voting restrictions.[133] The Eleventh, similarly, thought the VRA needed to satisfy the clear statement rule for the Court to grant standing.[134] The decisions look to the congressional testimony, the Senate Report accompanying the VRA ("Senate Report"), and subsequent voting legislation to infer Congress did not intend for the Act to include felon voting restrictions. Felon disenfranchisement statutes, according to those sources of authority, were not considered *per se* violations of the Act.[135]

Markedly different was the Ninth Circuit's reasoning in *Farrakhan*.[136] Though states *may* deprive felons the right to vote without violating the Fourteenth Amendment, the court reasons, "when felon disenfranchisement results in [vote] denial . . . or vote dilution on account of race or color, [s]ection 2 affords disenfranchised felons the means to seek redress."[137] Relying on *Hunter*, the court posited that states' authority over elections is not absolute and permitting these claims would animate the right of "protection against racially discriminatory voting practices."[138] By allowing Section 2 of the Fourteenth Amendment to prevail over the other sections, the court believed it would be reading an inherent contradiction into the amendment.[139] This reasoning matches the Eleventh Circuit's original view

130. *Id.* at 1901–02.

131. *Id.*

132. Hayden v. Pataki, 449 F.3d 305, 323 (2d Cir. 2006).

133. The court viewed the VRA's broad language—generally referring to all voting practices and procedures—not as a testament of the statute's unambiguity regarding felony disenfranchisement but rather an impetus for tailoring the VRA. *Id.* at 315 ("We are not convinced that the use of broad language in the statute necessarily means that the statute is unambiguous with regard to its application to felon disenfranchisement laws. In any event, our interpretation of a statute is not in all circumstances limited to any apparent 'plain meaning.' ").

134. Johnson v. Governor of Fla., 405 F.3d 1214, 1232 (11th Cir. 2005).

135. *See* Handelsman, *supra* note 15, at 1877.

136. Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003).

137. *Id.* at 1016.

138. *Id.*

139. In Judge Paez's majority panel opinion, the panel affirmed the district court's holding that section 2 applies to felons, but additionally stated that plaintiffs could not rely solely on general,

in *Johnson* before its reversal of the decision.

The "inherent contradictions" that produced these different holdings did not exist before *Richardson*. Legal scholars have argued that Section 2 of the Fourteenth Amendment was ignored by courts before *Richardson*, breathing new life into "a phrase from a long-slumbering sentence."[140] Further, the scholars argue that Congress has never invoked it and the majority's reading in *Richardson* gives legitimacy to a "practice that is out of date."[141] Justice Marshall echoes this view in his *Richardson* dissent, adding that Section 2, along with Sections 3 and 4,[142] must be read in historical context as addressing problems distinct to the Civil War.[143] Moreover, the ratification of the Fifteenth Amendment, others have concluded, effectively repealed Section 2 of the amendment.[144] The Supreme Court, though, has not provided a definitive answer to remedy the issue, and the interpretation of the Fourteenth Amendment remains divided between the circuits.[145]

II. ARGUMENT

A. STANDING: DO FELONS HAVE A CAUSE OF ACTION UNDER THE VRA?

Congress intended the VRA, broadly, to "banish the blight of racial discrimination in voting,"[146] but, as this Note discusses in Section II.C.2, litigants challenging felon disenfranchisement statutes have faced difficulty establishing standing in courts.[147] Standing is a jurisdictional requirement; courts will not review the merits without it.[148] Present Article III standing doctrine has three requirements: an *injury in fact*,[149] causation,[150] and redressability.[151] But this is a minimum constitutional requirement to satisfy

"statistical" evidence of racial bias in the criminal justice system when bringing claims. *Id.* at 1019.

140. *See* Handelsman, *supra* note 15, at 1906 n.203.

141. *Id.* at 1906.

142. U.S. CONST. amend. XIV, §§ 3–4.

143. Richardson v. Ramirez, 418 U.S. 24, 73–74 (1974) (Marshall, J., dissenting).

144. *See* Handelsman, *supra* note 15, at 1906.

145. *See, e.g.*, *id.*

146. *See* Hayden v. Pataki, 449 F.3d 305, 317–18 (2d Cir. 2006) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)). Congress intended the VRA's broad language to allow the act to have the "broadest possible scope." *Id.* at 318 ("It is indisputable that the Congress intended 'to give the Act the broadest possible scope.' " (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969))).

147. *Compare* Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003) (holding that felons have standing under the VRA to challenge disenfranchisement statutes), *overruled in part by* Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010), *with* Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (holding that Congress did not intend for the VRA to cover felon disenfranchisement statutes).

148. *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 221–23 (1988).

149. This is a "distinct and palpable" legally recognized injury. *Id.* at 222 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)).

150. Causation, here, means that the injury was "caused by the conduct complained of." *Id.*

151. The court, for redressability, determines if the injury "is fairly redressable by the remedy

Article III. When plaintiffs assert claims to enforce statutory rights, courts can deny standing, even if all Article III requirements are met, for prudential reasons.[152] The courts use *prudential standing* to decide whether a plaintiff can seek relief in the absence of a clear statutory grant. When prudential standing does not exist, the court is declaring that the plaintiff does not have a cause of action.[153] But, if Congress explicitly confers standing, the court's " 'prudential' hesitation is overcome."[154]

Constitutional challenges to felony disenfranchisement, though often unsuccessful on the merits, have not faced similar standing issues. *Richardson* did not invalidate the challenged statute but reviewed the merits of the claim.[155] The *Hunter* court made clear, as well, that, even if these laws are facially constitutional, statutes restricting felon voting are not without limits: intentional race discrimination is prohibited.[156] Courts would not invalidate a case of felon disenfranchisement on its face, but the protections of the Fourteenth and Fifteenth Amendments created a legally cognizable injury which plaintiffs could "stand on" in court.[157] Congress, too, could enforce these protections through the Amendments' enforcement clauses,[158] as long as the response was "congruent and proportional."[159] The VRA, to the Court, is a constitutional application of congressional power.[160] In *Thornburg*, in affirming the Results Test, the Court deems Congress can constitutionally enforce the Amendments through a disparate impact, rather than a purposeful discrimination, standard.[161]

The application of the clear statement rule, by the Second and Eleventh Circuits, implies the courts believed applying the VRA to felon disenfranchisement would operate as a *per se* invalidation, triggering a dramatic change in the federal and state balance of power. Due to this balance of power, these courts looked for Congress's express intent to include these voting restrictions, above the broad language of any "standard, practice, or procedure" which unambiguously covers felon disenfranchisement.[162] The *Hayden* court argues that the lack of

sought." *Id.*

152. *Id*. at 222–23.
153. *See id.* at 252.
154. *Id.*
155. *See* Richardson v. Ramirez, 418 U.S. 24, 26–34 (1974).
156. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985).
157. *See id*.
158. *See id.*; Hayden v. Pataki, 449 F.3d 305, 323–27 (2d Cir. 2006) (discussing the constitutional balance of power).
159. *See, e.g.*, Clarke, *supra* note 86, at 389–90; *supra* notes 73–92 and accompanying text.
160. Clarke, *supra* note 86 at 391.
161. *See supra* Section II.B.3.
162. *See Hayden*, 449 F.3d at 313 (quoting 42 U.S.C. § 1973(a) (2018)).

congressional discussion regarding felon disenfranchisement during the congressional hearings for the VRA signals that Congress did not intend for the VRA to apply to these laws.[163] However, from the VRA's enactment, Congress intended that the legislation would allow for broad challenges to election policies and procedures to adapt to the elaborate schemes to dilute minority votes in a race-neutral fashion.[164] The Congressional Record shows that the election procedures that operate in a discriminatory manner that Congress could not conceive of contemporaneously with the passage of the VRA are those procedures which the VRA was most designed to target. The court believed, still, that without a plain statement of intent, Congress could not change the power balance between the federal government and the states through legislation.[165]

But the Civil War Amendments had already altered the balance of power between the state and federal governments immensely—particularly in providing equal protection for all citizens. Although the landmark equal protection case *Washington v. Davis* provided that disparate purpose, rather than disparate impact, is the critical factor in determining a constitutional violation, Congress has wider latitude to enforce certain constitutional provisions through the Enforcement Clauses of the Civil War Amendments.[166] *Hunter* found this protection so robust as to cover even those practices authorized by the same Amendment.[167] The overt, intentional discrimination the court found in *Hunter*, in the enactment of the felony disenfranchisement challenge, avoided the necessity of reviewing the disparate impact.[168]

Since the VRA focused specifically on removing racial discrimination in voting, courts should rely on the instruction of *Hunter*, rather than *Richardson*, when applying section 2 to felony disenfranchisement statutes.[169] As the Second Circuit notes, the VRA was a congressional enforcement of the Fifteenth Amendment; and since the Supreme Court has interpreted the Constitution to disallow states to discriminate on the basis of race through felony disenfranchisement statutes, then the VRA should perhaps similarly be understood to enforce this aspect of the Constitution.[170]

163. *Id.* at 319–21.

164. *See, e.g.*, Shelby County v. Holder, 570 U.S. 529, 559–94 (2013) (Ginsburg, J., dissenting); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 2–18 (2008).

165. *See Hayden*, 449 F.3d at 305; Johnson v. Governor of Fla., 405 F.3d 1214, 1229–32 (11th Cir. 2005).

166. Washington v. Davis, 426 U.S. 229, 245 (1976).

167. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

168. *Id.*

169. *See id.*

170. *Hayden*, 449 F.3d at 350–52.

The power shift that concerns the Second and Eleventh Circuit derives from an improper reliance on *Richardson*,[171] rather than recognizing the Court already found the states' power to enact felon disenfranchisement statutes is not absolute.

Prohibiting these challenges would severely limit the broad reach Congress intended.[172] The Ninth Circuit succinctly concludes that "[f]elon disenfranchisement is a voting qualification, and section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA."[173] The historical and social factors influencing socioeconomic status and literacy rates caused both voting procedures to intrinsically limit the voting opportunities for Blacks. However, Congress was further aware that new schemes could arise after the invalidation of old discriminatory voting procedures.[174] For that reason, Congress drafted the VRA broadly to include any procedure or process that appears discriminatory to face scrutiny.[175] Though a felony distinction does not expressly prohibit voting by race, the VRA's enactment was a response to race-neutral voting procedures enacted with the intent to disenfranchise Blacks. Therefore, the plain reading of the text, congressional history, the statute's broad construction, and case law provide a strong justification for felons to have standing in section 2 challenges to felony voting restrictions.[176]

B. FELONY DISENFRANCHISEMENT UNDER THE TOTALITY OF THE CIRCUMSTANCES

The voting restrictions caused by felony records are not borne equally along racial lines. According to 2016 estimates, felony disenfranchisement restricts the right to vote from 6.1 million individuals with prior criminal convictions.[177] Around seven percent of the adult African American population is unable to vote due to a felony conviction; felony disenfranchisement affects under three percent of individuals nationally.[178]

171. *See id.* at 316–17; Johnson v. Governor of Fla., 405 F.3d. 1214, 1217–20 (11th Cir. 2005).

172. Shelby County v. Holder, 570 U.S. 529, 559–94 (2013) (Ginsburg, J., dissenting) ("Early attempts to cope with this vile infection resembled battling the Hydra. Whenever one form of voting discrimination was identified and prohibited, others sprang up in its place. This Court repeatedly encountered the remarkable 'variety and persistence' of laws disenfranchising minority citizens.").

173. Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003), *overruled in part by* Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010).

174. *See Shelby County*, 570 U.S. at 559–94 (Ginsburg, J., dissenting).

175. *Id.*

176. For a description, see section II.A.

177. Uggen, *supra* note 10, at 3. The laws which restrict franchise to felons are more aggressive in the United States than in the rest of the world. *Id.*

178. *Id.*

Only two states—Maine and Vermont—allow prisoners to vote.[179] The other forty-eight states comprise a broad spectrum of political disenfranchisement that range from no restriction once the sentence is completed to a permanent voting restriction: for example, Iowa, Virginia and Kentucky statutes contain provisions that permanently disenfranchise all individuals with felony convictions for life.[180] The punitive measure for felony convictions can often be prison time which, as discussed earlier, converts upon release into restriction of the right to vote.[181]

Successful challenges to felony disenfranchisement statutes require plaintiffs to show the challenged law has a racially disparate impact under the totality of the circumstances. This standard allows courts to perform a much broader analysis, not limited to the state or political subdivision's intent; the court should look at how the social and historical factors in these states interact with the challenged procedure. As Section II of this note discusses, the Senate's non-exhaustive list suggests that this historical analysis should be broad enough to consider all novel ways the states could create to deny or dilute the vote racially.

Application of section 2 requires that Courts examine not only the statute that disenfranchises felons, but also the process by which the state

179. *See* MANZA & UGGEN, *supra* note 22, at 51.

180. Cox & Miles, *supra* note 164, at 121–22. Notwithstanding the jurisdictions affected by felony disenfranchisement statutes, the aggregation of these laws has a compounding effect on voter registration rates. The United States has the highest rate of incarceration; the United States is home to one in four incarcerated individuals worldwide. This era of mass incarceration, as termed by social scientists and legal scholars, is a relatively new phenomenon. In 1972, the population in federal and state prisons was two hundred thousand. By 2014, 2.2 million individuals were incarcerated in the United States. This pointed increase in the United States incarceration rate hit Black communities the hardest. The national incarceration rate was 450 incarcerated per 100,000 for white individuals, but 2,306 per 100,000 for African Americans. *See* ALEXANDER, *supra* note 21, at 158–61. Following the 2019 gubernatorial election in Kentucky, Governor Andy Beshear restored voting rights to nearly one hundred and twenty thousand individuals with nonviolent felony convictions. This, however, did not affect the underlying statute that creates a lifetime ban on voting for felons. Further, in Iowa, Governor Kim Reynolds has signaled support for a constitutional amendment that would restore voting rights to felons upon completion of their sentence. Virginia's Governor, Ralph Northam, has used executive authority to restore voting rights to tens of thousands of individuals. Despite these progressive steps, these three states still ban voting rights for life to convicted felons. *See* Campo-Flores, *supra* note 6.

181. Demographic shifts in the criminal justice system, and prison system specifically, can increase the disenfranchisement rates exponentially. The latent effect of rising incarceration rates is a delayed voting restriction to large cohorts. Many variables play into the long-term chain that begins with arrest and ends subsequently with restrictions to franchise. For a discussion of the causes of mass incarceration, compare ALEXANDER, *supra* note 21, at 185 (positing a confluence of policies termed the federal "War on Drugs" is the main cause of racial mass incarceration), and CHRIS HAYES, A COLONY IN A NATION 136–37, 144–53 (2017) (claiming the socio-political phenomenon of "white fear" influenced politically successful "law and order" policies that led to an increase in the incarceration rate on racial lines), with JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 127–41 (2017) (arguing prosecutorial discretion for violent crimes is the central cause of mass incarceration).

defines felons. States have complex criminal justice systems, layered with discretion, to adjudicate crimes.[182] By including vote restrictions as a punitive measure, the Results Test requires courts to analyze the extent the discriminatory effects in the criminal justice system have hindered the minority access to the political process. To properly investigate the racial differences in the criminal justice system, courts should consider the disparities in both policing and incarceration. The broad analysis, too, should look at the use of racial appeals to crime in the political campaign process.

1. Racial Discrimination in Criminal Justice: Policing and Incarceration

The criminal justice system is extremely complex;[183] detailing each source of racial discrimination reaches beyond the scope of this Note. Challenging felony voting restrictions, however, does not comment on the criminal punishment associated with crime, rather only the civil penalties. For this reason, plaintiffs can succeed in section 2 challenges by producing a historical or social connection between criminal justice and the disenfranchisement of minority voters.[184] The Ninth Circuit echoes this adaptable view in *Farrakhan*, writing, "Thus, simply because Congress did not specifically identify racial bias in the criminal justice system as a relevant factor in identifying a [s]ection 2 violation does not mean that it should be excluded from a totality of the circumstances analysis."[185]

Police enforcement of crimes determines which individuals will enter the criminal justice system; arrest rates reflect a disparate racial impact.[186] Racial discrimination in law enforcement became a divisive topic of national debate when a Ferguson, Missouri police officer, Darren Wilson, killed an unarmed Black teenager, Michael Brown.[187] Local claims of racially disparate treatment spurred a federal investigation into the practices of the Ferguson Police Department.[188] The Department of Justice ("DOJ") report, following the investigation, concluded that "Ferguson's approach to law enforcement both reflects and reinforces racial bias, including

182. *See supra* note 181.

183. *See, e.g.*, PFAFF, *supra* note 181, at 1–11, and other sources cited *supra* note 181.

184. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

185. Farrakhan v. Washington, 338 F.3d 1009, 1020 (9th Cir. 2003), *overruled in part by* Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (suggesting the fact that Congress never discussed criminal justice or felony disenfranchisement in congressional hearings does not limit the VRA's application to felony disenfranchisement statutes).

186. *See supra* note 181 and accompanying text.

187. *See, e.g.*, Annys Shin, *Recalling the Protests, Riots After Fatal Police Shooting of Michael Brown*, WASH. POST (Aug. 3, 2017), https://www.washingtonpost.com/lifestyle/magazine/recalling-the-protests-riots-after-fatal-police-shooting-of-michael-brown/2017/08/01/9992f044-5a8d-11e7-a9f6-7c3296387341_story.html [https://perma.cc/ACX5-W8DD].

188. *Id.*

stereotyping."[189] In a subsequent investigation in Baltimore, the DOJ found that "the racial disparities in [Baltimore Police Department]'s stops and searches are further in BPD's arrest practices."[190] Studies conducted in various states have consistently reflected these results—statistics in New Jersey, New York, Maryland and Florida show dramatically different outcomes based on race.[191] In 2014, seventy police departments nationally arrested Blacks at a rate ten times greater than that of whites.[192]

Historians have noted the connection of *ground policing* to slave-era policies used to control slaves,[193] arguing this foundation created the disparate impact present today.[194] The origin of policing in southern colonies was in the form of slave patrols, which were "mounted whites who rode . . . their assigned 'beats'—the word originated with the patrols—seeking out runaway slaves . . . ."[195] These informal patrols would eventually evolve into publicly funded forces.[196] Following the Civil War, southern policing involved racially discriminatory enforcement of vagrancy and convict laws to force African Americans into *slave-like conditions*.[197] Policing in the first half of the twentieth century, conversely, did not provide the same protection and security to Blacks as it did to whites; law enforcement rarely investigated lynchings and other violent acts towards minorities.[198] The War on Drugs, supplemented by President Clinton's Federal Crime Bill,[199] increased and expanded the role of police enforcement, with minority communities experiencing the worst effects.[200] An NAACP report found, in some counties, that Blacks were thirty times

189. U.S. DEP'T OF JUSTICE: CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/MT7Q-RE4P].

190. The report found statistical evidence that the department disproportionately intrudes upon the lives of African Americans. U.S. DEP'T OF JUSTICE: CIVIL RIGHTS DIV., FEDERAL REPORTS ON POLICE KILLINGS 241 (2017).

191. *See* ALEXANDER, *supra* note 21, at 133–34; Renée M. Hutchins, *Racial Profiling: The Law, the Policy, and the Practice*, *in* POLICING THE BLACK MAN, *supra* note 43, at 95, 103–06.

192. *See* Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity,'* USA TODAY (Nov. 19, 2014, 5:13 PM), https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207 [https://perma.cc/Z3NC-5WBT].

193. Ground policing refers to the manner of enforcement where police offers patrol geographic areas and hold inordinate discretion in which suspects to stop or search. *See* FOUNTAIN, *supra* note 43, at 398–400.

194. *See id.*; *see generally* SALLY E. HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 107–24 (2001) (discussing the history of patrols and their duties in policing slaves' daily lives).

195. FOUNTAIN, *supra* note 43, at 397.

196. *Id.* at 398.

197. *See* Hutchins, *supra* note 191, at 96.

198. Stevenson, *supra* note 43, at 13–17.

199. ALEXANDER, *supra* note 21, at 56–57.

200. *See id.*

more likely to face marijuana charges than whites.[201]

It might be tempting for courts to separate policing today from these historical origins due to the fractured nature of police departments,[202] but this analysis would be incomplete. The appropriate application of felon disenfranchisement under the Results Test requires courts to consider the social and historical origins of law enforcement, including its racially discriminatory origins, the anticrime legislation that has expanded its presence with fervor in minority communities,[203] and how this has resulted in a disparate racial impact.

Policing is the threshold for entering the criminal justice system, but the prosecution of crimes determines which individuals become felons. Prosecutors hold the sole, generally unreviewable, authority to make charging decisions once police apprehend the alleged criminals.[204] Prosecutors, further, face no restrictions on the number of charges if probable cause exists. Remarkably few cases proceed to trial to determine guilt; plea bargains clear criminal dockets with minimal resources.[205] Defendants plead guilty in around 95 percent of cases.[206] Facing a long possible sentence, estimates show that between 2 and 5 percent of *innocent* defendants choose the plea bargain.[207] Depending on the circumstances, individuals could face the loss of the right to vote, along with incarceration, from the pressure to plead guilty. The incarceration rate in the United States exceeds all developed nations—with 5 percent of the world's population, the country incarcerates 25 percent of the world's prisoners.[208]

Extensive research has highlighted the racial disparities in incarceration rates, but the rapid growth of these inequalities requires courts to analyze the connection to felony voting restrictions.[209] Social scientists and legal scholars have argued over the source of these disparities, but universally recognize the disparate outcomes for minorities in the prison system. Incarceration rates are critically connected to felon disenfranchisement because felonies are generally crimes that face at least a year in prison.[210]

201. Hutchins, *supra* note 191, at 96.

202. *See* PFAFF, *supra* note 181, at 1–16 (explaining that the criminal justice systems is made up of 3,144 county systems).

203. *See* Hutchins, *supra* note 191, at 96.

204. *See* PFAFF, *supra* note 181, at 127–41.

205. *Id.* at 133 ("Plea bargaining not only shields the prosecutor from accountability, it also makes them more powerful by allowing them to process more cases per year.").

206. *Id*. at 132.

207. *See* ALEXANDER, *supra* note 21, at 87–89.

208. *See* PFAFF, *supra* note 181, at 1.

209. *See supra* note 43, and accompanying text.

210. Jeremy Travis & Bruce Western, *Poverty, Violence, and Black Incarceration*, *in* POLICING THE BLACK MAN, *supra* note 43, at 294, 301.

The racial disparities in incarceration rates grew most substantially between the 1970s and 1990s.[211] While Barack Obama was serving as the first African American elected President, arguably a product of the diverse populous the VRA helped create,[212] the incarceration rate for Blacks reached nearly six times the rate for whites.[213]

The resulting criminal records, carried disproportionately by minorities, create a population of individuals that could face civil penalties through disenfranchisement statutes.[214] Accurately analyzing the discriminatory effects of the prison system will be central to the courts' inquiry under the Results Test. Courts, along with this analysis, should also focus on the treatment of crime and criminals politically since this is the manner in which criminal codes and disenfranchisement statutes are passed into law.

2. Crime and Politics

Though initially rising crime rates urged a response to crime, political opportunists quickly utilized the race-neutral focus on "[getting] tough on crime" to elicit a racially motivated response from whites without expressly using racial terms.[215] During the Civil Rights movement, expressly racialized electorate appeals would politically damage candidates.[216] Nevertheless, the Southern Strategy,[217] a Republican electoral strategy designed to sympathize with white southern resentment, which was adopted by Nixon preceding the 1968 presidential election victory, used racial appeals in coded language to achieve political success without backfire. Courts recognize the existence of racial campaign tactics could result in discriminatory voting practices and procedures. In *White v. Regester*, which helped form the pre-*Bolden* discrimination standard, the Court relied on racial campaign tactics in Dallas in forming the objective factors used to invalidate the multi-member districts.[218]

The *White* Court wrote, regarding Bexar County elections, "[the organization in effective control of the Democratic Party] did not need the

211. *See id.* at 302.

212. *See* ANDERSON, *supra* note 7, at 1–43.

213. *See* PFAFF, *supra* note 181, at 1; THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS (2018), https://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf [https://perma.cc/4USQ-4GS7].

214. *See* THE SENTENCING PROJECT, *supra* note 213, at 7.

215. ALEXANDER, *supra* note 21, at 54–58.

216. *Id.*

217. The strategy focused on using race-neutral references to social programs, crime, and inner cities as racial dog whistles. Lee Atwater was famously caught on tape admitting the Southern Strategy was a replacement for not being able to use racial expletives anymore. HAYES, *supra* note 181, at 145–47.

218. White v. Regester, 412 U.S. 755, 767 (1973).

support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community."[219] The awareness of vote dissolution is not confined to the courts. The public often remains skeptical of politicians use of crime-focused messages with racial undertones. Congress, too, attempted to halt the use of racial appeals by recommending courts examine "the use of overt or subtle racial appeals in political campaigns" for Section 2 claims.[220]

The use of racial campaign tactics in the 1988 election is a model example of a broader trend of racist campaign tropes.[221] George H.W. Bush's "Willie Horton" advertisement juxtaposed the mugshot of a Black male with a call for robust and punitive crime and punishment policies.[222] The forty-fifth president of the United States Donald Trump notoriously placed ads in four daily newspapers calling for the death penalty for five Black teenagers accused of crimes,[223] crimes for which the individuals in question were later exonerated. These same individuals later received a settlement from New York City for the wrongful imprisonment.[224] Scholars have argued that the Willie Horton Ad changed the tone of Bush's campaign and increased the level of dog-whistle politics during the 1988 election.[225] This same punitive, law-and-order focus inspired many of Trump's 2016 presidential campaign platforms.[226]

News reports covering the 2018 election reflect similar tactics. Republicans repeatedly focused on illegal immigration from Mexico because, as President Trump tweeted on November 26, 2018, the migrant

219. *Id*.

220. Bart Jansen & Alan Gomez, *President Trump Calls Caravan Immigrants 'Stone Cold Criminals.' Here's What We Know.*, USA TODAY (Dec. 6, 2018, 2:00 PM), https://www.usatoday.com/story/news/2018/11/26/president-trump-migrant-caravan-criminals/2112846002 [https://perma.cc/TG22-ZZUQ].

221. *E.g.*, Monte Piliawsky, *Racial Politics in the 1988 Presidential Election*, 20 BLACK SCHOLAR 30, 30–37 (1989).

222. *See* ALEXANDER, *supra* note 21, at 54–55; Rachel Withers, *George H.W. Bush's "Willie Horton" Ad Will Always Be the Reference Point for Dog-Whistle Racism*, VOX (Dec. 1, 2018, 4:10 PM), https://www.vox.com/2018/12/1/18121221/george-hw-bush-willie-horton-dog-whistle-politics [https://perma.cc/ZN3Z-QB2].

223. Sarah Burns, *Why Trump Doubled Down on the Central Park Five*, N.Y. TIMES (Oct. 17, 2016), https://www.nytimes.com/2016/10/18/opinion/why-trump-doubled-down-on-the-central-park-five.html [https://perma.cc/L3SS-QTES].

224. Benjamin Weiser, *Settlement Is Approved in Central Park Jogger Case, but New York Deflects Blame*, N.Y. TIMES (Sept. 5, 2014), https://www.nytimes.com/2014/09/06/nyregion/41-million-settlement-for-5-convicted-in-jogger-case-is-approved.html [https://perma.cc/4CC5-G249].

225. Dog-whistle politics refer to the same principles found in the Southern Strategy of using coded, racial appeals for political gain. Withers, *supra* note 222.

226. *Id.*

caravan[227] is full of "stone cold criminals."[228] The coded, racist appeals are so glaring that one week before the 2018 midterm election three major news networks rejected a Trump Campaign advertisement that blamed Democrats for the crimes caused by one undocumented individual.[229] The Trump campaign was not alone. In California, a republican candidate sent out campaign literature calling his Palestinian-Mexican opponent a national security threat;[230] a New York Representative released advertisements referring to his Black opponent as a "big city rapper."[231]

While the politicization of racial stereotypes in a campaign is an essential factor in determining discrimination in the totality of the circumstances, courts must weigh the presence of hyperbole and misinformation regarding racial stereotypes and crime to justify policy initiatives. As discussed above, the Trump Campaign, even as recently as the 2018 midterm election, used racial appeals in campaign messaging surrounding illegal immigration. What began as a campaign promise to "Build the Wall" became the top Trump Administration goal for the President's first term.[232] On December 22, 2018, failed negotiations between the White House under President Trump and a divided legislature over border wall funding created the longest government shutdown in United States history.[233] The Trump Administration has consistently made national security arguments to justify the border wall, proclaiming the southern border of the United States is a gateway for violent criminals and drugs to enter the country.[234] President Trump, too, declared a national emergency

227. The caravan has repeatedly been reported as containing asylum-seeking individuals. Dara Lind, *The Migrant Caravan, Explained*, VOX (Oct. 25, 2018), https://www.vox.com/2018/10/24/18010340/caravan-trump-border-honduras-mexico [https://perma.cc/D2LS-XUPK].

228. Jansen & Gomez, *supra* note 220.

229. Brian Stelter & Oliver Darcy, *NBC and Fox Finally Stop Running Trump's Racist Ad After It Was Viewed by Millions*, CNN (Nov. 5, 2018, 3:06 PM), https://www.cnn.com/2018/11/05/media/nbc-trump-immigration-ad/index.html [https://perma.cc/9VKY-24GG].

230. Noah Lanard, *Antonio Delgado Overcomes Racist Ads Portraying Him as a "Big-City Rapper" to Win House Seat*, MOTHER JONES (Nov. 6, 2018), https://www.motherjones.com/politics/2018/11/antonio-delgado-overcomes-racist-ads-portraying-him-as-a-big-city-rapper-to-win-house-seat [https://perma.cc/B6VD-6AV8].

231. *Id.*

232. Ron Nixon & Linda Qiu, *Trump's Evolving Words on the Wall*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/us/politics/trump-border-wall-immigration.html [https://perma.cc/QD3V-NWWR]; Miriam Valverde, *How Trump Plans to Build, and Pay for, a Wall Along U.S.-Mexico Border*, POLITIFACT (July 26, 2016), https://www.politifact.com/truth-o-meter/article/2016/jul/26/how-trump-plans-build-wall-along-us-mexico-border [https://perma.cc/2CUE-NGGQ].

233. Jacob Pramuk & John N. Schoen, *The Partial US Government Shutdown Is Tied for the Longest Ever as Trump Border Wall Fight Rages on*, CNBC, (Jan. 11, 2018, 8:51 AM), https://www.cnbc.com/2019/01/10/government-shutdown-ties-for-longest-ever-amid-border-wall-fight.html [https://perma.cc/PSB9-F38B].

234. *See supra* note 225 and accompanying text.

over the "border crisis."[235]

However, these characterizations of undocumented immigrants and the empirical data regarding crime and immigration are not in agreement. The CATO Institute, a libertarian research institute, found that native-born citizens are more likely to have criminal convictions than immigrants, either documented or undocumented.[236] In particular, "[a]s a percentage of their respective populations, there were 56 percent fewer criminal convictions of illegal immigrants than of native-born Americans in Texas in 2015."[237] Despite these empirical conclusions, the administration continued to use anecdotes to rationalize an expensive barrier between the United States and Mexico. On January 10, 2019, even conservative-friendly Fox News suspended its coverage of President Trump's remarks at an immigration roundtable event in which President Trump described in vivid detail anecdotes of human-trafficking across the southern border.[238] The Trump administration's laser-like focus on crime and immigration supports the common conception within certain political parties that these criminal representations are useful for political benefit.

Politicians' use of discriminatory, racial stereotypes of Hispanic individuals for political gain in discussing illegal immigration mirrors the political use of stereotypes about Black communities through the "crime and punishment" appeals. These harmful and pervasive racial appeals to crime illuminate the inability to separate felon disenfranchisement statutes from their creation to perpetuate Black disenfranchisement. These examples are not localized; these are often national campaign platforms. Under the Results

235. *See* Jordan Fabian, *Trump Declares National Emergency at Border,* HILL (Feb. 15, 2019, 10:50 AM), https://thehill.com/homenews/administration/430092-trump-signs-emergency-declaration-for-border [https://perma.cc/GS7Y-C65Q].

236. Christopher Ingraham, *Two Charts Demolish the Notion that Immigrants Here Illegally Commit More Crime*, WASH. POST (June 19, 2018, 11:46 AM), https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime/?utm_term=.0467eed95335 [https://perma.cc/4QWM-4KRT].

237. *Id.*

238. Aaron Rupar, *Fox News Cuts away from Trump Roundtable After He Describes Human Trafficking in Grisly Detail*, VOX (Jan. 10, 2019, 5:05 PM), https://www.vox.com/2019/1/10/18177405/trump-tape-human-trafficking-border-wall [https://perma.cc/ASR6-FQAV]. The full remarks by President Trump were:

> They drive. They just go where there's no security, where you don't even know the difference between Mexico and the United States. There's no line of demarcation. They just go out and where there's no fencing, or walls or any kind, they just make a left into the United States and they come in and they have women tied up. They have tape over their mouths, electrical tape, usually blue tape, as they call it. It's powerful stuff. Not good. And they have three, four, five of them in vans, or three of them in back seats of cars. And they just drive right in. They don't go through your points of entry. They just go right through. And if we had a barrier of any kind — a powerful barrier, whether it's steel or concrete — if we have a barrier, they wouldn't be able to make that turn. They wouldn't even bother trying.

Id.

Test, states would have a difficult task in proving that the felon disenfranchisement statutes were created in a vacuum, isolated from historical trends of minority disenfranchisement and the current political environment flooded with racial stereotypes and images that portray minorities, of multiple races, as criminals.

This recent political focus centering around the criminal nature of undocumented aliens—which this Note terms *The Southwestern Strategy*—has the potential to have real consequences for the criminal justice outcomes for Latino citizens. Latinos have already faced a disproportionate level of incarceration relative to their share of the populace. In 2017, Hispanics accounted for 23 percent of inmates while only representing 16 percent of the population.[239] Further, the tactics used by Immigration and Customs Enforcement ("ICE"), the primary bureaucratic agency directed at overseeing unauthorized immigration, have proven increasingly inaccurate. A Los Angeles Times investigation found that ICE has released 1,480 citizens since 2012 after verifying their immigration status.[240] A study from the CATO Institute, however, extrapolates that ICE wrongfully detained 3,506 citizens in Texas alone between 2006 and 2017.[241] More recently, in Florida, 420 citizens faced deportation after ICE directed local law enforcement to detain these individuals.[242] One such wrongful detention culminated in a $190,000 settlement, approved by the Grand Rapids, Michigan city council, to a US-born marine of Latino descent that these federal immigration officials wrongfully detained.[243] Racial profiling by federal officials, on the basis of presumed citizenship status, increases the number of interactions between law enforcement and Latino individuals. This ultimately can lead to heightened opportunity for these communities to suffer from felony arrest and eventual disenfranchisement.

Plaintiffs, claiming felony disenfranchisement violates section 2, can

239. The imprisonment rate for whites was 272 per 100,000 citizens, whereas this rate for Latinos was 823 per 100,000. John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison Is Shrinking*, PEW RES. CTR. (Apr. 30, 2019), https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison [https://perma.cc/626K-5V5P].

240. Paige St. John & Joel Rubin, *Must Reads: ICE Held an American Man in Custody for 1,273 Days. He's Not the Only One Who Had to Prove His Citizenship*, L.A. TIMES (Apr. 27, 2018, 5:00 AM), https://www.latimes.com/local/lanow/la-me-citizens-ice-20180427-htmlstory.html [https://perma.cc/9MTY-4NM7].

241. DAVID J. BIER, CATO INST., U.S. CITIZENS TARGETED BY ICE: U.S. CITIZENS TARGETED BY IMMIGRATION AND CUSTOMS ENFORCEMENT IN TEXAS (2018), https://www.cato.org/sites/cato.org/files/pubs/pdf/irpb-8.pdf [https://perma.cc/BR64-ZTK5].

242. Darlena Cunha, *ICE Is Dangerously Inaccurate*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/opinion/ice-raids.html [https://perma.cc/R4AE-6NXX].

243. Alex Horton, *Police Knew a War Veteran Was a U.S. Citizen. ICE Detained Him Anyway.*, WASH. POST (Nov. 14, 2019, 1:25 PM), https://www.washingtonpost.com/national-security/2019/11/14/police-knew-war-veteran-was-us-citizen-ice-detained-him-anyway [https://perma.cc/G53Y-Z224].

focus on the history of law and order tactics and the current usage of racial campaign appeals to show these pleas have influenced the preservation of strict disenfranchisement punishments. The urban areas inflicted with crime in the 1960s suffer presently from criminal stereotypes.[244] Despite decreasing crime rates, the criminal justice system experiences still increasing incarceration and ultimately disenfranchisement. Further, these litigants can produce evidence of the continued use of racial appeals to elicit support for policy initiatives that can harm marginalized groups.[245] Similar to literacy tests,[246] that used a race-neutral indicator to limit Black voting registration, felony disenfranchisement suffers from the fallacious underpinning that awards voting rights based on the merit of avoiding a felony. Section 2, as amended, requires the consideration of the disparate impact and granting of crimes determined by many levels of discretion in the criminal justice system.[247] Felony disenfranchisement laws are connected to the same historical conditions that created literacy tests.

The political environment in a given state jurisdiction also requires federal courts to carefully examine a given state's independent history of disenfranchisement laws, including efforts by state actors to create new race-neutral procedures to circumvent challenges of discriminatory policies.[248] Like Oklahoma's response to *Guinn*'s invalidation of the Grandfather Clause, states will often craft thinly-veiled legal amendments that maintain the disparate impact of discriminating laws while also preserving the constitutionality of the statute in the face of potential constitutional challenges.[249]

Section 4 of the VRA sought to minimize litigation and efficiently administer decisions regarding election procedures through preclearance, as

244. FORMAN, *supra* note 75, at 1–17.

245. One example of how the Trump Administration's immigration policy has harmed individuals is the family separation policy. *See generally* Maya Rhodan, *Here Are the Facts About President Trump's Family Separation Policy*, TIME (June 20, 2018, 10:37 AM), http://time.com/5314769/family-separation-policy-donald-trump [https://perma.cc/DFM9-JW76] (providing an overview of Trump's border policy, discussing future implications, and contrasting with past policy); Maya Rhodan, *The Family Separation Policy Ended. Now the Trump Administration Is Pursuing a Family Detention Policy,* TIME (Sept. 6, 2018), http://time.com/5388643/family-separation-policy-court-agreement [https://perma.cc/CN77-A5CV] (articulating the Trump Administration's practices after the ending of family separation).

246. Literacy tests were ultimately found discriminatory but originally were justified by arguing the electorate should be literate to make an informed decision. *See* ANDERSON, *supra* note 7, at 3, 5–7.

247. Police, prosecutors, and judges all have an inordinate amount of discretion in arrest, charging, and sentencing decisions respectively. *See* PFAFF, *supra* note 181, at 1–10.

248. This fear was expressed in Ginsburg's *Shelby County* dissent when she characterized disenfranchisement laws as a hydra that pop up in new ways when an old loophole is closed. Shelby County v. Holder, 570 U.S. 529, 560 (2013) (Ginsburg, J., dissenting).

249. Guinn v. United States, 238 U.S. 347, 368 (1915) (invalidating the grandfather clause in Oklahoma).

opposed to section 2 as-applied challenges.[250] However, in light of *Shelby*'s rejection of preclearance, litigants will need to show the political environment in the state demands increased scrutiny under section 2. Though this factor appears to place a more significant burden on the original covered preclearance jurisdiction,[251] instead the context and origination of felony disenfranchisement statutes post-reconstruction could make this factor challenging to overcome by any state adopting a felony disenfranchisement statute.

CONCLUSION

Racism, rather than any other political philosophy, has been America's guiding ideology since its inception. The original Constitution protected the rights of slaveowners and the institution of slavery even before the Bill of Rights preserved the rights which we consider fundamental today.[252] Eleven clauses concerned slavery; "[ten] protect slave property and the powers of masters."[253] The "three-fifths clause" dramatically increased the political power of southern slaveholding states, and Article 4 did not allow an enslaved individual to gain freedom by escaping to a non-slaveholding state.[254] It has been noted that "[t]he great divide in America has always been the color of skin . . . ."[255]

James Baldwin recognized the influence of racism when he wrote that "history is not our past . . . it is the present."[256] *Slave Patrols* eventually became legally sanctioned forces enforcing racist laws, which slowly transformed into the network of police departments currently applying laws in a racially discriminatory manner. Each step in the progression has attempted to add more legitimacy to the process through the enactment of seemingly race-neutral laws applied by individuals with limitless discretion. Desmond Meade experienced this firsthand through his felony convictions and losing his ability to vote. Rather than become another historical statistic,

250. *See* ANDERSON, *supra* note 7, at 25–27 (explaining past Civil Rights Acts had not been as effective as the VRA in remedying African-American disenfranchisement).

251. *See generally* Shelby County v. Holder, 570 U.S. 529, 571–80 (2013) (Ginsburg, J. dissenting) (explaining the widespread racial disenfranchisement in the original covered jurisdiction that led to the adoption of the VRA).

252. David Waldstreicher, *How the Constitution Was Indeed Pro-Slavery*, ATLANTIC (Sept. 19, 2015), https://www.theatlantic.com/politics/archive/2015/09/how-the-constitution-was-indeed-pro-slavery/406288 [https://perma.cc/V3EK-3MW8]; Juan Perea, *Private: The Proslavery Constitution*, AM. CONST. SOC'Y: EXPERT F. (Feb. 1, 2016), https://www.acslaw.org/expertforum/the-proslavery-constitution [https://perma.cc/H2G7-3B5F].

253. Waldstreicher, *supra* note 252.

254. *Id*.

255. FOUNTAIN, *supra* note 43, at 402.

256. JAMES BALDWIN, I AM NOT YOUR NEGRO 107 (Raoul Peck ed., 2017).

he fought to restore rights to all those in Florida in the same position.

The VRA's purpose was to provide a mechanism for the federal government to prohibit race-neutral election procedures that lead to racially disadvantageous outcomes. Although certain aspects of the VRA, section 4, intended to focus on states with a history of discriminatory voting procedures, Congress also drafted section 2 to ensure broadly no voting mechanisms in the United States discriminated based on race. For this reason, felons should be protected and allowed to bring challenges under the VRA for procedures that result in the abridgment of voting rights, as felon status mirrors the other race-neutral conditions afforded VRA protection. The VRA applies broadly to all voting mechanisms, and the congressional history of the VRA shows that Congress intended to pass broad legislation. Since felony disenfranchisement is a voting qualification, process, or procedure, the VRA applies to felon disenfranchisement statutes.

Upon establishing standing for convicted felons, courts then use a Results Test to determine VRA violation. After weighing the factors under the totality of the circumstances, courts should conclude that the felony disenfranchisement statutes violate section 2 of the VRA. In this era of stark racial disparities in the criminal justice system, courts must carefully examine felony disenfranchisement statutes' connection to social and historical conditions. The criminal justice system has produced such a substantial number of offenders that felony disenfranchisement arguably has the greatest discriminatory effect on voting rights. Campaigns continue to use racialized images to take advantage of stereotypes for political gain.

Further, campaigns supported by racial tactics have existed since Reconstruction; however, a national obsession with "law and order" over the last half-decade has facilitated the proliferation of racial tactics in elections. These campaign tactics create a context that results in voting restriction through felony disenfranchisement laws. Moreover, no view of a state's history of discrimination can be thorough without also weighing the state's political environment surrounding disenfranchisement laws, which includes the state's past attempts to circumvent the Constitution through tailored, race-neutral procedures.

These factors altogether should lead a rational court to conclude that felony disenfranchisement statutes violate the VRA. Although Congress did not contemplate these laws during congressional hearings, Congress intended to draft the VRA broadly to respond appropriately to any new discriminatory voting procedures that could arise. These challenges will not alter the criminal sentence one faces, only restore voting rights to ex-felons. This analysis provides no solution for the racial inequalities in criminal

justice, but, rather, suggests that courts minimize their disparate impact on the right to vote.