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INTENTIONAL DISCRIMINATION IN FARRAKHAN v. GREGOIRE:
THE NINTH CIRCUIT’S VOTING RIGHTS ACT STANDARD
“RESULTS IN” THE NEW JIM CROW

JONATHAN SGRO

Jarrious Cotton cannot vote. . . . Cotton’s family tree tells the
story of several generations of black men who were born in the
United States but who were denied the most basic freedom that
democracy promises—the freedom to vote for those who will
make the rules and laws that govern one’s life. Cotton’s great-
great-grandfather could not vote as a slave. His great-grandfather
was beaten to death by the Ku Klux Klan for attempting to vote.
His grandfather was prevented from voting by Klan intimidation.
His father was barred from voting by poll taxes and literacy tests.
Today, Jarrious Cotton cannot vote because he, like many black
men in the United States, has been labeled a felon and is cur-
rently on parole.1

I. INTRODUCTION

If current incarceration rates hold, three in ten of the next genera-
tion of African-American men will be disenfranchised at some point in
their lives.2 In states that disenfranchise ex-offenders, as many as forty
percent of African-American men will permanently lose their right to
vote.3 Congress enacted the Voting Rights Act of 1965 (VRA) with the
intent to rid the country of racial discrimination in voting.4 In part due to

1. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE
OF COLORBLINDNESS 1 (2010). The “New Jim Crow” refers to the emergence of a
new racial undercaste as result of increased incarceration and legalized discrimi-
nation against those convicted. See generally id.

Jarrious Cotton was a plaintiff in Cotton v. Fordice. See Cotton v. Fordice, 157
F.3d 388, 389 n.1 (5th Cir. 1998) (noting Cotton’s claim was severed from other
appellant’s claim and dismissed). The Fifth Circuit held in that case that a Missis-
sippi felon disenfranchisement provision was free of a racially discriminatory taint.
See id. at 391.

2. See SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED
fd_bs_fdlawsinusDec11.pdf (noting prospective impact of felon disenfranchise-
ment on African-American men).

3. See id. (discussing future impact of felon disenfranchisement if current in-
carceration rates hold). See generally Christopher Uggen et al., Citizenship, Democ-
racy, and the Civic Reintegration of Criminal Offenders, 605 ANNALS AM. ACAD. POL. &
SOC. SCI. 281 (2006) (analyzing size and scope of felon and ex-felon population,
consequences of felony convictions, and implications for crime and reintegration).

Rights Act of 1965 reflects Congress’ [sic] firm intention to rid the country of

(139)
the VRA, people of color are no longer subject to racial intimidation or literacy tests at the ballot box; however, a more subtle and insidious mechanism has replaced these explicit methods to suppress the minority vote: felon disenfranchisement.5

Forty-eight states maintain felon disenfranchisement laws—only Maine and Vermont permit inmates to vote.6 These laws, like their racially explicit predecessors, overwhelmingly affect people of color due to racial bias in the criminal justice system.7 Presently, the United States imprisons a larger percentage of its black population than did South Africa at the height of Apartheid.8 In fact, roughly thirteen percent of African American men, or 1.4 million, are disenfranchised, a rate seven times the national average.9

racial discrimination in voting.”). Congress enacted the Voting Rights Act (VRA) pursuant to its enforcement power under Section 2 of the Fifteenth Amendment. See id. In addition to banning literacy tests and allowing federal monitoring of elections, the VRA required covered jurisdictions to receive approval from the Department of Justice for any changes to voting procedures. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973b (2006)). Section 2 of the VRA was not limited to covered jurisdictions, but generally applied the language of the Fifteenth Amendment to all jurisdictions: “No voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.” Id. at 437 (codified as amended at § 1973(a)).

5. See ALEXANDER, supra note 1, at 38-40 (discussing success of Civil Rights Act and VRA in dismantling Jim Crow system of discrimination in public accommodations, employment, voting, education, and federally financed activities, and noting that “[p]roponents of racial hierarchy found they could install a new racial caste system without violating the law or the new limits of acceptable political discourse, by demanding ‘law and order’ rather than ‘segregation forever’”).

6. See id. at 153 (discussing states that bar felons from voting and noting that “[t]he vast majority of states continue to withhold the right to vote when prisoners are released on parole’ and “some states deny the right to vote for a period ranging from a number of years to the rest of one’s life”); Marc Mauer, Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration, 12 FED. SENT’G REP. 248, 248 (2000) (surveying state “patchwork” of felon disenfranchisement laws); Developments in the Law, One Person, No Vote: The Laws of Felon Disenfranchisement, 115 HARV. L. REV. 1939, 1942 (2002) (discussing state felon disenfranchisement laws).


8. See ALEXANDER, supra note 1, at 6 (discussing disparate impact of mass incarceration and War on Drugs on African Americans).

Initially, advocates alarmed by the disparate impact of felon disenfranchisement on racial minorities brought challenges under the Fourteenth and Fifteenth Amendments of the Constitution.\(^{10}\) However, recent efforts to invalidate felon disenfranchisement laws have focused on section 2 of the VRA.\(^{11}\) Section 2 provides that “[n]o voting qualification or prerequisite to voting . . . shall be imposed or applied . . . in a manner which \textit{results in} a denial or abridgement of the right . . . to vote on account of race or color.”\(^{12}\) Currently, federal circuit courts are divided over whether challenges to felon disenfranchisement laws are cognizable under section 2 of the VRA.\(^{13}\) In this sometimes rancorous division, the Ninth Circuit is the only circuit to explicitly hold that it is permissible to challenge felon disenfranchisement laws under the VRA.\(^{14}\) Nevertheless, in \textit{Farrakhan v. Gregoire (Farrakhan III)},\(^{15}\) the Ninth Circuit recently revised its previous holding en banc and required plaintiffs bringing a section 2 claim alleging racial bias in the criminal justice system to show intentional discrimination in that system or in the challenged law’s passage.\(^{16}\) The Supreme Court has not considered a challenge to felon disenfranchisement under section 2, but its decisions on vote dilution claims under the VRA provide insight into the Court’s understanding of the Act and the framework for successful challenges.\(^{17}\)

This Note (i) argues that the Ninth Circuit’s intentional discrimination requirement directly contradicts the language of the VRA’s 1982 amendments and (ii) suggests a formulation of section 2’s results test that aligns with precedent under the VRA and the Court’s disparate impact jurisprudence.\(^{18}\) Part II briefly outlines the history of felon disenfranchisement laws in the United States and the current racial bias in the criminal justice system, and Part III provides an overview of challenges under section 2 of the VRA.\(^{19}\) Part IV discusses the Ninth Circuit’s deci-

\(^{10}\) For a discussion of early challenges to felon disenfranchisement, see \textit{infra} notes 34-38 and accompanying text.

\(^{11}\) For a discussion of recent challenges to felon disenfranchisement, see \textit{infra} notes 62-117 and accompanying text.


\(^{13}\) For a discussion of federal appellate decisions on felon disenfranchisement, see \textit{infra} notes 62-117 and accompanying text.

\(^{14}\) \textit{See Farrakhan v. Gregoire (Farrakhan III)}, 623 F.3d 990, 992 (9th Cir. 2010) (per curiam) (affirming previous holding that felon disenfranchisement laws may be challenged under section 2 of VRA).

\(^{15}\) 623 F.3d 990 (9th Cir. 2010) (per curiam).

\(^{16}\) \textit{See id.} at 994 (holding that plaintiffs must show intentional discrimination in operation of criminal justice system or enactment of law).

\(^{17}\) For a discussion of vote dilution cases, see \textit{infra} notes 42-61 and accompanying text.

\(^{18}\) \textit{See S. Rep. No. 97-417, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 179 (“This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2.”)}.

\(^{19}\) For a discussion of the history of felon disenfranchisement in the United States and racial bias in the criminal justice system, see \textit{infra} notes 23-33 and accompanying text. For a discussion of challenges to felon disenfranchisement laws
sion in *Farrakhan III*, while Part V analyzes the court’s novel evidentiary standard. Part VI suggests the appropriate evidentiary standard for assessing felon disenfranchisement laws under section 2. Part VII concludes with a discussion of the impact of the Ninth Circuit’s decision on future challenges to felon disenfranchisement and the Court’s interpretation of section 2.

II. LEGAL DISCRIMINATION AND RACIAL BIAS IN THE CRIMINAL JUSTICE SYSTEM

Felon disenfranchisement laws in the United States may be traced to ancient and medieval legal codes. Between 1776 and 1821, eleven states disqualified criminals from voting. By 1868, this number jumped to twenty-nine. As the Civil War approached, disenfranchisement laws disqualified numerous groups from voting, including women, men without extended residency, African Americans, soldiers, students, the institutionalized mentally ill, and criminals. Today, only the institutionalized mentally ill and criminals remain barred. After Reconstruction, many southern states re-drafted their criminal disenfranchisement laws with the clear intent of disqualifying African Americans from voting and achieved under the Fourteenth Amendment and section 2 of the VRA, see *infra* notes 34-85 and accompanying text.

20. For a discussion of *Farrakhan III* and an analysis of the Ninth Circuit’s decision, see *infra* notes 86-132 and accompanying text.

21. For a discussion of a section 2 standard that accords with the language of the VRA and precedent, see *infra* notes 133-67 and accompanying text.

22. For a discussion of the impact of *Farrakhan III* on future challenges under section 2 of the VRA, see *infra* notes 168-78 and accompanying text.

23. *See*, e.g., Alec C. Ewald, “Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States, 2002 Wis. L. Rev. 1045, 1059-66 (discussing historical roots of felon disenfranchisement laws); R. Gregory Jerald, Comment, Modern Day Discrimination or a Valid Exercise of States’ Rights?: The Circuits Split as to Whether the Federal Voting Rights Act Applies to State Felon Disenfranchisement Statutes, 7 Fla. Coastal L. Rev. 141, 148 (2005) (discussing history of felon disenfranchisement); *see also* Ewald, *infra*, at 1061 (“English colonists in North America transplanted much of the mother country’s common law regarding the civil disabilities of convicts, and supplemented it with statutes regarding suffrage.”); Mauer, *supra* note 6, at 248 (“Felon disenfranchisement laws in the U.S. have their origins in the ‘civil death’ practices applied to ‘infamous’ offenders in medieval Europe and later in a variety of civil disabilities imposed on offenders in England.”).

24. *See* Ewald, *supra* note 23, at 1063 (discussing disenfranchisement of criminals in colonial era). Some have attributed the increased prevalence of felon disenfranchisement to an effort to limit the political strength of lower class groups. *See id.* at 1064.

25. *See id.* (discussing disenfranchisement in early United States history).

26. *See id.* (discussing disenfranchised groups prior to Civil War); Mauer, *supra* note 6, at 248-49 (discussing groups excluded from electoral process).

rapid success.\textsuperscript{28} Today, although racial animus is less explicit and there are many arguments defending felon disenfranchisement, similar discriminatory effects continue.\textsuperscript{29}

Presently, statistical disparities in policing, prosecution, and sentencing between whites and minorities relative to population figures reveal alarming evidence of racial bias in the criminal justice system.\textsuperscript{30} The War on Drugs has exacerbated the effect of felon disenfranchisement on minority populations and has mirrored the discriminatory history of many felon disenfranchisement laws.\textsuperscript{31} Despite overwhelming evidence of racial

\textsuperscript{28} See, e.g., Ewald, supra note 23, at 1065 (discussing intentionally discriminatory criminal disenfranchisement provisions after Reconstruction); Dugree-Pearson, supra note 7, at 361 (“[S]ome southern states in the late 19th and early 20th centuries narrowly tailored their disenfranchisement laws to preclude those convicted of crimes thought to be disproportionately committed by African Americans . . . .”); Jerald, supra note 23, at 149 (discussing effort among certain southern states to blunt effect of Fifteenth Amendment through use of literacy tests, poll taxes, and grandfather clauses). For example, in Mississippi, almost seventy percent of eligible African Americans were registered to vote, but two years after the state’s constitutional convention in 1890, less than six percent were eligible to vote. See Jerald, supra note 23, at 150.

\textsuperscript{29} See, e.g., Jerald, supra note 23, at 150 (noting “staggering effects felon disenfranchisement statutes continue to have on the black vote”); see also Note, The Disenfranchisement of Ex-felons: Citizenship, Criminality, and the Purity of the Ballot Box, 102 Harvard L. Rev. 1300, 1301 (1989) (discussing policy justifications for felon disenfranchisement). Two primary concerns have been advanced to justify felon disenfranchisement: (1) “fear that ex-convicts might use their votes to alter the content or administration of the criminal law” and (2) the “belief that disqualification of former felons is necessary to guard against vote fraud and related election offenses.” See id. at 1302-03. Additional theoretical justifications rely on the understanding that felons have broken the social contract and “only the virtuous are morally competent to participate in governing society.” See id. at 1304. Commentators have noted that the former justification is incompatible with broader, more modern conceptions of social contract intended “to promote human freedom and development,” while the latter notion, which relies on civic republicanism’s exclusionary aspect, “is inconsistent with modern society’s commitment to equality and inclusion.” See id. at 1306-08. Instead, commentators argue that disenfranchisement is an “act of communal self-delusion” by which society localizes blame for crime in the individual “to obscure the complexity of the roots of crime” and the culpability of contingent social structures. See id. at 1312-13 (asserting that “criminals in our society are permanent outsiders, and the effort to oppose them is understood as a ‘war on crime’” and “[d]isenfranchisement is an ideal vehicle for dramatic illustration of the distinction between ‘us’ and ‘them,’ because one of the main functions of the struggle against ‘out-groups’ is to ‘bring into consciousness basic norms governing rights and duties of citizens’” (quoting Lewis A. Coser, The Functions of Social Conflict 127 (1956))).

\textsuperscript{30} See generally David Rudovsky, Litigating Civil Rights Cases to Reform Racially Biased Criminal Justice Practices, 39 Colum. Hum. Rts. L. Rev. 97, 101 (2007) (noting that African Americans suffer from “severe disproportional representation” in all phases of criminal justice process). Racial discrimination is most visible in police practices such as vehicle and pedestrian stops, as well as detentions and searches. See id. at 102 (discussing statistical disparity based on race in stops and seizures on New Jersey Turnpike and in Philadelphia and New York City).

\textsuperscript{31} See Gabriel J. Chin, Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 J. Gender Race & Just. 253, 254 (2002) (noting that collat-
disparity, challenges to discrimination in the criminal justice system face numerous obstacles. Nevertheless, some commentators argue that increased incarceration rates and successful innocence claims provide a unique opportunity to challenge racial discrimination in the criminal justice system.

III. CHALLENGES TO FELON DISENFRANCHEISEMENT LAWS: FROM UNEQUAL PROTECTION TO MIXED RESULTS

Early challenges to felon disenfranchisement laws predominately involved claims under the Fourteenth and Fifteenth Amendments. In Richardson v. Ramirez, the U.S. Supreme Court held that such challenges could not survive because the Fourteenth Amendment’s language approved of felon disenfranchisement. Soon thereafter, in Hunter v. Under-
the Court invalidated an Alabama felon disenfranchisement law upon a clear showing of purposeful discrimination in the law’s enactment. While plaintiffs challenged the constitutionality of felon disenfranchisement laws, members of racial minority groups also challenged state apportionment plans under the Equal Protection Clause. Ultimately, the Court’s apportionment jurisprudence instigated amendments to the VRA that explicitly rejected a requirement of intentional discrimination. Because this lowered the evidentiary burden, recent challenges have attacked felon disenfranchisement under section 2 of the VRA.

“except for participation in rebellion, or other crime.” See id. at 45 (internal quotation marks omitted). In his dissent, Justice Marshall rejected the majority’s reliance upon Section 2 of the Fourteenth Amendment because Section 2 had the limited purpose of providing “a special remedy—reduced representation—to cure a particular form of electoral abuse—the disenfranchisement of Negroes.” See id. at 74, 76 (Marshall, J., dissenting) (noting that Congress did not approve all election practices to which Section 2 was inapplicable and such practices were not immunized “from evolving standards of equal protection scrutiny”).

38. See id. at 233 (holding that felon disenfranchisement laws may not be used to purposefully discriminate against racial minorities). In Hunter, the plaintiffs alleged that the drafters of the disenfranchisement law “intentionally adopted” the misdemeanors identified in the provision to disenfranchise African-American voters on account of their race. See id. at 224. The plaintiffs also asserted that the provision had such an effect. See id. Recognizing little dispute that the drafters sought to establish white supremacy in the state, the Court found sufficient evidence of racially discriminatory motive to invalidate the statute. See id. at 228-33 (rejecting defendant’s argument that original intent of enactment was irrelevant as clearly contradictory to Court’s equal protection jurisprudence).

39. See, e.g., Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986) (establishing criteria for demonstrating that voting devices resulted in unequal access to electoral process); City of Mobile v. Bolden, 446 U.S. 55, 61, 65 (1980) (holding that section 2 of VRA has same effect as Fifteenth Amendment and both require showings of discriminatory purpose), superseded by statute, Voting Rights Act of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134, as recognized in Thornburg, 478 U.S. 30; White v. Regester, 412 U.S. 755, 765 (1973) (holding that Texas legislative redistricting plan may be invalidated where multimember districts are “used invidiously to cancel out or minimize the voting strength of racial groups”); Whitcomb v. Chavis, 403 U.S. 124, 143 (1971) (holding that “validity of multi-member districts [are] justiciable . . . , where the circumstances of a particular case may ‘operate to minimize or cancel out the voting strength of racial or political elements of the voting population’”) (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965))). For a further discussion of these apportionment cases, see infra notes 43-53 and accompanying text.

40. See Gingles, 478 U.S. at 35 (“Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the ‘results test,’ applied by this Court in White v. Regester, and by other federal courts before Bolden.” (citations omitted)).

41. See, e.g., Simmons v. Galvin, 575 F.3d 24, 34-36 (1st Cir. 2009) (holding that VRA provides no cause of action against state law that disenfranchises incarcerated felons because such laws are deeply rooted in United States history and Constitution), cert. denied, 131 S. Ct. 412 (2010); Hayden v. Pataki, 449 F.3d 305, 329 (2d Cir. 2006) (en banc) (holding that Congress did not intend VRA to apply to felon disenfranchisement laws and made no clear statement of intent to modify federal balance by applying VRA to such laws); Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc) (holding that section 2 of VRA does
A. Pre-amendment Vote Dilution Claims

The Supreme Court considered whether legislative apportionment plans were invidiously discriminatory under the Equal Protection Clause of the Fourteenth Amendment in both Whitcomb v. Chavis and White v. Regester. To sustain such claims, the Court stated that plaintiffs maintain the burden to show that the political processes leading to legislators’ nominations and elections “were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.” In both cases, the Court considered the dilutive effect of the redistricting plans in light of the cultural and economic realities of the minority groups, including the continuing effects of invidious discrimination in areas such as education, employment, economics, health, and politics. The Court in Whitcomb and White considered the totality of the circumstances to determine both access to the political process and discriminatory purpose.

not apply to felon disenfranchisement laws because contrary holding would conflict with Fourteenth Amendment); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (holding that Tennessee statute did not violate VRA).

42. 403 U.S. 124 (1971). The plaintiffs in Whitcomb challenged an Indiana legislative apportionment plan alleging it “invidiously diluted the force and effect of the vote of Negroes and poor persons living within . . . ‘the ghetto area.’” See id. at 128-29.

43. 412 U.S. 755 (1973). The plaintiffs in White challenged a Texas legislative redistricting plan alleging it “operated to dilute the voting strength of racial and ethnic minorities.” See id. at 758-59.

44. Id. at 765-66. The Court concluded that it is insufficient to show that the racial minority group “has not had legislative seats in proportion to its voting potential.” See id. (discussing burden of proof for “claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups”).

45. See id. at 767-70 (surveying past and present condition of Mexican Americans in Bexar County); Whitcomb, 403 U.S. at 149-50 (noting absence of evidence that African Americans “were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen”).

46. See White, 412 U.S. at 765 (“[W]e have entertained claims that multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups.”); Whitcomb, 403 U.S. at 149 (“[T]he courts have been vigilant in scrutinizing schemes allegedly conceived or operated as purposeful devices to further racial discrimination.”). Addressing the disestablishment of the multimember district in Bexar County, the White Court first recognized Mexican Americans in Bexar County as an identifiable class for Fourteenth Amendment purposes that had “long suffered from, and continue[d] to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others.” See White, 412 U.S. at 767-68 (citation omitted). The Court also noted that Mexican Americans suffered from “a cultural and language barrier [making] participation in community processes extremely difficult.” Id. at 768. The Court stressed “that Mexican-American voting registration remained very poor in the county and that, only five Mexican-Americans since 1880 have served in the Texas Legislature from Bexar County.” Id. at 768-69. The Court also noted that “the Bexar County legislative delegation in the
Similarly, in *City of Mobile v. Bolden*, the Court extended its purposeful discrimination requirement to alleged violations of the VRA. The plaintiffs alleged that the practice of electing city commissioners at-large unfairly diluted the voting strength of African Americans in violation of the Fourteenth and Fifteenth Amendments, as well as section 2 of the VRA. Finding that Congress did not intend section 2 to add anything to the Fifteenth Amendment, the plurality viewed the claims as duplicative. Proceeding with its analysis under the Fifteenth Amendment, the plurality held that the Amendment only prohibits "purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.'" In dissent, Justice House was insufficiently responsive to Mexican-American interests." *Id.* at 769.

The Court acknowledged that the district court arrived at its decision "based on the totality of the circumstances" and stated:

> [W]e are not inclined to overturn these findings [that the multimember district in Bexar County invidiously excluded Mexican Americans from effective participation in political life], representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise.

*Id.* at 769-70.


48. See *id.* (challenging city's at-large method of electing commissioners under Fourteenth and Fifteenth Amendments and VRA).

49. See *id.* at 58 (discussing background and procedural history). In 1911, the Alabama legislature authorized large municipalities to adopt a commission form of government. See *id.* at 59. Mobile established a city commission in the same year and has continued to maintain the system. See *id.* 

> "[E]ach candidate for the Mobile City Commission runs for election in the city at-large for a term of four years in one of three numbered posts, and may be elected only by a majority of the total vote."

*Id.* at 59-60.

50. See *id.* at 58, 60-61 ("[I]t is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and . . . it was intended to have an effect no different from that of the Fifteenth Amendment itself." (footnote omitted)).

51. *Id.* at 65 (finding no Fifteenth Amendment violation where African Americans "register and vote without hindrance"). The Court relied upon precedent requiring racially discriminatory motivation to prove a violation of the Fifteenth Amendment. See *id.* at 62-63 (concluding that "plaintiffs failed to prove that the legislature ‘was either motivated by racial considerations or in fact drew the districts on racial lines’” and "that in the absence of such an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses" (quoting *Wright v. Rockefeller*, 376 U.S. 52, 56 (1964))). Addressing the plaintiffs' Fourteenth Amendment claim, the Court held that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 67 (alteration in original) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)). Additionally, the Court rejected a reading of *White* that allowed a violation of the Fourteenth Amendment due to diluted voting strength of a discrete group without a showing of discriminatory intent. See *id.* at 68. The Court also rejected the court of appeals's understanding that "a plaintiff may establish this illicit purpose [ ] by ad
ducing evidence" that satisfies the factors announced in *Zimmer v. McKeithen*. *Id.* at
White objected to the plurality’s opinion for its erroneous neglect of the principle that invidious discriminatory purpose can be inferred from objective factors like those relied upon in *White*.52 While *Bolden* appeared to close the door to challenges absent clear discriminatory purpose, Congress acted quickly to eliminate any such requirement.53

B. 1982 Amendments to the VRA

Following the Court’s decision in *Bolden*, Congress amended the VRA in 1982 “to make clear that proof of discriminatory intent is not required to establish a violation of Section 2.”54 Instead, Congress adopted the results test, which required that “[n]o voting qualification . . . or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen . . . to vote on account of race or color.”55 While some argue that the amendment focused on vote dilution claims like the challenges to apportionment plans in *Whitcomb* and *White*, the Court has held that the results test applies to both vote dilution and vote denial claims.56 Tracking the factors con

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52. See id. at 95 (White, J., dissenting) (finding that invidious discriminatory purpose may be inferred from totality of facts). Justice White argued that the district court and court of appeals properly adhered to the admonition that “’[t]he plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question.’” Id. at 97 (alteration in original) (quoting *White v. Regester*, 412 U.S. 755, 766 (1973)). Justice White faulted the plurality for ignoring the facts deemed relevant in *White* and *Whitcomb* to the question of whether purposeful discrimination may be inferred: “a lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a history of discrimination, majority vote requirements, provisions that candidates run for positions by place or number, [and] the lack of any provision for at-large candidates to run from particular geographical subdistricts.” See id. at 101, 103 (asserting that by viewing factors in isolation, plurality rejected totality of circumstances approach); see also *Whitcomb v. Chavis*, 403 U.S. 124, 177 (1971) (Douglas, J., dissenting) (“[T]he test for multi-member districts is whether there are invidious effects.”).

53. For a discussion of the 1982 amendments to the VRA, see *infra* notes 54-61 and accompanying text.


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sidered in the Court’s apportionment cases, the Senate Report on the 1982 amendments included “typical factors” (the Senate Factors) that courts may consider to determine whether, under the totality of circumstances, a challenged voting practice results in the denial or abridgement of the right to vote on account of race.\textsuperscript{57} Notably, the fifth Senate Factor inquires into “the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.”\textsuperscript{58}

The Court first had the opportunity to interpret the amendments to the VRA in \textit{Thornburg v. Gingles}.\textsuperscript{59} Addressing a vote dilution claim, the plurality provided an extensive overview of the 1982 amendments and concluded that “[t]he essence of a [section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to

\begin{itemize}
  \item 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
  \item 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
  \item 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
  \item 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
  \item 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
  \item 6. whether political campaigns have been characterized by overt or subtle racial appeals;
  \item 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
\end{itemize}

Additional factors that in some cases have had probative value as part of plaintiffs’ evidence to establish a violation are:

\begin{itemize}
  \item Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
  \item Whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.
\end{itemize}

\textit{Id.} (footnotes omitted). The Senate Report emphasized that “there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other,” and that, “[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.” \textit{Id.} at 29.

\textsuperscript{57}  See S. Rep. No. 97-417, at 28-29 (discussing Senate Factors). The Senate Factors include:

\begin{itemize}
  \item 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
  \item 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
  \item 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
  \item 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
  \item 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
  \item 6. whether political campaigns have been characterized by overt or subtle racial appeals;
  \item 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
\end{itemize}

\textit{Id.} at 24.

\textsuperscript{58}  \textit{Id.} at 24.

cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” Ultimately, granting deference to the district court due to its acquaintance with local political realities, the plurality affirmed the lower court’s holding that North Carolina’s use of a multimember electoral structure caused African-American voters in the districts to have less opportunity than white voters to elect representatives of their choice.

C. Post-amendment Challenges to Felon Disenfranchisement Under Section 2

Due to the relaxed legal standard codified in the 1982 amendments to the VRA and affirmed in subsequent vote dilution cases, hopeful challengers to felon disenfranchisement laws began to seek relief under section 2 of the VRA. However, the clarity Congress intended has diminished as federal appellate courts have split in interpreting section

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60. Id. at 47 (plurality opinion) (discussing totality of circumstances test as applied to multimember district and at-large voting schemes). The plurality noted that Congress repudiated the intent test for three principle reasons: (1) “it is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities,” (2) “it places an ‘inordinately difficult’ burden of proof on plaintiffs,” and (3) “it ‘asks the wrong question.’” Id. at 44 (quoting S. Rep. No. 97-417, at 36). According to the Senate Report, the proper question “is whether ‘as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.’” Id. (quoting S. Rep. No. 97-417, at 28). Addressing the Senate Factors, the plurality noted that the factors are pertinent to certain types of section 2 violations, particularly vote dilution claims, but other factors also may be relevant. See id. at 45 (emphasizing that that “the question whether the political processes are ‘equally open’ depends upon a searching practical evaluation of the ‘past and present reality,’ and on a ‘functional’ view of the political process.” (quoting S. Rep. No. 97-417, at 30). Additionally, the plurality articulated a number of circumstances necessary for multimember districts to impair minority voters’ ability to elect representatives of their choice:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable— in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate. Id. at 50-51 (citations omitted).

61. See id. at 80 (affirming lower court’s evaluation of totality of circumstances in which “racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice”).

62. For a discussion of challenges to felon disenfranchisement laws under section 2 of the VRA, see infra notes 65-85 and accompanying text.
Nevertheless, in addition to challenges to felon disenfranchisement laws, a number of circuit courts have heard other claims under section 2 that may elucidate the statute’s evidentiary standard.64 In the first challenge to reach a federal appellate court, the Sixth Circuit did not object to the use of section 2 of the VRA to challenge felon disenfranchisement.65 In Wesley v. Collins,66 an African-American citizen who pleaded guilty to being an accessory to larceny challenged Tennessee’s felon disenfranchisement provision under the Fourteenth and Fifteenth Amendments as well as section 2.67 The court acknowledged that

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63. See, e.g., Farrakhan v. Washington (Farrakhan I), 338 F.3d 1009, 1016 (9th Cir. 2003) (holding felon disenfranchisement challenge cognizable under section 2 of VRA); Wesley v. Collins, 791 F.2d 1255, 1259-63 (6th Cir. 1986) (assessing challenge to Tennessee felon disenfranchisement statute under section 2 of VRA, but finding no violation). But see Simmons v. Galvin, 575 F.3d 24, 34 (1st Cir. 2009) (rejecting challenge to felon disenfranchisement under VRA because such laws are deeply rooted in United States history and Constitution), cert. denied, 131 S. Ct. 412 (2010); Hayden v. Pataki, 449 F.3d 305, 328 (2d Cir. 2006) (en banc) (holding that Congress did not intend VRA to apply to felon disenfranchisement laws and made no clear statement of intent to modify federal balance by applying VRA to such laws); Johnson v. Governor of Fla., 405 F.3d 1214, 1224 (11th Cir. 2005) (en banc) (holding that section 2 of VRA does not apply to felon disenfranchisement laws because contrary holding would conflict with Fourteenth Amendment).

64. See, e.g., Smith v. Salt River Project Agric. Improvement and Power Dist., 109 F.3d 586, 595-96 (9th Cir. 1997) (holding that requirement that voters own real property within boundaries of district to vote in district elections did not violate section 2 of VRA, agreeing with district court conclusion that “the observed differences in rate of home ownership between non-Hispanic whites and African-Americans is not substantially explained by race, but is better explained by other factors independent of race”); Ortiz v. City of Phila. Office of the City Comm’rs Voter Registration Div., 28 F.3d 306, 314-15, 323 (3d Cir. 1994) (holding that Pennsylvania law requiring voters who fail to vote after two years be purged from voting rolls did not violate section 2 of VRA because plaintiffs’ evidence “failed to demonstrate that ‘the purge law is the dispositive force in depriving minority voters of equal access to the political process’” (citation omitted)); Salas v. Sw. Tex. Junior Coll. Dist., 964 F.2d 1542, 1555-56 (5th Cir. 1992) (holding that at-large district did not violate section 2 of VRA because plaintiffs offered no evidence linking low voter turnout to past official discrimination); Irby v. Va. State Bd. of Elections, 889 F.2d 1352, 1358-59 (4th Cir. 1989) (holding that state’s appointive system for selecting school board members did not violate section 2 of VRA because evidence of underrepresentation of African Americans on school board in relation to general population and underrepresentation in governing bodies that appoint school board members did not suffice to prove discriminatory effect); see also Tokaji, supra note 56, at 709-13 (discussing vote denial cases, including challenges to voting equipment and voter identification).

65. See Wesley, 791 F.2d at 1259 (“The Voting Rights Act secures not only the opportunity for all qualified citizens to cast their ballot, but also guarantees that an individual’s vote will not be diluted.”).

66. 791 F.2d 1255 (6th Cir. 1986).

67. See id. at 1257 (discussing procedural history). The Tennessee Voting Rights Act of 1981 provided that:

1) No person who has been convicted of an infamous crime, as defined by § 40-20-112, in this state shall be permitted to register to vote or vote at any election unless he shall have been pardoned by the governor, or his
Tennessee’s felon disenfranchisement provision disproportionately impacted African Americans due to significantly higher conviction rates compared to whites.\footnote{68} It then stated, “such a showing merely directs the court’s inquiry into the interaction of the challenged legislation ‘with those historical, social and political factors generally probative of dilution.’\footnote{69} After noting a history of discrimination with continuing present-day effects, the court held that other social and political factors, such as the state’s legitimate purpose for enacting the statute, led to the conclusion that there was no violation of the VRA.\footnote{70}

After Wesley, a circuit split on the issue emerged.\footnote{71} Nearly twenty years later, the Eleventh Circuit held that allowing challenges to felon disenfranchisement laws under the VRA would place the statute in direct conflict with the affirmative sanction of the Fourteenth Amendment.\footnote{72} In

\begin{quote}
full rights of citizenship have otherwise been restored as prescribed by law. \\
\textit{Id.} at 1258 n.3 (quoting \textit{Tenn. Code Ann.} § 2-19-143 (1981), \textit{held unconstitutional by May v. Carlton}, 245 S.W.3d 340 (Tenn. 2008)). The court noted that the review to determine whether “challenged legislation results in vote dilution under Section 2 based on the ‘totality of the circumstances’ requires a highly individualistic inquiry.” \textit{See id.} at 1260 (noting “results test” and Senate Factors).
\end{quote}

\begin{quote}
\footnote{68} \textit{Id.} at 1261 (noting disproportionate impact on African Americans).
\end{quote}

\begin{quote}
\end{quote}

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\footnote{70} \textit{See id.} (holding that state may constitutionally disenfranchise felons). The court asserted that felons are not “disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention and punishment.” \textit{Id.} at 1262.
\end{quote}

\begin{quote}
\footnote{71} \textit{See Johnson v. Governor of Fla}, 405 F.3d 1214, 1227 (11th Cir. 2005) (en banc) (observing that claim that Florida’s felon disenfranchisement law violates section 2 raises important question of statutory interpretation and that circuits are split).
\end{quote}

\begin{quote}
\footnote{72} \textit{See id.} at 1229 (holding that felon disenfranchisement has “affirmative sanction” of Fourteenth Amendment). Relying on Richardson’s interpretation of the Fourteenth Amendment, the court concluded that it could not construe the VRA in a way that “create[s] a constitutional question unless there is a clear statement from Congress endorsing this understanding.” \textit{See id.} (stating that interpretation of VRA that recognized challenges to felon disenfranchisement would place statute outside of Congress’s enforcement power). Additionally, the court observed that legislative history indicates that Congress did not intend the VRA to reach felon disenfranchisement provisions in 1965 and made no mention of such provisions in 1982 when the statute was amended. \textit{See id.} at 1252-34.
\end{quote}

However, four of the twelve judges, in three separate opinions, rejected the majority’s analysis and found that racially discriminatory provisions are cognizable under section 2 of the VRA. \textit{See id.} at 1235-51 (arguing that racially discriminatory felon disenfranchisement laws are cognizable under VRA). In a concurring opinion, Judge Tjoflat argued that if plaintiffs could support the claim that racial bias in the criminal justice system interacts with the state’s felon disenfranchisement provision to disadvantage minority voters, “they might demonstrate the sort of causal connection between racial bias and disparate effect necessary to make out a vote-denial claim.” \textit{See id.} at 1239 (Tjoflat, J., concurring). Similarly, Judge Barkett found that the plain language of section 2 of the VRA unambiguously applies to felon disenfranchisement and “[t]he majority’s finding of a conflict between the
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Johnson v. Governor of Florida, the plaintiffs filed a class action under the Fourteenth Amendment and section 2 of the VRA on behalf of all Florida citizens who had been convicted of a felony and thus had been barred from voting under the state’s felon disenfranchisement law. Relying upon Richardson and Hunter, the court found insufficient evidence of racial animus in the disenfranchisement provision’s enactment to establish an Equal Protection Clause violation.

After an extensive review of the VRA’s legislative history, the Second Circuit soon joined the Eleventh Circuit in its interpretation of the VRA, holding that Congress did not intend that the Act encompass felon disenfranchisement provisions. In Hayden v. Pataki, African-American and Latino inmates challenged New York’s felon disenfranchisement statute under the VRA. While the court noted that such statutes are presump-

VRA and Section 2 of the Fourteenth Amendment stems from its failure to distinguish between felon disenfranchisement laws generally and those that result in racial discrimination.” Id. at 1248 (Barkett, J., dissenting).

73. 405 F.3d 1214 (11th Cir. 2005) (en banc).

74. See id. at 1216-17 (discussing plaintiffs’ claim). Florida’s felon disenfranchisement law—a constitutional provision—provides that “[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability.” Fla. Const. art. VI, § 4.

75. See Johnson, 405 F.3d at 1217-27 (discussing plaintiff’s claim “that racial animus motivated the adoption of Florida’s criminal disenfranchisement provision in 1868 and this animus remains legally operative today, notwithstanding the fact that Florida altered and reenacted the provision in 1968”). After noting differences between the 1868 and 1968 versions of Florida’s disenfranchisement law, particularly the narrowing of the prohibition to only those convicted of felonies, the court found that Florida would have enacted the provision without impermissible motive. See id. at 1220-24. Furthermore, the court determined that Florida in fact did enact the provision without an impermissible motive. See id.

76. See Hayden v. Pataki, 449 F.3d 305, 316 (2d Cir. 2006) (en banc) (holding that VRA does not cover felon disenfranchisement provisions).

77. 449 F.3d 305 (2d Cir. 2006) (en banc).

78. See id. at 305 (discussing plaintiffs’ claims). The court consolidated two cases for oral argument. See id. at 309 (noting consolidation of Muntaqim v. Coombe, 396 F.3d 95 (2d Cir. 2004), and Hayden v. Pataki, No. 00 Civ. 8586(LMM), 2004 WL 1335921 (S.D.N.Y. June 14, 2004)). Muntaqim, an African-American inmate, filed a pro se complaint in 1994 that alleged that “New York Election Law § 5-106 violates the [VRA] because ‘it results in a denial or abridgment of the right . . . to vote on account of race.’” See id. at 310 (alteration in original) (quoting 42 U.S.C. § 1973(a) (2006)). The Hayden complaint named twenty-one plaintiffs currently incarcerated or paroled challenging “New York State’s unconstitutional and discriminatory practice of denying suffrage to persons who are incarcerated or on parole for a felony conviction and the resulting discriminatory impact that such denial of suffrage has on Blacks and Latinos in the State.” Id. at 311. New York Election Law § 5-106 states:

2. No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole.

tively constitutional, it cited several factors in finding reason to explore the VRA’s purpose in addition to the plain language of the statute, which the court admitted “could be read to include felon disenfranchisement provisions.”

The court particularly emphasized the clear statement rule, which provides that unless Congress makes it “unmistakably clear” of contrary intention in the text of a statute, a court may look to the context of the statute’s enactment or its legislative history to find evidence that Congress did not intend to alter the federal balance.

79. See Hayden, 449 F.3d at 315-16 (listing reasons to conclude that Congress did not intend to include felon disenfranchisement provisions within coverage of VRA). The reasons that the court considered include:

(1) the explicit approval given such laws in the Fourteenth Amendment;
(2) the long history and continuing prevalence of felon disenfranchisement provisions throughout the United States;
(3) the statements in the House and Senate Judiciary Committee Reports and on the Senate floor explicitly excluding felon disenfranchisement laws from provisions of the statute;
(4) the absence of any affirmative consideration of felon disenfranchisement laws during either the 1965 passage of the Act or its 1982 revision;
(5) the introduction thereafter of bills specifically intended to include felon disenfranchisement provisions within the VRA’s coverage;
(6) the enactment of a felon disenfranchisement statute for the District of Columbia by Congress soon after the passage of the Voting Rights Act;
and
(7) the subsequent passage of statutes designed to facilitate the removal of convicted felons from the voting rolls.

Id. (footnote omitted).

80. See id. at 325, 325 (stating that courts should assume that Congress did not intend to alter federal balance and that clear statement rule (or plain statement rule) “requires Congress to make its intent ‘unmistakably clear’ when enacting statutes that would alter the usual constitutional balance between the Federal Government and the States” (quoting Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)) (internal quotation marks omitted)). The Second Circuit acknowledged that the Court in Gregory noted “that ‘the principle it articulated did not apply when a statute was unambiguous.’” Id. at 324 (quoting Salinas v. United States, 522 U.S. 52, 60 (1997)). But see id. at 325 (“[W]e will apply the clear statement rule when a statute admits of an interpretation that would alter the federal balance but there is reason to believe, either from the text of the statute, the context of its enactment, or its legislative history, that Congress may not have intended such an alteration of the federal balance.”). The court concluded that, despite the “broad and general language” of the statute, Congress would “have specified that felon disenfranchisement provisions are covered by the [VRA] if that were its intent.” Id. at 325-26.

The five dissenting judges rejected the majority’s view that the statute was ambiguous. See id. at 346 (Parker, Jr., J., dissenting) (“In order to justify its failure to apply the plain language of VRA § 2, the majority must find ambiguity in that provision’s pellucid language.”); id. at 368 (Sotomayor, J., dissenting) (“Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.”); id. (Katzmann, J., dissenting) (“I believe that this language of the Voting Rights Act is facially unambiguous . . . .”). The dissenters also rejected the majority’s interpretation of the legislative history. See id. at 345 (Parker, Jr., J., dissenting) (“[T]he fact that felon disenfranchisement statutes may sometimes be constitutional does not mean they are always constitutional.”); id. at 365 (Calabresi, J., dissenting) (“The fact that race-neutral felon disenfranchisement is permissible under § 4(c) tells us nothing at all about whether § 2 allows racially discriminatory felon disenfranchisement.”); id. at 369 (Katzmann, J., dissenting) (“Surely, the silence of enacting legislators cannot overcome the unambiguous and broadly worded provisions of a statute that was meant
In the next such claim subject to appellate review, the First Circuit also found ambiguity in the legislative history of the VRA and joined the Eleventh and Second Circuits in holding felon disenfranchisement laws exempt from the VRA’s protections.81 In Simmons v. Galvin,82 incarcerated felons challenged Massachusetts’s felon disenfranchisement provision under the VRA, claiming that past discrimination in the criminal justice system resulted in the disproportionate disqualification of minorities from voting.83 Like the Second Circuit, the First Circuit noted that felon disenfranchisement provisions are presumptively constitutional, but found that the VRA’s “broad and ambiguous” language allowed judicial inquiry beyond the statute’s text.84 After reviewing the legislative history of section 2 of the VRA, the 1982 amendments to the VRA, and post-1982 congressional actions assuming the validity of felon disenfranchisement laws, the First Circuit concluded that “Congress has excepted from the reach of the VRA protections from vote denial for claims against a state which disenfranchises incarcerated felons.”85

Notably, now-Justice Sotomayor stated in her separate dissenting opinion, “I fear that the many pages of the majority opinion and concurrences . . . may give the impression that this case is in some way complex. It is not.” Id. at 367 (Sotomayor, J., dissenting).

82. 575 F.3d 24 (1st Cir. 2009), cert. denied, 131 S. Ct. 412 (2010).
83. See id. at 26 (discussing disparate impact claim under VRA). In 2000, Massachusetts voters passed an amendment to the state’s constitution “to disqualify currently incarcerated felons from voting in certain elections.” See id.
84. See id. at 32 (“[T]he state’s denial of the right to vote to felons has a constitutional grounding.”); id. at 35 (“We agree with the Second Circuit that the language of § 2(a) is both broad and ambiguous and that judicial interpretation of a claim concerning felon disenfranchisement under the VRA may not be limited to the text of § (2)(a) alone.”).
85. See id. at 41 (holding VRA does not extend to felon disenfranchisement provisions). Like the dissenters in Hayden, Judge Torruella faulted his fellow panelists for misinterpreting the issue before the court, stating “this is not a case about the state’s authority to disenfranchise convicted felons, nor about the popularity or desirability of that practice.” See id. at 45-46 (Torruella, J., dissenting) (arguing that “this is a case about interpreting a clearly worded congressional statute”). Instead, he argued that the VRA unambiguously applied to all voting qualifications that have a discriminatory effect on the basis of race. See id. at 50 (“One need not delve too deeply into the legislative history to discover that Congress enacted the Voting Rights Act of 1965 pursuant to its powers to enforce the Fifteenth Amendment for the ‘broad remedial purpose of rid[ding] the country of racial discrimination in voting.’” (alteration in original) (quoting Chisom v. Roemer, 501 U.S. 380, 403 (1991)) (internal quotations marks omitted)). Further, Judge Torruella stated that the 1982 amendments to the VRA expanded the remedial power of the act “by relieving plaintiffs of the burden of proving discriminatory intent.” Id. at 52.
IV. FARRAKHAN V. GREGOIRE: LEGAL PING-PONG YIELDS DISPARATE RESULTS AND THE REBIRTH OF INTENT

The Ninth Circuit further muddied section 2’s waters in 2003 when it held that felon disenfranchisement laws with racially disparate effects could be challenged under section 2 of the VRA.86 What renders the Ninth Circuit’s decision of unique importance is not only its departure from the predominant view of other circuits, but also its ultimate requirement of intentional discrimination.87 This requirement, wholly at odds with the language of the Act and the Court’s totality of the circumstances inquiry in vote dilution cases, only lends confusion to the already convoluted section 2 landscape.88

A. Another Challenger Takes to the Table

Minority citizens Muhammad Shabazz Farrakhan and his fellow plaintiffs lost their right to vote pursuant to Washington’s felon disenfranchisement law.89 Together they filed a pro se lawsuit in federal district court, alleging that “minorities are disproportionately prosecuted and sentenced, resulting in their disproportionate representation among the persons disenfranchised under the Washington Constitution.”90 As a result, the plaintiffs argued that “Washington law causes vote denial and vote dilution on the basis of race, in violation of the VRA, as well as direct violations of the United States Constitution.”91

According to the plaintiffs’ expert witnesses, African Americans in Washington state were over nine times more likely to be incarcerated than

86. See Farrakhan I, 338 F.3d 1009, 1012-16 (9th Cir. 2003) (holding that felon disenfranchisement laws that deny right to vote in discriminatory manner may violate VRA).
87. For a discussion of the Ninth Circuit’s requirement of intentional discrimination in Farrakhan I, see infra notes 108-17 and accompanying text.
88. For a discussion of the Ninth Circuit’s reasoning in Farrakhan I, see infra notes 118-32 and accompanying text.
89. See Farrakhan II, 590 F.3d 989, 993 (9th Cir.) (discussing factual background), aff’d in part, overruled in part en banc by 623 F.3d 990 (9th Cir. 2010) (per curiam). Washington’s constitution provided that “[a]ll persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise.” WASH. CONST. art. VI, § 3 (repealed 2010), held unconstitutional by Farrakhan II, 590 F.3d 989. Washington law defines an “infamous crime” as one that is “punishable by death in the state penitentiary or imprisonment in a state correctional facility,” WASH. REV. CODE § 29A.04.079 (2012).
91. Id. (discussing factual and procedural background). After the court dismissed the plaintiffs’ claims sua sponte for lack of standing, they amended the complaint by adding Carl Maxey, an African-American registered voter, and asserting claims under the VRA, as well as the First, Second, Fifth, Sixth, Seventh, Eighth, Fourteenth, and Fifteenth Amendments. See id.
whites, despite a 3.72-to-1 arrest ratio for violent offenses. A study of the Washington State Patrol revealed that Native Americans were more than twice as likely as whites to be searched, African Americans were seventy percent more likely, and Latinos were more than fifty percent more likely. Further, reports indicated that racial differences in illegal behavior did not warrant racial disparities in arrest rates.

B. Farrakhan I Serves Challengers Well

The district court granted the State’s motion to dismiss on the vote dilution claim and granted the State’s motion for summary judgment on the vote denial claim. The court found challenges to felon disenfranchisement laws cognizable under section 2 of the VRA, but concluded that the plaintiff’s evidence was “legally insufficient to establish causation.

92. See Farrakhan II, 590 F.3d at 1009 (noting plaintiffs’ compelling evidence of discrimination in Washington’s criminal justice system).

93. See id. at 1010 (discussing disparity in probability of search depending on race). A study of the Vancouver, Washington Police Department reflected similar findings for traffic violations: despite the fact that searches of whites yield more frequent seizures of contraband, African Americans were “nearly twice as likely to be searched as Whites and Latino were three times more likely to be searched.” See id.

94. See id. (discussing racial disparities in arrest rates). “The Seattle Police Department [ ] arrested African Americans and Latinos for drug possession at rates much higher than their proportion among users. Whites, on the other hand, were arrested . . . at rates much lower than their proportion among users.” Id. Reports also indicated racial disparities in charging and bail practices. See id. Dr. Crutchfield’s report found that whites were “less likely to have charges filed than minorities,” and “[m]inority defendants were less likely to be released on their own recognizance.” Id. Further expert testimony attributed racial disparities in drug possession and delivery arrests to three systemic practices: the police’s focus on (1) crack cocaine, (2) outdoor drug venues, and (3) the downtown area. See id. (discussing Dr. Beckett’s report on racial disparities in drug arrests in Seattle). Dr. Beckett found that these organizational practices “cannot be explained in race-neutral terms.” See id. (stating focus on crack could not be explained by frequency of exchange, level of violence, or health problems associated with drug; “the focus on outdoor drug activity cannot be explained by either greater citizen complaints or greater yield from such arrests”; and focus on downtown was “out of proportion to the level of drug crime there” and did not correspond to level of citizen complaints).

95. See Farrakhan, 987 F. Supp. at 1313 (dismissing plaintiffs’ vote dilution claim for failure to allege facts relevant to Gingles factors, including voter cohesiveness). In allowing a challenge to the felon disenfranchisement statute under the VRA, the district court held that the plain statement rule does not apply to the VRA and that the VRA does not violate section 2 of the Fourteenth Amendment. See id. at 1309-11. Noting evidence “that African, Hispanic, and Native Americans are targeted for prosecution of serious crimes and that they are over-represented in prison populations,” the court stated that “[i]f true, Plaintiffs allegations may establish a causal connection between Washington’s disenfranchisement scheme and the denial of voting rights to racial minorities.” Id. at 1312.
under the VRA" because "it is discrimination in the criminal justice system, not the disenfranchisement provision itself, that causes any vote denial."96

On appeal, the Ninth Circuit in *Farrakhan v. Washington* (Farrakhan I)97 reversed and remanded for further proceedings, holding that the plaintiff's challenge to Washington's felon disenfranchisement law was cognizable under section 2 of the VRA and that evidence of discrimination within the criminal justice system can be relevant to a section 2 analysis.98 The court stated that "a Section 2 'totality of the circumstances' inquiry requires courts to consider how a challenged voting practice *interacts with* external factors such as 'social and historical conditions' to result in denial of the right to vote on account of race or color."99

C. Farrakhan II Nets Felons' First Victory

Following remand, the parties again filed cross-motions for summary judgment, and the district court granted the State's motion.100 The court found the plaintiffs' expert testimony regarding racial bias in the criminal justice system to be "compelling," as well as "admissible, relevant, and persuasive."101 Nevertheless, the district court held that "the totality of the

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97. 338 F.3d 1009 (9th Cir. 2003).

98. See id. at 1016 (holding 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'). The court also noted that the district court's "by itself" causation standard would "defeat the interactive and contextual totality of the circumstances analysis repeatedly applied by [its] sister circuits in Section 2 cases" and would effectively read an intent requirement back into the VRA, "contradict[ing] the clear command of the 1982 amendments to section 2" of the VRA. See id. at 1018-19.

99. Id. at 1011-12 (quoting Thornburg v. Gingles, 478 U.S. 30, 47 (1986)). The Ninth Circuit denied the defendant's motion for rehearing en banc, but Judge Kozinski offered a fervent dissent that foreshadowed the court's ultimate decision on the issue. See Farrakhan v. Washington, 359 F.3d 1116, 1116-18 (9th Cir. 2004) (Kozinski, J., dissenting) (arguing that court's decision was contradictory to precedent because plaintiffs' case was "based entirely on statistical disparities"). Ultimately, relying on legislative history, Judge Kozinski argued that the VRA was never intended to reach felon disenfranchisement laws and expressed concern that a contrary view would raise serious constitutional issues regarding the scope of Congress's enforcement power. See id. at 1120-21. Noting that felon disenfranchisement laws are presumptively constitutional, Judge Kozinski advocated for a requirement of purposeful, invidious use of those laws to undermine constitutionality. See id. at 1121.


101. Id. at *6 (stating that court was "compelled to find that there is discrimination in Washington's criminal justice system on account of race," and that such discrimination "clearly hinder[s] the ability of racial minorities to participate ef-
circumstances does not support a finding that Washington’s felon disenfranchisement law results in discrimination in its electoral process on account of race.”

On appeal, the Ninth Circuit held that the plaintiffs demonstrated that the discriminatory impact of Washington’s felon disenfranchisement was attributable to racial discrimination in Washington’s criminal justice system and that Washington’s felon disenfranchisement law violated effectively in the political process, as disenfranchisement is automatic” (alteration in original) (quoting Farrakhan I, 338 F.3d at 1020)). The plaintiffs relied on the reports of two expert witnesses: Dr. Robert Crutchfield, a professor of sociology at the University of Washington, and Dr. Katherine Beckett, an associate professor of sociology at the University of Washington. See id. at *5 nn.3-4. Dr. Crutchfield’s report reviewed empirical research conducted on racial and ethnic disparities in various parts of Washington’s criminal justice system, including policing and investigation, prosecution, and sentencing. See id. at *5 (describing studies showing that racial disparities in state’s criminal justice system could not be explained by legitimate factors, such as higher level of involvement in criminal activity). Crutchfield offered two explanations for the reported racial disparities: “(1) discriminatory actions of criminal justice decision makers (either intentional or unconscious); and (2) structural or institutional causes (ways of doing business, such as decision rules that are theoretically race-neutral, but are not race-neutral in practice).” Id. Additionally, the Crutchfield report contained evidence of “unwarranted” racial disparities in rates of vehicle searches and “observable racial differences’ in the processing of criminal cases (e.g., charging and bail recommendations, lengths of confinement, and alternative sentencing.” See Farrakhan II, 590 F.3d at 994 (citation omitted).

Dr. Beckett’s report outlined the findings of her study on the “extent and causes of racial disparity in Seattle drug [possession] and delivery arrests.” Id. at 995 (citation omitted). The report noted:

(1) in Seattle, a majority of drug users are white (with the possible exception of users of crack cocaine); (2) in Seattle, a majority of those who deliver “serious drugs” are white (with the possible exception of crack cocaine); (3) 52.2 percent of those arrested for possession, and 64.2 percent of those arrested for delivery of serious drugs in Seattle from January 1999-April 2001, were black; (4) Latinos are also over-represented among those arrested for drug possession; and (5) this over-representation is primarily the result of three factors: (A) law enforcement’s concentration on the crack cocaine market; (B) law enforcement’s concentration on outdoor drug venues; and (C) the geographic focus on outdoor drug venues in Seattle’s downtown area.

Farrakhan, 2006 WL 1889273, at *5.

102. Farrakhan, 2006 WL 1889273, at *9 (holding that statutory language requires existence of discrimination in voting on broader scale). The court explained that discrimination in the criminal justice system is just one factor to consider in the totality of the circumstances and also that the remaining Senate Factors weighed in favor of the state. See id. at *7. While the court acknowledged that many of those factors are not relevant to a vote denial claim, it found that factors seven and eight were relevant and the plaintiffs failed to present “any evidence on the extent to which minority group members have been elected to political office in Washington or the level of responsiveness elected officials have to the particularized needs of members of minority groups.” Id. at *8. The court also found that Senate Factor nine—whether the state’s policy justifications are “tenuous”—also weighed in favor of the defendants, finding plaintiffs’ ability to examine the validity of felon disenfranchisement laws “extremely limited” after the Supreme Court’s sanction of such laws. See id.
section 2 of the VRA.\textsuperscript{103} Importantly, the court determined that the “on account of” requirement may be satisfied “‘where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances,’ which include the State’s criminal justice system,” thus reiterating its previous holding in \textit{Farrakhan I}\.\textsuperscript{104} The court noted that the plaintiffs introduced expert testimony demonstrating that the statistical disparity and disproportionality in Washington’s criminal justice system arose from discrimination and the State failed to refute that showing with race-neutral explanations.\textsuperscript{105} The court compared this method of proving discrimination to anti-discrimination jurisprudence in other areas.\textsuperscript{106} Accordingly, the court flatly rejected the State’s argument that the plaintiffs failed to show discriminatory intent or motive.\textsuperscript{107}

\textsuperscript{103.} See \textit{Farrakhan II}, 590 F.3d at 999 (noting that law of case doctrine requires reviewing court to follow appellate court’s decision on legal issues in same case and also that contrary holdings of other circuits are not binding). Elaborating on the circuit split, the court noted that the Sixth Circuit’s consideration of a section 2 challenge to Tennessee’s felon disenfranchisement law actually renders the split more pronounced and invalidates any assumption that \textit{Farrakhan I} can be considered “clearly erroneous.” See \textit{id}. at 1000. The court rejected the district court’s understanding of the Senate Factors and concluded that vote denial claims allow “more flexibility in determining whether, under the totality of the circumstances test, a single factor is controlling and whether any weight may or should be given to the presence or absence of others.” \textit{Id}. at 1005.

\textsuperscript{104.} \textit{Id}. at 1009 (quoting \textit{Farrakhan I}, 338 F.3d at 1019-20). The court distinguished between vote dilution and vote denial claims under section 2 of the VRA, stating that vote dilution claims “‘implicate the value of aggregation,’” while vote denial claims “‘implicate the value of participation.’” \textit{Id}. at 1006 (quoting Tokaji, supra note 56, at 718). Therefore, according to the court, “the primary question in such cases is not whether a ‘denial or abridgement’ occurs, but whether such denial is ‘on account of race.’” \textit{Id}. The court rejected the district court’s application of the Senate Factors and stressed that there is “no requirement that any particular number of factors support a particular claim.” See \textit{id}. at 1004-05 (quoting Gomez v. City of Watsonville, 863 F.2d 1407, 1412 (9th Cir. 1988), for propositions that Senate Factors were “‘only meant as a guide to illustrate some of the variables that should be considered by the court’” and “‘the range of factors that [are] relevant in any given case will vary depending upon the nature of the claim and the facts of the case’”).

\textsuperscript{105.} See \textit{id}. at 1012 (“Unlike in \textit{Salt River}, . . . Plaintiffs have produced evidence that Washington’s criminal justice system is infected with racial bias. The experts’ conclusions are not ‘statistical disparity alone,’ but rather speak to a durable, sustained difference in treatment faced by minorities in Washington’s criminal justice system—systemic disparities which cannot be explained by ‘factors independent of race.’”).

\textsuperscript{106.} See \textit{id}. at 1012-13 (“This method of proving racial discrimination is familiar in our antidiscrimination jurisprudence.”). Relying upon the three-step inquiry required in \textit{Batson v. Kentucky}, 476 U.S. 79 (1986), the court analogized discrimination in Washington’s criminal justice system to circumstances in which discriminatory intent may be proven “through the same circumstantial inference from a lack of race-neutral explanations.” See \textit{Farrakhan II}, 590 U.S. at 1013.

\textsuperscript{107.} See \textit{Farrakhan II}, 590 F.3d at 1012-13 (“[P]roof of discriminatory intent is not required to establish a violation of Section 2.” (alteration in original) (quoting S. REP. No. 97-417, at 2 (1982), \textit{reprinted in} 1982 U.S.C.C.A.N. 177, 179)).
D. Rehearing Returns to Intent in Farrakhan III

Subsequently, the Ninth Circuit granted rehearing en banc and reversed the panel’s decision that Washington’s felon disenfranchisement law violated the VRA. The court held that plaintiffs bringing a section 2 challenge to a felon disenfranchisement law must show intentional discrimination. The majority first acknowledged that three circuits found felon disenfranchisement laws to be categorically exempt from challenges brought under section 2 of the VRA. With these opinions in mind, the majority concluded that “the rule announced in Farrakhan I sweeps too broadly.”

Like the First and Second Circuits, the majority looked beyond the text of the statute, noting that felon disenfranchisement laws have a long history in the United States and that many such laws were in effect when the Fourteenth and Fifteenth Amendments were ratified. Further, relying upon Richardson, the majority stated that “felon disenfranchisement has an affirmative sanction in the Fourteenth Amendment.” As additional grounds for skepticism that it is permissible to challenge felon disenfranchisement laws under the VRA, the majority emphasized that the criminal justice system has “its own unique safeguards and remedies against arbitrary, invidious or mistaken conviction.”

Nevertheless, the court did not reverse its previous holding that it is permissible to challenge felon disenfranchisement laws under section 2 of the VRA.

Judge McKeown’s dissent recognized the circuit split on the initial question of whether felon disenfranchisement laws may be challenged under the VRA, but noted that “the wisdom of Farrakhan I is not within the purview of the panel to reconsider here.” Id. at 1016 (McKeown, J., dissenting). However, Judge McKeown expressed caution and identified a distinction between currently incarcerated felons and those already released. See id. at 1017. Judge McKeown also rejected the majority’s distinction between vote dilution and vote denial claims, asserting that the majority erred in disregarding certain Senate Factors. See id. at 1018-19.

108. See Farrakhan III, 623 F.3d 990, 994 (9th Cir. 2010) (per curiam) (holding that Washington’s felon disenfranchisement law did not violate VRA).

109. See id. (“Because plaintiffs presented no evidence of intentional discrimination in the operation of Washington’s criminal justice system . . . we conclude that they didn’t meet their burden of showing a violation of the VRA.”).

110. See id. at 993 (noting circuit split). For a discussion of the circuit split, see supra notes 62-85 and accompanying text.

111. Farrakhan III, 623 F.3d at 993.

112. See id. (“These laws predate the Jim Crow era and, with a few notable exceptions, have not been adopted based on racial considerations.” (citation omitted)).

113. Id. (citing Richardson v. Ramirez, 418 U.S. 24 (1974)). The majority also acknowledged that when Congress enacted the VRA, it was aware of the language of the Fourteenth and Fifteenth Amendments, yet did not indicate that felon disenfranchisement laws were suspect. See id. (noting long history of felon disenfranchisement laws and asserting that Congress was aware of these laws when it enacted and amended VRA).

114. Id. (“By definition, felon disenfranchisement takes effect only after an individual has been found guilty of a crime.”).
the VRA.\textsuperscript{115} Instead, the majority held that plaintiffs “must at least show that the criminal justice system is infected by \textit{intentional} discrimination or that the felon disenfranchisement law was enacted with such intent.”\textsuperscript{116} Because the plaintiffs failed to provide evidence of intentional discrimination in the operation of Washington’s criminal justice system, the majority concluded that they did not meet their burden to show a violation of section 2 and affirmed the district court’s grant of summary judgment to the State.\textsuperscript{117}

V. The Ninth Circuit’s Unambiguous Error

In \textit{Farrakhan III}, the Ninth Circuit properly upheld its previous holding that challenges to felon disenfranchisement laws are cognizable under section 2 of the VRA.\textsuperscript{118} Nevertheless, the Ninth Circuit improperly ignored both the plain language of the Act and established Supreme Court precedent in requiring discriminatory intent to succeed on such a claim.\textsuperscript{119} In reaching its decision, the Ninth Circuit erroneously relied upon the legislative history of the VRA, the so-called “affirmative sanction”

\textsuperscript{115} See id. at 992 (“When this case was last before our court, we held that felon disenfranchisement laws can be challenged under Section 2 by introducing [statistical evidence that there are racial disparities in Washington’s criminal justice system].”).

\textsuperscript{116} Id. at 993 (limiting holding to narrow issue).

\textsuperscript{117} See id. at 994 (affirming district court’s holding that plaintiffs did not show any violation of section 2 of VRA). Four concurring judges agreed that the majority’s holding did not overturn \textit{Farrakhan I}’s holding that “a § 2 analysis requires consideration of factors external to the challenged voting mechanism itself.” \textit{Id.} at 995 (Thomas, J., concurring). They also rejected the majority’s new intent requirement. \textit{See id.} at 996 (“I respectfully part company with the majority to the extent that it suggests that proof of discriminatory intent is required to establish a § 2 violation.”). Judge Graber concurred in the judgment, but disagreed with the majority’s decision to alter its previous holding in \textit{Farrakhan I}. \textit{See id.} at 997 (Graber, J., concurring) (arguing that majority could have affirmed district court’s holding on ground that plaintiffs failed totality of circumstances test). Judge Graber found no need to address whether felon disenfranchisement laws may be challenged under section 2 of the VRA because the court declined to rehear \textit{Farrakhan I} en banc over a vigorous dissent and the Supreme Court denied certiorari. \textit{See id.} (“Once we have resolved a preliminary and important point of law and the full court and the Supreme Court have declined to intervene, judicial prudence strongly suggests that we should not later disturb that ruling—and thereby undo years of effort by the parties and the courts—in the very same case when doing so is entirely unnecessary.”).

\textsuperscript{118} See id. at 992 (per curiam) (acknowledging that felon disenfranchisement laws can be challenged under section 2 of VRA by introducing evidence of racial disparities in criminal justice system); \textit{see also Farrakhan I}, 338 F.3d 1009, 1012-16 (9th Cir. 2003) (holding challenges to felon disenfranchisement laws cognizable under section 2).

\textsuperscript{119} \textit{See Farrakhan III}, 623 F.3d at 993 (per curiam) (requiring proof of intentional discrimination).
of felon disenfranchisement in the Fourteenth Amendment, and the “unique safeguards” of the criminal justice system.\(^{120}\)

A. Congressional Silence Does Not Indicate Approval

The Ninth Circuit erred when it relied upon congressional silence in the original enactment of the VRA and the 1982 amendments as evidence of tacit approval of felon disenfranchisement.\(^{121}\) As a threshold matter, many judges have rejected resorting to legislative history despite the plain and unambiguous language of the VRA.\(^{122}\) As Judge Katzmann noted in a dissenting opinion in Hayden, “Surely, the silence of enacting legislators cannot overcome the unambiguous and broadly worded provisions of a statute that was meant to apply to a multitude of state policies not specifically enumerated in its text . . . .”\(^{123}\) In addition, commentators have noted that congressional silence on the applicability of the VRA to felon disenfranchisement could point to the opposite conclusion—if Congress did not intend the VRA to reach felon disenfranchisement, the congressional record and floor debates would evince that objective.\(^{124}\)

\(^{120}\) See id. (noting long history of felon disenfranchisement, legislative history, affirmative sanction of Fourteenth Amendment, and safeguards of criminal justice system).

\(^{121}\) See id. (“Congress was no doubt aware of [felon disenfranchisement statutes in twenty-nine states] when it enacted the VRA in 1965 and amended it in 1982, yet gave no indication that felon disenfranchisement was in any way suspect.”).

\(^{122}\) See Simmons v. Galvin, 575 F.3d 24, 49 (1st Cir. 2009) (Torruella, J., dissenting) (“Though it is unable to point to any actual textual ambiguity, the majority nevertheless makes a conclusory assertion that ’[t]he language of § 2(a) is both broad and unambiguous.’ Breadth, however, does not render a statute ambiguous.” (alteration in original) (citation omitted)), cert. denied, 131 S. Ct. 412 (2010); Hayden v. Pataki, 449 F.3d 305, 346 (2d Cir. 2006) (en banc) (Parker, Jr., J., dissenting) (“In order to justify its failure to apply the plain language of VRA § 2, the majority must find ambiguity in that provision’s pellucid language.”); id. at 368 (Sotomayor, J., dissenting) (“Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.”); id. (Katzmann, J., dissenting) (“I believe that this language of the Voting Rights Act is facially unambiguous . . . .”); Johnson v. Governor of Fla., 405 F.3d 1214, 1248 (11th Cir. 2005) (en banc) (Barkett, J., dissenting) (“The language of Section 2 of the VRA is unambiguous, and compels a conclusion that it applies to felony disenfranchisement provisions.”); see also Matthew E. Feinberg, Suffering Without Suffrage: Why Felon Disenfranchisement Constitutes Vote Denial Under Section Two of the Voting Rights Act, 8 Hastings Race & Poverty L.J. 61, 85 (2011) (“[U]nder Supreme Court precedent, it is the plain meaning of the statute which controls the analysis, and the plain meaning of the statute implies that Section Two of the Voting Rights Act applies to felony disenfranchisement. It is therefore not permissible to consider extrinsic information about the statute absent an ‘extraordinary showing’ by Congress that Section Two does not apply to felony disenfranchisement.” (footnote omitted)).

\(^{123}\) Hayden, 449 F.3d at 369 (Katzmann, J., dissenting) (arguing that silence cannot overcome plain meaning of statute).

\(^{124}\) See Feinberg, supra note 122, at 88 (“No member of Congress mentioned felon disenfranchisement during the debate on the amendments, but there is significant comment about how any voting test that results in racial discrimination
B. Richardson Does Not Immunize Discriminatory Felon Disenfranchisement Laws from Scrutiny

Furthermore, the Ninth Circuit erred by relying upon Richardson for the proposition that “felon disenfranchisement has an affirmative sanction in the Fourteenth Amendment.” While lower courts may not quarrel with the Supreme Court’s holding in Richardson, the tacit approval of a facially neutral practice does not forever exempt that practice from challenge in its discriminatory forms. Justice Marshall’s dissent in Richardson best articulated this view that Congress did not immunize “from evolving standards of equal protection scrutiny” all election practices to which Section 2 of the Fourteenth Amendment was inapplicable. The would violate the statute.”; see also Simmons, 575 F.3d at 51-52 (Torruella, J., dissenting) (“The majority makes much of the fact that felon disenfranchisement was not specifically mentioned in the legislative history, but ‘it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute.’ It is also illogical to interpret silence as intent to exclude, given that the very purpose of § 2’s broad language was to avoid reciting the various maneuvers that states may devise in the course of their ‘unremitting and ingenious defiance.’” (quoting Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 (1980); South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966)); Hayden, 449 F.3d at 354 (Parker, Jr., J., dissenting) (“The majority’s use of silence is even worse than its use of floor debates, and the Supreme Court has repeatedly cautioned against drawing inferences from silence.”); Johnson, 405 F.3d at 1250 (Barkett, J., dissenting) (“The majority’s focus on the absence of congressional findings as to felony disenfranchisement, and its disregard of the statutory text, eviscerates Congress’s intent to give Section 2 the ‘broadest possible scope.’” (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)). Commentators have also noted that the congressional record of the 1982 amendments did not contemplate a per se ban on analogous voting practices such as at-large elections, but considered such practices vulnerable if “in the totality of the circumstances, they resulted in the denial of equal access to the process.” See, e.g., Feinberg, supra note 122, at 89 (quoting S. REP. NO. 97-417, at 16 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 193). 125. See Farrakhan III, 623 F.3d at 993 (citing Richardson v. Ramirez, 418 U.S. 24, 54 (1974)). 126. See Hayden, 449 F.3d at 349-50 (Parker, Jr., J., dissenting) (“Richardson did not grant felon disenfranchisement immunity against any other ground of invalidity; it simply held that denying the vote to felons was not a per se violation of the Fourteenth Amendment. . . . But because the ‘other crimes’ provision of § 2 of the Fourteenth Amendment did not foreclose the Equal Protection challenge to Alabama’s felon disenfranchisement law in Hunter, it necessarily follows that Congress also has the power under the Fourteenth Amendment to regulate potentially discriminatory felon disenfranchisement statutes, as it did when it passed the VRA.”); Johnson, 405 F.3d at 1241 (Wilson, J., concurring in part and dissenting in part) (“[Section] 2 of the Fourteenth Amendment does not conflict with Congress’s attempts to prohibit criminal disenfranchisement that is not racially neutral.”); see also Feinberg, supra note 122, at 88 (arguing that Congress’s passage of facially neutral felon disenfranchisement statute in District of Columbia in years following enactment of original VRA does not prove Congress could not have intended to include felon disenfranchisement within reach of VRA). 127. See Richardson, 418 U.S. at 75-76 (Marshall, J., dissenting) (arguing that equal protection still applies); see also Simmons, 575 F.3d at 53 (Torruella, J., dissenting) (“The most that can be gleaned from this language is that by addressing
Court’s decision in *Hunter*, invalidating a racially discriminatory felon disenfranchisement provision, provides further evidence that the Fourteenth Amendment does not contain a *per se* sanction of felon disenfranchisement.128

C. Racial Bias in the Criminal Justice System Is Not a Safeguard

Finally, the Ninth Circuit erred in questioning the applicability of the VRA to felon disenfranchisement laws on the ground that the criminal justice system has “its own unique safeguards” against mistaken conviction.129 The faulty logic of this proposition ignores the underlying theory

the eventuality of ‘abridg[ment] . . . for participation in . . . crime,’ Congress contemplated that at least in some circumstances, felon disenfranchisement could exist. Thus, it merely implies that there is no *per se* ban on such laws.” (alteration in original)); *Hayden*, 449 F.3d at 345 (Parker, Jr., J., dissenting) (“[T]he fact that felon disenfranchisement statutes may sometimes be constitutional does not mean they are always constitutional.”); id. at 365 (Calabresi, J., dissenting) (“The fact that race-neutral felon disenfranchisement is permissible under § 4(c) tells us nothing at all about whether § 2 allows racially discriminatory felon disenfranchisement.”); *Johnson*, 405 F.3d at 1248 (Barkett, J., dissenting) (“The majority’s finding of a conflict between the VRA and Section 2 of the Fourteenth Amendment stems from its failure to distinguish between felon disenfranchisement laws generally and those that result in racial discrimination.”).

128. See *Hunter v. Underwood*, 471 U.S. 222 (1985) (holding that Alabama felon disenfranchisement law violated Equal Protection Clause because desire to discriminate against blacks on account of race motivated original enactment and law continues to have such effect); see also *Hayden*, 449 F.3d at 349 (Parker, Jr., J., dissenting) (“Unquestionably, *Richardson* did not authorize the use of felon disenfranchisement for discrimination, as the Supreme Court made clear in *Hunter v. Underwood.*” (citation omitted)). Further, given the pitched argument regarding the proper interpretation of Section 2 of the Fourteenth Amendment in relation to the VRA, some commentators have emphasized the fact that Congress enacted the VRA pursuant to its power under both the Fourteenth and Fifteenth Amendments. See id. at 350 (“The majority fails to appreciate that the operative provisions of the VRA were enacted pursuant to Congress’s power under the Fifteenth Amendment. Moreover, when it added the results test of VRA § 2 in 1982, Congress invoked its powers to enforce by ‘appropriate legislation’ both the Fifteenth Amendment’s guarantee that no citizen will be denied the right to vote on account of race and the Fourteenth Amendment’s guarantee of racial equality.” (citations omitted)); *Johnson*, 405 F.3d at 1242 (Wilson, J., concurring in part and dissenting in part) (“Congress enacted the VRA pursuant to the enforcement clauses of the Fourteenth and Fifteenth Amendments in response to rampant violations of the right to vote.”).

129. See *Farrakhan III*, 623 F.3d at 993 (“By definition, felon disenfranchisement takes effect only after an individual has been found guilty of a crime. This determination is made by the criminal justice system, which has its own unique safeguards and remedies against arbitrary, invidious or mistaken conviction.”). This justification parallels the Sixth Circuit’s similarly myopic conclusion in *Wesley* that felons are not disenfranchised because of an immutable characteristic such as race, but because of “their conscious decision to commit a criminal act for which they assume the risks of detention and punishment.” *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (discussing rationale for felon disenfranchisement laws); see also, Jerald, supra note 23, at 178-79 (arguing that racial discrimination in criminal justice system is hard to prove because “[o]ther considerations [ ] could explain the disproportionate felony impact on minorities,” including “the felon’s
of the challengers’ claim, to wit, racial bias in the criminal justice system results in the disproportionate impact of felon disenfranchisement. The plaintiffs submitted ample evidence that the criminal justice system did not adequately contain safeguards against “arbitrary, invidious or mistaken conviction.” Moreover, a body of commentary identifies the criminal justice system not as a solution to the problem posed by felon disenfranchisement, but the problem itself.

socioeconomic status, prior criminal record, severity of the offense, strength of evidence presented against him, quality of legal representation, and/or the age of the felon”). But see Farrakhan II, 590 F.3d 989, 1014 (9th Cir.) (“Before one who commits a criminal act becomes a felon, however, numerous other decisions must be made by State actors. . . . If those decision points are infected with racial bias, resulting in some people becoming felons not just because they have committed a crime, but because of their race, then that felon status cannot, under § 2 of the VRA, disqualify felons from voting.”), aff’d in part, overruled in part en banc by 623 F.3d 990. For a discussion of the racial bias in the criminal justice system, see supra notes 30-33 and accompanying text.


131. Farrakhan III, 623 F.3d at 993; see Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *6-9 (E.D. Wash. July 7, 2006) (stating that court was “compelled to find that there is discrimination in Washington’s criminal justice system on account of race,” and that such discrimination “clearly hinder[s] the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic” (quoting Farrakhan I, 338 F.3d at 1020)), rev’d, 590 F.3d 989, aff’d in part, overruled in part en banc by 623 F.3d 990.

132. See Chin, supra note 31, at 254 (“The tainted history of drug prosecutions and use of collateral consequences as a technique of racial discrimination is troubling in the context of the modern criminal justice system. For all categories of crime, the best evidence of discriminatory prosecution exists for drug violations; while African Americans are not more likely to commit drug crimes than members of other races, they are much more likely to be arrested, prosecuted, convicted, and sentenced to prison.”); Mauer, supra note 6, at 248 (discussing decline in number of potential voters due to combined impact of criminal justice policies and felon disenfranchisement laws); Rudovsky, supra note 30, at 101 (“The problem of racial discrimination in the criminal justice system is stark and seemingly impervious to change. Young African-American men bear the brunt of the system’s injustices during a period in which the nation has moved to a process of mass incarceration.”); see also Alexander, supra note 1, at 100 (discussing racially discriminatory motive behind War on Drugs and Supreme Court precedent granting police and prosecutors broad discretion and protection from scrutiny for racial bias). Alexander explains that a formally colorblind criminal justice system achieves shocking racially discriminatory results in two stages:

The first step is to grant law enforcement officials extraordinary discretion regarding whether to stop, search, arrest, and charge for drug offenses, thus ensuring that conscious and unconscious racial beliefs and stereotypes will be given free reign. Unbridled discretion inevitably creates huge racial disparities. Then, the damming step: Close the courthouse doors to all claims by defendants and private litigants that the criminal justice system operates in racially discriminatory fashion.

Alexander, supra note 1, at 100.
VI. A TEST WITH CLEAR RESULTS

Supporters of the Ninth Circuit’s novel evidentiary standard under section 2 of the VRA may validly point to the fact that no previous court had articulated a clear interpretation of the VRA’s results test.\(^{133}\) This Part asserts that the appropriate standard for evaluating claims under section 2 of the VRA incorporates the plain language of the results test with a burden-shifting scheme familiar under Title VII of the Civil Rights Act of 1964 and the Court’s equal protection jurisprudence.\(^{134}\) Under this standard, Washington’s felon disenfranchisement law would fail.\(^{135}\)

A. The Codified Results Test

In 1982, Congress amended section 2 of the VRA and explicitly rejected \emph{Bolden}’s intentional discrimination requirement.\(^{136}\) The plain language of section 2 prohibits any voting qualification or prerequisite to voting that \emph{results in} a denial or abridgement of the right to vote on account of race or color.\(^{137}\) Further, Congress codified many of the factors that the Court had considered as part of its totality of the circumstances inquiry in \emph{Whitcomb} and \emph{White}.\(^{138}\) As subsequently interpreted by the Supreme Court in \emph{Gingles}, “[t]he essence of a [section] 2 claim is that a certain electoral law, practice, or structure \emph{interacts with} social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”\(^{139}\) The court

\(^{133}\) See Ellen Katz et al., \emph{Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Right Act Since 1982}, 39 U. Mich. J.L. Reform 643, 656 (2006) (noting that “[t]he nature of Section 2 litigation has changed in recent years” and that most challenges involved at-large elections). Only a small number of cases involved vote denial claims such as challenges to registration practices, candidacy, voting requirements, or other practices such as annexations and felon disenfranchisement. See Tokaji, supra note 56, at 709 (noting that majority of section 2 cases address issues of vote dilution, as opposed to vote denial).

\(^{134}\) See generally Tokaji, supra note 56, at 723-26 (suggesting “new vote denial test” modeled on disparate impact test of Title VII and borrowing from jury discrimination cases under Equal Protection Clause).

\(^{135}\) For a discussion of why Washington’s felon disenfranchisement law would not survive under the proposed standard, see infra note 167.

\(^{136}\) See S. REP. No. 97-417, at 2 (1982), \emph{reprinted in} 1982 U.S.C.C.A.N. 177, 179 (“This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in \emph{Mobile v. Bolden}.”).


\(^{138}\) Compare S. REP. No. 97-417, at 28-29 (discussing relevant factors), \emph{with} White v. Register, 412 U.S. 755, 769-70 (1973) (considering several factors in totality of circumstances), \emph{and} Whitcomb v. Chavis, 403 U.S. 124, 149-55 (1971) (same). For a discussion of the Senate Factors, see supra notes 57-58 and accompanying text.

properly relied upon this same standard in assessing the plaintiffs’ vote denial claim in *Farrakhan v. Gregoire* (*Farrakhan II*).\(^{140}\)

While some debate whether the prevention of intentional discrimination was the core value underlying section 2 of the VRA, the 1982 amendments established an impact-based standard to achieve its ultimate purpose.\(^{141}\) Congress’s primary focus on vote dilution, not vote denial claims, likely explains why Congress did not explicitly adopt a disparate impact test.\(^{142}\) Nevertheless, the results test remains applicable to vote denial claims, albeit in a simplified form that does not require a showing of the *Gingles* preconditions or a certain number of the Senate Factors.\(^{143}\)

\(^{140}\) 590 F.3d 989 (9th Cir.), aff’d in part, overruled in part en banc by 623 F.3d 990 (9th Cir. 2010) (per curiam); see id. at 1009 (“[T]he ‘on account of’ requirement may be met ‘where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances,’ which include the state’s criminal justice system.” (quoting *Farrakhan* I, 338 F.3d 1009, 1019 (9th Cir. 2003))).

\(^{141}\) See S. REP. NO. 97-417, at 30 (“[T]he ultimate test would be . . . whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice.”); see also Tokaji, supra note 56, at 720 (“While Senator Hatch was correct to identify the prevention of intentional discrimination as the core value underlying Section 2, he was wrong to rule out an impact-based legal standard as a way of getting at that core value. An impact-based test may serve as a prophylactic against intentional discrimination that might otherwise seep into the voting process undetected.” (footnote omitted)). But see S. REP. No. 97-417, at 15-19 (discussing absence-of-intent requirement in original legislative intent of section 2). Additionally, some commentators have downplayed the distinction between requirements of discriminatory intent and discriminatory effect. See Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1136 (1989) (“The intent doctrine has come to resemble Title VII in both focus and structure. In many contexts, it too centers on outcome, rather than input, and it too weighs the claims of both sides through its allocation of the burden of proof between the parties.”); George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2320 (2006) (“Concrete issues of proof, more than any abstract theory, reveal the fundamental similarity between claims of intentional discrimination and those of disparate impact.”).

\(^{142}\) See Tokaji, supra note 56, at 720 (discussing difference between vote dilution and vote denial claims and Congress’s focus on vote dilution during 1982 amendments). Additionally, Tokaji notes that Congress avoided explicitly adopting a disparate impact test to assuage concerns that courts would read section 2 to require proportional representation. See id. at 722. But see S. REP. No. 97-417, at 6 (“The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.”).

\(^{143}\) See Chisom v. Roemer, 501 U.S. 380, 394 (1991) (“[P]laintiffs can prevail under § 2 by demonstrating that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race.”); *Farrakhan II*, 590 F.3d at 1006 (“[T]he primary question in such cases is not whether a ‘denial or abridgement’ occurs, but whether such denial is ‘on account of race.’ In vote denial claims brought under the ‘results test,’ the ‘on account of’ element is proved by showing that a ‘discriminatory impact . . . is attributable to racial discrimination in the surrounding social and historical circumstances. . . . Given the analytical distinction between vote dilution and vote denial, it is clear that Senate Factors 7 and 8, while relevant to the former, are of lesser relevance to a vote denial claim.” (alteration in original) (footnote omitted) (citation omitted)); see also Tokaji, supra
The disproportionate denial of minority votes, without more, establishes that a particular practice has a dilutive effect and leaves remaining the issue of whether there is a causal connection between the disproportionate effect and surrounding social and historical circumstances. While the Ninth Circuit in *Farrakhan II* appeared to end its inquiry upon such a showing, consideration of the Court’s anti-discrimination jurisprudence indicates that the results test may require an additional step.

**B. The Court’s Disparate Impact Jurisprudence**

The Supreme Court’s results-based anti-discrimination law places the burden on defendants to justify allegedly discriminatory conduct after the plaintiff shows disparate impact. Notably, Title VII, enacted one year before the VRA and with a similarly broad purpose of ridding discrimination in employment, adopts a results-based test for plaintiffs challenging employment practices with a disparate impact on members of a protected class. Under Title VII, once a plaintiff makes a prima facie case of

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144. See *Farrakhan II*, 590 F.3d at 1009 (noting that felon disenfranchisement is automatic and “sole remaining issue is causation”).

145. See *Farrakhan II*, 590 F.3d at 1009 (noting that felon disenfranchisement is automatic and “sole remaining issue is causation”).


147. See H.R. Doc. No. 88-914, at 18 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2393 (“Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens . . . .”)

In the last decade it has become increasingly clear that progress has been too slow
parate impact, the defendant employer may offer evidence that the challenged practice constitutes a business necessity.148 Comparably, at least one judge has argued that defendants under section 2 of the VRA have the burden to prove the electoral necessity of the challenged practice.149

Similarly, the Court’s anti-discrimination jurisprudence, particularly in jury selection, allows a plaintiff to establish a prima facie case of purposeful discrimination where the challenging party’s race was substantially

and that national legislation is required to meet a national need . . . . A number of provisions of the Constitution of the United States clearly supply the means ‘to secure these rights,’ and H.R. 7152 . . . is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.”; see also Griggs, 401 U.S. at 429-32 (“The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. . . . Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.”); Ortiz v. City of Phila. Office of the City Comm’n’s Voter Registration Div., 28 F.3d 306, 334 (3d Cir. 1994) (Lewis, J., dissenting) (“Given the similarities between [Title VII and section 2 of the VRA], it is not surprising that in Griggs, the Supreme Court relied on a Voting Rights Act case in first explaining how and why Title VII prohibited the sort of discrimination challenged in a disparate-impact suit.” (citation omitted)); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 711-12 (3d ed. 2006) (comparing Title VII and VRA based on absence of discriminatory purpose requirement); Rutherglen, supra note 141, at 2317 (discussing similarities between Title VII of Civil Rights Act and section 2 of VRA). See generally BUREAU OF NAT’L AFFAIRS, THE CIVIL RIGHTS ACT OF 1964: TEXT, ANALYSIS, LEGISLATIVE HISTORY; WHAT IT MEANS TO EMPLOYERS, BUSINESSMEN, UNIONS, EMPLOYEES, MINORITY GROUPS (1964) (discussing far-reaching significance of Civil Rights Act of 1964).

148. See Griggs, 401 U.S. at 431 (“The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”). Congress codified Griggs’ disparate impact standard and the business necessity defense in the Civil Rights Act of 1991 which provides:

An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . . .

42 U.S.C. § 2000e-2(k)(1)(A) (2006) (emphasis added); see also Rutherglen, supra note 141, at 2317 (noting that after 1991 amendments to Title VII, “the defendant has both the burden of production and persuasion to establish that an employment practice with disparate impact is job related for the position in question and consistent with business necessity.” (quoting § 2000e-2(k)(1)(A)(i))).

149. See Ortiz, 28 F.3d at 333-35 (Lewis, J., dissenting) (arguing that voter-purge statute should only be permitted if necessary to achieve stated public interest under section 2 of VRA). Judge Lewis noted that “if a state or local government can show that a voting practice that operates to the disadvantage of minority registrants is necessary to run a valid election, that practice would not constitute a violation of § 2,” and, “[c]onsistent with other results-based anti-discrimination law, defendants should bear the burden of proving necessity once plaintiffs establish the existence of disparate impact.” Id. at 334.
underrepresented on the venire. After the challenging party makes a prima facie showing, “the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.” Likewise, in the landmark equal protection case of Washington v. Davis, the Court required the State to rebut the presumption of unconstitutional action after noting that a discriminatory purpose may be inferred from the totality of circumstances, including “the fact . . . that the law bears more heavily on one race than another.” Nevertheless, the Court in Washington cautioned: “Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.” Disproportionate impact alone is not enough to prove purposeful discrimination.

150. See Batson v. Kentucky, 476 U.S. 79, 95 (1986) (discussing inference of discrimination in absence of African-American citizens on jury). In Batson, the Court stated that to establish a prima facie case,

[t]he defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant’s race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits “those to discriminate who are of a mind to discriminate.” Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors . . . raises the necessary inference of purposeful discrimination.

Id. at 96 (citation omitted) (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

151. Id. at 97.

152. 426 U.S. 229 (1976).

153. See id. at 242 (discussing inference of discrimination from disparate impact on one race). Relying on the jury selection cases, the Court stated that upon a prima facie showing of discrimination on the basis of race, “the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.” Id. at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)); cf. Hunter v. Underwood, 471 U.S. 222, 228 (1985) (“Once racial discrimination is shown to have been a ‘substantial’ or ‘motivating’ factor behind enactment of the law, the burden shifts to the law’s defenders to demonstrate that the law would have been enacted without this factor.”). If the Court accepts the government’s justification, it will apply rational basis review, but if the Court is persuaded that there is a discriminatory purpose, it will invalidate the law. See CHEMERINISKY, supra note 147, at 718.

154. Davis, 426 U.S. at 242. The Court continued: “Standing alone, [disproportionate impact] does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.” Id. (citation omitted). Further, the Court rejected the more rigorous analysis of Title VII, noting a host of constitutional issues that would follow from “tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.” See id. at 248. The Court soon clarified its holding in Davis, listing a series of factors to consider when determining whether invidious discriminatory purpose was a motivating factor. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977) (stating that circumstantial and direct evidence of intent may follow from historical background of decision, specific sequence of events leading to challenged decision, substantive departures from normal procedure,
poseful discrimination in a facially neutral statute, however all explicit classifications on the basis of race remain subject to strict scrutiny and defendants maintain the burden of showing that the discrimination is necessary and narrowly tailored to a compelling interest.155 Additionally, the Court has applied strict scrutiny to voting cases where the challenged practice poses “severe” restrictions on the right to vote.156

C. A New Results Test

Combining the business necessity defense of Title VII with the burden-shifting of the Court’s equal protection jurisprudence, it is apparent that a similar burden-shifting scheme is appropriate under section 2 of the VRA.157 Under such a test, the plaintiffs would have the burden of show-
ing that “a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”\textsuperscript{158}

The test would require plaintiffs to show both a disparate impact on minority voters and a causal connection with social and historical conditions.\textsuperscript{159} The appropriate causal connection would be a contributing cause, not a dispositive force.\textsuperscript{160}

For example, in a challenge to a felon disenfranchisement law, plaintiffs would first show a disparate impact on minority voters.\textsuperscript{161} Second, they would show that racial bias in the criminal justice system contributed to the disproportionate disenfranchisement of minority voters.\textsuperscript{162} Upon such a prima facie showing, the burden would shift to the defendant to show that the practice is narrowly tailored to a compelling state interest.\textsuperscript{163} Consistent with the Court’s application of strict scrutiny to racial discrimination and fundamental rights, to be narrowly tailored, the practice must have a race-neutral explanation or the defendant must have considered

\textsuperscript{158} Thornburg \textit{v.} Gingles, 478 U.S. 30, 47 (1986); see also Tokaji, \textit{supra} note 56, at 724 (deriving test from “ultimate test” in Senate Report—“whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their . . . choice”—and fifth Senate Factor—“the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process” (alteration in original) (quoting S. Rep. No. 94-417, at 29-30 (1982), \textit{reprinted in} 1982 U.S.C.C.A.N. 177, 206-07)).

\textsuperscript{159} See \textit{Farrakhan II}, 590 F.3d at 1009 (“[T]he ‘on account of’ requirement may be met ‘where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances’ . . . .” (quoting \textit{Farrakhan I}, 338 F.3d 1009, 1019-20 (9th Cir. 2003))).

\textsuperscript{160} See Ortiz, 28 F.3d at 323 (Lewis, J., dissenting) (“In order to properly apply § 2 in this case, we cannot require the plaintiffs to prove that Pennsylvania’s non-voting purge law operates, by itself and independently of other circumstances, to produce discriminatory results.”); see also S. Rep. No. 97-417, at 29 n.114 (“Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.”).

\textsuperscript{161} See Tokaji, \textit{supra} note 56, at 724 (discussing first prong of prima facie case).

\textsuperscript{162} See id. (discussing second prong of prima facie case).

\textsuperscript{163} See id. at 725-26 (relying on additional Senate Factor—“whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous”—and arguing that “government should be required to show the challenged practice is narrowly tailored to a compelling government interest” (quoting S. Rep. No. 94-417, at 29)); see also Rutherglen, \textit{supra} note 141, at 2314 (arguing that application of disparate impact analysis is heavily dependent upon context). For a discussion of justifications asserted in defense of felon-disenfranchisement statues, see \textit{supra} note 29 and accompanying text.
race-neutral alternatives first. For example, in the context of felon disenfranchisement, a state would have to show that there is a race-neutral explanation for the disparate effects in the criminal justice system, not just that the law itself is facially race-neutral. To require otherwise would undermine section 2's focus on discriminatory effect rather than discriminatory intent. Because the Ninth Circuit in Farrakhan II required a similar prima facie showing and noted the absence of any race-neutral justification by the State for disparities in the criminal justice system, it is clear that Washington’s felon disenfranchisement law would fail the above test.

VII. Felon Disenfranchisement and the Colorblind Court

Given the convoluted legal landscape, the growing concern for the collateral consequences of mass incarceration, and the interest in the political ramifications of felon disenfranchisement, the issue is ripe for Su-

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164. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (invalidating city’s affirmative action contracting plan because “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”); Regents of the Univ. of Cal. v. Bakke, 486 U.S. 265, 357 (1978) (Brennan, J., concurring in part and dissenting in part) (“Unquestionably we have held that a government practice or statute which restricts ‘fundamental rights’ or which contains ‘suspect classifications’ is to be subjected to ‘strict scrutiny’ and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available.”).

165. See Farrakhan II, 590 F.3d 989, 1012 (9th Cir.) (distinguishing Salt River on ground that “experts’ conclusions are not ‘statistical disparity alone,’ but rather speak to a durable, sustained difference in treatment faced by minorities in Washington’s criminal justice system—systemic disparities which cannot be explained by ‘factors independent of race’”), aff’d in part, overruled in part en banc by 623 F.3d 990 (9th Cir. 2010) (per curiam). For further discussion of race-neutrality, see supra notes 146-56 and accompanying text.

166. See S. Rep. No. 97-417, at 15-16 (noting that original legislative intent as to section 2 did not require discriminatory intent or purpose); see also Farrakhan I, 338 F.3d 1009, 1018-19 (9th Cir. 2003) (noting that district court’s “‘by itself’ causation [standard] would defeat the interactive and contextual totality of the circumstances analysis repeatedly applied by [ ] sisters circuits in Section 2 cases” and effectively read intent requirement back into VRA, contradicting clear command of 1982 amendments to section 2 of VRA).

167. See Farrakhan II, 590 F.3d at 1004 (“Have Plaintiffs demonstrated a prima facie case that the felon disenfranchisement law violates § 2 of the VRA, i.e., that: (1) there are significant statistical racial disparities in the operation of the criminal justice system; (2) those disparities cannot be explained in race-neutral ways; and (3) those non-race-neutral disparities in the criminal justice system lead to significant racial disparities in the qualification to vote, such that Plaintiffs would be entitled to judgment as a matter of law based upon the uncontroverted evidence?”). The Ninth Circuit repeatedly noted that the plaintiffs introduced evidence and expert testimony “demonstrating that the statistical disparity and disproportionality evident in Washington’s criminal justice system arise from discrimination, and the State has failed to refute that showing.” See id. at 1012.
preme Court review. Its intervention would resolve the circuit split on the threshold issue of challenges to felon disenfranchisement under section 2 of the VRA. It would also allow the Court to consider the appropriate evidentiary standard under section 2 and clarify the relationship of the results test to recent vote denial claims. As such, the fate of future challenges to felon disenfranchisement waits in the balance.

While the Court could defer to the tenuous reasoning of the majority of circuit courts to address the issue, it should seize the opportunity to recognize racial bias in the criminal justice system and the devastating effect of mass incarceration on communities of color. If it chooses to do so, the above standard, in explicitly acknowledging the State’s opportunity to rebut a prima facie showing of racial discrimination, provides further constitutional protection to section 2 of the VRA by satisfying the congruence and proportionality requirements of Congress’s enforcement powers. To allay fears that the results test invalidates all felon

168. See Alexander, supra note 1, at 10-11 (“More recently, civil rights groups around the country have helped to launch legal attacks and vibrant grassroots campaigns against felon disenfranchisement laws and have strenuously opposed discriminatory crack sentencing laws and guidelines, as well as ‘zero tolerance’ policies that effectively funnel youth of color from schools to jails.”); see also Tokaji, supra note 56, at 689 (“The years since the 2000 presidential election have witnessed unprecedented attention to the mechanics of election administration.”).

169. For a discussion of the circuit split, see supra notes 62-85 and accompanying text.

170. For a discussion of the appropriate evidentiary standard, see supra notes 133-67 and accompanying text.

171. See Ryan P. Haygood, Disregarding the Results: Examining the Ninth Circuit’s Heightened Section 2 “Intentional Discrimination” Standard in Farrakhan v. Gregoire, 111 Colum. L. Rev. Sidebar 51, 65 (2011) (“The ironic and disheartening result of all this . . . is that Washington’s disproportionately disfranchised racial minorities are left with only one hope for change: to rely on the same political process that has already cast them out.”).

172. For a discussion of appellate decisions rejecting challenges to felon disenfranchisement under section 2 of the VRA, see supra notes 62-85 and accompanying text.

173. See City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”); see also Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 736 (2004) (holding that because Family Medical Leave Act targeted sex-based classifications, subject to heightened standard of review, legislature granted more deference in prophylactic legislation); Tennessee v. Lane, 541 U.S. 509, 528-29 (2004) (noting heightened judicial scrutiny applied to constitutional guarantees such as access to courts cases Congress’s burden in showing pattern of constitutional violations to justify prophylactic legislation). Because Congress enacted section 2 to address racial discrimination in the exercise of a fundamental right, according to Lane and Hibbs, courts should grant Congress more deference in enacting prophylactic or remedial legislation. See Tokaji, supra note 56, at 729. But see Johnson v. Governor of Fla., 405 F.3d 1214, 1230-31 (11th Cir. 2005) (en banc) (stating that plaintiff’s interpretation that VRA conflicts with Fourteenth Amendment raises serious constitutional issues because enforcement power does not allow prohibition of constitutionally protected practices); Farrakhan v. Washington, 359 F.3d 1116, 1123 (9th Cir. 2004) (Kozinski, J., dissenting) (arguing that
disenfranchisement laws with a disparate impact on racial minorities, the proposed standard would only reach laws that are discriminatory due to social and historical circumstances.\(^{174}\)

The test outlined above, in addition to its solid foundation in the text of the VRA and Supreme Court precedent, will force the Court and states to consider the effect of a growing civil rights outrage.\(^{175}\) In an effort to remain colorblind, the Court has been reluctant to open the door to challenges of racial bias in the criminal justice system; however, Congress has acknowledged that the Fourteenth and Fifteenth Amendments failed to eliminate invidious forms of racial discrimination.\(^{176}\) It is not for the Court to reject this legislative purpose, especially in a time when a much more insidious form of racial discrimination has taken hold across the country.\(^{177}\) For those like Jarvious Cotton and Mohammad Farrakhan, colorblindness will not remedy the loss of their most fundamental right, but will only submerge and obscure the racial disparities that persist in society.\(^{178}\)

subjecting felon disenfranchisement to section 2 would violate Congress’s enforcement powers because “[t]he theoretical, undocumented threat of unconstitutional felon disenfranchisement laws simply doesn’t justify such a broad remedy”).

174. For a discussion of the prima facie case, see supra notes 158-62 and accompanying text.

175. For a discussion of the proposed burden-shifting scheme, see supra notes 157-67 and accompanying text. For a discussion of the racial bias in the War on Drugs and the increased incarceration of minorities, see ALEXANDER, supra note 1, at 20-57.

176. See A Bill to Enforce the Fifteenth Amendment to the Constitution of the United States: Hearing on S. 1564 Before the S. Comm. of the Judiciary, 89th Cong. 2 (1965) (statement of Nicholas deB. Katzenbach, Att’y Gen. of the U.S.) (“While, in theory, the [Fifteenth] Amendment devitalizes these techniques, in fact, they flourish. It is now apparent that its promise is yet to be redeemed, and that Congress must meet the obligation, expressly conferred by the Amendment, to enforce its provisions. The purpose of the Voting Rights Act of 1965 is to meet that obligation.”).

177. For further discussion of racial bias in the criminal justice system, see supra notes 30-33 and accompanying text.

178. See ALEXANDER, supra note 1, at 228 (“Our blindness also prevents us from seeing the racial and structural divisions that persist in society: the segregated, unequal schools, the segregated jobless ghettos, and the segregated public discourse—a public conversation that excludes the current pariah caste.”).