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Let’s Not Jump to Conclusions: How Courts Should Approach Voting Rights Act Challenges to Felon Disenfranchisement Laws

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# Approaching a Voting Rights Act Challenge to Felon Disenfranchisement Laws

## Table of Contents

**INTRODUCTION** .................................................. 1  
I. **BACKGROUND** ............................................... 4  
   A. The Right to Vote ........................................... 4  
   B. Burdick v. Takushi ......................................... 9  
   C. Felon Disenfranchisement Laws in the United States .......... 11  
      1. The Impact of Felon Disenfranchisement Laws .......... 14  
      2. Richardson v. Ramirez ................................. 16  
   D. Section 2 of the Voting Rights Act and the 1982 Amendments .... 18  
II. **THE CURRENT SPLIT OF AUTHORITY** .............. 22  
   A. The Ninth Circuit Allows VRA Challenges ....................... 23  
   B. The Second Circuit Rejects VRA Challenges ..................... 25  
III. **SOLUTION: DEVELOPING A NEW APPROACH TO VRA VOTE DENIAL CHALLENGES TO FELON DISENFRANCHISEMENT LAWS** .......... 30  
   A. The Mechanics of the New Sliding Scale Approach to Felon Disenfranchisement Challenges ... 33  
      1. Establishing a Vote Denial Challenge to a Felon Disenfranchisement Statute ... 34  
      2. Determining the Appropriate Level of Scrutiny .......... 37  
   B. The Proposed Approach Should Apply to VRA Felon Disenfranchisement Challenges ... 41  
      1. Consistent Judicial Application of Sliding Scale Scrutiny .................. 42  
      2. Consistency with Precedent and Legislative Intent ........ 44  
   C. The Proposed Approach Addresses the Second Circuit’s Constitutional Concerns .......... 48  
   D. The Proposed Approach Allows Use of the VRA as the Only Plausible Avenue for Redress .......... 56  
**CONCLUSION** .................................................. 58
INTRODUCTION

Federal courts are jumping to conclusions about the constitutionality of allowing felon disenfranchisement challenges under section 2 of the Voting Rights Act ("VRA"). In the midst of their leaps, these courts have skipped over a crucial analytical step, leading to a potential misapplication of the VRA. Because of their flawed analyses, some federal courts may be silently condoning infringements of certain citizens’ right to vote—a right that Congress intended to protect through the VRA.¹

Through section 2 of the VRA, Congress granted courts the power to strike down laws that disproportionately burden minorities’ voting rights.² Presently, however, federal courts


² Voting Rights Act § 2, 42 U.S.C. § 1973 (2007); see discussion infra Part I.D. In other contexts, Congress and federal courts reject voting regulations that disproportionately burden minority voting rights. See generally U.S. CONST. amend. XXIV (prohibiting poll taxes); U.S. CONST. amend.
disagree about felons’ ability to challenge state felon
disenfranchisement statutes under section 2 of the VRA. The
current split of authority threatens to prevent challenges to
statutes that disenfranchise felons, even though such statutes
often have disproportionate effects on minorities. The Ninth
Circuit Court of Appeals allows challenges to felon
disenfranchisement statutes under section 2. However, the
Second Circuit Court of Appeals prohibits challenges to felon
disenfranchisement statutes under section 2 because of concerns
that allowing such challenges violates constitutional
provisions.

Importantly, an analytical flaw exists within these federal
courts’ reasoning. Both courts have ignored an important
question in their analyses: how would courts approach Section 2

XV (prohibiting states from denying right to vote on account of race, color,
or previous condition of servitude); Hunter v. Underwood, 471 U.S. 222, 233
(1985) (striking Alabama felon disenfranchisement law because of invidious
legislative intent); Guinn v. United States, 238 U.S. 347 (1915) (striking
Oklahoma grandfather clause that exempted most whites from literacy test).

3 See infra Part II.

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

5 See infra Part II.A.

6 See infra Part II.B.
challenges to felon disenfranchisement laws? Instead, these courts simply assume an ability to foresee the juridical effects and constitutional implications of allowing these challenges.

This Comment addresses and responds to the courts’ flawed reasoning. Specifically, this Comment asserts that a uniform approach to section 2 felon disenfranchisement challenges must exist before courts can determine the constitutionality of allowing these challenges. Currently, however, there is no uniform approach. This Comment responds to the flawed reasoning by proposing a workable approach to felon disenfranchisement challenges under Section 2.

Part I discusses the emergence of voting protections, the history of felon disenfranchisement laws, and the evolution of section 2 of the VRA. Part II examines the current circuit split regarding whether a plaintiff can challenge felon disenfranchisement laws under section 2 of the VRA. Part III analyzes the need for a standard approach to these challenges and argues that a variation of sliding scale scrutiny is the best approach.

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7 See infra Part III.


9 See infra Part I.

10 See infra Part II.

11 See infra Part III.
I. BACKGROUND

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

A. The Right to Vote

The Supreme Court, under Chief Justice Earl Warren, made significant advancements in identifying and protecting the right

\footnote{See, e.g., Fla. Const. art. VI, § 4(a) (declaring, “No person convicted of a felony . . . shall be qualified to vote”); N.Y. Elec. Law § 5-106(2) (McKinney 2006) (declaring that “[no felon] shall have the right to . . . vote at any election”); see also Note, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box", 102 Harv. L. Rev. 1300, 1301-02 (1989) (tracing concept of disenfranchising felons back to ancient Greece and Anglo-Saxon England).}

\footnote{See, e.g., Fla. Stat. Ann. § 97.041 (West 2006) (denying right to vote to “person who has been convicted of any felony . . . who has not had his or her right to vote restored”).}

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

\footnote{See infra Parts I.A-D.}
to vote.\textsuperscript{16} Prior to these advancements, many citizens found little assistance in the struggle to obtain voting rights.\textsuperscript{17} The Warren Court began protecting the right to vote by identifying voting as a fundamental right.\textsuperscript{18} This opened the door for the Fourteenth Amendment’s fundamental rights doctrine to serve as a vehicle for challenging statutes that abridge the right to vote.\textsuperscript{19} Consistent with the Supreme Court’s fundamental rights


\textsuperscript{17} Courts traditionally interpreted the original Constitution as a document of negative restrictions, failing to guarantee anyone the affirmative right to vote. See, e.g., Minor v. Happersett, 88 U.S. 162, 170-78 (1875) (holding that Constitution does not grant any citizen affirmative right to vote). The text of the original Constitution only required an election for the members of the House. U.S. Const. art I, § 4. Gradually, the notion of a protected right to vote emerged through the amendment process. See U.S. Const. amends. XIV, XVII, IXX, XXIV, XXVI (specifically referring to “right to vote” and prohibiting poll taxes). Further frustrating citizens’ efforts to attain the right to vote was the Court’s disposition to avoid voting claims by invoking the political question doctrine. See Colegrove v. Green, 328 U.S. 549, 552 (1946) (holding that claim of inadequate representation and responsiveness was political question and, thus, non-justiciable).

\textsuperscript{18} See Kramer, 395 U.S. at 626; Reynolds, 377 U.S. at 561-62 (stating that right to vote is fundamental in free and democratic society).

\textsuperscript{19} See, e.g., Bd. of Estimate v. Morris, 489 U.S. 688, 690 (1989) (pursuing Fourteenth Amendment voting rights challenge to representation on local Board); Dunn v. Blumstein, 405 U.S. 330, 331-32 (1972) (pursuing Fourteenth Amendment challenge to durational residency voting restriction); Lucas, 377
jurisprudence, courts reviewed these challenges under strict scrutiny.\(^\text{20}\)

After recognizing a fundamental right to vote, the Supreme Court began identifying those entitled to this right.\(^\text{21}\) Gradually, the Court defined a core electorate of those individuals who satisfied the age, residency, citizenship, and non-felon status requirements set by their state legislatures.\(^\text{22}\) Absent a compelling state interest, the Supreme Court required

U.S. 713 (pursuing Fourteenth Amendment voting rights challenge to Colorado districting scheme).

\(^\text{20}\) See Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (applying strict scrutiny to statute abridging fundamental right to familial living situation); Dunn, 405 U.S. at 337, 342 (applying strict scrutiny to Tennessee’s durational residency voting qualification); Stanley v. Illinois, 405 U.S. 645, 657-58 (1972) (applying strict scrutiny to statute abridging fundamental right to familial custody); Kramer, 395 U.S. at 626-27 (applying strict scrutiny to statute abridging fundamental right to vote); Loving v. Virginia, 388 U.S. 1, 12 (1967) (applying strict scrutiny to statute abridging fundamental right to marry).

\(^\text{21}\) See infra note 23 and accompanying text.

\(^\text{22}\) See Gerald L. Neuman, "We Are the People": Alien Suffrage in German and American Perspective, 13 Mich. J. Int’l L. 259, 313-14 (1992) (discussing and defining term “core electorate”); see also Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982) (holding that formal citizenship can be prerequisite to voting rights); Richardson v. Ramirez 418 U.S. 24, 56 (1974) (holding that state can disenfranchise felons pursuant to constitutional authority); Dunn, 405 U.S. at 360 (holding that Tennessee’s durational residency requirement for voting was unconstitutional); Oregon v. Mitchell, 400 U.S. 112, 130-31 (1970) (holding that Congress could not force states to enfranchise eighteen year-olds); Carrington v. Rash, 380 U.S. 89, 96-97 (1965) (holding that Texas could not deny members of Army voting rights when members were bonafide residents of town).
states to enfranchise all individuals who satisfied these requirements.\textsuperscript{23} Accordingly, statutes disenfranchising members of the core electorate triggered strict scrutiny because these people had a fundamental right to vote.\textsuperscript{24} Under strict scrutiny, a challenged statute is only valid if the state narrowly tailors it to achieve a compelling state interest.\textsuperscript{25} Statutes disenfranchising non-members, however, triggered only rational basis review because people outside of the core electorate do not have a fundamental right to vote.\textsuperscript{26} Under rational basis

\begin{itemize}
\item \textsuperscript{23} See Kramer, 395 U.S. at 628-29. A sole exception to this principle emerged through the development of the one person/one vote doctrine. See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728 (1973) (recognizing that special purpose of district allowed for unequal vote weighing). When a local governing body is not part of the core government, associated electoral schemes that deny one person/one vote representation do not trigger strict scrutiny. See Ball v. James, 451 U.S. 355, 370 (1981) (finding one acre/one vote scheme permissible when irrigation district did not possess traditional government powers); Salyer, 410 U.S. at 728 (finding one acre/one vote scheme permissible when district had a special, limited purpose and disproportionate impact); see also Richard Briffault, Who Rules at Home?: One Person/One Vote and Local Governments, 60 U. Chi. L. Rev. 339, 362-67 (discussing one person/one vote doctrine and exceptions for local governments).
\item \textsuperscript{24} See, e.g., Dunn, 405 U.S. at 337, 342 (using strict scrutiny to sustain challenge to residency restriction by plaintiff who was bona-fide resident).
\item \textsuperscript{25} Black's Law Dictionary 1462 (8th ed. 2004) (defining “strict scrutiny”).
\item \textsuperscript{26} See, e.g., Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 70 (1978) (using rational basis review to deny challenge to residency restriction by non-resident plaintiff).
\end{itemize}
review, such statutes are valid if they are rationally related to achieving a legitimate state interest.\(^{27}\)

Despite conforming to fundamental rights jurisprudence, applying strict scrutiny to any restriction of the core electorate’s right to vote proved unworkable.\(^{28}\) In the early 1990s, the Supreme Court realized that any statute regulating elections theoretically imposes some restriction on voting rights.\(^{29}\) If the Court applied strict scrutiny to all election statutes, many statutes would be unconstitutional.\(^{30}\) For fear of infringing states’ autonomy in controlling elections, the Court sought a new approach that did not employ strict scrutiny irrespective of the severity of the voting restriction.\(^{31}\) Instead, the Court believed that adjusting the level of scrutiny relative to the severity of the voting restriction better respected states’ autonomy.\(^{32}\)

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\(^{29}\) See id. (acknowledging that election laws invariably impose some amount of burden on voters).

\(^{30}\) See id. at 433–34.

\(^{31}\) See id.

\(^{32}\) See id. at 433.
B. Burdick v. Takushi

In *Burdick v. Takushi*, the Supreme Court adopted sliding scale scrutiny as a workable approach to voting rights claims. In *Burdick*, a registered voter filed suit against the Hawaii Director of Elections to challenge Hawaii’s prohibition of write-in candidacy. The plaintiff framed the challenge as one of voting rights infringement because the prohibition prevented him from voting for the person he wished to elect. The District Court for the District of Hawaii granted summary judgment for the plaintiff. On appeal, the Ninth Circuit Court of Appeals reversed this decision, holding that Hawaii’s ban on write-in candidacy served a legitimate state interest. The Supreme Court granted certiorari to decide whether a state’s power to regulate elections could justify an infringement of a core electorate member’s voting rights.

The Supreme Court held that Hawaii’s interest in regulating elections outweighed the minimal burden on the plaintiff’s right to vote. In reaching this conclusion, the Court adopted the

33. *Id.* at 434.
35. *Burdick*, 504 U.S. at 430.
38. *Burdick*, 504 U.S. at 432.
39. *Id.* at 439 (discussing state’s interest in avoiding possibility of unrestrained factionalism at general election (referring to Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986))

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sliding scale approach used in cases regarding a candidate’s ability to appear on a ballot.\textsuperscript{40} Using this approach, the Burdick Court found a minimal burden on the plaintiff’s voting rights because a candidate of choice could easily access the ballot.\textsuperscript{41} The Court then identified several legitimate state interests that sufficiently justified the minimal burden on the plaintiff’s right to vote.\textsuperscript{42}

In cases following Burdick, the Court began adjusting the level of scrutiny based on how severely the challenged regulation burdened the right to vote.\textsuperscript{43} Under this approach, a statute imposing a slight burden on the right to vote triggers rational basis review.\textsuperscript{44} However, a statute imposing a severe burden on the right to vote receives strict scrutiny.\textsuperscript{45} Thus, before applying the appropriate level of scrutiny, a court confronting a voting rights challenge must first determine the

\textsuperscript{40}See Burdick, 504 U.S. at 434; Anderson v. Celebrezze, 460 U.S. 780, 788-89 (1983) (applying sliding scale scrutiny to ballot access claim). The Court justified borrowing this approach from candidates’ rights cases because one cannot easily separate the rights of voters and candidates. Burdick, 504 U.S. at 433-34; see Bullock v. Carter, 405 U.S. 134, 143 (1972).

\textsuperscript{41}Burdick, 504 U.S. at 434, 435-39.

\textsuperscript{42}Id. at 439-40.

\textsuperscript{43}See id. at 434.

\textsuperscript{44}See id. at 438-39 (applying rational basis review because burden is slight); Werme v. Merrill, 84 F.3d 479, 485-86 (1st Cir. 1996) (applying rational basis review because burden is slight).

\textsuperscript{45}See Duke v. Smith, 13 F.3d 388, 395 (11th Cir. 1994) (applying strict scrutiny because burden is severe); Ayers-Schaffner v. DiStefano, 860 F. Supp. 918, 921 (D.R.I. 1994) (applying strict scrutiny because burden is severe).
severity of the burden. This analysis became the new judicial approach to voting rights claims under the Fourteenth Amendment.

C. Felon Disenfranchisement Laws in the United States

Borrowing from European models, statutes disenfranchising citizens as punishment for a crime date back to colonial times in the United States. Over time, these laws became more common

46 See Burdick, 504 U.S. at 434.


48 For a thorough analysis of the history of these laws, see Angela Behrens, Note, Voting — Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws, 89 MINN. L. REV. 231, 236 (2004).
and severe.\textsuperscript{49} The number of states enacting such laws increased, and the durations of disenfranchisement also increased.\textsuperscript{50}

Today, four categories of felon disenfranchisement laws exist, imposing burdens of varying degrees on a felon’s ability to vote.\textsuperscript{51} First, fourteen states and the District of Columbia prevent a felon from voting only for the duration of the felon’s incarceration.\textsuperscript{52} Second, five states extend this period beyond incarceration and prohibit voting while a felon is on parole.\textsuperscript{53} Third, twenty-seven states disenfranchise felons beyond parole and prevent a felon from voting during the probationary period.\textsuperscript{54} Finally, three states prevent felons from voting for the rest of their lives.\textsuperscript{55}

The statutory language of felon disenfranchisement laws also varies.\textsuperscript{56} While some laws disenfranchise citizens upon conviction for a felony offense, others disenfranchise citizens

\textsuperscript{49} Id. at 237-38.

\textsuperscript{50} Id.

\textsuperscript{51} See The Sentencing Project, Felony Disenfranchisement Laws in the United States (Nov. 2006), available at http://www.sentencingproject.org/pdfs/1046.pdf; see also Behrens, supra note 49, at 239 (discussing four categories of modern felon disenfranchisement statutes). Only Vermont and Maine do not disenfranchise felons, allowing even those currently incarcerated to vote. See Behrens, supra note 49, at 239; The Sentencing Project, supra.

\textsuperscript{52} See The Sentencing Project, supra note 52.

\textsuperscript{53} See id.

\textsuperscript{54} See id.

\textsuperscript{55} These states are Florida, Kentucky, and Virginia. See id.

\textsuperscript{56} See infra note 58 and accompanying text.
upon conviction for crimes of moral turpitude.\textsuperscript{57} Differences in statutory language allow different states to enforce laws imposing equal durations of disenfranchisement in different manners.\textsuperscript{58} For example, when applying the statutory language, courts in one state may permanently disenfranchise citizens upon conviction for any felony.\textsuperscript{59} At the same time, courts in another state may permanently disenfranchise citizens only upon conviction for crimes that minorities more commonly commit.\textsuperscript{60} In the past, state legislatures have intentionally manipulated the statutory language of felon disenfranchisement laws to have this effect.\textsuperscript{61}


\textsuperscript{59} See, e.g., FLA. CONST. art. VI, § 4(a).


\textsuperscript{61} See Hunter, 471 U.S. at 226-27.
1. The Impact of Felon Disenfranchisement Laws

Felon disenfranchisement laws deny over 5.3 million otherwise qualified voters the opportunity to elect their representatives.62 These laws deny more American citizens the right to cast a ballot than any other voting restriction.63 In states imposing a lifetime ban, some experts estimate that forty percent of the next generation of African American males may suffer permanent disenfranchisement.64

Despite racially neutral language, felon disenfranchisement statutes disproportionately affect racial minority groups.65 In 2004, one in twelve African Americans could not vote because of felon disenfranchisement laws.66 In contrast, these laws prevent only about one in sixty non-African Americans from voting.67

This disproportionate impact is the result of minority over-representation among felons in most states.68 Many scholars believe that this is the result of unequal treatment of


63 See Behrens, supra note 49, at 231.

64 See The Sentencing Project, supra note 52.

65 See Behrens, supra note 49, at 244-47.


67 Id.

68 See Behrens, supra note 49, at 244-45.
minorities throughout the criminal justice system. In many states, the government disproportionately stops, searches, arrests, books, charges, convicts, and sentences minorities as compared to non-minorities.

Because this unequal treatment varies by state, felon disenfranchisement statutes in some states more severely affect minorities than similar statutes in other states do. For example, in Connecticut, Pennsylvania, and Illinois, the disenfranchisement rate of African Americans is more than seventeen times greater than that of non-African Americans. In contrast, Hawaii disenfranchises proportionally fewer African


71 Compare infra note 73 and accompanying text, with infra note 74 and accompanying text.

72 See King, supra note 63, at 18.
Americans than non-African Americans. Consequently, the degree to which felon disenfranchisement statutes result in a racially biased infringement on voting rights also varies by state.

2. Richardson v. Ramirez

After the Warren Court began protecting voting rights, felons attempted to challenge disenfranchisement statutes. In Ramirez, felons from California challenged California’s disenfranchisement statute under the Equal Protection Clause of the Fourteenth Amendment. The felons invoked original jurisdiction in the Supreme Court of California by seeking a writ of mandate compelling election officials to register them to vote. The California Supreme Court held that the challenged statute violated the Equal Protection Clause, and the state subsequently appealed to the United States Supreme Court.

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74 Compare supra note 73 and accompanying text, with supra note 74 and accompanying text.
76 418 U.S. at 27.
78 Id. at 216-17; see Richardson v. Ramirez, 414 U.S. 816, 816 (1973) (granting certiorari).
Despite the infringement on felons’ rights to vote, the Supreme Court sustained the law without employing strict scrutiny.\(^79\) Instead, the Court found authorization for felon disenfranchisement statutes in section 2 of the Fourteenth Amendment.\(^80\) This section explicitly exempts states from reduced representation in the House of Representatives when disenfranchising citizens for participation in rebellion or commission of high crimes.\(^81\) By declining to subject felon disenfranchisement laws to strict scrutiny, the Ramirez Court ended the Fourteenth Amendment’s potential as a vehicle for challenges to these laws.\(^82\) Following Ramirez, courts now apply rational basis review to Fourteenth Amendment felon

\(^79\) Richardson, 418 U.S. at 41-42, 54; see U.S. Const. amend. XIV, § 2.

\(^80\) Richardson, 418 U.S. at 41-42, 54 (finding affirmative authorization for felon disenfranchisement statutes in section 2 of Fourteenth Amendment); see U.S. Const. amend. XIV, § 2.

\(^81\) U.S. Const. amend. XIV, § 2.

\(^82\) Richardson, 418 U.S. at 54-55; see also Allen v. Ellison, 664 F.2d 391, 395 (4th Cir. 1981) (stating that Richardson decision closed door to equal protection challenges to felon disenfranchisement statutes). Several years later, the Court held that the equal protection doctrine was not entirely unavailable to felons wishing to challenge the laws that disenfranchise them. Hunter v. Underwood, 471 U.S. 222, 233 (1985) (holding that when plaintiff can establish invidious legislative intent, statute will be subject to strict scrutiny). Without direct evidence of invidious intent, plaintiffs are currently unable to invoke heightened scrutiny of felon disenfranchisement challenges under the Fourteenth Amendment. See Hunter, 471 U.S. at 230-31.
disenfranchisement challenges and find at least a legitimate justification for such laws.83

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

In 1965, Congress enacted the VRA to protect the voting power of minorities in the United States.84 Due to the historical struggle between state legislatures and the federal government, the VRA is an intentionally broad prophylactic statute that prevents discriminatory voting regulations.85 The


85 See Allen v. State Bd. of Elections, 393 U.S. 544, 566-67 (1969) (discussing broad legislative intent of VRA); Hayden v. Pataki, 449 F.3d 305, 361-62 (2d Cir. 2006) (Parker, J., dissenting) (discussing historical struggle between federal government and creatively oppressive state legislatures, and need for VRA to be broad and prophylactic). The series of cases known as the white primary cases, in which the Supreme Court protected black Texas citizens’ right to vote, exemplifies this struggle. See Terry v. Adams, 345 U.S. 461, 470 (1953) (holding that private political association could not disenfranchise black citizens); Smith v. Allwright, 321 U.S. 649, 664-66 (1944) (holding that Texas Democratic Party could not prevent black
Supreme Court requires that courts interpret and apply this Act as broadly as possible.\textsuperscript{86}

Section 2 of the VRA prohibits states from denying or abridging the right to vote on account of race or color.\textsuperscript{87} There are two traditional categories of challenges under section 2.\textsuperscript{88} In vote dilution challenges, plaintiffs allege that a voting scheme, commonly a districting arrangement, diminishes minorities' political influence despite having the opportunity to vote.\textsuperscript{89} In vote denial challenges, however, plaintiffs allege that a voting regulation diminishes minorities' ability to cast a ballot in a racially disparate manner.\textsuperscript{90}

In 1980, the Supreme Court faced a redistricting challenge that questioned the proper judicial approach to section 2 claims.\textsuperscript{91} The Court decided that section 2 paralleled the citizens from voting in primary elections); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (holding that Texas legislature could not disenfranchise black citizens).

\textsuperscript{86} See Chisom v. Roemer, 501 U.S. 380, 403 (1990) (warning that even if courts foresee problems in applying congressionally mandated totality of circumstances approach, courts cannot adopt judicially created limitation on coverage of VRA); Allen, 393 U.S. at 566-67 (requiring broad interpretation of VRA).

\textsuperscript{87} Voting Rights Act § 2.

\textsuperscript{88} See Tokaji, supra note 9, at 691-92.

\textsuperscript{89} See id.

\textsuperscript{90} See id.

\textsuperscript{91} See City of Mobile v. Bolden, 446 U.S. 55, 60-61 (1980) (holding that use of multimember district scheme did not violate section 2 of VRA).
Fifteenth Amendment and provided no additional voting protection for minorities.\(^92\) As such, plaintiffs would need to establish invidious legislative intent to prevail on any claim under section 2 of the VRA.\(^93\) This approach imposed a seemingly insurmountable burden on plaintiffs that neither Congress nor civil rights activists accepted.\(^94\)

In response to the Court’s decision to require a showing of invidious intent, the Senate emphasized section 2 during re-enactment proceedings for section 4 of the VRA.\(^95\) Section 4 lists universally prohibited state voting prerequisites and devices.\(^96\) Congress ultimately decided that, while Fifteenth Amendment voting rights challenges require proof of actual discriminatory legislative intent, challenges grounded in section 2 do not.\(^97\) Instead, Congress mandated a totality of the circumstances analysis for section 2 purposes and identified

\(^92\) Id. at 60-61.
\(^93\) Id. at 61-62.
\(^95\) See id. at 1407.
\(^97\) *S. Rep.* No. 97-417, at 15-19 (1982). Requiring invidious intent would render section 2 useless because if plaintiffs can prove invidious intent, actions under the Fourteenth and Fifteenth Amendments are already available. See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (allowing felon disenfranchisement challenge under Fourteenth Amendment when plaintiff can establish invidious intent). The amended section 2 prohibits voting qualifications that result in denial or abridgement of the right to vote on account of race or color. Voting Rights Act § 2.
seven appropriate factors of this analysis.\textsuperscript{98} Congress mandated this approach to ensure that section 2 reaches all laws resulting in discriminatory voting rights infringement, as opposed to only intentionally discriminatory laws.\textsuperscript{99}

Recently, plaintiffs have begun reading section 2 of the VRA as a plausible vehicle for challenging felon disenfranchisement laws.\textsuperscript{100} These plaintiffs argue that felon disenfranchisement laws have a racially disparate impact on voting rights, and thus fall within the scope of section 2.\textsuperscript{101}

\textsuperscript{98} Voting Rights Act § 2(b); S. Rep. No. 97-417, at 28-29 (1982) (identifying non-exhaustive list of seven factors for analysis, including extent to which minorities suffer discrimination in education, employment, and health).

\textsuperscript{99} See S. Rep. No. 97-417, at 30 (emphasizing that amended language shows that plaintiffs need only show that system or practice results unequal minority access to political process, and not invidious intent). But see City of Mobile, 446 U.S. at 60-62 (employing an intent test in analyzing section 2 challenge before 1982 amendments).

\textsuperscript{100} See Hayden v. Pataki, 449 F.3d 305, 309 (2d Cir. 2006) (pursuing section 2 challenge to felon disenfranchisement law); Johnson v. Bush, 405 F.3d 1214, 1216 (11th Cir. 2005) (pursuing section 2 challenge to felon disenfranchisement law); Farrakhan v. Locke, 338 F.3d 1009, 1011 (9th Cir. 2003) (pursuing section 2 challenge to felon disenfranchisement law); Wesley v. Collins, 791 F.2d 1255, 1257 (6th Cir. 1986) (pursuing section 2 challenge to felon disenfranchisement law).

\textsuperscript{101} See, e.g., Hayden, 449 F.3d at 310-12 (featuring section 2 challenge to felon disenfranchisement statute); Muntaqim v. Coombe, 366 F.3d 102, 103-06 (2d Cir. 2004) (featuring section 2 challenge to felon disenfranchisement statute); Johnson v. Bush 214 F. Supp. 2d 1333, 1335 (S.D. Fla. 2002) (featuring section 2 challenge to felon disenfranchisement statute); Farrakhan v. Locke, 987 F. Supp. 1304, 1307 (E.D. Wash. 1997) (featuring section 2 challenge to felon disenfranchisement statute); Wesley v. Collins,
However, under the current interpretation of the VRA, it is unclear if a court will sustain a challenge to these laws under section 2.\textsuperscript{102}

II. THE CURRENT SPLIT OF AUTHORITY

Despite the broad language and congressional intent of section 2, courts disagree about the VRA’s ability to reach felon disenfranchisement statutes.\textsuperscript{103} The Ninth Circuit Court of Appeals has found that section 2 is a plausible vehicle for challenges to felon disenfranchisement laws.\textsuperscript{104} The Second Circuit Court of Appeals, however, has held that plaintiffs cannot challenge felon disenfranchisement laws under section

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\textsuperscript{102} See discussion \textit{infra} Parts II.A-B. (discussing circuit split on issue of viability of VRA as challenge to felon disenfranchisement laws).

\textsuperscript{103} Compare \textit{Farrakhan}, 338 F.3d 1009 (allowing felon disenfranchisement challenge under section 2), and \textit{Wesley v. Collins}, 791 F.2d 1255, 1259-60 (6th Cir. 1986) (holding, implicitly, that courts can sustain challenge by applying section 2 analysis to challenged felon disenfranchisement law), with \textit{Hayden}, 449 F.3d 305 (precluding felon disenfranchisement challenge under section 2), and \textit{Johnson v. Bush}, 405 F.3d 1214 (11th Cir. 2005) (precluding felon disenfranchisement challenge under section 2).

\textsuperscript{104} See \textit{Farrakhan}, 338 F.3d at 1016. See generally \textit{Wesley}, 791 F.2d 1255 (engaging in analysis of felon disenfranchisement challenge brought under section 2).
2. Considering this split in authority, review by the Supreme Court appears to be both necessary and probable. Some courts have discussed the need for Supreme Court review of this issue. See Hayden, 449 F.3d at 310 (noting circuit split and discussing need for Supreme Court review); Montagim v. Coombe, 366 F.3d 102, 104 (2d Cir. 2004) (noting circuit split and discussing need for Supreme Court review). Following Farrakhan, the State of Washington immediately filed a motion for certiorari in the United States Supreme Court, but the Court denied this motion. Locke v. Farrakhan, 543 U.S. 984, 984 (2004). Some scholars believe that the Court denied certiorari for lack of a final judgment, given that the Ninth Circuit remanded the case for further analysis. See Edward B. Foley, Voter Eligibility: Felon Disenfranchisement, ELECTION LAW AT MORITZ, http://moritzlaw.osu.edu/electionlaw/ebook/part1/eligibility_felon02.html (last visited Feb. 12, 2007) [hereinafter Foley, Voter Eligibility]. After another district court judgment for the state, the case is currently approaching a second appellate review by the Ninth Circuit. Farrakhan v. Grecoire, 2006 WL 1889273 (E.D. Wash. July 7, 2006). After final review by Ninth Circuit, it is likely that the Supreme Court will grant certiorari in Farrakhan, or in a similar felon disenfranchisement case. See Foley, Voter Eligibility, supra.

A. The Ninth Circuit Allows VRA Challenges

In Farrakhan v. Washington, ex-felons in Washington challenged their disenfranchisement on the grounds that the state’s felon disenfranchisement provision violated section 2 of the VRA. The District Court for the Eastern District of Washington held that, while section 2 allowed such challenges, the challenged law did not violate that provision. On appeal, the Ninth Circuit Court of Appeals held that section 2 permits

105 See Hayden, 449 F.3d at 328; Johnson, 405 F.3d at 1234-35.

106 Some courts have discussed the need for Supreme Court review of this issue. See Hayden, 449 F.3d at 310 (noting circuit split and discussing need for Supreme Court review); Montagim v. Coombe, 366 F.3d 102, 104 (2d Cir. 2004) (noting circuit split and discussing need for Supreme Court review).

107 338 F.3d at 1016, 1011-12 (9th Cir. 2003); See WASH. CONST. art. VI, § 3.

108 Farrakhan, 338 F.3d at 1011.
challenges to felon disenfranchisement statutes and remanded the case for proper analysis.\textsuperscript{109}

The Ninth Circuit initially emphasized that the text of section 2 proscribes voting qualifications that result in a racially disparate infringement on voting rights.\textsuperscript{110} The court recognized that, by definition, felon disenfranchisement laws impose a voting qualification on the electorate.\textsuperscript{111} The Ninth Circuit ultimately concluded that felon disenfranchisement laws may violate the VRA if they result in a racially disparate denial of voting rights.\textsuperscript{112}

\textsuperscript{109} Id. at 1016, 1020. Unlike the District Court, the Ninth Circuit found that internal biases in the criminal justice system should be part of the totality of circumstances analysis. Id. at 1020. Consequently, the Ninth Circuit remanded the case, and instructed the district court to consider this evidence when analyzing the claim. Id.

\textsuperscript{110} Voting Rights Act § 2, 42 U.S.C. § 1973(a) (2007); see Farrakhan, 338 F.3d at 1014-15. The Supreme Court has held that this is the proper approach when interpreting a statute. See Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982) (citing Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979)) (stating that in all cases involving statutory construction, courts must start their analysis by looking at language employed by Congress).

\textsuperscript{111} See Farrakhan, 338 F.3d at 1016 (declaring that felon disenfranchisement statute is voting qualification, and section 2 clearly proscribes any voting qualification that denies citizens right to vote in discriminatory manner).

\textsuperscript{112} See id. at 1016-17. Courts opposed to allowing these challenges find some ambiguity in the statutory language of the VRA in order to justify looking beyond the plain text. See, e.g., Johnson v. Bush, 405 F.3d 1214, 1229 n.30 (11th Cir. 2005) (finding some ambiguity in language of section 2). For example, the Eleventh Circuit finds that the phrase “on account of race or color” is ambiguous. Id. However, when faced with the same issue, the Second Circuit failed to identify any ambiguity within the text. See Hayden
The Ninth Circuit also recognized the policy implications of denying felon disenfranchisement challenges under section 2. The court acknowledged that all citizens, even ex-felons, have the right to be free from racially discriminatory voting regulations. Mindful of this right, the Ninth Circuit allowed the plaintiffs to challenge the Washington felon disenfranchisement law under section 2.

B. The Second Circuit Rejects VRA Challenges

The Second Circuit Court of Appeals has held that challenges to felon disenfranchisement laws cannot succeed under the VRA. In Hayden v. Pataki, ex-felon citizens of New York and non-felon minority citizens filed suit to challenge New York’s felon disenfranchisement law. The District Court for the Southern District of New York granted judgment on the

v. Pataki, 449 F.3d 305, 346 (2d Cir. 2006) (Parker, J., dissenting). Instead, that court justified looking beyond the text when interpreting section 2 because it was not convinced that the language is unambiguous. See id.

113 Farrakhan, 338 F.3d at 1016.
114 Id.
115 Id.
116 See Hayden, 449 F.3d at 309. The Eleventh Circuit Court of Appeals has faced a similar challenge to Florida’s felon disenfranchisement law, and also rejected the challenge under section 2. Johnson, 405 F.3d at 1234 (holding that felon disenfranchisement laws are immune from VRA challenges).
117 Hayden, 449 F.3d at 311. The plaintiffs in Hayden included non-felon minorities in order to pursue both a vote denial and vote dilution challenge under section 2. Id. at 310-11; see also discussion of vote denial and vote dilution challenges under section 2 supra Part I.D.
pleadings, ruling that plaintiffs cannot challenge the law under section 2.\textsuperscript{118} On appeal, the Second Circuit Court of Appeals affirmed the district court’s decision.\textsuperscript{119} Instead of analyzing the merits of the claim, this court focused on the consequences of allowing courts to accept felon disenfranchisement challenges under section 2.\textsuperscript{120}

The Second Circuit predicted that allowing felon disenfranchisement challenges would create a series of unintended constitutional problems for the VRA.\textsuperscript{121} First, allowing courts to strike these laws under the VRA could result in an unconstitutionally broad use of Congress’s enforcement powers.\textsuperscript{122} Congress passed the VRA under authority of the enforcement powers granted in section 2 of the Fifteenth Amendment.\textsuperscript{123} This provision affords Congress the power to enact

\begin{itemize}
  \item \textsuperscript{118} Hayden v. Pataki, No. 00 Civ. 8586(LMM), 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004).
  \item \textsuperscript{119} Hayden, 449 F.3d at 328.
  \item \textsuperscript{120} See id.; see also Johnson, 405 F.3d at 1234 (rejecting section 2 challenge because of constitutional concerns).
  \item \textsuperscript{121} See Hayden, 449 F.3d at 328; see also Johnson, 405 F.3d at 1234 (rejecting section 2 challenge because of constitutional concerns).
  \item \textsuperscript{122} See Hayden, 449 F.3d at 335-37 (Walker, J., concurring); see also Johnson, 405 F.3d at 1230-32. Under section five of the Fourteenth Amendment and section two of the Fifteenth Amendment, Congress may enact “appropriate legislation” to enforce those amendments. U.S. Const. amend. XIV, § 5, amend. XV, § 2.
  \item \textsuperscript{123} See U.S. Const. amend. XV, § 2; City of Rome v. United States, 446 U.S. 156, 173 (1980) (stating that Congress passed VRA under authority of the Fifteenth Amendment’s enforcement clause); South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966) (discussing Congress’s use of Fifteenth Amendment’s enforcement
appropriate statutes to enforce the amendment.\(^{124}\) To constitute a valid use of this power, however, an enacted statute must be congruent and proportional to the record of evil.\(^{125}\) The Second Circuit acknowledged that Congress did not develop a specific record of racial discrimination resulting from felon disenfranchisement laws.\(^{126}\) In the absence of a specific record, the court predicted that if courts accept felon disenfranchisement challenges, the VRA will exceed Congress’s enforcement powers.\(^{127}\)

\(^{124}\) U.S. CONST. amend. XIV, § 5, amend. XV, § 2.

\(^{125}\) See City of Boerne v. Flores, 521 U.S. 507, 520, 530 (1997).

\(^{126}\) See Hayden, 449 F.3d at 335-37 (Walker, J., concurring); Johnson, 405 F.3d at 1230-32.

\(^{127}\) While this argument lacks merit absent a standard, predictable approach to vote denial claims, there are potential flaws to this argument at first glance. See discussion infra Parts III.A., III.C. First, the Supreme Court has not required that the congressional record be entirely specific relative to the breadth of Congress’s resulting action. See Nev. Dep’t of Human Res. V. Hibbs, 538 U.S. 721, 727-28 (2003) (acknowledging that Congress may enact prophylactic legislation that proscribes facially constitutional conduct in order to prevent subsequent unconstitutional conduct). Furthermore, the Court has also held that when Congress is using this power to protect the interests of a suspect class, the scope of this power is great. See Boerne, 521 U.S. at 526 (affirming the necessity of using strong remedial and preventive means of responding to America’s significant history of racial discrimination). Additionally, the scope of the defined evil significantly affects the merits of this rationale. See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639-40 (1999) (discussing need
Second, the Second Circuit found that allowing these challenges would unconstitutionally alter the balance of power between the federal and state governments. Recognizing states’ broad powers to regulate elections, the Second Circuit concluded that allowing the VRA to cover felon disenfranchisement laws would restrict this power. Accordingly, the court held that section 2 of the VRA cannot cover such statutes absent a clear statement of intent to alter the federal-state balance.

Finally, the Second Circuit reasoned that allowing felon disenfranchisement challenges under section 2 of the VRA for court to identify purported evil before determining if Congress exceeded enforcement powers). While The VRA was not a response to a significant record of intentionally discriminatory felon disenfranchisement statutes, Congress was responding to countless discriminatory voting restrictions. See Behrens, supra note 49, at 244-47.

128 Hayden, 449 F.3d at 310-11, 323; see also Johnson, 405 F.3d at 1232 n.35. 129 See U.S. CONST. art. I, § 4, cl. 1 (declaring, “The Times, Places, and Manner of holding Elections... shall be prescribed in each state by the Legislature thereof”); Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986) (stating that Constitution grants states broad power to prescribe times, places, and manner of elections and that this results in significant state control over elections); Hayden, 449 F.3d at 326; discussion of federal judicial protection of the right to vote supra Part I.A. However, this power is not unlimited. See Foster v. Love, 522 U.S. 67, 69 (1997) (discussing ability of Congress to preempt state voting regulations); discussion infra Part III.C.

conflicts with the Fourteenth Amendment.\textsuperscript{131} Similar to the Ramirez Court, the Second Circuit found affirmative authorization for these laws in section 2 of the Fourteenth Amendment.\textsuperscript{132} If section 2 were to reach felon disenfranchisement laws, the court foresaw a conflict because the VRA could strike state laws that the Constitution validates.\textsuperscript{133} In order to avoid this constitutional conflict with the Fourteenth Amendment, the Second Circuit precluded felon disenfranchisement challenges under the VRA.\textsuperscript{134}

\textsuperscript{131} See Hayden, 449 F.3d at 316; see also Johnson, 405 F.3d at 1228. The Supreme Court has previously held that section two of the Fourteenth Amendment expressly affirms states’ ability to disenfranchise felons. See U.S. CONST. amend. XIV, § 2 (declining to reduce state’s representation when state denies right to vote for participation in rebellion or other crime); Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (holding that section 2 of Fourteenth Amendment allows states to disenfranchise felons).

\textsuperscript{132} See Richardson, 418 U.S. at 54; Hayden, 449 F.3d at 316; see also Johnson, 405 F.3d at 1228; discussion supra Part I.C.2. These courts hold that section two of this amendment affirms states’ right to disenfranchise felons by declining to reduce a state’s representation for doing so. See U.S. CONST. Amend. XIV, § 2; Hayden, 449 F.3d at 316; see also Johnson, 405 F.3d at 1228.

\textsuperscript{133} See Hayden, 449 F.3d at 316; see also Johnson, 405 F.3d at 1228.

\textsuperscript{134} See Hayden, 449 F.3d at 316; see also Johnson, 405 F.3d at 1228. The canon of constitutional avoidance is a valid approach to statutory interpretation. See Clark v. Martinez, 543 U.S. 371, 381-84 (2005) (discussing avoidance canon); Oregon v. Mitchell, 400 U.S. 112, 131 (1970) (discussing need to interpret statute in way to avoid constitutional conflict); Adrian Vermeule, Saving Constructions, 85 Geo. L.J. 1945, 1960-61 (1997) (discussing need to interpret statute in way to avoid constitutional conflict). However, the argument appears faulty. See infra Part III.B.2.
III. Solution: Developing a New Approach to VRA Vote Denial Challenges to Felon Disenfranchisement Laws

Currently, there is no standard judicial approach to deciding felon disenfranchisement challenges under section 2 of the VRA.135 The Supreme Court has developed an approach to vote dilution claims brought under section 2.136 However, the Court has not developed a standard approach to vote denial claims, which include most VRA challenges to felon disenfranchisement laws.137

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135 This is true when the plaintiff frames the challenge as a vote denial claim. See Tokaji, supra note 9, at 709 (discussing well-established approach to vote dilution claims and acknowledging lack of comparable approach to vote denial claims). This Comment looks specifically at these challenges when framed as vote denial claims, despite the fact that plaintiffs could rationally challenge these laws as resulting in vote dilution. See Hayden, 449 F.3d at 309 (challenging New York’s felon disenfranchisement statute under both vote denial and vote dilution frameworks); King, supra note 63, at 19.


137 See Tokaji, supra note 9, at 292 (contrasting clear approach to vote dilution claims with lack of clear approach to vote denial claims); see, e.g.,
Until the Court adopts an approach to vote denial claims, the constitutionality of extending the VRA to felon disenfranchisement laws is unclear.\textsuperscript{138} If courts universally apply strict scrutiny to vote denial claims, they will invalidate many state voting regulations.\textsuperscript{139} If courts do invalidate this many regulations, the VRA would impinge states’ powers to regulate elections and would transcend the congressional record of discriminatory voting regulations.\textsuperscript{140} Thus, this approach would suggest that the VRA unconstitutionally alters the federal-state balance of powers and exceeds Congress’s Fifteenth Amendment enforcement powers.\textsuperscript{141} However, if courts apply only rational basis review, the VRA will not invalidate any felon disenfranchisement statute that

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\textsuperscript{138} See infra notes 140-44 and accompanying text.

\textsuperscript{139} See 16B AM. JUR. 2d Constitutional Law § 815 (2006) (referring to strict scrutiny as heavy burden of justification on state).

\textsuperscript{140} See discussion of constitutional concerns supra Part II.B.

\textsuperscript{141} See discussion of constitutional concerns supra Part II.B.
does not already violate the Fourteenth Amendment.\textsuperscript{142} In this case, the VRA would not alter the federal-state balance of powers nor exceed Congress’s enforcement powers, so it would be constitutional.\textsuperscript{143} Thus, the VRA’s constitutionality, if courts accept felon disenfranchisement challenges under section 2, depends on what standard of review courts apply to vote denial claims.\textsuperscript{144} Therefore, the Court cannot determine whether the VRA may constitutionally reach felon disenfranchisement laws until it adopts an approach to vote denial claims.\textsuperscript{145} The following section proposes a variation of Burdick’s sliding scale scrutiny

\textsuperscript{142} Because there are so many plausible state interests in denying felons voting rights, felon disenfranchisement laws will uniformly pass traditional rational basis review. See, e.g., Hayden, 449 F.3d at 326 (mentioning three plausible state interests that support felon disenfranchisement statutes); Owens v. Barnes, 711 F.2d 25, 28 (3d Cir. 1983) (discussing rational justifications for felon disenfranchisement statutes); Green v. Bd. of Elections, 380 F.2d 445, 451-52 (2d Cir. 1967) (discussing possible justifications for felon disenfranchisement statutes). Under modern Fourteenth Amendment jurisprudence, felon disenfranchisement challenges trigger rational basis review, suggesting that this amendment is no longer an effective vehicle for such challenges. See Johnson v. Bush, 214 F. Supp. 2d 1333, 1338 (S.D. Fla. 2002) (deciding that felon disenfranchisement statutes are incapable of violating either Fourteenth Amendment’s Equal Protection or Due Process clauses). But see Elena Saxonhouse, Note, \textit{Unequal Protection: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination}, 56 Stan. L. Rev. 1597, 1623-27 (2004) (suggesting that Fourteenth Amendment may still have power for felon disenfranchisement challenges).

\textsuperscript{143} See discussion of enforcement powers supra pp. 28-29.

\textsuperscript{144} See supra notes 140-44 and accompanying text.

\textsuperscript{145} See supra notes 140-44 and accompanying text.
as an approach to vote denial challenges to felon
disenfranchisement laws under the VRA.\textsuperscript{146}

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

As described in Burdick, there are two prongs of a sliding
scale scrutiny analysis.\textsuperscript{147} First, a court must determine the
severity of the burden a statute imposes on voting rights.\textsuperscript{148} Second, a court must select and apply the appropriate level of
scrutiny to the challenged statute.\textsuperscript{149} Courts applying the
Burdick form of sliding scale scrutiny have failed to establish
clear requirements for fulfilling each prong.\textsuperscript{150} However, characteristics of felon disenfranchisement challenges allow
courts to identify specific evidentiary requirements that
plaintiffs must satisfy.\textsuperscript{151}

\begin{footnotesize}
\begin{enumerate}
\item See Burdick v. Takushi, 504 U.S. 428, 433-34 (1992); infra Part III.A.
\item See Burdick, 504 U.S. at 433-34.
\item See id. at 434.
\item See id.
\item The Burdick form of this analysis fails to guide courts specifically in the
threshold determination of the severity of the burden. See id. at 434
(instructing courts to weigh character and magnitude of burden, without
identifying specific factors of this analysis). While some courts require
significant statistical evidence to show the burden is severe, many courts
seem to determine the severity of the burden instinctively. Compare Bullock
v. Carter, 405 U.S. 134, 142-45 (1972) (using intuition to decide if burden
(relying on plaintiff’s evidence to determine that burden is severe).
\item See discussion of evidentiary requirements infra Part III.A.1.
\end{enumerate}
\end{footnotesize}
1. Establishing a Vote Denial Challenge to a Felon Disenfranchisement Statute

The proposed form of sliding scale scrutiny requires a plaintiff to prove three elements in order to establish a vote denial claim under section 2. First, a plaintiff must show that he cannot vote because of the state’s felon disenfranchisement statute. This requirement is critical in characterizing the claim as one of vote denial under section 2.

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152 By combining factors that courts and scholars currently discuss when addressing felon disenfranchisement challenges, the proposed approach simplifies the required totality of the circumstances analysis. Voting Rights Act § 2b, 42 U.S.C. 1973 (2007) (requiring totality of circumstances analysis for section 2 claim); see Hayden v. Pataki, 449 F.3d 305, 314 n.7 (2d Cir. 2006) (mentioning that challenged New York statute was narrower in scope than felon disenfranchisement statutes in other states); Farrakhan v. Washington, 338 F.3d 1009, 1013 (9th Cir. 2003) (discussing plaintiff’s evidence of racial bias in state’s criminal justice); Tokaji, supra note 9, at 724 (proposing that section 2 plaintiffs must be able to trace voting rights infringement to bias in social and historical conditions). The three threshold elements are theoretically analogous to the approach to vote dilution challenges, in that they are necessary, and not sufficient, elements. See discussion of approach to vote dilution challenges supra note 137.


154 While a disenfranchised felon may theoretically pursue both a vote dilution and vote denial claim, a non-disenfranchised felon could not pursue a vote denial claim. See Tokaji, supra note 9, at 691-92 (contrasting vote denial and vote dilution claims under section 2); supra notes 89-91 and accompanying text.
Second, a plaintiff must develop a record of statistical data suggesting racial bias in the state’s criminal justice system. Because it is theoretically possible for minorities to commit felonies more frequently than non-minorities, evidence showing only minority over-representation among felons fails to establish bias. However, a plaintiff can establish bias through a combination of evidence that the state disproportionately stops, searches, arrests, charges, convicts, or severely sentences minorities.

155 It is important that a plaintiff need not prove that his individual status as a felon is the result of tangible incidents of racial bias. See Tokaji, supra note 9, at 724 (stating that section 2 plaintiffs need not prove intentional discrimination by state actor to establish vote denial claim). Such a requirement would present an insurmountable burden on plaintiffs and would contradict the 1982 section 2 amendments and the totality of the circumstances approach. See supra Part I.D. Furthermore, should a plaintiff prove specific incidents of racial bias, the plaintiff would have a cause of action under the Fourteenth and Fifteenth Amendments. See supra note 83 and accompanying text; infra note 255.

156 See 16B Am. Jur. 2d Constitutional Law § 815 (stating that although disparate impact may be relevant evidence of racial discrimination, standing alone, this evidence is insufficient); Tokaji, supra note 9, at 724-25 (suggesting that mere showing of overrepresentation among felons should not suffice to establish section 2 claim); supra note 70.

157 In Johnson v. Bush, the unsuccessful plaintiffs established no more than a discrepancy between minorities’ representation in Florida’s population and their representation among Florida’s felons. 405 F.3d 1214, 1235 (11th Cir. 2005) (Tjoflat, J., concurring). One justice in Johnson wrote separately to acknowledge that, even if section 2 applied, the plaintiffs failed to establish bias in the criminal justice system. Id. In contrast, the Ninth Circuit has suggested that plaintiffs may prove bias through statistics showing racial disparities at multiple stages of the criminal justice system.
Finally, a plaintiff must demonstrate a connection between the denial of the right to vote and the statistical racial bias in the criminal justice system.\(^{158}\) A plaintiff can demonstrate this connection in two steps.\(^{159}\) First, a plaintiff must show that his biological race—or the race in which society places him—faces bias in the criminal justice system.\(^{160}\) Second,

Farrakhan v. Washington, 338 F.3d 1009, 1013-14 (9th Cir. 2003). Thus, when facing these challenges today, the plaintiff’s ability to provide such statistical evidence seems to have an effect on the court’s analysis. Compare Johnson, 405 F.3d at 1235 (discussing unsuccessful plaintiffs’ inability to prove racial bias through statistical evidence), with Farrakhan, 338 F.3d at 1013-14 (discussing successful plaintiffs’ ability to prove racial bias through statistical evidence).

\(^{158}\) See Tokaji, supra note 9, at 724 (proposing that section 2 plaintiffs must be able to trace voting rights infringement to bias in social and historical conditions).

\(^{159}\) See id.; infra notes 161-62 and accompanying text.

\(^{160}\) Because victims of racism suffer this primarily because of appearance, this approach does not require a biological connection with the discriminated-against race. See Ian F. Haney Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 HARV. C.R.-C.L. L. REV. 1, 1-5 (1994) (discussing how central appearance is to racial identification and relative legal implications). For example, that a plaintiff is not biologically Middle Eastern is irrelevant if a prejudiced society would nonetheless perceive him and treat him as such. See Ken Davison, Note and Comment, The Mixed-Race Experience: Treatment of Racially Miscategorized Individuals Under Title VII, 12 ASIAN L.J. 161, 161-62 (2005) (stating that using physical features to determine race leads to racial miscategorization and results in misapplied prejudices). This plaintiff’s experience with the criminal justice system would inevitably mirror that of a person of Middle Eastern dissent. See id. Ultimately, this plaintiff may still lose the right to vote on account of race or color. See Voting Rights Act § 2, 42 U.S.C. 1973 (2007).
citizens from this group must also suffer disproportionate rates of disenfranchisement because of the challenged statute.  

While fulfilling the three required elements establishes a prima facie vote denial challenge to felon disenfranchisement laws under section 2, it does not guarantee success. A plaintiff is most likely to challenge a law successfully if a court applies heightened scrutiny. However, under the proposed approach, a court only applies heightened scrutiny if the plaintiff shows the statute substantially burdens voting rights. Based on this showing, the second prong of the sliding scale approach requires the court to determine the level of scrutiny to apply to the claim.

2. Determining the Appropriate Level of Scrutiny

After a plaintiff establishes a prima facie vote denial claim under section 2 of the VRA, the court must determine the

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161 See Tokaji, supra note 9, at 724 (proposing that plaintiffs prove disparate impact on minority voters to establish section 2 vote denial claim).

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

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

164 See Burdick v. Takushi, 504 U.S. 428, 433-34 (1992) (discussing requirement that court adjusts level of scrutiny relative to demonstrated burden on voting rights).

165 Id.
appropriate level of scrutiny. In order to do so, the court must characterize the magnitude of the statute’s burden on the plaintiff’s voting ability. The court should determine this using a two-factor analysis. The first factor of the analysis is the severity of the racial bias in the state’s criminal justice system, as evidenced by statistics. The second factor is the scope of the state’s disenfranchisement statute. The statute’s scope is narrow when it disenfranchises a felon only during incarceration, and it is expansive when it disenfranchises a felon for life.

A plaintiff’s ability to prove racial bias combined with the scope of the law are the primary factors in determining the level of scrutiny. When a plaintiff establishes significant

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

167 Id.

168 See infra notes 170-71 and accompanying text.

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

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

171 See discussion supra Part I.B.

172 See Burdick, 504 U.S. at 434 (requiring courts to determine level of scrutiny relative to magnitude of burden on voting rights).
racial bias and the challenged statute is expansive in scope, courts should apply strict scrutiny.\textsuperscript{173} Contrarily, when a plaintiff fails to show significant bias and the law is limited in scope, courts should apply rational basis review to the statute.\textsuperscript{174} If both the level of racial bias and the scope of the law are moderate, courts should apply intermediate scrutiny.\textsuperscript{175} Courts should also apply intermediate scrutiny when

\textsuperscript{173} According to the Burdick Court, laws that impose severe restrictions on voting rights must be narrowly drawn to advance a compelling state interest. \textit{Id.}; see also Norman v. Reed, 502 U.S. 279, 289 (1992); \textsc{Black’s Law Dictionary} 1462 (8th ed. 2004) (defining “strict scrutiny”).

\textsuperscript{174} According to the Burdick Court, when an election law imposes only reasonable, nondiscriminatory restrictions on voting rights, the state’s regulatory interests generally justify the restrictions. 504 U.S. at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). Although arguably ambiguous, later courts have interpreted this statement to require rational basis review when the burden imposed is slight. See, e.g., Werme v. Merrill, 84 F.3d 479, 485-86 (1st Cir. 1996) (following Burdick and applying rational basis review because burden imposed is slight).

\textsuperscript{175} When applying the Burdick variation of sliding scale scrutiny, courts disagree about if or when something between strict scrutiny and rational basis review should apply. Compare Fulani v. Krivanek, 973 F.2d 1539, 1544, 1546-47 (11th Cir. 1992) (applying intermediate scrutiny to statute that resulted in burden that is neither severe nor slight), and Pilcher v. Rains, 853 F.2d 334, 337 (5th Cir. 1988) (applying intermediate scrutiny to statute that resulted in burden that is neither severe nor slight), with Schrader v. Blackwell, 241 F.3d 783, 788-91 (6th Cir. 2001) (applying simple balancing test to statute imposing intermediate burden), and New Alliance Party of Ala. v. Hand, 933 F.2d 1568, 1576 (11th Cir. 1991) (applying simple balancing test to statute imposing intermediate burden). Under the proposed approach, however, statutes imposing intermediate burdens on voting rights should have to be reasonably necessary to further a legitimate state interest. See Fulani, 973 F.2d at 1544-47 (using sliding scale scrutiny, and applying
the racial bias is severe and the scope of the law is limited, or vice versa.176

While these two factors will control the analysis, the court should have discretion to adjust the result relative to additional evidence of a severe burden.177 Such evidence may include vague statutory language or evidence establishing any of the factors Congress codified during the 1982 amendment process.178 These factors include, among others, the extent to which official discrimination and prejudice in social institutions affects minorities’ ability to vote.179

Allowing this adjustment serves two purposes.180 First, this discretion allows courts to include additional, unpredicted intermediate scrutiny to statute imposing intermediate burden on plaintiff’s rights); BLACK’S LAW DICTIONARY 833 (8th ed. 2004) (defining “intermediate scrutiny”).

176 In these situations, the burden on voting rights is also intermediate. See supra note 176 and accompanying text.


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


180 See infra notes 182-83 and accompanying text.
evidence of a severe burden into its analysis.\textsuperscript{181} Second, this
discretion allows courts to incorporate the congressionally
mandated totality of the circumstances analysis.\textsuperscript{182}

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

The proposed approach to felon disenfranchisement
challenges under section 2 of the VRA is an adaptation of
Burdick’s sliding scale scrutiny.\textsuperscript{183} Following Burdick, courts
began applying sliding scale scrutiny to voting rights
challenges brought under the Fourteenth Amendment.\textsuperscript{184} Because

\textsuperscript{181} The flexibility to accept additional evidence beyond the threshold
requirements is important because, when targeting racially discriminatory
voting regulations, bright line rules are not desirable. See Bush v. Vera,
517 U.S. 952, 984 (1996) (stating that bright line rules are not available
when confronting claims of racially discriminatory districting scheme).
While the approach to vote dilution challenges features similar threshold
evidentiary requirements, the Supreme Court supplements these factors by
analyzing additional evidence of discriminatory impact. See Thornburg v.
Gingles 478 U.S. 30, 50-51 (1986) (describing appropriate approach to vote
dilution claims under section 2 of the VRA); Johnson v. DeGrandy, 512 U.S.
997, 1011-12 (1994) (deciding that full totality of circumstances analysis
must follow bright line Gingles preconditions for vote dilution challenge).

\textsuperscript{182} See Voting Rights Act § 2, 42 U.S.C. § 1973 (2007); discussion of
amendments to section 2 supra Part I.D.


\textsuperscript{184} See, e.g., Weber v. Shelley, 347 F.3d 1101, 1106 (9th Cir. 2003) (applying
Burdick approach to voting rights claim); Werme v. Merrill, 84 F.3d 479, 483-84
(1st Cir. 1996) (applying Burdick approach to voting rights claim); Schulz
v. Williams, 44 F.3d 48, 55-56 (2d Cir. 1994) (applying Burdick approach to
voting rights claim).
the Burdick approach currently applies to other voting rights cases, the Court would not be unfounded in adopting a similar analysis for VRA claims.\footnote{See Burdick v. Takushi, 504 U.S. 428, 432-34 (1992); Anderson v. Celebrezze, 460 U.S. 780, 789-90 (1983). Anderson is a ballot access case, but the Court has acknowledged that laws that affect candidates have at least some indirect effect on voters. Bullock v. Carter, 405 U.S. 134, 143 (1972). In Burdick, the Court believed employing the approach used in ballot access cases was appropriate for voting rights cases, due to the similarity between these claims. 504 U.S. at 433. It would be at least as appropriate, then, to adopt a form of the analysis used in Fourteenth Amendment voting rights cases to apply to VRA cases. Id.} The proposed variation of sliding scale scrutiny enables courts to confront felon disenfranchisement challenges uniformly, in a manner consistent with judicial precedent and legislative intent.\footnote{See discussion of judicial precedents and legislative intent infra Part III.B.2.}

1. Consistent Judicial Application of Sliding Scale Scrutiny

The proposed approach to felon disenfranchisement challenges under section 2 of the VRA will allow courts to approach these challenges in a consistent manner.\footnote{See infra notes 193-97 and accompanying text.} An important function of the Supreme Court is to settle splits of authority so that courts apply federal laws uniformly to all citizens.\footnote{See THE FEDERALIST No. 80 (Alexander Hamilton) (stating that mere necessity of uniformity in national laws decides question of federal judicial powers); Joel S. Flaxman, Steven’s Ratchet: When the Court Should Decide Not to Decide, 105 MICH. L. REV. FIRST IMPRESSIONS 94, 94, 96 (2006),} However, the Burdick Court failed to achieve this
goal by inadequately delineating the analysis of a statute’s burden on voting rights under sliding scale scrutiny.\textsuperscript{189} As a result, courts have struggled to apply the Burdick variation of sliding scale scrutiny in a consistent manner.\textsuperscript{190} While some courts require plaintiffs to provide statistical evidence showing a severe burden on voting rights, other courts rely on intuition when weighing the burden.\textsuperscript{191} In contrast, the proposed form of sliding scale scrutiny identifies specific factors for this analysis, allowing courts to confront felon disenfranchisement challenges consistently.\textsuperscript{192}

To ensure judicial consistency, the proposed approach exploits the common characteristics of felon disenfranchisement challenges brought under section 2.\textsuperscript{193} These claims unvaryingly allege that racial bias in a state’s criminal justice system results in voting rights infringement through the state’s

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\texttt{http://student.law.umich.edu/mlr/firstimpressions/vol105/flaxman.pdf}
\textsuperscript{189} See supra note 151 and accompanying text.
\textsuperscript{190} See supra note 151 and accompanying text.
\textsuperscript{191} See supra note 151 and accompanying text.
\textsuperscript{192} See discussion of the mechanics of this approach supra Part III.A.
\textsuperscript{193} See discussion of the mechanics of this approach supra Part III.A.
disenfranchisement statute.\textsuperscript{194} Incorporating these commonalities into specific evidentiary requirements ensures that courts throughout the country will approach felon disenfranchisement challenges similarly.\textsuperscript{195} Not only will future plaintiffs know exactly what evidence they must provide, but they will also anticipate the scrutiny their claims will elicit.\textsuperscript{196}

2. Consistency with Precedent and Legislative Intent

The Supreme Court has demanded the broadest possible interpretation and application of the VRA, warning that no judicially created limitation on its coverage is acceptable.\textsuperscript{197} However, absent a statutory exemption for felon disenfranchisement laws, precluding such challenges would result in a judicially created limitation on the VRA’s coverage.\textsuperscript{198}


\textsuperscript{195} See discussion of need to ensure uniform application of federal laws supra note 189 and accompanying text.


\textsuperscript{197} See supra note 87 and accompanying text.

Therefore, only an approach that allows courts to accept felon disenfranchisement challenges under section 2 honors the Supreme Court’s VRA jurisprudence.\textsuperscript{199} The proposed approach allows courts to hear these section 2 challenges effectively and constitutionally.\textsuperscript{200}

The proposed form of sliding scale scrutiny also allows courts to apply the VRA in a manner consistent with legislative intent.\textsuperscript{201} When amending section 2 in 1982, Congress identified seven factors signifying a denial or abridgement of voting rights based on the totality of circumstances.\textsuperscript{202} One of these factors is the extent to which the minority group suffers discrimination in social institutions such as education, employment, and health.\textsuperscript{203} These institutions are similar in that they affect the quality of citizens’ lives and accordingly face some amount of federal government regulation.\textsuperscript{204} The same is true for the criminal justice system.\textsuperscript{205} Thus, bias in this

\begin{footnotes}
\item[200] See discussion of constitutional considerations infra Part III.C.
\item[201] See infra notes 203-09 and accompanying text.
\item[202] S. Rep. No. 97-417, at 28-29 (1982); Boyd, supra note 95, at 1400 n.260 (discussing that codified factors were meant to adopt factors used in Court’s analysis in White v. Regester, 412 U.S. 755, 765-70 (1973)).
\end{footnotes}
institution satisfies a specified factor of the congressionally mandated totality of the circumstances analysis.\textsuperscript{206} Therefore, ignoring bias in the criminal justice system would contradict Congress’s intent in enacting the VRA by violating the proper section 2 analysis.\textsuperscript{207} The proposed approach complies with legislative intent by allowing courts to analyze evidence of bias in the criminal justice system.\textsuperscript{208}

Those opposed to courts accepting challenges to felon disenfranchisement statutes under section 2 might claim that Congress excluded these laws from the VRA.\textsuperscript{209} When amending section 4 of the VRA, which lists blanketly prohibited voting regulations, Congress chose not to add felon disenfranchisement statutes to this list.\textsuperscript{210} Furthermore, one Senator emphasized that the amended section four would not invalidate felon


\textsuperscript{208} See discussion of the mechanics of the proposed approach supra Part III.A.

\textsuperscript{209} See, e.g., Hayden v. Pataki, 449 F.3d 305, 318-319 (2d Cir. 2006) (deciding that Congress intended to exclude felon disenfranchisement laws from purview of entire VRA).

disenfranchisement laws. This argument suggests that, by excluding felon disenfranchisement laws from section 4, Congress intended to exclude these voting regulations from all sections of the VRA.

However, this argument fails because the legislative history of one section of the VRA does not represent Congress’s intent in another section. By not adding felon disenfranchisement statutes to section 4, Congress merely declined to characterize these laws as a per se violation of the VRA. This decision does not reveal that felon

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

213 See id. at 352-53 (Parker, J., dissenting) (stating that legislative history of one section of expansive statute such as VRA is of no value when attempting to understand other section); Johnson v. Bush, 405 F.3d 1214, 1249 (11th Cir. 2005) (Barkett, J., dissenting) (discussing that decision to not add felon disenfranchisement statutes to list of per se violations does not show intent to exempt these laws from VRA); Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 Va. L. Rev. 1295, 1300-01 (1990) (presenting textualist argument that even legislative history of statute is not accurate indicator of intent for same statute).

214 See Hayden, 449 F.3d at 364-66 (Calabresi, J., dissenting) (stating that although felon disenfranchisement statutes are not per se invalid under section 4, issue is if they violate section 2 when having discriminatory effect); Johnson, 405 F.3d at 1249 (Barkett, J., dissenting) (stating that
disenfranchisement laws may never violate section 2.\textsuperscript{215} Instead, section 2 addresses voting regulations that are not per se invalid under section 4, but that nonetheless result in a racially disparate impact on voting rights.\textsuperscript{216} Thus, precluding felon disenfranchisement challenges under section 2 contradicts the legislative intent of the VRA.\textsuperscript{217}

\textbf{C. The Proposed Approach Addresses the Second Circuit’s Constitutional Concerns}

The Supreme Court must delineate an approach to felon disenfranchisement challenges under section 2 before addressing the Second Circuit’s constitutional concerns.\textsuperscript{218} By adopting the proposed approach, the Court would be able to address these concerns and affirm the VRA’s constitutionality.\textsuperscript{219} Because this approach allows courts to alter the scrutiny relative to the decision to not invalidate all felon disenfranchisement laws under section four does not mean that these laws are free from any attacks).

\textsuperscript{215} See supra note 215 and accompanying text.

\textsuperscript{216} Section 2 instructs the judiciary on how to determine whether a non-prohibited regulation nonetheless results in a VRA violation. Voting Rights Act § 2, 42 U.S.C. § 1973 (2007).

\textsuperscript{217} See discussion of legislative intent supra Part III.B.2.

\textsuperscript{218} See discussion of the Second Circuit’s constitutional concerns supra Part II.B; discussion of the need to adopt an approach to vote denial claims under section 2 before addressing these concerns supra pp. 32-34.

\textsuperscript{219} See discussion of the Second Circuit’s constitutional concerns supra Part II.B.
burden on voting rights, it addresses the Second Circuit’s concerns of unconstitutional consequences.\textsuperscript{220}

First, contrary to the Second Circuit’s predictions, the VRA will remain a valid use of Congress’s enforcement powers under the Fifteenth Amendment.\textsuperscript{221} Specifically, under the proposed approach, the VRA will remain a congruent and proportional response to the record of racially discriminatory voting rights legislation.\textsuperscript{222} Instead of targeting specific racially biased voting regulations, Congress drafted the VRA as a general, prophylactic statute to prevent even unpredicted forms of this evil.\textsuperscript{223} As such, providing an exhaustive list of specific state ploys used to restrict minority voting rights was both impossible and illogical.

In the absence of a specific and exhaustive record of discriminatory felon disenfranchisement statutes that the VRA targets, one must consider the VRA’s constitutionality relative to the general record and history of discriminatory voting

\textsuperscript{220} See discussion of the court’s ability to adjust the level of scrutiny supra Part III.A.2.

\textsuperscript{221} See discussion of this concern supra pp. 28-29.

\textsuperscript{222} See City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

\textsuperscript{223} The history of creatively oppressive voting regulations shows that attempts to target specific restrictions minimally protect minorities’ ability to participate in the political process. See Hayden v. Pataki, 449 F.3d 305, 361-62 (2d Cir. 2006) (Parker, J., dissenting) (discussing historical struggle between federal government and creatively oppressive state legislatures, and need for VRA to be broad and prophylactic).
Because the VRA serves to pre-empt states in their perpetually creative attempts to infringe minority voting rights, the VRA will remain constitutional if it targets only racially burdensome statutes. Such statutes, in whatever form they may take, definitively fall within the purview of the Fifteenth Amendment.

The proposed approach protects the VRA as a valid use of enforcement powers by narrowly focusing courts’ powers to strike challenged statutes. Much like an anticipatory warrant in criminal procedure jurisprudence, the proposed approach proactively identifies a set of factors that suggest racial bias. Accordingly, should these factors exist, a challenged statute likely falls within the purview of the record and history of creatively oppressive voting restrictions. However, courts will not have the power to strike statutes until the

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225 However, there is some record of intentionally discriminatory felon disenfranchisement laws. See Behrens, supra note 49, at 244-47 (discussing connection between felon disenfranchisement laws and history of discriminatory legislative intent).

226 See discussion of proposed approach supra Part III.A.

227 See, e.g., United States v. Grubbs, 547 U.S. 90 (2006) (holding that anticipatory warrants may be valid, so long as probable cause exists that: i) triggering events will occur, and ii) if triggering events occur, target of search will be found).
identified factors are fulfilled. Thus, the proposed approach allows courts to strike racially biased voting restrictions that are within the purview of the Fifteenth Amendment, without forcing Congress to update constantly its specific record of racially discriminatory voting regulations. Requiring Congress to do so would cause significant delay in invalidating racially restrictive voting statutes, and give state legislatures a substantial head start in the formidable cat and mouse game.

Second, the proposed approach prevents section 2 from impermissibly altering the balance between the federal and state governments, as the Second Circuit predicts.\textsuperscript{228} Under the United States system of federalism, states are largely sovereign and enjoy significant power to regulate elections.\textsuperscript{229} However, constitutional amendments show that this power is not entirely free from federal control.\textsuperscript{230} For example, the Fifteenth Amendment restrains states from denying citizens the right to vote based on their race, thus altering the federal-state

\textsuperscript{228} See discussion of this constitutional concern \textit{supra} Part II.B.


\textsuperscript{230} See discussion of judicial voting rights protection \textit{supra} Part I.A; see also U.S. CONST. amends. XII, XIV § 2, XV, XVII, XIX, XXIV, XXVI (regulating elections through federal law).
balance of powers. The VRA, which Congress passed to enforce this amendment, merely enforces this legitimate federal constraint. If the application of section 2 to felon disenfranchisement laws corresponds with the Fifteenth Amendment’s purpose, the VRA will not further alter the federal-state balance.

The approach to felon disenfranchisement challenges under section 2 will determine if the VRA exaggerates the Fifteenth Amendment’s alteration of federal-state powers. Allowing courts to strike statutes that are racially neutral both

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


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

234 See U.S. CONST. amend. XV; Hayden, 449 F.3d at 358 (Parker, J., dissenting) (discussing that Reconstruction Amendments intentionally altered federal-state balance, and VRA only enforces this alteration).
facially and in application would significantly increase this alteration.\textsuperscript{235} However, the proposed approach allows courts to target only felon disenfranchisement laws that impose a substantial burden on minorities’ voting rights.\textsuperscript{236} This quality would allow the VRA to enforce the Fifteenth Amendment in a way that is consistent with that Amendment’s protection of minority voting rights.\textsuperscript{237} Thus, the proposed approach to felon disenfranchisement challenges would allow courts to avoid impermissibly altering the federal-state balance, as the Second Circuit foresees.\textsuperscript{238}

However, those opposed to allowing felon disenfranchisement challenges might argue that the Fourteenth Amendment affirms a state’s power to disenfranchise citizens who commit felonies.\textsuperscript{239} Echoing the Second Circuit’s disposition, some argue that section 2 of the Fourteenth Amendment authorizes these laws by

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\textsuperscript{235} See generally Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (identifying need for and extent of federal judicial review power).

\textsuperscript{236} See discussion of the mechanics of the proposed approach supra Part III.A.

\textsuperscript{237} See generally Marbury, 5 U.S. (1 Cranch) 137 (discussing extent of federal judicial review power).

\textsuperscript{238} See discussion of this concern supra p. 29-30.

\textsuperscript{239} See Richardson v. Ramirez, 418 U.S. 24, 41-42, 54 (1974) (finding affirmative authorization for felon disenfranchisement statutes in section two of the Fourteenth Amendment); Hayden, 449 F.3d at 316 (discussing approval for felon disenfranchisement statutes in section two of Fourteenth Amendment); Johnson v. Bush, 405 F.3d 1214, 1228 (11th Cir. 2005) (discussing approval for felo disenfranchisement statutes in section two of Fourteenth Amendment). But see Chin, supra note 236, at 260 (suggesting that Congress repealed section two of Fourteenth Amendment by enacting Fifteenth Amendment).
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withholding punishment when states disenfranchise felons.\textsuperscript{240} Accordingly, this argument suggests that if courts strike any felon disenfranchisement laws under the VRA, the Act impermissibly alters the federal-state balance.\textsuperscript{241}

This argument is flawed, however, because the Fourteenth Amendment does not grant states an unconditional power to disenfranchise felons.\textsuperscript{242} Instead, section 2 of the Fourteenth Amendment allows states to disenfranchise felons without federal punishment only when doing so is legally valid.\textsuperscript{243} However, when felon disenfranchisement laws disproportionately affect minorities’ voting rights, the VRA provides that these statutes

\textsuperscript{240} See U.S. Const. amend. XIV, § 2; Richardson, 418 U.S. at 41-42, 54 (finding affirmative authorization for felon disenfranchisement statutes in section 2 of the Fourteenth Amendment); Hayden, 449 F.3d at 316 (discussing approval for felon disenfranchisement statutes in section 2 of Fourteenth Amendment); Johnson, 405 F.3d at 1228 (discussing approval for felon disenfranchisement statutes in section 2 of Fourteenth Amendment); infra note 244 and accompanying text.

\textsuperscript{241} See Hayden, 449 F.3d at 326 (deciding that, because of explicit approval for felon disenfranchisement statutes in section 2 of Fourteenth Amendment, VRA would alter federal state balance if it covers these laws).

\textsuperscript{242} U.S. Const. amend. XIV, § 2. See Johnson, 405 F.3d at 1240 (Wilson, J., dissenting) (discussing proper interpretation of section 2 of Fourteenth Amendment). But see discussion of Richardson v. Ramirez supra Part I.C.2.

\textsuperscript{243} Section two of the Fourteenth Amendment punishes states for denying voting rights to eligible citizens by reducing the state’s representation in the federal legislature. U.S. Const. amend. XIV, § 2. According to the text, states are not subject to this punishment denying the right to vote for participation in rebellion or other crime. U.S. Const. amend. XIV, § 2.
are not legally valid. Accordingly, courts applying the VRA to felon disenfranchisement challenges should only strike statutes that are not within the Fourteenth Amendment’s limited authorization for these laws.

The proposed approach enables courts to distinguish the legally valid laws from the impermissible laws by focusing on the burden imposed on minority voting rights. This distinction enables section 2 of the VRA to parallel the Fourteenth Amendment’s minority rights protection, while respecting that Amendment’s limited authorization for felon disenfranchisement. Thus, allowing courts to strike specific felon disenfranchisement statutes under the VRA would neither

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

245 See U.S. Const. amend. XIV, § 2 (withholding punishment of reduced representation when state disenfranchises for participation in rebellion or other crime).

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

247 For a discussion of the enactment of the Fourteenth Amendment and racial considerations, see Foner, supra note 247, at 251-61.
conflict with the Fourteenth Amendment, nor unconstitutionally alter the federal-state balance.\(^{248}\)

\[D. \quad \text{The Proposed Approach Allows Use of the VRA as the Only Plausible Avenue for Redress}\]

Adopting the proposed approach to felon disenfranchisement statutes under section 2 of the VRA will re-open the courthouse doors to disenfranchised minorities seeking judicial redress.\(^{249}\) It is a fundamental function of the judiciary to afford citizens the ability to challenge laws that violate their rights.\(^{250}\) As the Ninth Circuit Court of Appeals acknowledged in \textit{Farrakhan}, even ex-felons have the right to challenge racially

\[^{248}\text{See supra notes 231-41 and accompanying text (discussing proposed approach’s effect on federal-state balance of powers); supra notes 245-50 and accompanying text (describing section 2’s compatibility with Fourteenth Amendment if applied to felon disenfranchisement laws).}\]

\[^{249}\text{See discussion of Richardson v. Ramirez, which held that Constitution expressly allows felon disenfranchisement laws supra Part I.C.2.}\]

\[^{250}\text{See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 162-63 (1803) (declaring that very essence of civil liberty is to afford every plaintiff remedy for violation of rights); \textit{The Federalist} No. 78 (Alexander Hamilton) (describing function of judicial branch as essential safeguard against ill humors of society, including protecting private rights of citizens against unjust and partial laws); \textit{The Federalist} No. 80 (Alexander Hamilton) (discussing that spirit behind fraudulent state laws will survive Constitutional safeguards, and that federal judiciary must have control over state practices); see also Taxier v. Sweet, 2 U.S. 81, 82 (1776) (stating that if plaintiffs were without remedy at law, court would provide some remedy to redress plaintiff’s injury).}\]
discriminatory voting regulations.\textsuperscript{251} Unfortunately, the Supreme Court’s use of rational basis review for felon disenfranchisement challenges under the Fourteenth Amendment precludes felons from effectively challenging felon disenfranchisement laws.\textsuperscript{252} Section 2 of the VRA may provide felons with an alternative means to challenge felon disenfranchisement laws.\textsuperscript{253} However, the Court must first develop an effective approach to these claims that protects the VRA’s constitutionality.\textsuperscript{254} The Court should adopt the proposed approach because it protects the constitutionality of the VRA while providing felons with an effective vehicle to challenge disenfranchisement laws.\textsuperscript{255}

\textsuperscript{251} Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003) (stating that permitting even a convicted felon to challenge felon disenfranchisement laws enforces right that every citizen has to challenge racially discriminatory voting regulations).


\textsuperscript{253} Voting Rights Act § 2, 42 U.S.C. § 1973 (2007); see discussion supra Part I.D.

\textsuperscript{254} See supra notes 139-46 and accompanying text.

\textsuperscript{255} See supra Part III.C.
CONCLUSION

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

Both the Ninth and Second Circuits overlook that courts do not currently have the analytical tools to consider vote denial challenges under Section 2. Accordingly, the constitutional implications of accepting felon disenfranchisement challenges under Section 2 are unforeseeable. When and if the Supreme Court addresses this split of authority, it must first establish a standard approach to vote denial claims under section 2.256 Only then can the Court determine the merits of each circuit’s rationale.257

This Comment proposes a variation of sliding scale scrutiny as an effective approach to felon disenfranchisement challenges under section 2.258 Such an approach allows courts to address felon disenfranchisement challenges uniformly and in a manner consistent with Supreme Court precedent and legislative

256 See supra notes 139-46 and accompanying text.

257 See Tokaji, supra note 9, at 732-33 (stating that while individuals may argue over best approach to section 2 vote denial claims, important thing is for courts to develop some workable standard).

258 See discussion supra Part III.A.
Furthermore, this approach protects the constitutional validity of the VRA, while affording courts the authority to regulate felon disenfranchisement statutes under section 2.  

Finally, the proposed approach enables disenfranchised felons to challenge potentially racially discriminatory laws that prevent them from voting. Under the current status of the law, however, felons may have lost their ability to protect their voting rights because federal courts have jumped to conclusions.

259 See discussion supra Part III.B.

260 See discussion supra Part III.C.

261 See discussion supra Part III.D.