FELON DISENFRANCHISEMENT IN ALASKA AND THE VOTING RIGHTS ACT OF 1965

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Alaska and forty-seven other states have provisions that limit the voting rights of felons. In many of these states, including Alaska, minority groups are disproprtionately affected by these felon disenfranchisement laws. This Note examines the validity of these laws generally, and Alaska's laws in particular, under the the Voting Rights Act of 1965.

I. INTRODUCTION

Alaska limits the voting rights of felons.[1] Forty-seven other states have similar policies.[2] And, as in many of these other states, racial minorities in Alaska are disproportionately affected.[3] Indeed, the state's largest minority group, Alaska Natives, is overrepresented in the state's prison population, indicating a greater likelihood of disenfranchisement.[4] Because the right to vote is central to democratic government, any law that tends more frequently to disenfranchise racial minorities should be cause for

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1. ALASKA CONST. art. V, § 2 ("No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored.").

2. JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES pt. IV (1998), *available at* http://www.hrw.org/reports98/vote.

3. *Id*. pt. III.

4. Alaska Natives constituted approximately sixteen percent of Alaska's general population as of 2000, United States Census, *available at* http://factfinder.census.gov (under "get a Fact Sheet for your community" enter "Alaska" into "state" field; then follow "2000" link) [hereinafter U.S. Census], but represent over thirty-seven percent of the state's prison population, ALASKA DEPT. OF CORRECTIONS, 2003 OFFENDER PROFILE 11 (2004), *available at* http://www.correct.state.ak.us/corrections/admin/docs/profile2003.pdf [hereinafter ALASKA OFFENDER PROFILE].

alarm. Nevertheless, because Alaska's felon disenfranchisement laws appear not to have been enacted with a discriminatory purpose, they likely do not violate the Federal Constitution.[5]

The laws may, however, run afoul of the Voting Rights Act of 1965 ("VRA"), which was amended in 1982 to invalidate state voting qualifications that have a racially disproportionate impact.[6] Recent litigation has challenged state felon disenfranchisement laws on this basis.[7] Though none of these challenges have succeeded—and two circuits have held that the VRA simply does not apply to felon disenfranchisement[8]—the Ninth Circuit recently allowed a VRA challenge to the State of Washington's felon disenfranchisement provision.[9]

To date, no case has been brought challenging felon disenfranchisement in Alaska. This Note is directed to that possibility. Part II puts Alaska's felon disenfranchisement laws into national context and explains why, even if they produce a racially discriminatory impact, they are likely not unconstitutional. Next, Part III assesses the circuit split over whether the VRA applies to felon disenfranchisement laws and the Ninth Circuit's decision that it does. Lastly, Part IV outlines the Ninth Circuit law that would govern a VRA challenge to Alaska's felon disenfranchisement laws in light of a recent similar challenge in Washington.

II. ALASKA'S FELON DISENFRANCHISEMENT LAWS

A. National Context

Disenfranchisement of criminals is neither a unique nor a recent phenomenon. The United Kingdom, Canada, and Australia all, to some degree, have voting qualifications based on criminal status.[10] The ancient Greeks and Romans disenfranchised those guilty of infamous crimes, and voting was among a range of civil

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5. *See* discussion *infra* Part II.C.

6. *See* Thornburg v. Gingles, 478 U.S. 30, 43–44 (1986).

7. *See, e.g.*, Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005).

8. *Hayden*, 449 F.3d at 310; *Johnson*, 405 F.3d at 1234.

9. Farrakhan v. Washington (*Farrakhan I*), 338 F.3d 1009, 1016 (9th Cir. 2003).

10. Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 73 (2003). Restrictions abroad, however, tend to be more mild than those found in the United States. *Id.*

rights denied in post-Renaissance Europe on the theory that criminals suffer a "civil death."[11]

Today in the United States, disenfranchisement is among many collateral consequences of felony conviction such as exclusion from certain professions and restrictions on carrying a concealed weapon.[12] In a frequently quoted opinion, Judge Henry Friendly justified the practice on a Lockean social-contract theory by arguing that criminals, in breaking societal rules, waive their rights to participate in the rule-making.[13] Other courts have expressed an interest in preserving the "purity of the ballot box" from infection by those who by their acts have proven themselves morally unfit.[14]

Nevertheless, the practice is not without critics.[15] With respect to traditional justifications for criminal sanction—rehabilitation, retribution, and deterrence—felon disenfranchisement seems to fall short given the counter-productivity of keeping criminals from participating in civil society, the disproportionate application of, in some cases, lifetime disenfranchisement to a broad range of crimes, and the limited deterrent effect of the threat of disenfranchisement.[16] Abroad, felon disenfranchisement laws have been judicially rejected on political and human-rights grounds.[17]

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11. *Id.* at 73–74; Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–60 (2002).

12. *See* Scott M. Bennett, Note, *Giving Ex-Felons the Right to Vote*, 6 CAL. CRIM. L. REV. 1 (2004) (outlining the most common normative arguments for and against felon disenfranchisement).

13. Green v. Bd. of Elections, 380 F.2d 445, 451–52 (2d Cir. 1967) (Friendly, J.) ("A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.").

14. Dunn v. Blumstein, 405 U.S. 330, 345 (1972) (quoting TENN. CONST. art. IV, § 1).

15. *See, e.g.*, Alec. C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109 (2004).

16. *See* Bennett, *supra* note 12, ¶¶ 29–45.

17. The Canadian Supreme Court recently struck down a law preventing prisoners from voting. Suavé v. Canada, [2002] S.C.R. 519. The European Court of Human Rights held that a United Kingdom felon disenfranchisement law violated the human rights of convicts. Hirst v. United Kingdom (No 2), 38 Eur. Ct. H.R. 40 (2005). For a detailed analysis of the Canadian decision, see Parkes, *supra* note 10, at 79–85. For an analysis of the ECHR decision as well as an assessment of a "growing international consensus," see Robin L. Nunn, Comment, *Lock Them Up and Throw Away the Vote*, 5 CHI. J. INT'L L. 763, 778–79 (2005).

The modern practice of felon disenfranchisement in the United States is primarily a function of state law.[18] Forty-eight states and the District of Columbia have some form of felon disenfranchisement, generally consisting of constitutional provisions buttressed by statute.[19] Felon disenfranchisement expanded after the nation's founding, with most such laws enacted during the mid- to late-nineteenth century.[20] At the time the Reconstruction Amendments were enacted, twenty-nine of the thirty-six states had some form of felon disenfranchisement.[21]

Modern practice varies by state. At the extreme, at least three states impose lifetime voting bans on felons.[22] These jurisdictions go beyond the historical scope of felon disenfranchisement laws in the United States and the contemporary practice in other states and internationally.[23] The reach of these laws is striking—lifetime disenfranchisement may even be predicated upon crimes such as jaywalking, vagrancy, or breaking a water pipe.[24]

Alaska's felon disenfranchisement law is not as severe. The state constitution provides that "[n]o person may vote who has

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18. Although the United States Constitution generally grants states the authority to establish voter qualifications, *see* U.S. CONST. art. I, § 2, cl. 1, that authority is constrained, not only by other express constitutional provisions, *e.g.*, U.S. CONST. amend. XV (right to vote cannot be denied on account of race); U.S. CONST. amend. XIX (gender); U.S. CONST. amend. XXIV (poll taxes), but also by strict scrutiny under the Equal Protection Clause as interfering with the fundamental right of voting, *see* Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969); Reynolds v. Sims, 377 U.S. 533 (1964).

19. *See* FELLNER & MAUER, *supra* note 2, pt. II (surveying severity of felon disenfranchisement laws by state). For a state-by-state summary of state felon disenfranchisement laws, see SUSAN M. KUZMA, U.S DEP'T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY (DOJ/OPA), CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996), http://www.usdoj.gov/pardon/forms/state_survey.pdf (last visited Oct. 2, 2006).

20. Angela Behrens, Christopher Uggens & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 563–67 (2003).

21. Johnson v. Governor of Fla., 405 F.3d 1214, 1218 n.5 (11th Cir. 2005).

22. *See* FELLNER & MAUER, *supra* note 2, pt. II. Restoration of civil rights, including the franchise, is possible in some states upon pardon of the offense. *See id.*

23. For example, the United Kingdom, Canada, and Australia generally restore voting rights upon the completion of sentence. *See* Parkes, *supra* note 10, at 73.

24. Richardson v. Ramirez, 418 U.S. 24, 75–76 n.24 (1964) (Marshall, J., dissenting).

been convicted of a felony involving moral turpitude unless his civil rights have been restored."[25] The provision was adopted at Alaska's constitutional convention in 1956 and became law upon Alaska's admission to the union in 1959.[26] Congress approved Alaska's constitution, including the felon disenfranchisement provision, when it granted statehood.[27] The language mirrored that of contemporary provisions in other states' constitutions.[28]

The contours of the constitutional provision are set by statute. The term "felony involving moral turpitude" is defined to include nearly all felonies.[29] Voting registration is automatically cancelled upon conviction.[30] Voting rights are restored, and felons may re-register to vote upon completion of their sentences including any terms of parole or probation.[31] Felon disenfranchisement in Alaska, which is more lenient than the lifetime ban imposed in

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25. ALASKA CONST. art. V, § 2.

26. GORDON HARRISON, ALASKA'S CONSTITUTION: A CITIZEN'S GUIDE, 3 (4th ed. 2003), *available at* http://w3.legis.state.ak.us/infodocs/constitution/citizens_guide.pdf [hereinafter CITIZEN'S GUIDE].

27. *See id*. at 3–4.

28. GERALD A. MCBEATH, THE ALASKA STATE CONSTITUTION: A REFERENCE GUIDE 125 (1997). The voting qualifications in Alaska's original constitution included a literacy test. CITIZEN'S GUIDE, *supra* note 26, at 105.

29. ALASKA STAT. § 15.60.010(8) (2006). At present, crimes meriting disenfranchisement ("felon[ies] involving moral turpitude") include:

> those crimes that are immoral or wrong in themselves such as murder, manslaughter, assault, sexual assault, sexual abuse of a minor, unlawful exploitation of a minor, robbery, extortion, coercion, kidnapping, incest, arson, burglary, theft, forgery, criminal possession of a forgery device, offering a false instrument for recording, scheme to defraud, falsifying business records, commercial bribe receiving, commercial bribery, bribery, receiving a bribe, perjury, perjury by inconsistent statements, endangering the welfare of a minor, escape, promoting contraband, interference with official proceedings, receiving a bribe by a witness or a juror, jury tampering, misconduct by a juror, tampering with physical evidence, hindering prosecution, terroristic threatening, riot, criminal possession of explosives, unlawful furnishing of explosives, promoting prostitution, criminal mischief, misconduct involving a controlled substance or an imitation controlled substance, permitting an escape, promoting gambling, possession of gambling records, distribution of child pornography, and possession of child pornography . . . .

Id.

30. ALASKA STAT. § 15.07.135.

31. ALASKA STAT. § 15.05.030 ("Upon the unconditional discharge, the person may register under AS 15.07."). "Unconditional discharge" occurs when "a person is released from all disability arising under a conviction and sentence, including probation and parole." ALASKA STAT. § 15.60.010(38).

some states, is in line with the policies of a majority of other states.[32]

B. Felon Disenfranchisement and Race

Though facially race-neutral, felon disenfranchisement laws were, historically, enacted with a discriminatory purpose. Authors have noted that many states enacted such laws in the aftermath of the Civil War as part of a larger defensive response to the Reconstruction Amendments' extension of the franchise to African-Americans.[33] This response included poll taxes, literacy tests, and other Jim Crow measures to suppress the voting power of African-Americans.[34] For example, a 1901 felon disenfranchisement provision to Alabama's state constitution was expressly intended to single out only those felonies believed to be more frequently committed by African-Americans.[35] In 1985, the Supreme Court struck down that provision in the case of *Hunter v. Underwood*.[36]

To the extent felon disenfranchisement laws were tailored to maximize a racially disparate impact, they have enjoyed considerable success.[37] Nationally, an estimated thirteen percent of African-American men are disenfranchised, with as many as thirty-one percent of African-American men in two states—Alabama and Florida—permanently disenfranchised.[38] Following a review of voting in the United States, the National Commission on Federal Election Reform, chaired by former presidents Jimmy Carter and Gerald Ford, urged states to scale back felon disenfranchisement laws, citing that as many as one in six African-Americans were disenfranchised in many states.[39] Even where discriminatory intent

32. *See* FELLNER & MAUER, *supra* note 2, pt. III.

33. Behrens et al., *supra* note 20, at 563 (analyzing post-Civil War responses to extending the franchise to African-Americans and drawing on social science theories of race competition and criminal justice).

34. *Id.*

35. Hunter v. Underwood, 471 U.S. 222, 228–29 (1985). The Alabama statute at issue was not discriminatory on its face, but the Court nevertheless struck it down on the basis of discriminatory intent evidenced in the legislative history. *See id.* at 227–32; Underwood v. Hunter, 730 F.2d 614, 618–20 (11th Cir. 1984).

36. Hunter v. Underwood, 471 U.S. at 232–33.

37. *See* FELLNER & MAUER, *supra* note 2, pt. II (setting out the racially disproportionate impact of felon disenfranchisement laws).

38. *Id.* pt III.

39. THE NATIONAL COMMISSION ON FEDERAL ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 51 (August 2001), *available at* http://millercenter.virginia.edu/programs/natl_commissions/final_report.html.

has not been proven, discriminatory effect continues to be the reality.[40]

Alaska's experience is comparable. Although comprehensive studies of racial disparity in felon disenfranchisement in Alaska are unavailable, incarceration statistics provide a useful proxy.[41] Alaska's largest minority group, Alaska Natives, comprise approximately sixteen percent of the state's general population,[42] but they account for thirty-seven percent of its prison population.[43] Similar disparity exists in the cases of other minorities, including African-Americans, who account for over ten percent of the prison population[44] while representing less than four percent of the general population.[45] It has been suggested that cultural factors may make Alaska Natives more susceptible to felon disenfranchisement.[46] The precise mechanism by which racial bias in the criminal justice system may result in disproportionate disenfranchisement, and indeed whether racial bias is the cause of the disparity, is unclear and would require further study.

C. Constitutionality of Alaska's Felon Disenfranchisement Law

Felon disenfranchisement laws come under constitutional scrutiny in two ways. First, as a restriction on voting, the laws interfere with a fundamental right and implicate the Equal

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40. In Florida, the Eleventh Circuit denied an equal protection challenge to the state's felon disenfranchisement laws for lack of demonstrated racially discriminatory intent, Johnson v. Governor of Fla., 405 F.3d 1214, 1223 (11th Cir. 2005), even though nearly one in three African-American men in Florida is permanently disenfranchised, *see* FELLNER & MAUER, *supra* note 2, pt. III.

41. Incarceration rates are, at best, an imprecise proxy for felon disenfranchisement. They are over-inclusive in that they include those inmates who are ineligible to vote, as well as those incarcerated for misdemeanors, and they are under-inclusive in that they do not include parolees or Alaska felons incarcerated outside of the state who are also unable to vote.

42. U.S. Census, *supra* note 4.

43. ALASKA OFFENDER PROFILE, *supra* note 4.

44. *Id.*

45. U.S. Census, *supra* note 4.

46. *See, e.g.*, Dave Stephenson, *For Alaska Natives: Extermination by Incarceration?*, INDIAN COUNTRY TODAY, June 26, 2003, *available at* http://www.indiancountry.com/content.cfm?id=1056628610 (advancing the argument that Alaska Natives may be more likely to confess to a crime upon arrest than are white arrestees, thereby reducing the likelihood of a plea agreement for a lesser charge or sentence). If true, such factors might make felony—as opposed to misdemeanor—conviction more likely, leading to longer incarceration periods and thereby exacerbating the impact of felon disenfranchisement.

Protection Clause of the Fourteenth Amendment. Second, because the laws affect the voting rights of racial minorities, they also implicate the Fifteenth Amendment's prohibition on disenfranchisement "on account of race."[47] Supreme Court decisions addressing both theories have concluded that felon disenfranchisement laws are constitutional unless it can be proved they were enacted with racially discriminatory intent.[48]

Ordinarily, a state law affecting a fundamental right, such as voting, would be subject to strict scrutiny.[49] However, in the 1974 case of *Richardson v. Ramirez*, the Supreme Court held that felon disenfranchisement laws are not subject to heightened scrutiny under Section 1 of the Fourteenth Amendment because Section 2 of that Amendment includes an "affirmative sanction" of such laws.[50] Section 2 of the Fourteenth Amendment, which reduces a state's representation in Congress in proportion to its disenfranchisement of otherwise qualified voters, provides an exception for disenfranchisement based on "participation in rebellion, or other crime."[51] Chief Justice Rehnquist, writing for a divided court, reasoned that "those who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment."[52] Put another way, the voting

47. *See* U.S. CONST. amend. XV.

48. The Court has also heard and rejected Eighth Amendment challenges to felon disenfranchisement. *See* Trop v. Dulles, 356 U.S. 86, 96–97 (1958) (felon disenfranchisement is not punitive and merely designates a grounds for voting eligibility). For an in-depth treatment of felon disenfranchisement as punishment in the context of the Eighth Amendment, see Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85 (2005).

49. *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627–28 (1969) (applying strict scrutiny to voting restrictions); Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter. . . ."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[T]he political franchise . . . is regarded as a fundamental political right . . . .").

50. Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

51. U.S. CONST. amend. XIV, § 2. The Amendment provides in pertinent part that "when the right to vote at any election . . . is denied . . . or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation [in Congress] shall be reduced . . . ." *Id.* (emphasis added).

52. *Richardson*, 418 U.S. at 43.

rights of *felons* are not protected as "fundamental" under the Equal Protection Clause.[53]

Nevertheless, even if *Richardson* shields felon disenfranchisement laws from strict scrutiny under the Equal Protection Clause,[54] Section 1 of the Fourteenth Amendment still operates independently to prevent purposeful racial discrimination. In *Hunter v. Underwood*,[55] the Supreme Court struck down a provision in Alabama's constitution disenfranchising those convicted of certain enumerated felonies.[56] The provision was enacted in 1901 with the purpose of disenfranchising on the basis of race and applied only to felonies believed committed more frequently by African-Americans.[57] Chief Justice Rehnquist, writing for the Court as he did in *Richardson*, explained that "[w]ithout again considering the implicit authorization of [felon disenfranchisement under § 2 of the Fourteenth Amendment], we are confident that § 2 was not designed to permit the purposeful

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53. At least one circuit has framed the law in this way. *See* Owens v. Barnes, 711 F.2d 25, 27 (3d Cir. 1983).

54. *Richardson*'s reading of Section 2 of the Fourteenth Amendment has been widely criticized. *See, e.g.*, Carlos M. Portugal, *Democracy Frozen in Devonian Amber: The Racial Impact of Permanent Felon Disenfranchisement in Florida*, 57 U. MIAMI L. REV. 1317, 1325–26 (2003); John Hart Ely, *Interclausal Immunity*, 87 VA. L. REV. 1185, 1195 (2001). Dissenting, Justice Marshall argued in *Richardson* that Section 2 merely established a system of punitive reduction in representation for disenfranchisement as a compromise because wholesale enfranchisement of African-Americans would have been unpalatable and, therefore, that the scope of the language of Section 2 is limited to the operation of its punitive sanction and not to the entirety of the Fourteenth Amendment. *Richardson*, 418 U.S. at 73–74 (Marshall, J., dissenting).

For an argument that the Fifteenth Amendment effectively repealed Section 2 of the Fourteenth Amendment and, therefore, that the latter cannot shield felon disenfranchisement laws from equal protection scrutiny, 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 (2004).

Richardson preempts the question of whether, without a Section 2 shield, felon disenfranchisement would survive strict scrutiny. For an argument that felon disenfranchisement fails strict scrutiny because it is over-inclusive and only tenuously related to the most commonly cited state interests, see Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 98 MINN. L. REV. 231, 259–72 (2004).

55. 471 U.S. 222, 232 (1985).

56. *Id.* at 232.

57. *Id.* at 227–28; *see* discussion *supra* note 35.

racial discrimination attending the enactment and operation of [a law] which otherwise violates § 1 of the Fourteenth Amendment."[58]

Independently of the Fourteenth Amendment, the Fifteenth Amendment prohibits the denial of the right to vote "on account of race."[59] The Supreme Court has construed this prohibition to apply only to intentional discrimination.[60] In *City of Mobile v. Bolden*, the Supreme Court held that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."[61]

Alaska's felon disenfranchisement laws are facially neutral and would, therefore, be unconstitutional only if enacted with a discriminatory purpose. Because the laws do not appear to have been adopted with racially discriminatory intent,[62] they are subject to legal challenge, if at all, only under federal legislation.[63]

III. THE VOTING RIGHTS ACT OF 1965

A. The Voting Rights Act of 1965 and the 1982 Amendments

Though the Fifteenth Amendment was ratified in 1870, it took nearly one hundred years before Congress systematically addressed disenfranchisement of racial minorities.[64] The Voting Rights Act of 1965[65] was enacted by Congress to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."[66] Congress was prompted to act after case-by-case litigation under previous legislation, including the Civil Rights Act of 1957, failed to

58. *Id.* at 233.

59. U.S. CONST. amend. XV.

60. City of Mobile v. Bolden, 446 U.S. 55, 62 (1980).

61. *Id.*

62. This Note assumes, for the purpose of analysis, that discriminatory intent did not drive enactment of Alaska's felon disenfranchisement laws—or, at the very least, that discriminatory purpose likely could not be proven in the context of a constitutional challenge.

63. Of course, less countermajoritarian methods of legal reform remain available to Alaskans, such as constitutional amendment and the state legislative process.

64. Portugal, *supra* note 54, at 1328.

65. 42 U.S.C. §§ 1971–1973 (2000), as amended in 1970, Pub. L. 91-285, 84 Stat. 314 (1970), and in 1982, Pub. L. 97-205, 96 Stat. 131 (1982). The VRA has been reauthorized and amended by Congress on several occasions, including in 1970, 1975, and 1982, and was reauthorized by the President in July 2006. *Bush Signs Extension of Voting Rights Act*, N.Y. TIMES, July 28, 2006, at A22.

66. South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

adequately prevent disenfranchisement on account of race.[67] The VRA imposed bold measures, including section 5, which prohibited the use of discriminatory tests or devices, such as literacy tests, and required that any state making use of such devices would thereafter have to apply for pre-clearance from the U.S. Attorney General or a federal circuit judge in Washington, D.C. for any future changes to voting laws.[68] At the time of the VRA's enactment, Alaska employed a literacy test and was, therefore, designated a "covered jurisdiction" for these purposes.[69] Federal supervision of the voting laws of "covered jurisdictions," most of which are in the South, continues today.[70]

In 1966, the Supreme Court upheld the VRA as a valid exercise of Congress's enforcement powers under Section 2 of the Fifteenth Amendment.[71] In 1980, however, the Court narrowed the effect of the VRA in *City of Mobile v. Bolden*.[72] There, the Court held that section 2 of the VRA[73] had "an effect no different from that of the Fifteenth Amendment itself" and that a voting qualification law would only be struck down under the Act if it were proved that the law was enacted with a racially discriminatory purpose.[74] In so doing, the Court overruled the then-applicable "effects test" for voting qualifications.[75]

In 1982, Congress responded to *City of Mobile* by adding a "totality of the circumstances" test to section 2 of the VRA.[76]

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67. *Id.* at 313.

68. *See* Voting Rights Act of 1965, 89 Pub. L. 110, 79 Stat. 437 (1965).

69. *See* Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43, 45–46 (2004); CITIZEN'S GUIDE, *supra* note 26, at 107.

70. Congressional representatives from southern states covered by the VRA's section 5 pre-clearance provisions sought to remove those provisions during the reauthorization of the VRA in 2006. *See* Raymond Hernandez, *After Challenges, House Approves Renewal of Voting Act*, N.Y. TIMES, July 14, 2006, at A13.

71. *Katzenbach*, 383 U.S. at 337.

72. 446 U.S. 55 (1980) (plurality opinion).

73. The original text of the section read, "No voting qualification or prerequisites to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Voting Rights Act of 1965, 89 Pub. L. 11, 79 Stat. 437 (1965).

74. *City of Mobile*, 446 U.S. at 61–62.

75. *See, e.g.*, White v. Regester, 412 U.S. 755, 769 (1973) (totality of the circumstances test applied to vote dilution case brought under section 2 of the VRA).

76. Thornburg v. Gingles, 478 U.S. 30, 43 (1986). The amended section 2 provides, in pertinent part:

Under the amended VRA, "plaintiffs [can] prevail by showing that, under the totality of the circumstances, a challenged election law or procedure [has] the effect of denying a protected minority an equal chance to participate in the electoral process."[77] As the Court later explained, "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions" to cause unequal voting power.[78]

B. Applicability of the VRA to Felon Disenfranchisement Laws

Since the 1982 amendments to the VRA, several plaintiffs have sought to use it to invalidate felon disenfranchisement laws on the basis of their racially disproportionate effects.[79] Circuits have split over whether the VRA does, in fact, apply to felon disenfranchisement laws. The Second Circuit in *Hayden v. Pataki* and the Tenth Circuit in *Johnson v. Governor of Florida* both held the VRA inapplicable to felon disenfranchisement laws.[80] In contrast, in *Farrakhan v. Washington*,[81] the Ninth Circuit held that "[f]elon disenfranchisement is a voting qualification, and Section 2 is clear that *any* voting qualification that denies citizens the right to vote in a discriminatory manner violates the VRA."[82] Therefore, a claim against Alaska's felon disenfranchisement laws would be

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> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) of this section is established if, based on the *totality of the circumstances*, it is shown that . . . members of [protected racial minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973 (2000) (emphasis added).

77. *Gingles*, 478 U.S. at 44 n.8.

78. *Id.* at 47.

79. *Id.*; *see, e.g.*, Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005).

80. *Hayden*, 449 F.3d at 310; *see Johnson*, 405 F.3d at 1234.

81. Farrakhan v. Washington (*Farrakhan I*), 338 F.3d 1009, 1016 (9th Cir. 2003).

82. *Id.* The Sixth Circuit also considered a VRA challenge to Tennessee's felon disenfranchisement law in *Wesley v. Collins*, 791 F.2d 1255 (2d Cir. 1986). The court did not directly consider whether the VRA applies to felon disenfranchisement but appears to have assumed that it did. *See id.* at 1262 (affirming dismissal of the VRA claim on summary judgment).

"cognizable under Section 2 of the VRA" under Ninth Circuit precedent.[83]

The Second and Tenth Circuit opinions concluding that the VRA does not apply to felon disenfranchisement laws rely on three arguments: (1) that the Fourteenth Amendment authorizes felon disenfranchisement laws (the "affirmative sanction" argument); (2) that application of the VRA to felon disenfranchisement would be an unconstitutional exercise of Congress's enforcement power; and (3) that canons of statutory construction support construing the VRA not to apply to felon disenfranchisement laws. The relative merits of each argument are assessed in turn.

1. The "Affirmative Sanction" Argument. As discussed previously, the *Richardson* case established that felon disenfranchisement laws enacted without racially discriminatory intent do not violate the Equal Protection Clause.[84] This is because Section 2 of the Fourteenth Amendment's enforcement mechanism—that a state's representation in Congress will be reduced in proportion to the disenfranchisement of otherwise qualified voters—carries an express exception for disenfranchisement based on "participation in rebellion, or other crime."[85]

The Eleventh Circuit, in *Johnson*, seized on language in *Richardson* describing Section 2 of the Fourteenth Amendment as an "affirmative sanction" of felon disenfranchisement and cited it for the proposition that states have discretion to deny the vote to convicted felons.[86] The court argued that applying the VRA to Florida's felon disenfranchisement law would allow "a congressional statute to override the text of the Constitution."[87] More recently, the Second Circuit, in *Hayden*, cited Section 2 of the Fourteenth Amendment as the "starting point" in the analysis of the VRA's applicability to New York's felon disenfranchisement law.[88] The Second Circuit, while noting that felon

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83. *Farrakhan I*, 338 F.3d at 1016.

84. *See* Richardson v. Ramirez, 418 U.S. 24, 54–55 (1974); *supra* notes 50–58 and accompanying text.

85. U.S. CONST. amend. XIV, § 2.

86. Johnson v. Governor of Fla., 405 F.3d 1214, 1228–29 (11th Cir. 2005) (quoting *Richardson*, 418 U.S. at 54).

87. *Id.* at 1229.

88. Hayden v. Pataki, 449 F.3d 305, 316 (2d Cir. 2006); *accord* Muntaqim v. Coombe, 366 F.3d 102, 122 (2d Cir. 2004). *Hayden* is the *en banc* rehearing of the *Muntaqim* decision, which is incorporated by reference. *Hayden*, 449 F.3d at 313–14.

disenfranchisement provisions are not entirely immune from constitutional or congressional scrutiny, found that the Fourteenth Amendment provided "explicit approval" of those types of laws.[89] Dissenting from the Ninth Circuit's denial of an *en banc* rehearing of the *Farrakhan* case, Judge Alex Kozinski argued that felon disenfranchisement laws were presumptively valid due to the Fourteenth Amendment's textual endorsement of such laws.[90]

Interestingly, neither the Second Circuit nor Judge Kozinski addressed the fact that the VRA was enacted to enforce the Fifteenth Amendment, not the Fourteenth. The Eleventh Circuit brushed off the distinction in a footnote.[91] The distinction is, however, the key weakness to the "affirmative sanction" argument because the Fifteenth Amendment grants its own protections that are not hindered by purported limitations to the scope of the Fourteenth Amendment.

Judge Barrington Daniels Parker, Jr. of the Second Circuit made this point in his dissent in *Hayden*. Pointing out that *Richardson*'*s* "affirmative sanction" came in the context of a claim that felon disenfranchisement was a *per se* violation of the Fourteenth Amendment, Judge Parker noted that "*Richardson* did not grant felon disenfranchisement immunity against any other ground of invalidity. . . ."[92] As a textual matter, Section 2 of the Fourteenth Amendment at most "*declines to prohibit*" felon disenfranchisement and does not affirmatively immunize the practice relative to other constitutional protections.[93] As Judge Parker reasoned:

> The Constitution does not endorse felon disenfranchisement when it declines to prohibit the practice, any more than the Constitution endorses felon enslavement when the Thirteenth Amendment states: "Neither slavery nor involuntary servitude, *except as punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States . . . ." Declining to prohibit something is not the same as protecting it.[94]

Nor does Section 2 of the Fourteenth Amendment *require* states to disenfranchise felons. If states can choose not to disenfranchise felons without running afoul of the Fourteenth Amendment, then Congress, acting pursuant to its power to

89. *Hayden,* 449 F.3d at 316.

90. Farrakhan v. Washington (*Farrakhan II*), 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting).

91. *Johnson*, 405 F.3d at 1228–29 n.29.

92. *Hayden*, 449 F.3d at 349 (Parker, J., dissenting).

93. *Id.* (citation omitted) (emphasis added).

94. *Id.* (citation omitted).

enforce the Fifteenth Amendment, can compel the same result. Indeed, the "affirmative sanction" argument is more of a rhetorical device than an independent constitutional limitation on the VRA.

2. Arguments on the Constitutionality of the VRA as Enforcement Legislation. Enforcement legislation under the Fourteenth and Fifteenth Amendments is valid only to the extent that it remedies or prevents actual constitutional violations.[95] The Eleventh Circuit, Chief Judge John M. Walker, Jr.'s concurrence to the Second Circuit's *Hayden* opinion, and Judge Kozinski's dissent in the Ninth Circuit have all argued that the VRA would be unconstitutional as applied to felon disenfranchisement laws.[96]

The enforcement power is limited by two independent requirements. The first is that enforcement legislation must be supported by a history of constitutional violations.[97] The second is that the measures must be narrowly tailored to the constitutional ill sought to be avoided.[98] In his *Hayden* concurrence, Chief Judge Walker found no congressional record establishing that felon disenfranchisement laws have been used to discriminate against minority voters.[99] In *Johnson*, the petitioners had argued that specific examples of violations should not be required because Congress could not envision every possible means of racial discrimination.[100] The Eleventh Circuit rejected this argument, citing the widespread use of felon disenfranchisement laws at the time that the VRA was enacted.[101] Lastly, Judge Kozinski emphasized in his dissent from the Ninth Circuit's denial of a rehearing in *Farrakhan* that "[t]he theoretical, undocumented threat of unconstitutional felon disenfranchisement laws simply doesn't justify" application of section 2 to those state laws.[102]

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95. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

96. *See Hayden*, 449 F.3d at 330 (Walker, C.J., concurring); *Johnson*, 405 F.3d at 1231–32; Farrakhan v. Washington (*Farrakhan II*), 359 F.3d 1116, 1121 (9th Cir. 2004) (Kozinski, J., dissenting).

97. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000); Oregon v. Mitchell, 400 U.S. 112, 130 (1970) (holding the amendment to VRA lowering the voting age to eighteen invalid because Congress made no findings that an age limit of twenty-one was used to discriminate on race).

98. *See City of Boerne*, 521 U.S. at 520.

99. *Hayden*, 449 F.3d at 330–31 (Walker, C.J., concurring).

100. *Johnson*, 405 F.3d at 1231 n.33.

101. *Id.*

102. Farrakhan v. Washington (*Farrakhan II*), 359 F.3d 1116, 1123 (9th Cir. 2004) (Kozinski, J., dissenting).

Lack of congressional findings of a pattern of historical discrimination through felon disenfranchisement laws[103] informs the analysis of the proportionality and congruence of the purported remedial measure at issue. Although the Supreme Court has repeatedly emphasized the importance that enforcement legislation be geographically targeted,[104] the VRA applies to all states regardless of their individual histories.[105] To the extent the VRA is either inadequately supported by findings of a pattern of discrimination or not narrowly tailored, application of the VRA to felon disenfranchisement would be unconstitutional.

The Ninth Circuit did not consider this issue in *Farrakhan* when it allowed a VRA challenge to Washington's felon disenfranchisement law to proceed.[106] On remand, the *Farrakhan* case was dismissed on summary judgment, mooting for now the question of constitutionality of the VRA as applied to felon disenfranchisement laws.[107] Indeed, the narrow issue of as-applied constitutionality of the VRA as enforcement legislation relative to felon disenfranchisement laws would not be ripe until such a law is actually invalidated. Rather, the constitutional doubt associated with application of the VRA to felon disenfranchisement serves primarily as a predicate for the statutory construction arguments discussed next.

3. Statutory Interpretation Arguments. The Ninth Circuit's interpretation of the VRA was the same as that pointedly expressed in a dissent by Judge Sonia Sotomayor of the Second Circuit: "[i]t is plain to anyone reading the Voting Rights Act that it applies to all 'voting qualification[s].'"[108] The majority in the

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103. This is not to say that there is not an actual record of state use of felon disenfranchisement laws to discriminate on race. That states used felon disenfranchisement laws in order to discriminate is well documented. *See supra* notes 33-37 and accompanying text. Rather, that history is not part of the congressional findings made at the time of the enactment of the VRA and its relevant amendments. *See Hayden*, 449 F.3d at 330–31 (Walker, C.J., concurring).

104. *Farrakhan II*, 359 F.3d at 1124 (Kozinski, J., dissenting) (noting that a purported enforcement legislation was not geographically targeted and was therefore struck down in United States v. Morrison, 529 U.S. 598 (2000)).

105. Geographic targetedness is particularly relevant to the present analysis of Alaska and is addressed in Part IV.

106. *See* Farrakhan v. Washington (*Farrakhan I*), 338 F.3d 1009, 1016 (9th Cir. 2003).

107. *See* Farrakhan v. Gregoire (*Farrakhan III*), No. CV-96-076-RHW, 2006 U.S. Dist. LEXIS 45987, at *2 (E.D. Wash. July 7, 2006).

108. *Hayden*, 449 F.3d at 367–68 (Sotomayor, J., dissenting) (second alteration in original); *Farrakhan I*, 338 F.3d at 1016.

Second Circuit, though admitting that "[t]here is no question that the language of [section 2] is extremely broad . . . and could be read to include felon disenfranchisement provisions," nevertheless stressed the importance of interpretation in light of congressional intent, cryptically citing dated authority for the proposition that "[t]he circumstances of the enactment of particular legislation may persuade a court that Congress did not intend the words of common meaning to have their literal effect."[109]

Two canons of construction have been deployed to interpret the VRA away from felon disenfranchisement provisions: the avoidance canon and the clear statement rule. The Eleventh Circuit relied upon the avoidance canon, which counsels that, in the case of an ambiguous statute, "where an otherwise acceptable construction of a statue would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[110]

The Second Circuit—both sitting *en banc* in *Hayden* and through the three-judge panel that decided *Muntaqim v. Coombe*, the predecessor to *Hayden*—distanced itself from the Eleventh Circuit's reliance on the avoidance canon.[111] The reason expressed in *Muntaqim* is that the clarity of the text of section 2 of the VRA is impossible to reconcile with the avoidance canon's ambiguity requirement.[112] Indeed, a concurring judge on the Eleventh Circuit conceded that the majority "overstates the case for constitutional avoidance" because "[a]s a purely textual matter, a voting

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109. *Hayden*, 449 F.3d at 315 (quoting Watt v. Alaska, 451 U.S. 259, 266 (1981)).

110. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

111. *See* 366 F.3d 102, 128 n.22 (2d Cir. 2004) ("[Section 2], while vague, does not seem ambiguous."), *aff'd en banc*, *Hayden*, 449 F.3d 305. The *Hayden* court barely mentioned the avoidance canon and made only passing reference to the Eleventh Circuit's reliance on it. 449 F.3d at 313, 328 n.24.

112. *See Muntaqim*, 366 F.3d at 128 n.22. The *Johnson* court, ironically, turned to the *Muntaqim* decision for the proposition that section 2 is ambiguous, citing that court's assessment that the meaning of section 2 is "exceedingly difficult to discern." Johnson v. Governor of Fla., 405 F.3d 1214, 1229 n.30 (11th Cir. 2005) (quoting *Muntaqim*, 366 F.3d at 116). In the quoted passage, however, the *Muntaqim* court referred to ambiguity in the degree of intent required to establish a violation of section 2, not the scope of the Act's coverage relative to felon disenfranchisement laws. *Johnson,* 405 F.3d at 1229 n.30; *Muntaqim*, 366 F.3d at 116–18.

qualification based on felony status . . . falls within the scope of the VRA."[113]

A stronger statutory construction argument, and the one adopted by the majority in *Hayden*, is premised on the so-called clear statement rule. The rule provides that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[114] The *Hayden* court held that the clear statement rule does not require ambiguity but only a lack of a clear statement, explaining that "we will apply the clear statement rule when a statute admits of an interpretation that would alter the federal balance but there is reason to believe . . . that Congress may not have intended such an alteration of the federal balance."[115] The rule is intended to prevent a statute from inadvertently affecting the federal-state balance of power. The Supreme Court has held, in another context, that "clear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation."[116] Given that sweeping language alone may not satisfy the clear statement rule, the question becomes one of congressional intent.

Considerable evidence suggests that Congress did not intend the VRA to apply to felon disenfranchisement laws.[117] For example, though Congress expressly identified common forms of discriminatory voter qualifications, including literacy, educational, and moral character tests, it never mentioned felon disenfranchisement in the text of the VRA.[118] In fact, as noted by the *Hayden* court, the only reference to felon disenfranchisement in the legislative history of the VRA was to clarify that the VRA's character test provisions "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability."[119] Indeed, the *Hayden*

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113. *Johnson*, 405 F.3d at 1239–40 (Wilson, J., concurring in part).

114. Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (quoting Will v. Mich., 491 U.S. 58, 65 (1989) (internal citation omitted)).

115. *Hayden*, 449 F.3d at 325.

116. Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119, 139 (2005) (addressing a presumption against applying statutes to the internal affairs of foreign vessels).

117. *See, e.g.*, *Hayden*, 449 F.3d at 315.

118. *See* 42 U.S.C. § 1973b(c) (2000).

119. *Hayden*, 449 F.3d at 318 (quoting S. Rep. No. 89-162, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562); *see also* H.R. Rep. No. 89-439, at 19

court reasoned that, given the prevalence of felon disenfranchisement statutes, "it seems unfathomable that Congress would silently amend the Voting Rights Act in a way that would affect them."[120]

Whether application of the VRA to felon disenfranchisement laws would upset the federal-state balance is in dispute. In *Muntaqim*, the Second Circuit held that the federal-state balance would be upset because applying the VRA to felon disenfranchisement laws would exceed Congress's enforcement power and contradict Section 2 of the Fourteenth Amendment.[121] The Eleventh Circuit in *Johnson* concurred generally with that conclusion but did not rely on it.[122] On a rehearing of *Muntaqim* in *Hayden*, the Second Circuit hewed its analysis more directly to "three important state interests" that would be affected by applying the VRA to New York's felon disenfranchisement law: "(1) the regulation of the franchise; (2) the State's authority to craft its criminal law; and (3) the regulation of correctional institutions."[123]

Rejecting the federalism concerns similarly raised by the Tenth Circuit in *Johnson*, Judge Rosemary Barkett in dissent reasoned that federalism is not implicated by the VRA because the "Fourteenth and Fifteenth Amendments altered the constitutional balance between the two sovereigns—*not* the Voting Rights Act, which merely enforces the guarantees of those amendments."[124] This argument was repeated in Judge Parker's *Hayden* dissent.[125]

(1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457. Nor did the 1982 amendments expand the scope of the VRA. Chisom v. Roemer, 501 U.S. 380, 383–84 (1991) ("[T]he coverage provided by the 1982 amendment is coextensive with the coverage provided by the Act prior to 1982."). The 1982 amendments merely lowered the evidentiary burden to establish a violation by replacing an "intent" test with an "effects" test. *Id.* at 403–04.

120. *Hayden*, 449 F.3d at 317 (quoting Johnson v. Governor of Fla., 405 F.3d 1214, 1234 (11th Cir. 2005)).

121. *See* Muntaqim v. Coombe, 366 F.3d 102, 126 (2d Cir. 2004). Both arguments against applying the VRA to felon disenfranchisement discussed serve as predicates for application of the clear statement rule because they implicate federalism.

122. The court makes passing reference to the clear statement rule in a footnote. *See Johnson*, 405 F.3d at 1232 n.35.

123. *Hayden*, 449 F.3d at 326.

124. *Johnson*, 405 F.3d at 1250 (Barkett, J., dissenting) (citing a dissent from an equally divided court in the Second Circuit's first consideration of the question in *Baker v. Pataki*, 85 F.3d 919, 938 (2d Cir. 1996) (Feinberg, J., dissenting)).

125. *Hayden*, 449 F.3d at 358.

Whatever the uncertainties of the basis for these divergent circuit decisions, Ninth Circuit law is, for now, clear that a challenge to Alaska's felon disenfranchisement law is possible under section 2 of the VRA.

IV. ALASKA'S FELON DISENFRANCHISEMENT LAW AND THE VOTING RIGHTS ACT OF 1965

A. Ninth Circuit's Framework for Challenges Under Section 2 of the VRA

Nearly a decade before *Farrakhan*, the Ninth Circuit set a framework for challenges under section 2 of the VRA in *Smith v. Salt River*.[126] *Salt River* involved an Arizona agricultural district power board election rule that limited voting to landowners within the district.[127] African-American plaintiffs claimed that the voting qualification combined with racial disparities in land ownership rates had a racially disproportionate effect on voting rights in violation of section 2 of the VRA.[128]

The *Salt River* court affirmed that section 2 of the VRA "prohibits voting qualifications which *result in* discrimination on account of race or color . . . [and] requires proof only of a discriminatory result, not of discriminatory intent."[129] Further, the intent is judged under the "totality of the circumstances" test with reference to several non-exclusive, so-called Senate Factors identified in the legislative history of the VRA.[130]

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126. Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586 (9th Cir. 1997).

127. *Id.* at 589.

128. *Id.* at 588.

129. *Id.* at 594 (citing Chisom v. Roemer, 501 U.S. 380, 394 (1991)).

130. *Id.* at 594 n.6. The Senate Factors are:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process[;]
>
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as

Significantly, in interpreting the "totality of the circumstances" test under the VRA, the *Salt River* court held that "a bare statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 'results' inquiry. Instead, 'section 2 plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result.'"[131]

As the Ninth Circuit explained, "[t]he real question this case presents is whether the land ownership requirement denies African-Americans the right and opportunity to vote . . . ."[132] Affirming the district court's dismissal for lack of a "causal connection," the Ninth Circuit, relying heavily on a stipulated lack of historical racial discrimination, concluded that "the statistical disparity in African-American and white home ownership does not prove the District has violated § 2."[133]

B. Applying the VRA in *Farrakhan*

In late 2000, the Eastern District of Washington dismissed for the first time a claim by Muhammad Shabazz Farrakhan and others that Washington's felon disenfranchisement law violated section 2 of the VRA.[134] The court held that "although the disenfranchisement provision clearly has a disproportionate impact on racial minorities, there is no evidence that the provision's enactment was motivated by racial animus, or that its operation *by*

> education, employment and health, which hinder their ability to participate effectively in the political process;
>
> (6) whether political campaigns have been characterized by overt or subtle racial appeals;
>
> (7) the extent to which members of the minority group have been elected to public office in the jurisdiction;

Additional factors . . . are:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized need of the members of the minority group; [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous.

Id. (citing S. Rep. No. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07).

131. *Id.* at 595 (alteration in original) (quoting Ortiz v. City of Philadelphia Office of the City Comm'rs Voter Registration Div., 28 F.3d 306, 312 (9th Cir. 1997)).

132. *Id.* at 596.

133. *Id.*

134. Farrakhan v. Locke, No. CS-96-76-RHW, 2000 U.S. Dist. LEXIS 22212, at *18 (E.D. Wash. Dec. 1, 2000), *rev'd in part sub nom.*, Farrakhan v. Washington (*Farrakhan I*), 338 F.3d 1009 (9th Cir. 2003).

itself has a discriminatory effect."[135] The court referenced the Senate Factors but declined to apply them directly.[136] Instead, the court reasoned that, factoring out racial discrimination in the criminal justice system, it was impossible to show a discriminatory effect from the disenfranchisement provision.[137]

The Ninth Circuit rejected the district court's reasoning and held that section 2 of the VRA required more than an isolated inquiry into the challenged voting qualification without reference to external factors.[138] Instead, the court emphasized that section 2's "totality of the circumstances" test "requires courts to consider how a challenged voting practice *interacts with* external factors such as 'social and historical conditions' to result in denial of the right to vote on account of race or color."[139] Holding that an inquiry into a "causal connection" between racial discrimination and denial of voting rights involves reference to the relevant Senate Factors, the court specifically noted that "racial bias in the criminal justice system" is relevant and encompassed in the factors.[140]

Having rejected the "by itself" causation standard applied by the district court, the Ninth Circuit remanded the case for an evaluation of the external factors that may establish a causal relationship between discrimination in the criminal justice system and the voting mechanism based on felony status.[141] The court explained that "a causal connection may be shown where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances."[142] The court illustrated the test with reference to the *Salt River* case.[143] There, the challenge failed because the external factor—a difference in land ownership rates—was not "*substantially explained by race*."[144]

Captioned *Farrakhan v. Gregoire* on remand, the case was heard a second time by Judge Robert Whaley of the Eastern

135. *Locke*, 2000 U.S. Dist. LEXIS 22212, at *9–*10.

136. *Id.* at *9 n.4.

137. *Id.* at *10.

138. *Farrakhan I*, 338 F.3d at 1011–12.

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

140. *Id.* at 1020.

141. *Id.* at 1019–20 ("[C]ourts must be able to consider whether voting practices 'accommodate or amplify the effect that . . . discrimination has on the voting process.'" (alteration in original) (quoting Smith v. Salt River Project Agric. Improvement and Power Dist., 109 F.3d 595 n.7 (9th Cir. 1997))).

142. *Id.* at 1019.

143. *Id.* (citing *Salt River*, 109 F.3d at 595).

144. *Id.* at 1017 (quoting *Salt River*, 109 F.3d at 591).

District of Washington.[145] Reviewing statistical evidence of racial discrimination in Washington's criminal justice system, Judge Whaley wrote that "the Court is compelled to find that there is discrimination in Washington's criminal justice system on account of race . . . [and] this discrimination 'clearly hinder[s] the ability of racial minorities to participate effectively in the political process . . . .'"[146]

In spite of this finding, the court in *Farrakhan III* took the "totality of the circumstances" test as an opportunity to balance away intentional discrimination in the criminal justice system with reference to historical and social factors indicating a lack of discriminatory intent in Washington. Addressing the Senate Factors, the court cited a range of historical and social conditions such as: Washington's support for racial minorities; a lack of discriminatory intent in the enactment of the felon disenfranchisement law; the long tradition of felon disenfranchisement in the United States; and even the implicit endorsement of felon disenfranchisement in Section 2 of the Fourteenth Amendment.[147] Weighing the factors, the court concluded that "the totality of the circumstances does not support a finding that Washington's felon disenfranchisement law results in discrimination in its electoral process on account of race."[148]

C. Alaska's Felon Disenfranchisement Law in Light of *Farrakhan III*

The court in *Farrakhan III* found that Washington's felon disenfranchisement law did not violate section 2 of the VRA in spite of "compelling" evidence of racial discrimination in the criminal justice system.[149] Despite the Ninth Circuit's holding that a violation depends on the interaction between a voting mechanism and external factors, the court in *Farrakhan III* weighed "Washington's history, or lack thereof, of racial bias in its electoral process" to find that the totality of the circumstances test does not support a finding that Washington's felon disenfranchisement law violates the VRA.[150]

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145. Farrakhan v. Gregoire (*Farrakhan III*), No. CV-96-076-RHW, 2006 U.S. Dist. LEXIS 45987 (E.D. Wash. July 7, 2006).

146. *Id.* at *18 (quoting *Farrakhan I*, 338 F.3d at 1020) (evaluating evidence under the summary judgment standard).

147. *Id.* at *23–*28.

148. *Id.* at *29.

149. *Id.* at *28.

150. *Id.* at *28–*29.

Significantly, the court in *Farrakhan III* allowed historical evidence to stand in for an analysis of the required causal connection between discrimination and racially disproportionate effects of a voting qualification. In *Salt River*, the disproportionate land ownership rates were not the result of discrimination—they were simply a statistical anomaly.[151] In *Farrakhan III*, disproportionate felony conviction was more than a statistical anomaly—it was evidence of racial discrimination.[152] Nevertheless, this causal nexus was deemed outweighed by other Senate Factors. Indeed, applying a balancing test to the Senate Factors may provide a back door for other arguments, such as the "affirmative sanction argument," which the Ninth Circuit has rejected.[153]

In Alaska, the statistics demonstrate that felon disenfranchisement has a racially disproportionate impact.[154] Compared with Washington, however, Alaska may not be able to rely so heavily on evidence of a historical lack of racial bias to defeat a challenge to its felon disenfranchisement law. One factor sure to be considered by any court hearing a VRA challenge to Alaska's felon disenfranchisement law will be that Alaska was designated a "covered jurisdiction" because of its use of a literacy test at the time of the VRA's enactment.[155] Although Alaska was able to demonstrate in 1966 that it had not made racially discriminatory use of that test for the preceding five years,[156] the stigma of having been singled out under section 5 of the VRA weighs in favor, perhaps, of additional scrutiny under section 2. Nevertheless, the outcome of a challenge to Alaska's felon disenfranchisement law is certain to be, as it was in *Salt River* and *Farrakhan III*, a fact-specific inquiry shaded by the trial court's view of the proper application of the totality of the circumstances test.

V. CONCLUSION

Felon disenfranchisement in Alaska will continue to be cause for concern as long as it works a racially disproportionate effect. Though recent decisions in the Tenth and Second Circuits have

151. Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 596 (9th Cir. 1997).

152. *Farrakhan III*, 2006 U.S. Dist. LEXIS 45987 at *28.

153. *See* Wesley v. Collins, 791 F.2d 1255, 1261 (6th Cir. 1986) (considering the Fourteenth Amendment as a factor in the totality of the circumstances test).

154. *See* discussion *supra* Part II.B.

155. *See supra* note 68 and accompanying text.

156. CITIZEN'S GUIDE, *supra* note 26, at 107 (noting that literacy tests in Alaska "lingered under a cloud of suspicion").

rejected claims against state felon disenfranchisement laws brought under section 2 of the Voting Rights Act of 1965, the Ninth Circuit has expressly held that such challenges can proceed. One such claim, in the State of Washington, was ultimately unsuccessful. Nevertheless, a case brought in Alaska, on different facts and before a different court, may well invalidate the state's practice of disenfranchising felons on the basis of its racially disproportionate impact.