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The New Vote Denial: Where Election Reform Meets the Voting Rights Act

Daniel P. Tokaji

Ohio State University Moritz College of Law

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THE NEW VOTE DENIAL: WHERE ELECTION REFORM MEETS THE VOTING RIGHTS ACT

DANIEL P. TOKAJI*

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I. INTRODUCTION

The years since the 2000 presidential election have witnessed unprecedented attention to the mechanics of election administration. Legislators,¹ academics,² and

*Assistant Professor of Law, The Ohio State University Moritz College of Law. A.B., Harvard University; J.D., Yale Law School. Thanks to Dave Becker, Ned Foley, and Spencer Overton for their detailed comments on an earlier draft. Thanks also to Mitch Witkov and Caitlin Downing for their excellent research assistance.

1. See, e.g., Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (Supp. II 2002) (amending voting laws in the wake of the 2000 election); Florida Election Reform Act of 2001, FLA. STAT. ANN. §§ 101.5604–.56042 (West 2002) (mandating that counties use “an electronic or electromechanical precinct-count tabulation voting system” and prohibiting punch-card ballots); Act of Apr. 18, 2001, No. 166, 2001 Ga. Laws 269 (amending Georgia voting laws); Act of May 15, 2001, ch. 564, 2001 Md. Laws 3013–23 (amending Maryland laws and requiring uniform statewide voting systems).

2. See, e.g., Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937 (2005) (discussing problems with the 2004 presidential election); Daniel P. Tokaji, *Early Returns on Election Reform:*

the public at large³ have focused on a variety of practices that had previously been the province of a relatively narrow group of election officials. Among the administrative practices considered under the general rubric of “election reform” are voter registration, provisional voting, ballot security measures, voting machines, early and absentee voting, challenges to voter eligibility, and the process for recounts and contests.⁴ Recognizing that every vote really does matter, at least in some elections, the parties have made these areas a new electoral battleground.⁵

Advocacy groups have also sprung into action. After the 2000 election, for example, civil rights groups brought litigation in several states over whether voting equipment like the now-notorious punch-card voting system had a disparate impact on people of color.⁶ There have also been several legal cases challenging felon disenfranchisement, a practice that some believe to have been determinative in Florida’s 2000 election.⁷ On the other side of the ideological spectrum, conservatives have argued for stringent ballot security measures in the name of fraud prevention.⁸ Most recently, Republican legislators in a number of states have proposed—and in two instances passed—legislation requiring voters to show photo identification in order to have their votes counted.⁹

This focus on the “nuts-and-bolts”¹⁰ of election administration coincides with increased attention to the Voting Rights Act of 1965 (VRA). Congressional consideration of the VRA provisions set to expire in 2007 has led to a vigorous debate over whether the concerns that led to its enactment more than forty years ago remain salient in the twenty-first century. The confirmation hearings of Chief

Discretion, Disenfranchisement, and the Help America Vote Act, 73 GEO. WASH. L. REV. 1206, 1220–39 (2005) (discussing problems with the 2004 presidential election in Ohio).

3. See, e.g., *Day to Day: Commentary for Federally Issued Voter Registration Cards* (NPR radio broadcast Nov. 1, 2004) (noting poll showing 58% of voters believed there could be another “Florida-style mess” on election day 2004); Bob Ney & Steny H. Hoyer, Op-Ed., *Reform the Election Process: Get Rid of Ancient Technology and Federal Mandates*, WASH. TIMES, May 30, 2001, at A15 (noting polls showing that “Americans overwhelmingly support election reform”).

4. For a detailed discussion of litigation regarding these issues in the 2004 election, see Tokaji, *supra* note 2, at 1220–39.

5. See, e.g., James Dao, *The 2004 Campaign: Battlegrounds: Ohio*, N.Y. TIMES, Oct. 31, 2004, G1, at 27 (describing efforts of parties and other groups to gear up for election fights in 2004); *Lawyers Become Factor in Election*, AUGUSTA CHRONICLE (Ga.), Oct. 30, 2004, at A9 (describing plans for litigation in the event of a close election in 2004).

6. See Paul M. Schwartz, *Voting Technology and Democracy*, 77 N.Y.U. L. REV. 625, 647 (2002); Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1743 (2005); see also Tokaji, *supra* note 2, at 1222 (noting disparate impact of punch-card voting machines on African Americans).

7. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792–93, 793 tbl.4a (2002).

8. See JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (2004); John H. Fund, *Marylanders will Vote Early—and Often*, WALL ST. J., Feb. 9, 2006, at A13.

9. See GA. CODE ANN. § 21-2-417 (Supp. 2005); IND. CODE § 3-5-2-40.5 (Supp. 2005); WIS. STAT. § 5.02 (Supp. 2005).

10. Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378 (2001).

Justice Roberts and Justice Alito also resulted in renewed attention to the VRA, including their past writings on Section 2, which prohibits any practice that “results in a denial or abridgement of the right . . . to vote on account of race.”¹¹

This Article focuses on the cases in which these two areas—election reform and VRA enforcement—intersect. More specifically, it focuses on cases in which minority voters allege that the rules or practices governing the administration of elections result in the disproportionate denial of their votes. The most prominent examples that have arisen in recent years are in the areas of voting equipment, felon disenfranchisement, and voter ID requirements. The question that frames my analysis is how the VRA, particularly Section 2, should apply to these cases.¹² If the controversies in 2000 and 2004 are any indication, the mechanics of election administration will be the subject of continuing litigation in years to come. It is therefore critical that courts develop a fair and workable standard to assess claims that minority voters have been excluded from equally participating in the electoral process.

At the outset, it is important to distinguish two analytically distinct types of VRA cases: those involving *vote denial* and those involving *vote dilution*. “Vote denial” refers to practices that prevent people from voting or having their votes counted. Historically, examples of practices resulting in vote denial include literacy tests, poll taxes, all-white primaries, and English-only ballots. “Vote dilution,” on the other hand, refers to practices that diminish minorities’ political influence in places where they are allowed to vote. Chief examples of vote-dilution practices include at-large elections and redistricting plans that keep minorities’ voting strength weak.¹³ The first generation of VRA enforcement focused mainly on vote denial, while the second generation, which began in earnest in the 1980s, focused mainly on vote dilution.¹⁴ The application of the VRA to practices such as felon disenfranchisement, voting machines, and voter ID laws represents a new

11. 42 U.S.C. § 1973(a) (2000).

12. Though my focus in this article is on Section 2 of the VRA, much of my analysis would also apply to preclearance determinations under Section 5. I mostly limit my discussion to Section 2, however, because the Supreme Court has interpreted the legal standard under these two sections of the VRA to be different. See *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 336 (2000); *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 477 (1997).

13. Richard L. Engstrom, *Racial Discrimination in the Electoral Process: The Voting Rights Act and the Vote Dilution Issue*, in *PARTY POLITICS IN THE SOUTH* 197, 197 (Robert P. Steed et al. eds., 1980) (defining dilution as “the practice of reducing the potential effectiveness of a group’s voting strength by limiting its ability to translate that strength into the control of (or at least influence with) elected public officials”); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 *VAND. L. REV.* 523, 553–58 (1973) (describing various practices used for vote dilution and vote denial).

14. Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 121, 122–23 (Mark E. Rush ed. 1998) (discussing first- and second-generation VRA questions); Anthony A. Peacock, *From Beer to Eternity: Why Race Will Always Predominate under the Voting Rights Act*, in *REDISTRICTING IN THE NEW MILLENNIUM* 119, 124–27 (Peter F. Galderisi ed., 2005) (same).

generation of VRA enforcement.¹⁵ This Article collectively refers to these practices as the “new vote denial.”¹⁶

While a substantial body of case law and academic commentary addresses the application of Section 2 to vote dilution cases, there has been much less focus on the statute’s application to vote denial cases. That is largely because Congress primarily focused on vote dilution cases, such as at-large elections, when it enacted the 1982 amendments to the VRA that added the “results test.” It is clear, however, that this test applies to vote denial as well as vote dilution. Under the unambiguous language of Section 2, the results test applies to practices that “deny” the equal right to vote as well as to those practices which merely “abridge” it. While cases since the 1980s have lent some clarity to the legal standard that applies in Section 2 vote dilution claims, it is anything but clear what standard should apply to vote denial claims. The most detailed analysis of this problem appears in cases involving state felon disenfranchisement laws; but, as I shall explain, the courts’ analyses of the question leaves much unanswered—or at least unsatisfactorily answered.

This Article attempts to address these shortcomings in case law and academic literature by suggesting a legal standard that should govern Section 2 vote denial claims. I recommend a burden-shifting test that borrows from cases interpreting Title VII of the Civil Rights Act of 1964 and, to a lesser extent, juror selection cases under the Equal Protection Clause. Under my proposed test, voters would have the initial burden to show that the challenged practice interacts with social and historical conditions, resulting in the disproportionate denial of minority votes. The state or local entity whose practice is challenged would then have the opportunity

15. The first two generations of voting rights enforcement correspond to the first two components of the right to vote that Professor Karlan has identified: participation and aggregation. See Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 249 (1993). She has also identified a third interest: governance. *Id.* She and some other commentators have referred to claims involving democratic governance as the “third generation” of voting rights enforcement. See, e.g., Karlan, *supra* note 14, at 23 (“The emerging ‘third generation’ of voting rights issues focuses on questions of governance.”); Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1152 (1993) (“In the third generation, the marginalization of minority group interest is reproduced in the newly integrated legislature.”). However, as Professor Karlan noted, the Supreme Court’s decision in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), has frustrated the emergence of—or at least the ability to use the VRA for—third-generation claims. Karlan, *supra* note 14, at 125. I thus omit governance claims from my discussion.

16. Practices that result in the disproportionate denial of minorities’ votes may, of course, have the ultimate effect of diminishing their collective strength and their ability to elect representatives of their choice. In this sense, then, vote-denying practices may also have—in fact, they necessarily have—a dilutive effect, implicating the interest of vote aggregation as well as that of voter participation. See *supra* note 15. Nevertheless, for purposes of simplicity, this Article uses the terms “vote denial” and “vote dilution” in a mutually exclusive way—the former referring to practices that prevent minorities from voting or having their votes counted, and the latter to practices that result in the diminution of minority voting strength where they are permitted to vote and have their votes counted. This terminology is not meant to deny that vote-denying practices may in the aggregate dilute minority voting strength.

to show that the practice is narrowly tailored to serve a compelling interest. This test has the advantage of capturing those practices that weaken minorities' voting strength and may arise from intentional discrimination, while still taking into account governmental ends that may be so strong as to warrant disproportionate barriers to minority participation.¹⁷

Part II of this Article reviews developments in the area of election administration since the 2000 election. Part III briefly traces the first two generations of VRA enforcement, including the 1982 amendments to Section 2 that gave rise to the results test. It then examines the new generation of voting rights claims, considering how Section 2 applies to practices that result in the disproportionate denial of minority votes. Part IV articulates a test for Section 2 vote denial claims and explains why Section 2, if interpreted in this manner, would satisfy constitutional scrutiny as applied to vote-denying practices.

II. ELECTION REFORM: POST-2000 DEVELOPMENTS

Since the 2000 presidential election, there has been a great deal of public, scholarly, and legislative attention to the mechanics of election administration.¹⁸ The razor-thin margin of victory in that election revealed the dark underbelly of Florida's electoral system, and it quickly became apparent that the problems in the Sunshine State were hardly unique. This in turn triggered a flurry of litigation and legislation, including the Help America Vote Act of 2002 (HAVA). That law, however, has not ended the debates over election reform, but instead has largely moved those debates to the state level. Cognizant that every vote does indeed matter, at least in some elections, the parties and voting rights advocates are increasingly attending to the gritty details of elections that relatively few people had noticed before. To understand the implications of the VRA on the changing electoral ecosystem, it is necessary to first review the key developments during this period.

The story of the intensified focus on the mechanics of elections starts with the 2000 election and the opinion in *Bush v. Gore*.¹⁹ With the pivotal state of Florida hanging in the balance, then-Vice President Al Gore sought a recount of punch-card ballots in four key counties.²⁰ After the Florida Elections Canvassing Commission certified the election for his opponent George W. Bush, Vice President Gore filed a contest of the election pursuant to state law.²¹ Vice President Gore prevailed in

17. My focus here is on the test that *courts* should apply in Section 2 vote denial cases and, as explained below, such a test is fully consistent with the text and history of the existing statute. Congress could certainly amend Section 2 to expressly incorporate my proposed test, though I think that courts could and should adopt this test even without an amendment.

18. See *supra* notes 1–3.

19. 531 U.S. 98 (2000)

20. *Id.* at 101.

21. *Id.*

the Florida Supreme Court, which ordered a statewide recount,²² but the United States Supreme Court reversed, effectively ending the election.²³

The post-election wrangling revealed the problems in Florida's election system, long shrouded from public view. These events led those on both sides of the aisle to recognize the need for election reform. The United States Supreme Court anticipated this need in its *Bush v. Gore* opinion, noting:

The closeness of this election, and the multitude of legal challenges which have followed in its wake, have brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics reveal that an estimated 2% of ballots cast do not register a vote for President for whatever reason, including deliberately choosing no candidate at all or some voter error, such as voting for two candidates or insufficiently marking a ballot. . . .

This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.²⁴

In fact, it was not only the voting machines, but the entire infrastructure of American elections that was subject to scrutiny in the aftermath of the 2000 election. Congress was not the only entity to undertake a thorough examination of this infrastructure. A number of commissions and other bodies produced thorough reports examining various aspects of U.S. elections, from machines, to registration, to polling place operations.²⁵ Racial inequalities arising from existing voting equipment and other electoral practices were among the areas that received attention. An analysis released by the U.S. Commission on Civil Rights, for example, found that "blacks were far more likely than non-blacks to have their ballots rejected" by Florida's voting equipment.²⁶ The Commission also found that

22. *Id.* at 101–02.

23. *Id.* at 111.

24. *Id.* at 103–04.

25. See HENRY E. BRADY ET AL., COUNTING ALL THE VOTES: THE PERFORMANCE OF VOTING TECHNOLOGY IN THE UNITED STATES I (2001); CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE I (2001) [hereinafter CALTECH/MIT REPORT]; NAT'L COMM'N ON FED. REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS I (2002) [hereinafter CARTER-FORD REPORT]; U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001).

26. ALLAN J. LICHTMAN, REPORT ON THE RACIAL IMPACT OF THE REJECTION OF BALLOTS CAST IN THE 2000 PRESIDENTIAL ELECTION IN THE STATE OF FLORIDA 3 (2001). This is consistent with the racial disparities that subsequent studies found to exist nationwide. See Tokaji, *supra* note 6, at 1763–67.

Florida's "overzealous" purge of its registration lists resulted in the disproportionate exclusion of African American voters.²⁷

One of the most significant findings during the post-2000 period was that the voting machines were probably not, after all, the largest source of lost votes in the 2000 election. According to the Caltech/MIT Voting Technology Project's 2001 report, that dubious distinction belonged to registration problems, which accounted for some 1.5 to 3 million lost votes in 2000.²⁸ Voting equipment and ballot layout problems accounted for another 1.5 to 2 million lost votes, with up to a million more lost due to polling place operations.²⁹ A blue ribbon commission, co-chaired by former Presidents Jimmy Carter and Gerald Ford (commonly known as the Carter-Ford Commission), likewise took a broad look at the American election system. Its final report recommended changes in a wide range of areas, including voting equipment, registration, overseas voting, felon voting, early voting, ID requirements, and the creation of a new federal agency to oversee election administration.³⁰ Several of these recommendations became a part of HAVA.

Recognizing that equipment was only one of many challenges facing the United States' electoral system, Congress began consideration of election reform legislation in early 2001, but the end-product of its efforts, HAVA, did not become law until October 29, 2002.³¹ During the interim period, there was intense partisan disagreement over what shape election reform should take.³² One of the issues in dispute was the extent to which mandates should be imposed on the states, as opposed to simply providing incentives to improve their election systems—in other words, whether to provide carrots or sticks. On an ideological level, the battle between the parties largely revolved around the tension between access and integrity, with Democrats generally favoring measures advancing the former value and Republicans the latter.³³

A major focal point of the access-versus-integrity debate was whether to require voters to show some form of identification when they appeared at the polls. The ultimate version of HAVA included a limited ID requirement, applicable only to first-time voters who registered by mail on or after January 1, 2003.³⁴ HAVA does not require voters to show photo identification, but instead allows various other

27. U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, at xiv (2001).

28. CALTECH/MIT REPORT, *supra* note 25, at 8.

29. *Id.* at 9.

30. CARTER-FORD REPORT, *supra* note 25, at 6–14.

31. For a more detailed description of HAVA's legislative history, see Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424 (2004).

32. See David Mark, *With Next Election Only a Year Away, Proponents of Ballot Overhaul Focus Their Hopes on 2004*, 59 CONG. Q. WKLY. 2532, 2532 (2001).

33. See Tokaji, *supra* note 2, at 1207; Spencer Overton, *Stealing Democracy: How Politicians Exclude Voters to Win Elections* 131–32 (Aug. 20, 2005) (unpublished manuscript, on file with the author).

34. See 42 U.S.C. § 1548(b)(1) (Supp. II 2002).

documents that show the voter's name and address, such as a utility bill, bank statement, or government document.³⁵ Congress tied this limited ID requirement to the requirement that all states implement computerized statewide registration lists, including the name and registration information for every voter within each state.³⁶

Other provisions of HAVA address voting equipment, providing financial incentives for states to eliminate punch-card and lever machines³⁷ and imposing minimum requirements for disability access and auditability.³⁸ The Act also requires all states to implement provisional voting, which allows voters whose names do not appear on the registration list to cast a conditional ballot that will be counted if their eligibility is later confirmed.³⁹ Aside from these basic requirements, however, HAVA left most of the details of election reform to state and local election officials.⁴⁰ It is within the states, therefore, that some of the most important election reform battles have taken place.

Even before HAVA's enactment, several states took some steps toward election reform, mostly on the voting technology front. After the 2000 election, the American Civil Liberties Union brought lawsuits in five states (Florida, Georgia, Illinois, California, and Ohio) challenging the use of punch-card voting equipment.⁴¹ Each lawsuit asserted the use of this equipment had a disparate impact on voters of color, in violation of Section 2 of the Voting Rights Act.⁴² The lawsuits also alleged that the use of punch-card voting systems in some counties but not others denied equal protection rights to voters of all races under *Bush v. Gore* and other cases.⁴³ As these lawsuits proceeded, some state legislative bodies took up the call for election reform.⁴⁴ Not surprisingly, Florida was quick to act. The Florida Election Reform Act of 2001 provided for voting equipment upgrades, as well as poll worker training, voter education, and a voter registration database.⁴⁵ Georgia and Maryland also enacted legislation providing for voting system

35. *Id.* § 15483(b)(1) & (2).

36. *Id.* § 15483(a)(1).

37. *Id.* § 15302.

38. *Id.* § 15481.

39. *Id.* § 15482.

40. Tokaji, *supra* note 2, at 1207–08. For a more detailed description of HAVA's requirements, see *id.* at 1214–18.

41. Tokaji, *supra* note 6, at 1729–30. The author was co-counsel in the California and Ohio cases.

42. Tokaji, *supra* note 6, at 1729 & n.127; see also ALLAN J. LICHTMAN, REPORT ON THE RACIAL IMPACT OF THE REJECTION OF BALLOTS CAST IN THE 2000 PRESIDENTIAL ELECTION IN THE STATE OF FLORIDA 3 (2001) (finding “blacks were far more likely than non-blacks to have their ballots rejected”); Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?*, 47 AM. J. POL. SCI. 46, 48–49 (2003) (finding a racial gap in uncounted ballots between black and white voters with punch-card and optical-scan systems).

43. Tokaji, *supra* note 6, at 1729 & n.126.

44. *Id.* at 1730–32.

45. *Id.* at 1730–31.

improvements in 2001, and California voters approved a bond act that provided funds for new voting equipment in 2002.⁴⁶

Most other states, however, did not take significant steps toward the improvement of election administration until after HAVA's enactment in late 2002. HAVA required each state to formulate a detailed implementation plan.⁴⁷ Yet implementation proceeded more slowly than Congress anticipated, partly due to the President's delay in appointing members to the Election Assistance Commission (EAC), the body responsible for overseeing HAVA's implementation.⁴⁸ The failure to fully and promptly fund the EAC's work also hampered implementation efforts.⁴⁹ States were reluctant to move forward with election reform and did not fully implement many of HAVA's requirements—most notably those relating to voting technology and state registration databases—in time for the 2004 election.⁵⁰ That election witnessed unprecedented attention to the mechanics of election administration from the two major parties and independent groups. Among their specific areas of focus were voting machines, registration requirements, provisional voting, ID requirements, challenges to voter eligibility, and long lines at some polling places.⁵¹

The 2004 election showed that the work of election reform is far from complete, and studies conducted since then reveal that substantial problems remain.⁵² Fortunately, there is an increased focus on collecting data and other information on the functioning of American election administration. One product was a comprehensive survey of election officials, conducted after the 2004 election at the behest of the EAC.⁵³ Billed as “the largest and most comprehensive survey of voting and election administration practices ever conducted by a U.S. government organization,” the survey examined such areas as voter registration, ballots counted, voting equipment usage, and polling place operations.⁵⁴ One of the more favorable findings is that only 1.02 percent of ballots cast in 2004 did not register a vote for President, the lowest in a post-World War II presidential

46. *Id.* at 1731.

47. 42 U.S.C. § 15403(b) (Supp. II 2002). These plans can be found at 69 Fed. Reg. 14,001–15,232 (Mar. 24, 2004).

48. Tokaji, *supra* note 2, at 1219.

49. *Id.*

50. *Id.* at 1219–20.

51. The controversies over these issues in the critical swing state of Ohio are discussed at length in Tokaji, *supra* note 2, at 1220–39.

52. See CENTURY FOUND. WORKING GROUP ON STATE IMPLEMENTATION OF ELECTION REFORM, BALANCING ACCESS AND INTEGRITY I (2005); COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS I (2005), http://www.american.edu/ia/cfer/report/full_report.pdf.

53. ELECTION DATA SERVS., INC., U.S. ELECTION ASSISTANCE COMM'N, FINAL REPORT OF THE 2004 ELECTION DAY SURVEY I (2005) [hereinafter ELECTION DAY SURVEY], available at http://www.eac.gov/election_survey_2004/pdf/EDS-Full_Report_wTables.pdf.

54. *Id.* at 1.

election.⁵⁵ But among the most striking findings of the 2004 Election Day Survey are the substantial disparities based on race, language, and class in a wide range of areas. As set forth in the survey's executive summary:

Jurisdictions with low education and income, compared with other jurisdictions, tend to report more inactive voter registration, lower voter turnout, higher number of provisional ballots cast, higher drop-off and associated components of overvotes and undervotes, lower average number of poll workers per polling place, and greater percentage of inadequately staffed polling places. While these patterns present a challenge to election administrators, they are consistent with a large body of academic literature that equates higher levels of civic participation to higher levels of education and income.⁵⁶

To take one example, African American jurisdictions reported a greater percentage of polling places with inadequate numbers of poll workers.⁵⁷ Conversely, jurisdictions with higher income and education levels reported a higher average number of poll workers.⁵⁸

The 2004 Election Day Survey also found substantial disparities with respect to language minorities. It specifically examined jurisdictions with a substantial number or percentage of non-English proficient residents, which are covered by Section 203 of the VRA, finding:

Jurisdictions covered by the Section 203 of the Voting Rights Act tended to report more inactive voter registration, lower voter turnout, fewer returned absentee ballots, and much greater numbers of provisional ballots cast. These patterns were often similar to those found among predominantly Hispanic and predominantly non-Hispanic Native American jurisdictions. These findings appear to be consistent with voters within these jurisdictions having difficulty in navigating the electoral process in a language that is not their native tongue.⁵⁹

55. *Id.* at 5; see also Charles Stewart III, *Residual Vote in the 2004 Election 1* (Cal.Tech/MIT Voting Tech. Project, Working Paper No. 25, 2005), available at http://vote.caltech.edu/media/documents/wps/vtp_wp25.pdf (estimating that one-million votes were "saved" in 2004 due to better equipment and polling place procedures).

56. ELECTION DAY SURVEY, *supra* note 53, at 9.

57. *Id.* at 7.

58. *Id.* The text in this paragraph and the paragraph that follows appears in substantially similar form in Equal Vote Blog, <http://moritzlaw.osu.edu/blogs/tokaji/2005/09/race-language-class-and-voting.html> (Sept. 28, 2005, 23:26 EST).

59. ELECTION DAY SURVEY, *supra* note 53, at 9.

These findings suggest that significant disparities remain in the administration of elections and that racial and language minorities are more likely to bear the brunt of those inequalities.

Since the 2004 election, the access-versus-integrity debate has become even more intense. As was the case in Congress before HAVA's enactment, a focal point of the debate in the states has been voter ID. Republican legislators in several states have advanced bills that would impose stricter voter ID requirements than HAVA, which only requires identification of first-time voters who registered by mail and does not require photographic identification.⁶⁰ A number of states have debated laws that would require *all* voters to show photo identification.

Two states—Indiana and Georgia—passed laws in 2005 that require all voters to show a government-issued photo ID in order to have their votes counted.⁶¹ Both laws have resulted in litigation. A federal judge in Georgia issued a preliminary injunction against enforcement of that state's photo ID law,⁶² but relief was denied in the suit challenging Indiana's law.⁶³ The available evidence indicates that people of color are less likely to have a driver's license, and thus would be more severely affected by photo ID requirements. A Wisconsin study, for example, found that African American voters were significantly less likely to have a state-issued driver's license.⁶⁴ In addition, career staff in the U.S. Department of Justice wrote a detailed memorandum assessing the racial impact of Georgia's 2005 photo ID law.⁶⁵ That memorandum concluded that the law would have a disproportionate impact on black voters,⁶⁶ who are less likely to have access to a vehicle, and thus, presumably, to have a driver's license. The Department of Justice nevertheless precleared Georgia's law, against its career staff's recommendation.⁶⁷

Other states have enacted laws that impose stricter identification requirements than HAVA, but do not require photo identification. In Arizona, for example, voters enacted a law that requires voters to show either a photo ID or two forms of

60. See *infra* Part III.A.2.

61. GA. CODE ANN. § 21-2-417 (Supp. 2005); IND. CODE § 3-5-2-40.5 (Supp. 2005).

62. See *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1377 (N.D. Ga. 2005). Subsequent to that order, the Georgia legislature enacted a modified version of its photo ID law (S.B. 84), which the Governor signed into law in January 2006. See Nancy Badertscher & Sonji Jacobs, *Voter ID Costs Still Debated; Counties Say They're Already Overworked*, ATLANTA J.-CONST., Jan. 28, 2006, at 1E.

63. See *Ind. Democratic Party v. Rokita*, 2006 U.S. Dist. LEXIS 20321, at *1-8 (S.D. Ind. Apr. 14, 2006).

64. John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin* 1-2 (June 2005), <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>.

65. Memorandum from Robert Berman, Deputy Chief, et al. to U.S. Dep't of Justice (Aug. 25, 2005) [hereinafter *Berman Memorandum*], available at <http://www.votingrights.org/news/downloads/Section%205%20Recommendation%20Memorandum.pdf>.

66. *Id.* at 51.

67. I discuss the Georgia preclearance decision and consider its implications for the Section 5 preclearance process in Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. (forthcoming 2006).

non-photo identification.⁶⁸ And in 2006, the Ohio legislature passed a bill that requires either a state-issued photo ID, a military photo ID, or a non-photo ID with the voter's name and current address.⁶⁹

State felon disenfranchisement laws have also received considerable attention in the years since the 2000 election. All but sixteen states apply legal restrictions on voting to some felons who are no longer in prison.⁷⁰ A total of fourteen states deny the vote to some or all ex-felons who have completed their sentences, including probation and parole.⁷¹ One study estimated if ex-offenders who had completed their sentence had been allowed to vote in Florida, Vice President Gore would have carried the state by more than 31,000 votes.⁷² Noting the trend away from lifetime disenfranchisement, the Carter-Ford Report recommended the restoration of voting rights for those who have completed their sentences, including those on probation or parole.⁷³ The report questioned, however, whether Congress has the power to eliminate felon disenfranchisement,⁷⁴ and HAVA was silent on the subject.

Still, some significant developments on ex-felons' voting rights have occurred in the states.⁷⁵ Several states now restore ex-offenders' voting rights automatically upon the completion of their sentences or some period of time afterward.⁷⁶ Evidence shows the general public is beginning to view the reinstatement of ex-offenders' voting rights more favorably.⁷⁷

The debates surrounding felon disenfranchisement have a prominent racial component because of the racial disparities in the rates of felon disenfranchisement⁷⁸ and the historical link between race and criminal

68. ARIZ. REV. STAT. ANN. § 16-579(A) (Supp. 2005).

69. H.B. 3, 126th Gen. Assem., sec. 3501.19, 2006 Ohio Legis. Bull. 75 (LexisNexis), available at 2005 Ohio HB 3 (LexisNexis).

70. Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSP. ON POL. 491, 494 tbl.1 (2004).

71. *Id.*

72. Uggen & Manza, *supra* note 7, at 793 tbl.4a.

73. CARTER-FORD REPORT, *supra* note 25, at 45-46.

74. *Id.* at 45.

75. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1147-48 (2004); see also THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2 (2005), available at <http://www.sentencingproject.org/pdfs/1046.pdf> (summarizing developments in the states between 1997 and 2005).

76. See CHRISTOPHER UGGEN & JEFF MANZA, SUMMARY OF CHANGES TO STATE FELON DISENFRANCHISEMENT LAW, 1865-2003 (2003), available at <http://www.sentencingproject.org/pdfs/UggenManzaSummary.pdf>.

77. See Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1540-41 (2003); Jeff Manza et al., "Civil Death" or Civil Rights? *Public Attitudes Towards Felon Disenfranchisement in the United States* 22 (Mar. 4, 2003), <http://www.socsci.umn.edu/~uggen/POQ8.pdf>.

78. *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1941 (2002).

disenfranchisement.⁷⁹ Since 2000, three federal courts of appeals have addressed state felon disenfranchisement laws. As discussed at greater length below,⁸⁰ each of these cases included a VRA claim based on racial disparities arising from the disenfranchisement of ex-offenders.⁸¹ These cases have thus far yielded mixed results, and the legal standard applicable to felon disenfranchisement and other voter qualifications under Section 2 of the VRA is anything but clear.⁸² As in other areas of election administration, considerable uncertainty remains over the extent to which racial inequalities affecting electoral participation can and should be tolerated.

III. VOTING RIGHTS ENFORCEMENT: FROM DENIAL TO DILUTION AND BACK AGAIN

As the developments since 2000 reveal, racial equality figures prominently in the ongoing debate over election reform. The evidence generated in those debates shows that racial and language minorities continue to experience unequal treatment in various aspects of the voting process. While intentional discrimination is difficult to establish, existing evidence supports the conclusion that identification requirements, outdated voting equipment, and felon disenfranchisement laws bear most heavily on African American and Latino voters. These inequalities raise the critical question of whether such practices violate the VRA, the core purpose of which is to ensure voting equality for racial and language minorities.

To answer this question, I now turn to a discussion of the VRA, focusing especially on Section 2's prohibition of practices that deny or abridge voting rights on account of race. As I explain, the first generation of VRA enforcement largely focused on practices that denied the vote to racial minorities—especially African Americans in the South—while second-generation enforcement mainly focused on practices that diluted minority voting strength. After reviewing this history, I return to the subject of election administration in Part III.B and discuss the new generation of VRA cases applying Section 2 to practices allegedly having a disparate impact on minority voters.

79. For a discussion of the history of felon disenfranchisement, focusing on its application to racial minorities, see Manza & Uggen, *supra* note 70, at 492–93.

80. See *infra* Part III.B.3.

81. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005), *cert. denied*, *Johnson v. Bush*, 126 S. Ct. 650 (2005); *Muntaqim v. Coombe*, 366 F.3d 102, 104 (2d Cir. 2004); *Farrakhan v. Washington*, 338 F.3d 1009, 1011 (9th Cir. 2003).

82. The Ninth Circuit reinstated a VRA Section 2 challenge to Washington's felon disenfranchisement law. See *Farrakhan*, 338 F.3d at 1011–12. The Eleventh Circuit, on the other hand, rejected a VRA Section 2 and Fourteenth Amendment challenge to Florida's felon disenfranchisement law, see *Johnson*, 405 F.3d at 1216–17, and the Supreme Court subsequently denied certiorari, See *Johnson v. Bush*, 126 S. Ct. 650, 650–51 (2005). A three-judge panel of the Second Circuit likewise rejected a VRA Section 2 challenge to New York's law disenfranchising current felons and parolees. See *Muntaqim*, 366 F.3d at 130. The full court subsequently decided to rehear that case en banc, see *Muntaqim v. Coombe*, 396 F.3d 95 (2d Cir. 2004), and the matter is still pending before that court.

A. First- and Second-Generation Claims

Upon its enactment in 1965, the VRA had an immediate impact by opening the voting booths to Southern blacks who had been excluded since the late nineteenth century. The first generation of VRA enforcement consisted largely of dismantling formal barriers to African American participation. Three prior voting rights laws—passed in 1957, 1960, and 1964—were of limited effectiveness because they depended mostly on litigation for enforcement.⁸³ In some cases, Southern federal judges were reluctant to undo barriers to African American participation.⁸⁴ In other cases, Southern officials adopted new exclusionary practices immediately after the old ones had been stopped.⁸⁵

The VRA overwhelmed the system of disenfranchisement that had kept blacks out of Southern politics. Between 1965 and 1967, African American voter registration in states covered by the VRA increased from 29.3 percent to 52.1 percent.⁸⁶ The VRA's immediate success was largely attributable to Section 4, the centerpiece of the 1965 Act, which temporarily suspended literacy tests.⁸⁷ The deployment of federal examiners under Sections 6 through 8 of the VRA was also critical in helping to register eligible black voters.⁸⁸

Although enacted ten years later, the 1975 amendments to the VRA, which added protections for language minorities,⁸⁹ may be seen as part of the first generation of enforcement. Those amendments expanded Section 4's coverage beyond the South to portions of the Southwest and West,⁹⁰ thereby bringing significant numbers of Latinos, Asian Americans, and Native Americans within the VRA's scope.⁹¹ The amendments also banned literacy tests and required bilingual materials in places with a substantial percentage (more than five percent) of non-English proficient voters.⁹² Between the 1965 Act and the 1975 amendments, the

83. BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 12–15 (1992).

84. *Id.* at 14.

85. See Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in MINORITY VOTE DILUTION 145, 149 (Chandler Davidson ed., 1984); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 229 (2003).

86. GROFMAN ET AL., *supra* note 83, at 23 tbl.1. Under Section 4, jurisdictions were deemed covered and subjected to special requirements if: (1) they conditioned voting on a test or some other device and (2) less than half of the voting age population was either registered or actually voted in the 1964 presidential election. 42 U.S.C. § 1973b(b) (2000); see also GROFMAN ET AL., *supra* note 83, at 16–17.

87. Derfner, *supra* note 83, at 149. The literacy test ban became permanent in 1975. GROFMAN ET AL., *supra* note 83, at 21.

88. GROFMAN ET AL., *supra* note 83, at 18, 22–23.

89. *Id.* at 21.

90. *Id.*

91. *Id.* at 20.

92. *Id.* at 20–21.

VRA was successful in stopping many of the practices that had effectively denied racial minorities access to the ballot.

While dismantling direct impediments to participation was a necessary precondition to equal voting rights, it was not sufficient.⁹³ The second generation of VRA enforcement focused on vote *dilution*—that is, on practices that diminish minorities' voting strength where they were permitted to vote.⁹⁴ Common vote dilution practices included at-large elections, gerrymandered districts, majority-vote requirements, anti-single-shot laws, annexation of outlying areas with predominantly white populations, and replacement of elected officials with appointed officials.⁹⁵

Two legal developments were especially vital to the attack on dilutive practices. One was the Supreme Court's opinion in *Allen v. State Board of Elections*,⁹⁶ which held that Section 5 of the VRA reached "the subtle, as well as the obvious" state practices that effectively denied the vote on account of race.⁹⁷ The *Allen* decision invigorated the formerly sporadic enforcement of Section 5 of the VRA.⁹⁸ Under Section 5, covered jurisdictions must obtain "preclearance" of electoral changes before they may take effect from either the U.S. Department of Justice or the United States District Court for the District of Columbia.⁹⁹ To obtain preclearance, the jurisdiction wishing to make a change must show that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color,"¹⁰⁰ a standard that the Supreme Court later interpreted to prohibit "retrogression"—changes that would make racial minorities worse off than they were before.¹⁰¹ *Allen* clarified that Section 5 applies not only to practices denying access to the ballot box, but also to more sophisticated efforts to weaken minority voting strength.¹⁰² Section 5 became especially important in attacking vote dilution after the 1970 redistricting cycle because it placed the burden on covered states and counties to show their proposed changes would not diminish racial minorities' voting strength.¹⁰³

The other critical legal development in challenging vote dilution was Congress's 1982 amendments to Section 2 of the VRA, which added the "results

93. See Karlan, *supra* note 14, at 122.

94. See *id.*

95. *Id.*; GROFMAN ET AL., *supra* note 83, at 24.

96. 393 U.S. 544 (1969).

97. *Id.* at 565.

98. Chandler Davidson, *The Voting Rights Act: A Brief History*, in CONTROVERSIES IN MINORITY VOTING 28–29 (Bernard Grofman & Chandler Davidson eds., 1992).

99. 42 U.S.C. § 1973c (2000).

100. *Id.*

101. *Beer v. United States*, 425 U.S. 130, 141 (1976); see also *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 340 (2000) (holding Section 5's purpose prong applies only to practices that have a retrogressive purpose, and not to those with a discriminatory but non-retrogressive purpose).

102. GROFMAN ET AL., *supra* note 83, at 24–25.

103. *Id.* at 29.

test.” Before 1980, the Court held that to establish a constitutional violation arising from the use of multi-member districts, minority voters had the burden of showing that “the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”¹⁰⁴ The Court applied that standard in *White v. Regester* to hold that multi-member districts in a Texas plan effectively undercut African Americans’ and Mexican Americans’ voting strength.¹⁰⁵ Following *White*, the Fifth Circuit’s opinion in *Zimmer v. McKeithen* struck down a Louisiana reapportionment that included at-large districts.¹⁰⁶ The chief significance of *White* and *Zimmer* was that neither rested its holding on a finding of discriminatory intent, instead concluding that the challenged at-large election schemes violated the Constitution due to their impact on minority voting strength.

In 1980, however, challenges to vote dilution hit a roadblock. In *Mobile v. Bolden*,¹⁰⁷ a plurality of the Court concluded that intentional discrimination was necessary for an at-large election scheme to violate the Constitution.¹⁰⁸ At issue in *Bolden* was an at-large election scheme for Mobile commissioners, under which all voters throughout the city elected each of the commissioners.¹⁰⁹ Due to the racial polarization of the electorate and the fact that whites were a numerical majority, blacks had been completely shut out of the commission.¹¹⁰ *Bolden* altered the evidentiary standard established in *White* and *Zimmer* to require direct evidence of discriminatory intent.¹¹¹ This requirement made it significantly more difficult for minority voters to challenge election systems that effectively prevent them from electing candidates of their choice.¹¹²

In direct response to *Bolden*, Congress added the results test in the 1982 amendments to Section 2.¹¹³ The original version of Section 2 tracked the language of the Fifteenth Amendment, prohibiting practices that deny or abridge the vote on account of race.¹¹⁴ In its place, the 1982 amendments provided:

104. *White v. Regester*, 412 U.S. 755, 766 (1973) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971)).

105. *Id.* at 767–70.

106. *Zimmer v. McKeithen* 485 F.2d 1297, 1305–09 (5th Cir. 1973).

107. 446 U.S. 55 (1980).

108. *Id.* at 65.

109. *Id.* at 59–60.

110. See Jennifer G. Presto, Note, *The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After City of Boerne*, 59 N.Y.U. ANN. SURV. AM. L. 609, 613 (2004).

111. Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 205 (2005).

112. *Id.*

113. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

114. S. REP. NO. 97-417, at 17 (1982), as reprinted in 1982 U.S.C.A.N. 177, 194 (“Section 2 was designed to track the Fifteenth Amendment, whose wording it follows.”).

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 color¹¹⁵

Throughout the legislative debate over the 1982 amendments to Section 2, Congress's focus was on vote dilution claims.¹¹⁶ The House committee hearings included only limited discussion of Section 2,¹¹⁷ but this section was a major focus of the hearings before the Senate Subcommittee on the Constitution of the Committee on the Judiciary, of which Senator Orrin Hatch was chair.¹¹⁸ Those hearings included nine days of testimony and fifty-one witnesses. The hearings focused on whether replacing the *Bolden* test with a results test would effectively mandate proportional representation—that is, the election of racial minorities in numbers proportionate to their population.¹¹⁹ The report from Senator Hatch's subcommittee excerpted testimony from a string of conservative professors and other experts who testified that courts would effectively interpret a results test as a mandate for proportional representation or even quotas.¹²⁰ Future Chief Justice John Roberts, then a lawyer in the Justice Department, also made this argument in a memorandum asserting that the results test “would establish essentially a quota system for electoral politics.”¹²¹ Through a compromise brokered by Senator Bob Dole¹²² and ultimately enacted, the 1982 amendments expressly disclaimed any right

115. 42 U.S.C. § 1973 (2000) (emphasis added).

116. See *Voting Rights Act: Hearings Before the S. Subcomm. on the Constitution of the Comm. on the Judiciary*, 97th Cong. (1982) [hereinafter *Senate Hearings*]. For a detailed discussion of the legislative history to the 1982 amendments, see Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983).

117. See J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act* 45 (Feb. 2006) (unpublished manuscript, on file with author) (“[T]he House Judiciary Committee voted 23-1 for a bill that inserted an explicit results test into Section 2, but included a provision stating that a lack of proportional representation was not ‘in and of itself’ proof of a violation.”).

118. See *Senate Hearings*, *supra* note 116, at 1, 3 (statement of Senator Orrin G. Hatch, Chairman, S. Subcomm. on the Constitution); Presto, *supra* note 110, at 620 & n.56.

119. See Presto, *supra* note 110, at 621.

120. S. REP. NO. 97-417, at 139–47 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 311–20; see also Kousser, *supra* note 116, at 47 (“In their testimony, Administration witnesses and their compatriots chanted one refrain: anything except Stewart’s opinion in *Bolden* would lead inevitably to the proportional representation of minorities, a horrifying specter to them, compared to the grossly disproportionate over-representation of whites, which had always been the American way.” (emphasis omitted)).

121. Memorandum from John Roberts to the Attorney General 2 (Dec. 22, 1981) (emphasis omitted), available at <http://www.archives.gov/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf#page=9>.

122. See Kousser, *supra* note 117, at 48.

to proportional representation.¹²³ Senator Hatch nevertheless argued that the amendment's effect would be to mandate proportional representation.¹²⁴

The Senate Report accompanying the 1982 amendments listed seven factors that it identified as "typical" of those which could be used to demonstrate that a challenged practice denied minority voters "an equal opportunity to participate in the political processes and to elect candidates of their choice."¹²⁵ Derived from *White* and *Zimmer*, the factors were:

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 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.¹²⁶

123. 42 U.S.C. § 1973(b) (2000).

124. S. REP. NO. 97-417, at 96 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 269 (statement of Senator Orrin G. Hatch, Chairman, S. Subcomm. on the Constitution) (arguing that, despite disclaimer, amended Section 2 would entail a mandate for proportional representation).

125. *Id.* at 28–29, *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07.

126. *Id.* at 28–29, *as reprinted in* 1982 U.S.C.C.A.N. 177, 206–07 (citations omitted).

The Senate Report also identified two additional factors that have probative value in some cases: “whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group,” 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.”¹²⁷ The report noted that the Judiciary Committee meant to impose no requirement that a plaintiff prove a majority or any other particular number of factors to make out a case.¹²⁸ According to the Senate Report, the “ultimate test” was “whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice.”¹²⁹

Senator Hatch and other opponents of the results test were unpersuaded that this list of considerations, now known as the “Senate factors,” would eliminate the risk of courts mandating proportional representation in vote dilution cases.¹³⁰ In his separate statement accompanying the Senate Report, Senator Hatch pointedly asked just what exactly the Senate factors were supposed to get at.¹³¹ An intent standard, in his view, would have furnished a “core value” according to which a court could measure the evidence. By contrast, the results test in the amended version left it unclear what Section 2’s core value was.¹³² Despite the express renunciation of proportional representation in the text of the amended Section 2, Senator Hatch expressed his belief that “[t]here is no core value under the results test other than election results. There is no core value that can lead anywhere other than toward proportional representation by race and ethnic group.”¹³³ It was no answer, he argued, to advert to the “totality of circumstances” or the Senate factors.¹³⁴ Such evidence only explained the “scope of the evidence” that courts should consider in Section 2 claims, but did not explain the “standard of evidence, the test or criteria by which such evidence is assessed and evaluated.”¹³⁵ In Senator Hatch’s view, discriminatory intent was both the appropriate core value and the standard of evidence by which to measure violations of Section 2.¹³⁶ The majority in Congress did not, however, agree with Senator Hatch’s view, at least with respect to the legal standard, instead allowing a violation to be found on something less than a showing of discriminatory intent.

The legislative history of the 1982 amendments thus shows that Congress was almost exclusively focused on vote dilution claims, and particularly on whether

127. *Id.* at 29, as reprinted in 1982 U.S.C.C.A.N. 177, 207.

128. *Id.* at 29, as reprinted in 1982 U.S.C.C.A.N. 177, 207.

129. *Id.* S. REP. NO. 97-417, at 30 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 207.

130. Boyd & Markman, *supra* note 116, at 1398–99; Presto, *supra* note 110, at 621.

131. S. REP. NO. 97-417, at 96, as reprinted in 1982 U.S.C.C.A.N. 177, 269.

132. *Id.* at 96, as reprinted in 1982 U.S.C.C.A.N. 177, 269.

133. *Id.* at 96, as reprinted in 1982 U.S.C.C.A.N. 177, 269.

134. *Id.* at 96, as reprinted in 1982 U.S.C.C.A.N. 177, 269.

135. *Id.* at 96, as reprinted in 1982 U.S.C.C.A.N. 177, 269.

136. *Id.* at 96, as reprinted in 1982 U.S.C.C.A.N. 177, 269.

courts would read the amendments to require proportional representation. Although the amended statute's plain language clearly indicates that the results test applies to both vote denial and vote dilution claims, Congress's overwhelming concern was with the latter. This is understandable because ending vote denial practices would not create any risk of mandating proportional representation. On the other hand, applying a disparate impact standard to dilution claims would create the risk of mandating proportional representation. The results test was a compromise, designed to extend Section 2 beyond cases where discriminatory intent could be proven, without mandating proportional representation in vote dilution cases.

While Congress may not have been specific about the core value underlying the amended Section 2, the Supreme Court has provided guidance as to the standard governing claims under the 1982 amendments—or at least those claims alleging vote dilution. Justice Brennan's opinion in *Thornburg v. Gingles*¹³⁷ set forth three "preconditions" that a plaintiff must satisfy to make out a vote dilution claim under Section 2: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) the group must be "politically cohesive;" and (3) there must be racial bloc voting by whites, so as to defeat minority candidates.¹³⁸ Under this test, assessing the degree of racial polarization is at the "heart" of Section 2 vote dilution claims.¹³⁹ Imposing these conditions prevented Section 2 from becoming a broad mandate for proportional representation in vote dilution cases. In fact, avoiding such a mandate was expressly part of Justice Brennan's reason for adopting these preconditions.¹⁴⁰

The substantial majority of cases interpreting Section 2 have addressed issues of vote dilution rather than vote denial. According to a comprehensive report of the University of Michigan Law School's Voting Rights Initiative, there have been a total of 322 lawsuits raising Section 2 claims for which rulings are available.¹⁴¹

137. 478 U.S. 30 (1986).

138. *Id.* at 50–51.

139. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1992); see also Karlan, *supra* note 14, at 126 (citing Professor Issacharoff and stating racial polarization is the "touchstone of a section 2 claim").

140. *Gingles*, 478 U.S. at 50 n.17. But see *id.* at 85 (O'Connor, J., concurring) ("[T]he Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts.").

141. ELLEN KATZ ET AL., DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982, at 8 (2005), available at <http://sitemaker.umich.edu/votingrights/files/finalreport.pdf>. The report examined all rulings available on Westlaw or LexisNexis. *Id.* Many Section 2 cases did not result in an opinion that is available on one of these databases, and therefore are not included in the Michigan Voting Rights Initiative's report. See NATIONAL COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005, at 84-85 (2006).

Of those lawsuits, 145 involved challenges to at-large districts, 110 challenged redistricting plans, and eleven challenged majority vote requirements¹⁴²—all of which can safely be characterized as vote dilution rather than vote denial cases. Only thirty-six cases challenged election procedures (such as registration practices, candidacy, or voting requirements), and another thirty-six challenged other practices (including annexations, felon disenfranchisement, and appointment practices).¹⁴³ Some, but not all of these, would be characterized as vote denial cases. While some may disagree as to how to categorize some cases, it is clear that the overwhelming majority of Section 2 lawsuits since 1982 have involved claims of vote dilution and not vote denial.

B. The New Generation of Vote Denial Claims

While *Gingles* and its progeny have generated a well-established standard for vote dilution, a satisfactory test for vote denial cases under Section 2 has yet to emerge. The language of Section 2 indicates that the results standard applies to vote denial claims as well as vote dilution claims. The legislative history of the 1982 amendments, however, provides little guidance on *how* Section 2 should apply to practices resulting in the disproportionate denial of minority votes. That is mainly because Congress, especially the Senate, focused so intently on representation rather than participation. Specifically, Congress wanted to overrule *Bolden* without mandating proportional representation in dilution cases. So too, the Supreme Court's seminal opinion in *Gingles*, as important as it is for vote dilution cases, is of little use in vote denial cases; the preconditions the Supreme Court emphasized in *Gingles* are tangential at best in assessing whether vote-denying practices violate Section 2.

There are, however, a handful of lower court opinions addressing how Section 2 should apply to vote denial claims. In this Section, I focus on three branches of vote denial cases that are particularly relevant to current debates over election reform. The first branch consists of challenges to voting equipment like the infamous "hanging chad" punch-card. The second branch deals with voter identification requirements. The third branch involves voter qualifications—most significantly, laws disenfranchising former felons. I conclude none of these branches have articulated a wholly adequate test for evaluating these claims.

1. Voting Equipment

Several cases have applied Section 2 to claims arising from the use of allegedly substandard voting equipment, most notably the pre-scored punch-card system that

142. *Id.* at 8–9.

143. *Id.* at 9. Because some cases involved challenges to more than one election practice, the total number of practices challenged does not add up to the total number of lawsuits. *Id.*

gave rise to Florida's vote-counting crisis in the 2000 presidential election. In one case brought long before the 2000 election, *Roberts v. Wamser*,¹⁴⁴ a candidate sued under Section 2, alleging he lost an alderman election because the punch-card voting system resulted in the disproportionate loss of black votes.¹⁴⁵ The district court in *Roberts* concluded that, by failing to manually count ballots rejected by the tabulating system, the board of elections had violated Section 2.¹⁴⁶ The district court's opinion did not make clear what the standard for Section 2 vote denial claims should be.¹⁴⁷ Instead, the court applied the *Gingles* preconditions and Senate factors, while expressly reserving the question of whether they must be proven in a case challenging voting equipment.¹⁴⁸ The Eighth Circuit reversed for lack of standing without addressing the merits.¹⁴⁹

Since the 2000 presidential election, there has been Section 2 litigation regarding punch-card voting systems in five states. Cases in three of those states have yielded published opinions.¹⁵⁰

The first published opinion on the issue was *Common Cause v. Jones*, in which the district court allowed a Section 2 claim challenging California's punch-card voting equipment to proceed past the pleading stage.¹⁵¹ In its abbreviated opinion, the court concluded that the *Gingles* preconditions were irrelevant, and that the plaintiffs' allegation that "racial minorities are disproportionately denied the right to vote because their votes are uncounted in disproportionate numbers as a result of the voting mechanism that they are supplied" was sufficient to state a claim.¹⁵²

The next opinion to address the applicability of Section 2 to punch-card voting equipment was *Black v. McGuffage*¹⁵³ from the Northern District of Illinois. In *Black*, the court allowed a claim to proceed based on allegations of racial disparities arising from the use of punch-card voting equipment, without addressing the *Gingles* preconditions or the Senate factors.¹⁵⁴ The court held the allegation that "voters residing in predominantly Latino and African American precincts where

144. 679 F. Supp. 1513 (E.D. Mo. 1987), *rev'd on other grounds*, 883 F.2d 617 (8th Cir. 1989).

145. *Id.* at 1514–16.

146. *Id.* at 1531–32.

147. *Id.* at 1529.

148. *Id.* at 1529–32. Assuming that the *Gingles* preconditions had to be satisfied in order to challenge election procedures, the district court found that the black population was sufficiently large, geographically compact, politically cohesive, and subject to bloc voting by whites, thus meeting those preconditions. *Id.* at 1530.

149. *Roberts v. Wamser*, 883 F.2d 617, 624 (8th Cir. 1989).

150. *See Stewart v. Blackwell*, 356 F. Supp. 2d 791 (N.D. Ohio 2004); *Black v. McGuffage*, 209 F. Supp. 2d 889 (N.D. Ill. 2002); *Common Cause v. Jones*, 213 F. Supp. 2d 1106 (C.D. Cal. 2001).

151. *Common Cause*, 213 F. Supp. 2d at 1110.

152. *Id.* The parties in *Common Cause* subsequently stipulated to replacement of punch-card voting equipment, and the district court concluded it was feasible to replace this equipment in time for the 2004 elections. *Id.* at 1111–12.

153. 209 F. Supp. 2d 889 (N.D. Ill. 2002).

154. *Id.* at 896–97.

punch-card machines are utilized, bear a greater risk that their votes will not be counted than do other voters” was sufficient to state a claim.¹⁵⁵

The third case to address the applicability of Section 2 to punch-card voting equipment was *Stewart v. Blackwell*.¹⁵⁶ In that case, Ohio voters brought a Section 2 claim arising from that state’s continuing use of punch-card voting equipment.¹⁵⁷ After a bench trial that included evidence of higher rates of overvotes and undervotes in black precincts than in predominantly non-black ones, the district court rejected the voters’ claims.¹⁵⁸ The court’s cursory discussion of Section 2 distinguished between vote denial and vote dilution claims, recognizing that the case was an instance of the former, but failed to articulate a standard to govern such claims.¹⁵⁹ The court concluded there was no “‘actual’ denial of the right to vote on account of race,” because “[a]ll voters in a county, regardless of race, use the same voting system to cast a ballot, and no one is denied the opportunity to cast a valid vote because of their race.”¹⁶⁰

On appeal, the Sixth Circuit became the first appellate court to rule on the merits of a Section 2 claim challenging the disparate impact of voting equipment on minority voters.¹⁶¹ That court concluded that the district court misconstrued the requirements of Section 2.¹⁶² Citing prior circuit precedent, the Sixth Circuit noted that Section 2 plaintiffs “‘need show only that the challenged action or requirement has a discriminatory effect on members of a protected group.’”¹⁶³ According to the Sixth Circuit, Section 2 encompasses not only polling place access but also the right to have one’s vote counted on equal terms.¹⁶⁴ On remand, the Sixth Circuit ordered the district court to consider the “voluminous” statistical evidence showing a

155. *Id.* at 897.

156. 356 F. Supp. 2d 791 (N.D. Ohio 2004), *rev’d*, 2006 U.S. App. LEXIS 10027 (6th Cir. 2006).

157. *Id.* at 792.

158. *Id.* at 809, 816.

159. *Id.* at 807–08.

160. *Id.* at 808.

161. The Ninth Circuit’s en banc opinion in *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003)—the litigation seeking to postpone the California recall—briefly addressed the Section 2 issue but did not squarely rule on the merits. *Id.* at 918–19. The court instead rested on the deferential standard applicable to preliminary injunctions and the harm to the State of California that would result from postponing an election already begun. *Id.* at 919–20. The Ninth Circuit indicated the plaintiffs had made a stronger showing on the VRA claim than on its equal protection claim. *Id.* at 918. The court noted, however, that there was a factual dispute “as to the degree and significance of the disparity” arising from punch-card voting and thus concluded the district court acted within its discretion in denying a preliminary injunction. *Id.* at 918–19.

162. *Stewart v. Blackwell*, 2006 U.S. App. LEXIS 10027, at *95 (6th Cir. 2006).

163. *Id.* (quoting *Moore v. Detroit Sch. Reform Bd.*, 293 F.3d 352, 363 (6th Cir. 2002)).

164. *Id.*

correlation between over-voting and the percentage of African Americans in a precinct.¹⁶⁵

While these decisions provide only limited guidance on the standard applicable to Section 2 cases challenging racial disparities arising from voting equipment, the Sixth Circuit's opinion in *Stewart* is the most illuminating so far. That court quoted *Gingles* for the proposition that "the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."¹⁶⁶ It was therefore no answer to a Section 2 claim, in the Sixth Circuit's view, to assert that "socioeconomic conditions, not race" account for the disparity in lost votes.¹⁶⁷ The interaction between socioeconomic inequalities and the use of a particular voting system—far from defeating a Section 2 vote denial claim—instead supports support that claim, at least where (a) there are background racial inequalities with respect to education or other socioeconomic factors, and (b) those inequalities result in a disparity in the percentage of votes counted.¹⁶⁸

2. Voter Identification

An emerging area of election administration that can be expected to receive considerable attention in years to come is the disparate impact of ballot security measures on racial minorities. This issue has recently come to the fore due to efforts in several states to implement laws requiring voters to show photo ID in order to have their votes counted.¹⁶⁹ But thus far, the case law applying Section 2 to voter ID requirements is sparse and unenlightening, at least with respect to the legal standard applicable to such claims.¹⁷⁰

In *United States v. Berks County*,¹⁷¹ a Pennsylvania district court considered inconsistencies in the manner of obtaining identification from voters, which the plaintiffs alleged had a disparate impact on Latino voters.¹⁷² Citing the socioeconomic disparities affecting Latino voters, the relatively small number of

165. *Id.* Judge Gilman dissented from the panel's conclusion on the Section 2 claim. He acknowledged that the district court's ruling could have been "more thorough," but was "not convinced that the [district] court reached an erroneous conclusion." *Id.* at *157.

166. *Id.* at *101 (quoting *Gingles*, 478 U.S. at 47).

167. *Id.*

168. For further discussion of Section 2's applicability to voting equipment, see Richard B. Saphire & Paul Moke, *The Voting Rights Act and the Racial Gap in Lost Votes* (Oct. 23, 2005) (unpublished manuscript, on file with author); Tokaji, *supra* note 6, at 1743–44.

169. See *supra* notes 60–63 and accompanying text.

170. For scholarly commentary on recent voter identification proposals, see Spencer A. Overton, *Voter Identification* (March 21, 2006) (unpublished manuscript, on file with author).

171. 277 F. Supp. 2d 570 (E.D. Pa. 2003).

172. *Id.* at 573 (noting officials "treated Hispanic voters differently than other voters with regard to voter identification requirements").

Latinos represented as poll workers, and the “severe” impact of hostility toward Latinos evident in the conduct of some poll officials, the court concluded the plaintiffs had established a violation of Section 2.¹⁷³ The evidence of overt hostility toward Latinos makes *Berks County* a relatively easy case, and it sheds little light on how the results test would apply to cases in which poll officials impose an identification requirement without hostility toward a particular racial or ethnic group—but in a manner that still has a racially disparate impact.

Only one case has considered the application of Section 2 to a law requiring all voters to show photo ID to vote.¹⁷⁴ In *Common Cause/Georgia v. Billups*,¹⁷⁵ the district court granted a preliminary injunction against Georgia’s 2005 voter ID law, basing its conclusion on constitutional grounds.¹⁷⁶ But the court concluded that the plaintiffs had failed to show a substantial likelihood of prevailing on their Section 2 claim.¹⁷⁷ The court recognized that Section 2 applies to vote denial as well as to vote dilution, and cited *Gingles*’ recitation of the Senate factors.¹⁷⁸ And like *Stewart v. Blackwell*, it also quoted *Gingles* for the proposition that “[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”¹⁷⁹ While noting the plaintiffs’ evidence of socioeconomic disparities between blacks and whites, as well as disparities in access to a vehicle, the court concluded that this evidence was insufficient to warrant preliminary injunctive relief on plaintiffs’ Section 2 claim.¹⁸⁰

The apparent basis for the *Common Cause/Georgia* court’s conclusion is that the plaintiffs, while producing evidence of disparities in access to a vehicle, had not actually produced evidence of racial disparities in the possession of drivers’ licenses or other forms of photo ID. It thus remains an open question whether a Section 2 claim would lie where plaintiffs produced evidence that racial minorities are less likely to possess a government-issued photo ID and therefore would be more severely affected by the requirement that voters produce such identification.¹⁸¹

3. Voter Qualifications

173. *Id.* at 581. In reaching this conclusion, the court cited *Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984), which also involved evidence of the underrepresentation of minorities—in that case blacks—as poll workers and of discrimination at the polls. *See id.* at 131–32.

174. Indiana’s photo ID requirement has also been the subject of a legal challenge, which a federal district court rejected. *See Ind. Democratic Party v. Rokita*, 2006 U.S. Dist. LEXIS 20321, at *1–8 (S.D. Ind. Apr. 14, 2006). There was, however, no Section 2 claim in that case.

175. 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

176. *Id.* at 1376.

177. *Id.* at 1375.

178. *Id.* at 1373 (citing *Thornburg v. Gingles*, 478 U.S. 30, 44–45 (1986)).

179. *Id.* at 1374 (quoting *Gingles*, 478 U.S. at 47).

180. *Id.* at 1374–75.

181. *See Pawasarat, supra* note 66 (finding racial disparities in Wisconsin in the possession of drivers’ licenses).

The most thorough consideration of Section 2's applicability to vote denial has occurred in cases challenging voting qualifications, particularly laws denying voting rights to felons. So far, none of these cases have resulted in a final judgment for plaintiffs,¹⁸² though one circuit has issued a ruling allowing a Section 2 claim to proceed.¹⁸³

The first cases challenging felon disenfranchisement laws under Section 2 were unsuccessful.¹⁸⁴ In *Wesley v. Collins*,¹⁸⁵ the Sixth Circuit rejected a challenge to Tennessee's felon disenfranchisement law, on the ground that disparate impact alone was insufficient to make out a Section 2 claim.¹⁸⁶ The court concluded that the Tennessee statute did not deny felons the right to vote based on some "immutable characteristic," but instead on the "conscious decision" to commit a crime.¹⁸⁷ Its reasoning appears to be that felons' choice to engage in criminal activity, rather than the "qualification of the right to vote on account of race or color," caused the disproportionate denial of black votes.¹⁸⁸ This rationale is suspect at best, however, because Section 2 is not limited to facially race-based distinctions nor to ones that rest on immutable characteristics. Nor is a practice excluded from Section 2's scope merely because it depends upon voters' choices. Were that the case, then redistricting plans that dilute minority votes would also be excepted from Section 2 since those plans also depend on voters' choices—in that case, of where to live.

The Second Circuit has twice considered the applicability of Section 2 to felon disenfranchisement laws but has also failed to come up with a satisfactory test. However, as of this writing, the court has yet to definitively resolve the issue. In *Baker v. Pataki*,¹⁸⁹ the court considered a challenge to New York's felon disenfranchisement law.¹⁹⁰ The en banc court was evenly divided over whether to allow the plaintiffs' Section 2 claim to proceed, resulting in affirmance of the district court's order dismissing the case.¹⁹¹ Five judges concluded that the application of Section 2's results test to criminal disenfranchisement laws would raise serious constitutional questions.¹⁹² The other five believed that the results test

182. KATZET AL., *supra* note 141, at 9.

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

184. See *Karlan*, *supra* note 70, at 1147 & n.1.

185. 791 F.2d 1255 (6th Cir. 1986).

186. *Id.* at 1260–61.

187. *Id.* at 1261–62.

188. *Id.* at 1262.

189. 85 F.3d 919 (2d Cir. 1996) (per curiam).

190. *Id.* at 920–21.

191. *Id.* at 921.

192. *Id.* at 930. Those five judges rested their conclusion on Section 2 of the Fourteenth Amendment, which provides in pertinent part:

But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one

should apply to these cases.¹⁹³ Because the court was evenly split, the decision has no precedential effect.¹⁹⁴

The Second Circuit recently revisited the disenfranchisement issue in *Muntaqim v. Coombe*.¹⁹⁵ In *Muntaqim*, a three-judge panel sided with the five judges from *Baker* who rejected the applicability of Section 2 to felon disenfranchisement.¹⁹⁶ The panel reasoned that Section 2, if read to prohibit racial disparities arising from felon disenfranchisement, would upset the constitutional balance between the federal government and the states.¹⁹⁷ It therefore rejected that interpretation of Section 2 absent a “clear statement” from Congress.¹⁹⁸ Given that no such statement existed in Section 2 or its legislative history, the panel declined to read Section 2’s results test to encompass New York’s felon disenfranchisement law.¹⁹⁹ After the panel opinion, however, the Second Circuit granted plaintiffs’ petition for rehearing,²⁰⁰ and the case remains pending before the en banc court as this article goes to press.

Two other circuits have addressed the applicability of Section 2 to felon disenfranchisement, reaching conclusions that are difficult, if not impossible, to reconcile with one another.²⁰¹ In *Johnson v. Governor of Florida*,²⁰² the en banc Eleventh Circuit rejected a Section 2 challenge to Florida’s felon disenfranchisement statute.²⁰³ Like the three-judge panel in *Muntaqim*, the *Johnson* majority concluded that applying Section 2 to felon disenfranchisement laws would raise serious constitutional questions.²⁰⁴ The court based its conclusion on the “congruence and proportionality” standard articulated in *City of Boerne v. Flores*

years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2 (emphasis added). The “majority” read this provision to authorize the disenfranchisement of ex-felons. *Baker*, 85 F.3d at 929. *But 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, 272–75 (2004) (arguing the Fifteenth Amendment repealed Section 2 of the Fourteenth Amendment and provided a stronger proscription against racial discrimination in voting).

193. *Baker v. Pataki*, 85 F.3d 919, 936–38 (2d Cir. 1996).

194. *See* *Muntaqim v. Coombe*, 366 F.3d 102, 107–08 (2d Cir. 2004).

195. 366 F.3d 102.

196. *Id.* at 104.

197. *Id.* at 118–26.

198. *Id.* at 129.

199. *Id.* at 127–28.

200. *Muntaqim v. Coombe*, 396 F.3d 95, 95 (2d Cir. 2004).

201. *See* *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005), *cert. denied*, *Johnson v. Bush*, 126 S. Ct. 650 (2005); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003).

202. 405 F.3d 1214.

203. *Id.* at 1234.

204. *Id.* at 1230.

and its progeny, as well as the “absence of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters.”²⁰⁵

On the other hand, the Ninth Circuit allowed a Section 2 claim challenging Washington State’s felon disenfranchisement law to proceed in *Farrakhan v. Washington*.²⁰⁶ Reversing the district court’s grant of summary judgment to the state, the Ninth Circuit concluded that felon disenfranchisement was a form of vote denial subject to Section 2. “Felon 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.”²⁰⁷ In the Ninth Circuit’s view, the critical question was not simply whether there was racially discriminatory motivation for the felon disenfranchisement law, but whether it “interact[ed] with surrounding racial discrimination in a meaningful way.”²⁰⁸ While recognizing that the disparate impact of a voting practice is not sufficient, in itself, to establish a Section 2 claim,²⁰⁹ the court held that the existence of discrimination in the state’s criminal justice system should be considered as a part of the totality of circumstances.²¹⁰ The court further recognized it should consider disparate impact, even though it is not specifically listed as one of the Senate factors.²¹¹

In reaching this conclusion, the *Farrakhan* court distinguished *Smith v. Salt River Project Agricultural Improvement*, a prior Ninth Circuit case that had upheld a property ownership qualification for voting in agricultural improvement district elections.²¹² While that court found evidence of disparities in property ownership between whites and blacks, it did not find evidence that these disparities arose from “racial discrimination.”²¹³ Taken together, *Smith* and *Farrakhan* suggest that a Section 2 vote denial claim arises where discrimination *outside* the voting process interacts with the challenged practice to result in the disproportionate denial of minority votes. While such a showing may be sufficient to prove a claim (or at least to survive summary judgment), it is not clear whether the court believed such evidence was *necessary* to make out a claim.

The Ninth Circuit subsequently denied rehearing en banc in *Farrakhan*, over the vigorous dissent of Judge Kozinski and six other judges.²¹⁴ Judge Kozinski’s dissent is worthy of attention because it exposes the analytical difficulty at the heart of Section 2 vote denial claims. While acknowledging “intentional discrimination

205. *Id.* at 1230–31 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

206. 338 F.3d 1009 (9th Cir. 2003).

207. *Id.* at 1016.

208. *Id.* at 1018.

209. *Id.* at 1019.

210. *Id.* at 1019–20.

211. *Id.* at 1020.

212. *Farrakhan v. Washington*, 338 F.3d 1009, 1016–19 (9th Cir. 2003) (citing *Smith v. Salt River Project Agric. Improvement*, 109 F.3d 586 (9th Cir. 1997)).

213. *Id.* at 1017.

214. *Farrakhan v. Washington*, 359 F.3d 1116 (9th Cir. 2004).

external to voting” may be taken into account in Section 2 cases.²¹⁵ Judge Kozinski concluded that the plaintiffs did not present any evidence of intentional discrimination.²¹⁶ Instead, the plaintiffs’ arguments rested entirely on statistical evidence of a disparate racial impact.²¹⁷ By allowing plaintiffs’ claim to proceed based on nothing more than “a bare statistical showing of disproportionate impact,”²¹⁸ in Judge Kozinski’s view, the panel interpreted Section 2 in a way that rendered the statute “constitutionally questionable.”²¹⁹ To interpret Section 2 as reaching any felon disenfranchisement laws having a disparate impact, he argued, runs afoul of *Boerne*’s congruence and proportionality test.²²⁰ Moreover, Judge Kozinski opined that if the court’s interpretation was correct, then practices such as internet voting probably violate Section 2 because they have a disparate impact on minorities due to the racial disparities in access to a computer.²²¹

In one sense, the disagreement between Judge Kozinski and the panel in *Farrakhan* is quite narrow. Both appear to agree that a voting qualification does not violate Section 2 merely because it has a disparate impact on racial minorities. And both appear to agree that evidence of intentional discrimination *external* to the voting process that interacts with the challenged practice may give rise to a claim. They also appear to agree that the *Gingles* preconditions are irrelevant to a Section 2 vote denial claim. Where they differ is over whether Congress meant to include felon disenfranchisement within the scope of Section 2 and, more broadly, over the scope of Congress’s authority in remedying constitutional violations in the realm of voting.

What these opinions—like other Section 2 vote denial cases—leave unclear is precisely what the statute prohibits when it comes to voter qualifications or other practices that result in vote denial. While the opinions agree that a Section 2 vote denial claim requires something more than a mere disparate impact, what exactly that “something more” should consist of is debatable. This stems from the fact that, in Senator Hatch’s words, the core value underlying Section 2’s results test is less than completely transparent. Is the statute aimed solely at intentional discrimination in the voting process, as Senator Hatch thought it should be? Or does it more broadly prohibit practices that have a disproportionate impact on minorities’ ability to vote and have their votes counted? If neither disparate impact nor discriminatory intent is the standard for assessing Section 2 vote denial claims, as some of the cases suggest, then what is the proper standard? That is the riddle of vote denial. The answer to this riddle must not only provide the means for analyzing vote denial

215. *Id.* at 1119.

216. *Id.* at 1117.

217. *Id.*

218. *Id.* at 1118 (Kozinski, J., dissenting) (quoting *Smith*, 109 F.3d at 595) (emphasis removed).

219. *Id.* at 1116–17.

220. *Farrakhan v. Washington*, 359 F.3d 1116, 1121–23 (9th Cir. 2004) (Kozinski, J., dissenting).

221. *Id.* at 1125–26.

claims in the context of felon disenfranchisement but also guidance for expected challenges to other practices such as the use of voter identification, voting equipment, and even internet voting.²²²

IV. SECTION 2 AND THE NEW VOTE DENIAL

The attention to matters of election administration since the 2000 presidential election highlights the pressing need for judicial clarity on what showing must be made to establish a Section 2 violation in vote denial cases. As Part II showed, neither the legislative history of the 1982 amendments nor the *Gingles* opinion provide much guidance on this question. And as the cases discussed in Part III demonstrate, the lower courts have also struggled to define the legal standard to evaluate vote denial claims.

As I explain below, there are good reasons for applying a different test in vote denial cases than the one applied in vote dilution cases. The test that I recommend borrows from the burden-shifting analysis applied in employment discrimination cases under Title VII as well as in jury selection cases under the Equal Protection Clause. Under this test, a plaintiff could make a *prima facie* case by showing the challenged practice is a “but for” cause of racial disparity in voting. The state or local entity would still have the opportunity to demonstrate this practice is necessary to achieve a compelling government interest. While the outcome of this test may not always be clear, this burden-shifting test will at least ensure courts take into account the appropriate factors in Section 2 vote denial cases. After showing how this test might be applied to some election administration issues that are likely to arise in coming years, I explain why Section 2 would not exceed Congress’s enforcement powers if such a test were applied.

A. *Why Denial Is Different*

Vote denial cases *are* different from vote dilution cases. The most obvious difference is that next-generation vote denial cases, like first-generation vote denial cases, mainly implicate the value of participation; by contrast, second-generation cases involving vote dilution mainly implicate the value of aggregation.²²³ The cases that I have grouped together under the rubric of “new vote denial” may in this sense be seen as a throwback to the early days of voting rights enforcement. Like those early cases, and unlike second-generation cases, the new vote denial cases involve

222. Felon disenfranchisement might be considered different than other forms of vote denial because it arguably enjoys express constitutional authorization in Section 2 of the Fourteenth Amendment. *See id.* at 1121 (Kozinski, J., dissenting) (“[F]elon disenfranchisement laws are explicitly endorsed by the text of the Fourteenth Amendment.”). Nonetheless, the problem of formulating an adequate vote denial test exists for other qualifications and election practices that disproportionately exclude racial minorities.

223. *See supra* note 15.

practices that disproportionately exclude minority voters from participating in the electoral process at all. That is not to deny that vote-denying practices may also have an impact on minorities' ability to elect representatives of their choice. The point is that both first- and new-generation vote denial cases implicate the value of participation, and not merely the value of aggregation.

To be sure, there are significant differences between the new vote denial cases and the cases decided by the Warren Court in the 1960s and 1970s. Foremost among those differences was that the existence of intentional race discrimination was much more obvious in the earlier generation. But while hindsight has benefits, it may also obscure some of the similarities between the first and new generation of vote denial cases. Election officials (then as now) commonly denied that racial bias was the reason for these barriers, and incumbents advancing vote denial measures (then as now) were motivated by a desire to protect their own power, not just by racial animus.²²⁴

Any discriminatory intent underlying present-day vote denial practices such as ID requirements, voting technology, and felon disenfranchisement is of course less obvious. That is partly because times have changed since the VRA's enactment in the 1960s.²²⁵ But it is also because government actors nowadays are less likely to admit that intentional discrimination underlies their actions, even where it is part of the rationale for adopting or retaining a particular practice. Have the Republican-dominated legislatures in Georgia and Indiana adopted the nation's most restrictive voter ID measures because they know that black voters (who generally vote Democrat) will be among those most severely affected? Was this, in whole or in part, their intent in enacting the law? Because legislators are extremely unlikely to admit such motivations, proving that discriminatory intent exists is very difficult.²²⁶

For this reason, it is important to distinguish two concepts that Senator Hatch conflated in opposing the 1982 amendments: the *core value* of Section 2's results test and the *legal standard* that should be applied under it. Even if one agrees with Senator Hatch that the only core value underlying Section 2 is the eradication of

224. See J. MORGAN KOUSSER, *COLORBLIND INJUSTICE* 122–34, 324–27, 359–63 (1999); Kousser, *supra* note 117, at 91 (stating that “voting discrimination even in the nineteenth century was much more concerned with racial power than with racial antagonism, and politicians and their lawyers can nearly always find other plausible reasons for adopting discriminatory laws—fighting fraud, protecting incumbents or partisan interests, punishing criminals”).

225. See Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 188 (2005) (referring to the “Bull Connor is Dead problem”); Abigail Thernstrom & Edward Blum, *Do the Right Thing*, WALL ST. J., July 15, 2005, at A10 (arguing that Congress should allow Section 5 to expire because “[t]imes have changed” in the Deep South since the 1960s).

226. See LICHTMAN, *supra* note 42, at 3; Saphire & Moke, *supra* note 168, at 5–19; Tokaji, *supra* note 6, at 1760–67; Tomz & Van Houweling, *supra* note 42, at 47–49; (finding “blacks were far more likely than non-blacks to have their ballots rejected”); but see Berman Memorandum, *supra* note 65, at 9 (reporting the sponsor of the Georgia ID bill “said that when black voters in her black precincts are not paid to vote, they do not go to the polls,” and thus any decrease in black voting indicates only a decrease in fraud).

intentional discrimination, it does not follow that Section 2 plaintiffs should be required to prove intentional discrimination in order to make out a claim—or, put in his words, that intentional discrimination should be the “*standard* of evidence.” While Senator Hatch was correct to identify the prevention of intentional discrimination as the core value underlying Section 2,²²⁷ he was wrong to rule out an impact-based legal standard as a way of getting at that core value. An impact-based test may serve as a prophylactic against intentional discrimination that might otherwise seep into the voting process undetected.²²⁸

Even if it is clear that intentional discrimination did not underlie the original decision to *enact* a certain practice, it may be responsible for the decision not to *eliminate* that practice. For example, some members of a predominantly white legislature might have less motivation to eliminate an existing criminal disenfranchisement law that has a disparate impact on blacks, notwithstanding the fact that the intent to disenfranchise minorities played no discernible part in the original enactment of that law. So too, discriminatory intent may partially underlie the decision not to replace punch-card voting equipment that has a disparate impact on black voters, even if it did not motivate the original decision to purchase that equipment. Because discriminatory intent will be extremely difficult to prove in such cases, especially when governmental inaction is at issue, some form of an impact-based legal standard is necessary.

The inherent difficulty of proving intentional discrimination in modern-day vote voting disputes therefore supports the application of a disparate impact test, even if stopping intentional discrimination is the one and only “core value” served by Section 2. The problem is that Congress deliberately eschewed a simple disparate impact test when it amended the VRA in 1982. This, however, is largely due to the fact that Congress was so single-mindedly focused on vote dilution rather than on vote denial when it amended Section 2, even though the results test applies to both types of practices under the amendment’s plain language. The difficulty in ferreting out intentional discrimination, of course, exists with respect to both vote denial and vote dilution. But there are two important differences that together warrant a different analysis—one that is closer to a simple disparate impact test—when it comes to vote denial.

The first difference is that discerning whether a disparate impact exists is generally more straightforward in vote denial claims than in vote dilution claims. The *Gingles* preconditions and some of the Senate factors serve the function of helping to assess whether a particular practice actually has a dilutive effect on racial

227. While I agree with Senator Hatch on the core value Section 2 serves, one must keep in mind that the distinction between discriminatory intent and disparate impact is often more formal than real, especially in voting cases. See, e.g., Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1126 (1989) (applying the intent doctrine to the electoral process and finding “[t]he intent doctrine in voting cases bears even less relationship to motivation”); Kousser, *supra* note 117, at 52–53 (discussing “how closely related evaluations of intent and effect were”).

228. See *supra* note 224–26 and accompanying text.

minorities. Consider, for example, racial polarization and geographic compactness. Both of these factors are critical to ascertaining whether a particular electoral scheme, such as an at-large system or redistricting plan, weakens racial minorities' collective influence in comparison to other possible schemes. In vote dilution cases, it is essential that the court examine this sort of circumstantial evidence in assessing whether a particular electoral scheme diminishes minorities' voting strength compared to other feasible alternatives.

A court does *not* need to rely on such circumstantial evidence, however, when there is direct evidence that an electoral practice has the result of disproportionately denying minority votes. With respect to felon disenfranchisement laws, for example, the result may be shown by establishing that racial minorities are incarcerated, and thus disenfranchised, at higher rates than whites.²²⁹ With respect to voting equipment, a plaintiff could establish this result by showing that a particular type of voting machine, such as the pre-scored punch-card, results in more black votes being thrown out than white votes compared to alternative voting technologies.²³⁰ The size of minority populations, their geographical compactness, and racial bloc voting are irrelevant to measuring the impact of such practices on minority participation. It is therefore quite appropriate that lower courts have mostly disregarded these factors in Section 2 vote denial cases.

Although the results test is more straightforward in vote denial cases than in vote dilution cases, the relative simplicity of proving disparate impact in vote denial cases also creates a conundrum. Courts have struggled to avoid the conclusion that Section 2 is violated in any case where the challenged practice has a disparate impact on minority votes. Some decisions have avoided this conclusion by manipulating the "causation" requirement.²³¹ In *Wesley v. Collins*,²³² for example, the court avoided the conclusion that Tennessee's felon disenfranchisement law violated Section 2 by attributing the vote denial to the individual's choice to commit a crime, even though the vote denial would not have occurred but for the exclusionary law.²³³

In other cases, like *Farrakhan*, the courts have limited Section 2 through an "impact-plus" test for vote denial claims. Both the panel's opinion and Judge

229. See Uggen & Manza, *supra* note 7, at 780–81.

230. See LICHTMAN, *supra* note 42, at 3. Saphire & Moke, *supra* note 168, at 5–19; Tokaji, *supra* note 6, at 1760–67; Tomz & Van Houweling, *supra* note 42, at 47–49 (finding "blacks were far more likely than non-blacks to have their ballots rejected").

231. See Saphire & Moke, *supra* note 168, at 39–52.

232. 791 F.2d 1255 (6th Cir. 1986).

233. *Id.* at 1261–62; see also *Ortiz v. City of Philadelphia*, 28 F.3d 306, 313–14 (3d Cir. 1994) (rejecting Section 2 claim challenging the state's purge law and reasoning the law did not cause disparate levels of voter turnout); John A. Earnhardt, Note, *Challenging Episodic Practices Under Section 2 of the Voting Rights Act: Critical Analysis of Ortiz v. City of Philadelphia* Office of the City Commissioners Voting Registration Division, 52 WASH. & LEE L. REV. 1065, 1095–1100 (1995) (criticizing *Ortiz*); Saphire & Moke, *supra* note 168, at 47–55 (analyzing *Ortiz* opinion's discussion of causation).

Kozinski's dissent required something more than a mere disparate impact to make out a Section 2 claim.²³⁴ The *Farrakhan* majority found the required "something more" in discrimination outside the voting system that interacts with the challenged practice.²³⁵ Judge Kozinski agreed, at least insofar as discrimination is understood to mean intentional discrimination, but concluded that statistical evidence of disparate impact cannot suffice.²³⁶ He would instead require additional evidence of intentional discrimination outside the voting process that interacts with the challenged practice to produce a disparate racial impact.²³⁷ This requirement makes little sense, however, if the results test is supposed to serve as a prophylactic against voting practices—such as felon disenfranchisement or voter ID—adopted or retained due to intentional discrimination that would be difficult to prove in court. Such intent may exist whether or not there has been intentional discrimination external to the voting process.

Nevertheless, the causation and impact-plus tests adopted in these cases do serve a function, albeit awkwardly. By requiring something more than mere disparate impact to make out a Section 2 claim, the tests allow judges to consider the justifications the government proffers for adopting or keeping the voting practice in question. In felon disenfranchisement cases, these tests permit consideration of the penological justifications the state has for adopting the challenged practice. The causation and impact-plus requirements allow, in other words, a sort of under-the-table balancing of the government's interest in the challenged practice against its vote-denying impact.

This leads to the second reason why vote denial claims are qualitatively different from vote dilution claims. Congress had a good reason for avoiding a simple disparate-impact standard in the context of vote dilution cases: to prevent Section 2 from being read as a mandate for proportional representation. But that rationale is entirely absent in vote denial cases. Suppose, for example, a plaintiff could make a *prima facie* case of vote dilution by showing that a particular apportionment scheme had the effect of underrepresenting black voters. How would a court measure such an impact? The most obvious way to measure this impact is comparing the percentage of "safe" black seats to the percentage of blacks in the jurisdiction. It is not difficult to see how such a test could lead to a requirement of proportional representation. As I have already explained, the danger of proportional representation was the Senate's main concern when it debated whether to implement a results test in 1982, and this concern led to the Dole compromise, the Senate factors, and ultimately to the *Gingles* preconditions.²³⁸

Whatever dangers of proportional representation exist in applying a disparate-impact standard to vote dilution cases, they do not exist at all in vote denial cases.

234. See *supra* notes 206–21 and accompanying text.

235. *Farrakhan v. Washington*, 338 F.3d 1009, 1017–18 (9th Cir. 2003).

236. *Id.* at 1117 (Kozinski, J., dissenting).

237. *Id.* at 1119.

238. See *supra* Part III.A.

For example, allowing a plaintiff to make a prima facie against a voter ID law by showing the law has a more severe effect on black voters than on white voters is a far cry from requiring proportional representation. Thus, the concerns that led Congress to avoid a simple disparate-impact standard in vote dilution cases are not germane to vote denial claims.

B. A New Vote Denial Test

The differences between vote denial and vote dilution cases provide a strong argument for courts applying something closer to a simple disparate-impact test in vote denial cases. I recommend a disparate-impact test, modeled on the one applied in employment discrimination cases under Title VII.²³⁹ My test also borrows from jury discrimination cases under the Equal Protection Clause.²⁴⁰ In this Section, I describe the test that courts should consider adopting in new vote denial cases and suggest how it would apply in a few key areas.

As I have already explained, there are compelling reasons for constructing a different Section 2 test for vote denial claims than for vote dilution claims.²⁴¹ Foremost among those reasons is the relative simplicity of measuring disparate impact in vote denial cases and the absence of proportional representation concerns. Applying a disparate-impact test to vote denial cases, however, is not without its problems. I have already mentioned one problem: the need to create a test that considers the state's interests in the challenged practice.²⁴² The other problem is that Congress, when it amended Section 2 in 1982, did not label the test it created as a disparate-impact test.²⁴³ But as I explained earlier this omission is attributable to the fact that Congress was preoccupied with vote dilution—and specifically with

239. 42 U.S.C. § 2000e-2(k) (2000) (codifying the shifting of the burden of proof from a plaintiff to a defendant under the disparate-impact test in employment discrimination cases); see *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (describing how once a plaintiff shows a challenged employment practice is “discriminatory in operation,” the burden shifts to the employer to show a “business necessity” for the challenged practice); see also *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1580 (1996) (“Disparate impact cases involve neutral employment policies, such as competency tests, that have the unintended effect of discriminating against individuals who belong to a protected class.”); Rosemary Alito, *Disparate Impact Discrimination Under the 1991 Civil Rights Act*, 45 RUTGERS L. REV. 1011, 1020–21 (1993) (describing the burden-shifting framework of the disparate-impact test, under which the burden of persuasion shifts to the employer to demonstrate “business necessity” after a plaintiff shows a disparate impact).

240. See *Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (“Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.”).

241. See *supra* Part IV.A.

242. See *supra* Part IV.A.

243. See *supra* Part IV.A.

avoiding a proportional representation mandate—when it amended Section 2 in 1982.²⁴⁴

While Congress focused mostly on vote dilution in 1982, the legislative history provides some general guidance that is helpful in formulating a test for vote denial cases. The Senate Report stated the “ultimate test” under Section 2 is “whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their [sic] choice.”²⁴⁵ The fifth Senate factor is also instructive to vote denial cases: “the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.”²⁴⁶ Notably, the Senate Report did not qualify the type of discrimination a court should consider under the test—for example, a court is not limited to considering “intentional discrimination” or “official discrimination”—even though the intent/impact distinction and the public/private distinction were both firmly established components of constitutional law by 1982. The Supreme Court amplified the fifth factor in *Gingles*, stating the “essence of a § 2 claim is that a certain electoral law, practice, or structure *interacts with social and historical conditions* to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”²⁴⁷ Here again, Section 2 plaintiffs are not required to demonstrate intentional discrimination, much less intentional discrimination on the part of state actors, to make out a claim.

Still, these characterizations should cause hesitation in making disparate impact *alone* sufficient to make out a prima facie case under Section 2. Instead, a plaintiff should be required to show *both* (1) that the practice challenged results in the disproportionate denial of minority votes (i.e., that it has a disparate impact on minority voters); and (2) that this disparate impact is traceable to the challenged practice’s interaction with social and historical conditions. These might be thought of as “preconditions” to Section 2 vote denial claims, analogous to the three *Gingles* preconditions for Section 2 vote dilution claims. In cases challenging voting equipment, for example, Section 2 plaintiffs could make out a prima facie case by showing that past discrimination in education caused the higher rate of invalid votes that racial minorities cast using certain types of equipment.²⁴⁸ In a case challenging a photo ID requirement, a plaintiff could make a prima facie case by showing that discrimination in areas such as employment have resulted in fewer blacks having automobiles, or that housing discrimination led to larger numbers of blacks living in urban neighborhoods in which a vehicle, and thus a driver’s license, is

244. See *supra* Part III.A.

245. S. REP. NO. 94-417, at 30 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 207.

246. *Id.* at 29, as reprinted in 1982 U.S.C.C.A.N. 177, 206.

247. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (emphasis added).

248. For a discussion of the potential causes for the correlation between the use of certain voting equipment and the increase in the number of African Americans who cast invalid votes, see Tomz & Van Houweling, *supra* note 42.

unnecessary. Plaintiffs could then use this evidence to show the photo ID requirement disproportionately burdens blacks because it prevents many more blacks from voting than it does whites.

This still leaves the problem of providing the state or a local defendant with the opportunity to show the necessity of the challenged practice, despite its disparate impact on racial minorities. This corresponds to one of the two “[a]dditional factors” noted in the Senate Report: “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.”²⁴⁹ Unlike most of the other Senate factors, this factor seems quite germane to vote denial cases because of its focus on “qualification[s]” and “prerequisite[s]” to voting, among other things.²⁵⁰

Once the plaintiffs make a *prima facie* disparate-impact case by producing evidence of the two elements identified above, the burden should shift to the defendant to justify the challenged practice.²⁵¹ In a case challenging a voter ID requirement, for example, the burden would shift to the state to demonstrate the challenged practice is necessary to curb voting fraud. Just as employers in Title VII cases must show that a challenged employment practice is justified by a “business necessity,” state and local election officials would have to show that a challenged voting practice is justified by an “electoral necessity” once a *prima facie* disparate-impact case has been made. As in Title VII cases, defendants, appropriately, bear the burden at this stage because they are in the best position to explain why they believe vote-denying practices are necessary to achieve some vital interest.²⁵²

This burden-shifting also bears comparison to the test for assessing racial discrimination in the exercise of peremptory strikes under *Batson v. Kentucky*.²⁵³ Because *Batson* involved an equal protection claim, the showing required to establish a violation in that case was discriminatory intent, and not merely a discriminatory result as is the case under Section 2. But as Professor Daniel Ortiz has observed, the equal protection test that the Court has applied in jury discrimination cases is more relaxed than the intent test applied in *Washington v. Davis*²⁵⁴ and its progeny.²⁵⁵ *Batson* may thus be thought of as lying somewhere

249. S. REP. NO. 97-417, at (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 207.

250. *Id.* at 29, as reprinted in 1982 U.S.C.C.A.N. 177, 207.

251. A possible objection to my proposed test is that it would allow Section 2 claims to be made in cases where the differential impact of a voting procedure is relatively slight. It might, for example, seem unfair to apply Section 2 to a felon disenfranchisement law that disenfranchises twelve percent of blacks and eleven percent of whites. This could be dealt with by requiring that any disparities be statistically significant and by imposing a lower burden of justification on the state where the racial disparity is *de minimis*.

252. See e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (establishing a business necessity defense in a Title VII case).

253. 476 U.S. 79, 97 (1986).

254. 426 U.S. 229 (1976)

255. See Ortiz, *supra* note 227, at 1122 (noting the “lighter burden on the individual” and “heavier burden on the state” in jury selection cases, as opposed to employment and housing discrimination cases).

between an intent and an impact standard.²⁵⁶ Under *Batson's* test, a criminal defendant alleging jury discrimination must first provide evidence to raise an inference of discrimination, such as a pattern of striking jurors of a particular race.²⁵⁷ The burden then shifts to the state to provide a "neutral explanation" for striking the jurors in question.²⁵⁸ So too, I propose that where a Section 2 plaintiff has made a *prima facie* case of disparate impact, the burden should shift to the state or local entity to demonstrate a sufficient justification for the challenged practice.²⁵⁹

What should the government's burden be? I suggest that the government should be required to show the challenged practice is narrowly tailored to a compelling government interest. This high standard tracks that of constitutional race discrimination claims and will prevent the government from asserting pretextual justifications. One might argue for a lower standard (for example, showing the standard is rationally related to legitimate interests) in cases where the disparate impact on minority voters is relatively slight. But if state and local election officials are to meet their burden merely by devising an argument that the challenged practice is rational, it would be all too easy for pretextual justifications to creep in. For this reason, I suggest that the government's burden be set at a higher level than mere rationality.²⁶⁰ Whatever burden is imposed on the state, it is critical that it be required to produce *evidence*, and not merely speculation, as to the interests served by the challenged practice.

C. *Is This Test Constitutional?*

I have explained why vote denial cases warrant a different test from that applied in vote dilution cases, and have suggested a test that would shift the burden from Section 2 plaintiffs to defendants once a *prima facie* case of disparate impact is shown. The question that remains is whether this test would be constitutional. Developments in the Court's federalism jurisprudence and recent changes in the Court's composition make the outcome of any case involving Congress's constitutional enforcement powers difficult to determine with any confidence. Although it is difficult to predict what the Court *will* do, I think that the Court

256. *Id.* at 1120-23.

257. *Id.* at 96-97.

258. *Id.* at 98; see Ortiz, *supra* note 227, at 1122 (describing burden-shifting under *Batson* and the requirement that the prosecution cannot "merely deny that he had a discriminatory motive").

259. See Ortiz v. City of Philadelphia, 28 F.3d 306, 333-34 (Lewis, J., dissenting) (urging the adoption of Title VII burden-shifting in Section 2 cases). But see Earnhardt, *supra* note 233, at 1102-03 (arguing Title VII burden-shifting would give too much power to Section 2 plaintiffs).

260. Alternatively, if the government were allowed to meet its burden with some lesser showing than "narrowly tailored to a compelling interest," then the voting rights plaintiff should have an opportunity to show that the proffered interest is pretextual, as in Title VII cases. This would prevent government actors from attempting to hide behind invented justifications for practices that result in the disproportionate denial of minority votes.

should find the Section 2 test I have proposed to fall squarely within Congress's power to enforce the Fourteenth and Fifteenth Amendments.²⁶¹

Other commentators have more thoroughly addressed the impact of the Supreme Court's "new federalism" cases on the VRA,²⁶² so I will do so only briefly here. In the line of decisions beginning with *City of Boerne v. Flores*,²⁶³ the Court has applied the congruence and proportionality test in assessing the constitutionality of laws in which Congress purports to exercise its authority to enforce Fourteenth Amendment rights.²⁶⁴ To satisfy constitutional scrutiny, "[t]here must be a

261. Another potential basis on which my proposed Section 2 test might be upheld is the Elections Clause. U.S. CONST., art. I, § 4. ("The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations . . ."). The Elections Clause gives Congress the broad power to regulate congressional elections, including not only their time and place, but also registration, voter protection, fraud prevention, counting of votes, and the publication of election returns. *Smiley v. Holm*, 285 U.S. 355, 366 (1932). Lower courts have read the Elections Clause broadly in upholding the National Voter Registration Act of 1993 (commonly known as the "NVRA" or "motor voter"). See *ACORN v. Edgar*, 56 F.3d 791, 792 (7th Cir. 1995); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411, 1413 (9th Cir. 1995).

Of course, the Elections Clause could only furnish constitutional authority for Section 2's application to *federal* elections. But at least with respect to vote denial, claims, that may well be sufficient, as seems to have been the case with respect to the NVRA. After the enactment of the NVRA, some states attempted to implement dual registration systems, with one NVRA-compliant list for federal elections and another, noncompliant list for state elections. These dual systems proved to be overly burdensome. See Jeffrey A. Bloomberg, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 *FORDHAM L. REV.* 1015, 1033 n.135 (1995) (noting that two states, Illinois and Mississippi, chose to employ "expensive and cumbersome dual registration" systems after NVRA). By the same token, states could conceivably adopt one ID rule for state elections and another for federal elections—or even one form of voting equipment for federal elections and another for state elections—in order to get around Section 2 if interpreted to cover these practices (and upheld only under the Elections Clause). Because such dual systems are likely to prove too cumbersome to administer effectively, the Elections Clause might be a functionally adequate constitutional basis for Section 2 vote denial claims, despite its applicability only to federal elections.

262. See Hasen, *supra* note 225; Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 *MICH. L. REV.* 2341 (2003); Pitts, *supra* note 111, at 209–15.

263. 521 U.S. 507, 520 (1997).

264. See generally *Tennessee v. Lane*, 541 U.S. 509, 518–30 (2004) (discussing prior applications of *Boerne*'s congruence and proportionality test and holding Congress had the power to enact legislation regarding the "inadequate provision of public services and access to public facilities" under the Fourteenth Amendment); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728, 740 (2004) (describing *Boerne*'s congruence and proportionality test and concluding Congress acted within its power because "§ 2612(a)(1)(C) is congruent and proportional to its remedial object"); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 & n.9 (2001) (holding "Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I" of the Americans with Disabilities Act of 1990 because it failed the congruence and proportionality test); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 86 (2000) (holding the Age Discrimination in Employment Act of 1967 unconstitutional because it was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior") (quoting *Boerne*, 521 U.S. at 532); *United States v. Morrison*, 529 U.S. 598, 625–26 (2000) (holding the statute, which provided a civil remedy for gender motivated violence, did not pass the congruence

congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²⁶⁵ While Congress has the power to proscribe conduct that is not itself unconstitutional, in order to remedy or deter constitutional violations, it lacks the power to engage in a “substantive redefinition” of rights as defined by the Supreme Court.²⁶⁶ Congress exceeds its enforcement power when it enacts a law so out of proportion to the objective of enforcing constitutional rights that it can only be understood as an attempt to redefine those rights.²⁶⁷ Under this standard, the Court has struck down portions of the Religious Freedom Restoration Act, Violence Against Women Act, Americans with Disabilities Act, and the Age Discrimination in Employment Act.²⁶⁸

The Court has indicated, however, that Congress should have more latitude when it seeks to remedy racial discrimination or protect fundamental rights like the right to vote. Prior to *Boerne*, the Court upheld key portions of the VRA,²⁶⁹ including the preclearance provisions of Section 5 that are generally thought to impose more onerous burdens on state and local government entities than Section 2.²⁷⁰ The Supreme Court has also compared the VRA favorably to other statutes that the Court has struck down.²⁷¹ For example, in *Board of Trustees of the University of Alabama v. Garrett*,²⁷² the Court noted that Congress had compiled a much more extensive evidentiary record in support of the VRA than in support of the statute at issue in that case, Title I of the ADA.²⁷³ With regard to the VRA, the Court observed:

Congress documented a marked pattern of unconstitutional action by the States. State officials, Congress found, routinely applied voting tests in order to exclude African-American citizens from registering to vote. . . . Congress’ response was to promulgate in the Voting Rights Act a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States’ systematic denial of those rights was identified.²⁷⁴

and proportionality test); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646 (1999) (holding the Patent Remedy Act did not satisfy the congruence and proportionality test).

265. *Boerne*, 521 U.S. at 520.

266. *Lane*, 541 U.S. at 520 (citing *Boerne*, 521 U.S. at 519–20).

267. *Boerne*, 521 U.S. at 532.

268. *See supra* note 264.

269. *See City of Rome v. United States*, 446 U.S. 156, 173, 177 (1980); *Oregon v. Mitchell*, 400 U.S. 112, 133–35 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

270. *See Pitts*, *supra* note 85, at 237.

271. *United States v. Morrison*, 529 U.S. 598, 625–27 (2000).

272. 531 U.S. 356 (2001).

273. *Id.* at 373.

274. *Id.*

The Court's decisions in *Hibbs* and *Lane* also support the conclusion that my proposed Section 2 test falls within the scope of congressional power.²⁷⁵ In *Hibbs*, the Court upheld a portion of the Family Medical Leave Act of 1993 against a constitutional attack.²⁷⁶ Even though little evidence of state discrimination existed,²⁷⁷ the Court upheld the statute.²⁷⁸ The Court noted that Congress designed the statute to address gender stereotyping, and that sex discrimination—unlike discrimination based on disability—is subject to heightened equal protection scrutiny.²⁷⁹ Because the statute dealt with a suspect class, Congress's job of establishing the requisite pattern of constitutional violations was easier. In *Lane*, the Court upheld the application of Title II of the ADA to the accessibility of courtrooms.²⁸⁰ The Court highlighted the fact that Congress had before it a record which included discrimination against disabled persons with respect to "fundamental rights," specifically mentioning voting.²⁸¹ This evidence, the Court held, justified Congress's exercise of its "prophylactic power" to proscribe conduct that is not itself unconstitutional.²⁸²

Taken together, *Lane* and *Hibbs* suggest that the Court will give Congress greater latitude when Congress acts to enforce fundamental rights or to remedy discrimination against a suspect class. Section 2 of the VRA falls into both of these categories. In fact, Congress designed Section 2 to curb discrimination against the prototypical suspect class with respect to the prototypical fundamental right.²⁸³ While the Supreme Court has not considered the constitutionality of Section 2 under its new federalism jurisprudence, lower courts have uniformly upheld the statute against constitutional challenge.²⁸⁴ These lower courts have determined that Congress may enact legislation that sweeps in some voting practices that comply with the Constitution as long as it is acting to protect the core value of preventing intentional race discrimination from infecting the voting process.²⁸⁵ A disparate-

275. Any optimism on this point should be tempered by the recent personnel changes on the Supreme Court. Whether Chief Justice Roberts and Justice Alito will follow the approach taken by the majority of the Court in *Hibbs* and *Lane* remains to be seen.

276. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 740 (2004).

277. *See* Hasen, *supra* note 225, at 196–97.

278. *Hibbs*, 538 U.S. at 740.

279. *Id.* at 735–36.

280. *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004).

281. *Id.* at 524–25.

282. *Id.* at 528.

283. *See* *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (describing the right to vote as "fundamental . . . because [it is] preservative of all rights").

284. *See, e.g., United States v. Blaine County*, 363 F.3d 897, 904–05, 907–09 (9th Cir. 2004) (upholding the constitutionality of Section 2's results test and citing other lower court decisions doing the same).

285. *See id.* at 908–09.

impact analysis is a congruent and proportional remedy for intentional discrimination in the voting process that might otherwise seep in undetected.²⁸⁶

Even aside from the arguments for Section 2's constitutionality that would apply in any case,²⁸⁷ there are special reasons for upholding a broad remedy with respect to vote denial claims. As other commentators have noted, the Court has generally applied a more relaxed standard for intentional discrimination in voting than in other contexts.²⁸⁸ Even more importantly, the Court has dispensed with the requirement of discriminatory intent entirely in some vote denial cases. In *Harper v. Virginia Board of Elections*,²⁸⁹ for example, the Court struck down Virginia's poll tax because it impermissibly burdened the right to vote under the Fourteenth Amendment.²⁹⁰ Although the Court noted the possibility of a racially discriminatory application of the poll tax, it did not actually rest its holding on a finding of discriminatory intent, noting that such intent was unnecessary to hold the poll tax unconstitutional.²⁹¹ In *Bush v. Gore*, the Court held Florida's method of recounting punch-card ballots in the 2000 election violated equal protection.²⁹² The Court again did not find that the method used denied racial minorities—or indeed any particular group—equal treatment, much less than there had been *intentional* discrimination against any group. Instead, the Court identified the general principle of “equal weight . . . to each vote” and “equal dignity . . . to each voter,”²⁹³ while leaving the details of this principle's application was a matter for another day (or other days).²⁹⁴ As the Court now famously (or infamously) put it: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes

286. Although decided before *Boerne*'s articulation of the “congruence and proportionality” standard, the Court's decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), provides further support for the conclusion that a Section 2 disparate-impact test falls within congressional enforcement power. In *Fitzpatrick*, the Court unanimously upheld Title VII as a constitutional exercise of Congress' authority to abrogate state sovereign immunity. *Id.* at 456.

287. See generally Pitts, *supra* note 111, at 189 (generally stating “three core values” in support of finding Section 2 constitutional based on “any moderately conservative Court's” vision of “Congress's enforcement power”).

288. See, e.g., Ortiz, *supra* note 227, at 1137 (describing how the Court makes it more difficult to prove intent in housing and employment discrimination than in cases involving voting, education, and jury selection); Pitts, *supra* note 111, at 195 (citing Professor Ortiz and stating “the Court has generally made it easier for racial minorities to prove purposeful racial discrimination in certain contexts, including voting and education”); see also Shaw v. Reno, 509 U.S. 630, 646 (1993) (“[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines.”).

289. 383 U.S. 663 (1966).

290. *Id.* at 670.

291. *Id.* at 666 n.3; see also RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER* V. *CARR* TO *BUSH* V. *GORE* 36–37 (2003) (discussing a proposed dissent by Justice Goldberg for *Harper*, which was never published, finding “the principal aim of this limitation [of the poll tax] was the disenfranchisement of Negroes”).

292. *Bush v. Gore*, 531 U.S. 8, 109–10 (2000).

293. *Id.* at 104.

294. *Id.* at 105.

generally presents many complexities.”²⁹⁵ This leaves it less than clear what equal protection standard should govern claims challenging inequalities in the administration of elections.²⁹⁶

The Supreme Court’s failure to provide clear guidance on the scope of equal protection rights in the area of vote denial furnishes a compelling argument for upholding broad congressional enactments in this area. In the vote dilution area, the Court has provided considerable clarity on the scope of the constitutional right. Specifically, it has held that intentional race discrimination is required.²⁹⁷ On the other hand, the scope of equal protection rights is quite *unclear* when it comes to vote denial. The Court has provided little guidance in regard to vote denial claims beyond prohibiting poll taxes and disparate standards for conducting recounts within a state.²⁹⁸ Whatever federalism interests ordinarily apply to the state’s conduct of its elections, Congress should be given the latitude to articulate and enforce federal voting rights when the federal courts have not done so. This is consistent with the deference that the Court has long accorded to Congress in its decisions upholding the VRA and in its post-*Boerne* New Federalism cases. Where the Court has failed to articulate a clear constitutional rule, it would be more than a little unreasonable to require Congress to toe the line by tailoring enforcement to a constitutional right whose boundaries remain judicially undefined.²⁹⁹ For this

295. *Id.* at 109. For different interpretations of *Bush v. Gore*, compare Vikram David Amar, *Adventures in Direct Democracy: The Top Ten Constitutional Lessons from the California Recall Experience*, 92 CAL. L. REV. 927, 955–58 (2004) (describing the problems that have arisen with subsequent attempts to interpret the Court’s decision in *Bush v. Gore* and arguing the lack of the explicitness in the decision’s language have caused these problems), with Richard L. Hasen, *The California Recall Punch-Card Litigation: Why Bush v. Gore Does Not “Suck”* 17–19 (Loyola Law School (Los Angeles) Legal Studies Research, Paper No. 2004–17, 2004), available at <http://ssrn.com/abstract=589001> (responding to Amar’s criticisms of *Bush v. Gore* and arguing “the opacity of the opinion is something to be praised, not condemned”).

296. As Professor Pildes has observed, *Bush v. Gore* is probably best understood not as protecting conventional individual rights, but rather as guarding against “self-interested partisan manipulation.” Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 50 (2004). Despite the Court’s invocation of the “equal dignity owed to each voter,” *Bush v. Gore*, 531 U.S. at 104, the Court’s main concern was that discretion conferred in local election officials in Florida might be abused to the advantage of some groups of voters and the disadvantage of others. See Daniel Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2515 (2003). To be sure, *Bush v. Gore* was not about harm to racially defined groups. Nevertheless, the Court’s overriding concern with inequalities flowing from excessive administrative discretion has particular salience in cases where that discretion threatens racial minority groups. Without a disparate-impact test or some other prophylactic rule, practices used to exclude minority voters from participating in elections—like a modern-day poll tax—could all too easily escape detection.

297. See *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

298. See Tokaji, *supra* note 296, at 2510–15 (providing one view on how courts might apply *Bush v. Gore*’s analysis to other issues of election administration).

299. Unlike other aspects of election administration, this analysis does not apply equally to felon disenfranchisement because the Court has provided some clear guidance in this area. See e.g., *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (holding a statute denying persons convicted of a crime of

additional reason, the application of a disparate impact test to Section 2 vote denial claims should be deemed to fall within Congress's authority to enforce the Fourteenth Amendment.

V. CONCLUSION

Section 2 vote denial cases occur at the nexus between two areas that have, quite appropriately, received increased attention in recent years. The first area is election administration, which includes not only the equipment used to vote but also ID requirements, registration rules, provisional voting, and voter qualifications. State and local practices in each of these areas are sure to remain the subject of controversy, given the major parties' recognition—especially after Florida 2000 and Washington 2004—that every vote does matter, at least in some elections. The second area is the enforcement of the VRA, which recently celebrated its fortieth birthday and is the subject of renewed attention given that key provisions are up for renewal in 2007.

Section 2 is not among the expiring provisions, but its applicability to practices that result in the disproportionate denial of minority votes will certainly command the attention of courts for years to come. To date, the courts have failed to arrive at a manageable test for vote denial claims under Section 2. In fact, some courts have failed to appreciate that vote denial claims are qualitatively different from the vote dilution claims that have mostly consumed the courts' attention in Section 2 cases since 1982. My recommended vote denial test would place the initial burden on voters to demonstrate the challenged practice interacts with social and historical conditions so as to result in the disproportionate denial of minority votes. The state or local defendant would then have the burden of showing that the challenged practice is narrowly tailored to serve a compelling government interest. Such a test has the advantage of ferreting out practices that may be rooted in discriminatory intent that would otherwise be hard to prove, while at the same time allowing practices that are genuinely necessary for the sound management of elections. My test also falls squarely within the scope of Congress's prophylactic remedial powers under the Fourteenth and Fifteenth Amendments.

While one might quibble with the details of this proposed test, the most important point is that the courts must create a workable test for evaluating Section 2 vote denial claims—one that can apply to felon disenfranchisement, voting technology, ballot security measures, and other election administration practices. If Section 2 is to prove an effective deterrent to the new vote denial, and if state and local entities are to be given fair notice of what the statute proscribes, it is critical

moral turpitude of the right to vote unconstitutional and expressly stating the Court did not address Section 2 of the Fourteenth Amendment because racial discrimination motivated enactment of the statute); *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (distinguishing denying felons the right to vote from other state practices that are invalid under the Fourteenth Amendment).

that courts articulate the legal standard governing such claims more clearly than they have until now.

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