

RESURRECTING RETROGRESSION: WILL SECTION 2 OF THE VOTING RIGHTS ACT REVIVE PRECLEARANCE NATIONWIDE?

NOEL H. JOHNSON*

*The question is not whether the voting laws could be made more convenient — they virtually always can be. Rather, the question is whether the electoral system as applied treats protected classes the same as everyone else, determined by the totality of the circumstances.*¹

INTRODUCTION

The Voting Rights Act of 1965² is perhaps the most successful piece of civil rights legislation in this country's history. Since its enactment, the law has been instrumental in removing discriminatory voting barriers that had long kept minorities from enjoying an equal opportunity to participate in the political process.

However, the Voting Rights Act was significant for another reason: it fundamentally rearranged the constitutional order regarding control of elections. Section 5 of the Voting Rights Act employed certain triggering formulas that required all or part of sixteen states to seek preclearance from the federal government before implementing any new election regulation. In effect, this gave the federal government veto power over states' elections.

This order remained in place until 2013, when the Supreme Court decided in *Shelby County v. Holder*³ that the triggering formula used to impose preclearance obligations in certain parts of the country was

Copyright © 2017 Noel H. Johnson.

*Noel H. Johnson is an attorney with the Public Interest Legal Foundation, a nonprofit law firm that specializes in election law.

1. N.C. State Conf. of the NAACP v. McCrory, 182 F. Supp. 3d 320, 465 (M.D.N.C. 2016).
2. 52 U.S.C. §§ 10301–10508 (2014).
3. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

obsolete because it was based on decades-old voter registration data that did not reflect the current electoral landscape.

Even though *Shelby County* rejected federal oversight of state elections through Section 5, a conscious effort has been made on several fronts to resurrect federal supremacy over state control of elections under Section 2 of the Voting Rights Act. However, instead of using traditional Section 2 standards as found in the Supreme Court’s jurisprudence, these efforts attempt to import bare statistical tests for liability that were previously utilized under Section 5 to block state election laws.⁴

The standards under Section 5 and Section 2 are quite different. Section 5 employs a “retrogression” standard to block election law changes. That is, if the law diminishes the electoral clout of minority voters, even if by the barest of statistical margin, the law is blocked. Under Section 2, however, disparate impact does not determine liability. Rather, the court looks to the totality of the circumstances and asks whether the challenged practice has the real-world result of denying minorities an equal opportunity to participate in the electoral process.

This new approach to litigation has thus far been employed in Wisconsin, Texas, Ohio, Virginia, and North Carolina to challenge a host of election-related measures such as voter photo identification laws, changes to early voting periods, same-day voter registration, and requirements that voters only vote in the precinct where they live. If the strategies advanced in these cases are not combatted, every state will risk violating the Voting Rights Act if any change to an election law has any statistical impact on a racial minority group. And the constitutional balance between the states and the federal government that the Supreme Court sought to restore in *Shelby County* will be undone.

The courts undoubtedly have a role to play in safeguarding the voting rights of majority and minority peoples. That role, however, is to interpret the laws as they are written, not to opine on the “policy merits,” “desirability” or “popularity” of various voting measures and mechanisms or to weigh how such changes might tip the balance of political power.

4. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 548–49 (1969) (describing Section 5’s legal standard).

Courts hearing challenges under Section 2 must dispose of them under the appropriate legal standard. Section 2 of the Voting Rights Act requires much more than bare statistical disparities; it requires a searching inquiry into the real-world impact of a particular law on the opportunity of minority voters to cast a ballot, as viewed within the entire landscape of electoral opportunities.

I. HISTORICAL AND LEGAL BACKGROUND

Long before the ratification of the Fifteenth Amendment or the Voting Rights Act, Congress granted the states the power to regulate their elections. The Constitution expressly provides states with the unilateral authority to determine who may vote.⁵ The states may also determine the times, places, and manner of holding their elections, so long as the governing regulations are not inconsistent with federal law.⁶ As the Supreme Court recently reaffirmed, the “Times, Places, and Manner” encompasses regulations “relating to ‘registration’” of voters.⁷

With no legal prohibition against it, states exercised their authority to regulate elections in ways that overwhelmingly excluded minorities from political decision-making.⁸ In 1870, the Fifteenth Amendment granted African American men the right to vote, mandating that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”⁹ However, what followed was decades of “unremitting and ingenious defiance of the Constitution” in certain areas of the country.¹⁰

Some states¹¹ continued to erect barriers to deny the franchise to African Americans. These included “grandfather clauses,¹² property

5. U.S. CONST., art. I, § 2, cl. 1 (allowing election of Representatives), U.S. CONST. amend. XVII (allowing election of Senators) U.S. CONST., art. II, § 1, cl. 2 (allowing presidential electors chosen as directed by state legislatures).

6. See U.S. Const., Art. I, § 4, cl. 1; *Arizona v. Inter-Tribal Council of Ariz., Inc. (ITCA)*, 133 S. Ct. 2247, 2254 (2013) (Congress’s regulations “supersede those of the State which are inconsistent therewith.”).

7. *ITCA*, 133 S. Ct. at 2253 (internal citations omitted).

8. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 937 (1995) (stating that there was “almost absolute exclusion of the Negro voice in state and federal elections”).

9. U.S. CONST., amend. XV, § 1.

10. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

11. See, e.g., *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2619 (2013) (“In the 1890s, Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia began to enact literacy tests for voter registration and to employ other methods designed to prevent African-Americans from voting.”).

12. After the Fifteenth Amendment extended the right to vote to African American men,

qualifications, ‘good character’ tests, and the requirement that registrants ‘understand’ or ‘interpret’ certain matter.”¹³ “[B]lack were given more difficult questions, such as the number of bubbles in a soap bar, the news contained in a copy of the Peking Daily, the meaning of obscure passages in state constitutions, and the definition of terms such as habeas corpus.”¹⁴ White registrants were not given the same tests and thus the voter registration process was not equally accessible.¹⁵

Despite mechanisms to challenge these practices, the courts provided little help. Some jurisdictions were able to “stay[] one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down,”¹⁶ forcing a plaintiff to file a new lawsuit, which was “usually onerous to prepare.”¹⁷

Following years of ineffective, piecemeal litigation, Congress passed the Voting Rights Act of 1965.

II. SECTIONS 5 AND 2 OF THE VOTING RIGHTS ACT

A. Section 5 – Preclearance and the Statistical Retrogression Standard

Section 5 requires all jurisdictions covered by Section 4’s coverage formula¹⁸ to get approval from the federal government for—or preclear—“any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.”¹⁹ Preclearance may be sought from either the Attorney General or through a declaratory judgment from the United States District Court for the District of Columbia.²⁰

some states enacted “burdensome requirements for registration.” *See Louisiana v. United States*, 380 U.S. 145, 148 (1965). However, these new requirements contained exemptions for “any person who had been entitled to vote before January 1, 1867, or who was the son or grandson of such a person.” *Id.* By operation, these “grandfather clauses” exempted only white voters.

13. *Katzenbach*, 383 U.S. at 311.

14. *Lopez v. Monterey Cty.*, 525 U.S. 266, 297 (1999) (Thomas, J., dissenting) (internal quotations and citations omitted).

15. *Katzenbach*, 383 U.S. at 312 (“White applicants for registration have often been excused altogether from the literacy and understanding tests or have been given easy versions have received extensive help from voting officials, and have been registered despite serious errors in their answers.”).

16. *Beer v. United States*, 425 U.S. 130, 140 (1976).

17. *Katzenbach*, 383 U.S. at 314.

18. At the time of the Voting Rights Act’s passage, the jurisdictions subjected to preclearance included Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia as well as 39 counties in North Carolina and one in Arizona. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2620 (2013).

19. The Voting Rights Act, 52 U.S.C. § 10304(a).

20. *Id.*

Section 5 was designed to “remedy[] the effects of prior intentional racial discrimination.”²¹ Because reactive litigation had proved ineffective, Congress decided “to shift the advantage of time and inertia from the perpetrators of the evil to its victim.”²² Despite its noble intentions, Section 5 was not without constitutional concerns. “Section 5 is a unique requirement that exacts significant federalism costs,”²³ in the way of “drastic” interference with the States’ sovereignty to “give effect to their policy choices affecting voting.”²⁴ Nevertheless, the Act’s preclearance obligations were upheld under by the Supreme Court as a valid exercise of Congress’s power to enforce the Fifteenth Amendment.²⁵ According to the Court, the “extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees,” created “exceptional conditions” that justified intrusion into areas of state sovereignty.²⁶

Section 5’s preclearance mechanism uses a retrogression standard.²⁷ That means that a jurisdiction submitting a law for preclearance must affirmatively demonstrate that the law will have no negative statistical impact on the electoral ability of minority voters.

Sections 4 and 5 were intended by Congress to be temporary measures and were set by statute to expire after five years.²⁸ However, Congress reauthorized them for an additional five years.²⁹ Congress would reauthorize Sections 4 and 5 an additional three times prior to the Supreme Court’s decision in *Shelby County*.³⁰ In 2006, Sections 5

21. *Lopez v. Monterey Cty.*, 525 U.S. 266, 294 (1999) (Thomas, J., dissenting).

22. *Beer v. United States*, 425 U.S. 130, 140 (1976) (internal quotations and citations omitted).

23. *Lopez*, 525 U.S. at 293 (Thomas, J., dissenting) (collecting cases discussing this issue).

24. *Id.* at 294. Justice Powell described Section 5’s “encroachment” on state sovereignty as “especially troubling because it destroys local control of the means of self-government, one of the central values of our polity.” *City of Rome v. United States*, 446 U.S. 156, 201 (1980).

25. The Fifteenth Amendment provides, “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude,” U.S. CONST. amend. XV, § 1, and grants Congress the “power to enforce this article by appropriate legislation.” *Id.* § 2.

26. *South Carolina v. Katzenbach*, 383 U.S. 301, 334–35 (1966).

27. *See generally* *Bush v. Vera*, 517 U.S. 952 (1996) (Justice O’Connor joined by Chief Justice Rehnquist and Justice Kennedy concluded that “Creation of [the] District . . . (only) was not justified by a compelling state interest in complying with VRA § 5, which seeks to prevent voting-procedure changes leading to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise”).

28. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2620 (2013).

29. *Id.*

30. *Id.* at 2620–21. The Voting Rights Act was reauthorized for seven more years in 1975,

was not just reauthorized, it was amended to “prohibit more conduct than before.”³¹ The amended Section 5 more narrowly defined when an objection to a state voting law change is justified:

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.³²

In practice, the Department of Justice or the court would look to the status quo and then analyze whether the new change in the law would diminish the electoral strength of minorities.³³ If there was any such diminishment, the proposed change was blocked: “In § 5 preclearance proceedings . . . the baseline is the status quo that is proposed to be changed: If the change ‘abridges the right to vote’ relative to the status quo, preclearance is denied”³⁴

Section 5 “imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect.”³⁵ The Department of Justice was not required to show the extent or existence of diminishment.³⁶ If the jurisdiction could not show through quantitative evidence that the proposed change in its election laws would have no negative effect whatsoever on minorities, that change would not be precleared.³⁷

After the 2006 amendments, Section 5 was interpreted by the Department of Justice in such a way that bare statistical evidence of retrogression automatically froze any change to state election practices. Submissions were often blocked when no evidence of retrogression was presented, simply because the submitting jurisdiction could not prove the total absence of any discriminatory effect.³⁸ Furthermore, any

for 25 more years in 1982, and for 25 more years in 2006. *Id.*

31. *Id.* at 2621.

32. 52 U.S.C. § 10304.

33. *See* Holder v. Hall, 512 U.S. 874, 883, 114 S. Ct. 2581, 2586 (1994) (“Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change.”).

34. *Reno v. Bossier Par. Sch. Bd. (Reno II)*, 528 U.S. 320, 334 (2000).

35. *Reno v. Bossier Par. Sch. Bd. (Reno I)*, 520 U.S. 471, 480 (1997).

36. *Reno II*, 528 U.S. at 334.

37. *Id.* at 336.

38. *See, e.g.*, Objection Letter of Loretta King, Assistant Attorney General, to Thurbert E. Baker, Attorney General of Georgia (May 29, 2009), <http://www.justice.gov/crt/records/vot>

ambiguity weighed against the jurisdiction.³⁹ Importantly, there was no consideration given to the totality of the circumstances or any non-discriminatory factors or reasons for the change in election procedures.⁴⁰

South Carolina's effort to enact a voter identification law provides a prime example of how Section 5's statistical hair-trigger worked to stonewall state election law changes. In 2011, the Department of Justice interposed an objection to South Carolina's law on the basis of a 1.6% difference in ownership of photo identification between white and black voters.⁴¹ In the opinion of the Department, this small statistical difference in likely ID ownership was enough to interpose an objection because it allegedly "diminished" the electoral power of minorities.

The statistical disparity in ownership cited by the Department of Justice is, of course, not a finding that anyone was actually denied the right to vote. But under Section 5's retrogression standard, it was sufficient to lodge an objection.

With its law blocked, South Carolina was forced to file a lawsuit to obtain preclearance. The reviewing court noted that South Carolina's law included a "reasonable impediment" exception, which allowed voters lacking qualifying identification to vote after "simply . . . sign[ing] an affidavit at the polling place and list[ing] the reason that they have not obtained a photo ID."⁴² The "reasonable impediment" exception seemingly made no difference to the Department. Yet it became the basis for preclearance in federal court.⁴³

The Department of Justice used the 2006 amendments to Section 5 to wield veto power over state election laws using the smallest statistical disparities.

B. Section 2 – Gingles and the Totality of Circumstances Standard

Unlike Section 5, Section 2 applies nationwide and functions as a ban on racial discrimination in voting, with enforcement accomplished through litigation in federal court. Section 2 forbids any "standard,

/obj_letters/letters/GA/1_090529.pdf.

39. *McCain v. Lybrand*, 465 U.S. 236, 257 (1984).

40. *See, e.g., LaRoque v. Holder*, 650 F.3d 777, 794 (D.C. Cir. 2011).

41. Objection Letter of Thomas Perez, Assistant Attorney General, to C. Havird Jones, Jr., Esq., Assistant Deputy Attorney General of South Carolina at 2 (Dec. 23, 2011), http://www.justice.gov/crt/records/vot/obj_letters/letters/SC/1_111223.pdf.

42. *South Carolina v. United States*, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

43. *Id.*

practice, or procedure” that “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”⁴⁴ As originally enacted, Section 2 banned only election laws that were enacted with racially discriminatory *intent*.⁴⁵ However, amendments to the law in 1982 expanded its reach to laws that have racially discriminatory *results*, subject to a broad, totality-of-the-circumstances standard.⁴⁶

Section 2 states:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.⁴⁷

The so-called “results prong” of Section 2 was first interpreted by the Supreme Court in *Thornburg v. Gingles*,⁴⁸ which involved a challenge to North Carolina’s legislative redistricting plan.⁴⁹ *Gingles* provides the central guidance for courts addressing Section 2 challenges.⁵⁰

The *Gingles* Court set forth a standard by which certain factors must be present in order to meet the “totality of the circumstances”

44. 52 U.S.C. § 10301(a).

45. *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980).

46. S. Rep. No. 97-417, at 28–29 (1982), reprinted in 1982 U.S.C.C.A.N. 117, 206–07 [hereinafter Senate Report].

47. 52 U.S.C.S. § 10301.

48. 478 U.S. 30 (1986).

49. *Id.* at 34.

50. See, e.g., *Grove v. Emison*, 507 U.S. 25, 40–41 (1993); *Johnson v. De Grandy*, 512 U.S. 997, 1011–13 (1994).

standard of Section 2 and to find that a violation has occurred. These factors were taken from the Senate Judiciary Committee's majority report on the 1982 amendment to Section 2 and they include:

1. The extent of any history of official discrimination in the jurisdiction that touched the right of minorities to register, vote, or otherwise participate in the electoral process;
2. The extent to which voting in elections is racially polarized;
3. The extent to which the jurisdiction has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices that may enhance the opportunity for discrimination;
4. Whether minority candidates have been denied access to any candidate slating process;
5. The extent to which minorities in the jurisdiction bear the effects of discrimination in education, employment, and health that 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 minorities have been elected to public office.⁵¹

While some of the analysis in *Gingles* might apply only in the reapportionment context, two central thresholds can be discerned for all Section 2 claims. First, the plaintiff must show that a discriminatory effect came about "on account of" race.⁵² There must be some causal nexus between the supposed statistical retrogression and some concrete indicia of discrimination, such as one or more of the Senate factors. Second, the disparate impact must *result in actual real world unequal access* to the political process.⁵³ Ultimately, a plaintiff must do more than show a statistical difference in how an election law impacts minority voters by demonstrating how the election law actually impairs access to the electoral process.⁵⁴

51. Senate Report, *supra* note 46, at 28–29.

52. 52 U.S.C § 10301(a).

53. See *Thornburg v. Gingles*, 478 U.S. 30, 63 (1986) (explaining that the "critical question" under Section 2 is whether the contested law "results" in "less opportunity" for minority voters).

54. See *Frank v. Walker*, 768 F.3d 744, 753 (7th Cir. 2014) (Section 2 "does not condemn a voting practice just because it has a disparate effect on minorities.").

If, based on the totality of the circumstances, a plaintiff can show that the statistical differences were generated by one or more of the Senate factors or other indicia of discrimination that result in unequal access to the political process, then Section 2 is violated.⁵⁵ A plaintiff must show some causality between disparate treatment, disparate impact, and a demonstrable impact on actual election outcomes. If Section 2 liability were to lie in simple statistical disparity, absent causality and unsupported by a broad non-quantitative body of evidence, then that version of Section 2 may well face serious constitutional challenge in light of *Shelby County*. In addition, if plaintiffs were not required to show some close nexus between statistical retrogression and actual disparate treatment and electoral results, then the words “totality of the circumstances” and “on account of” in Section 2 would be without meaning.

III. THE SUPREME COURT RULES THAT SECTION 5 IS UNENFORCEABLE.

On June 25, 2013, the United States Supreme Court held in *Shelby County v. Holder* that it is unconstitutional to use the coverage formula in Section 4(b) of the Voting Right Act to determine which jurisdictions are subject to the preclearance requirement of Section 5.⁵⁶ Section 4’s triggering formulas were based on turnout data from 1964, 1968, and 1972.⁵⁷ Data this old, said the Court, could no longer justify “federal intrusion into sensitive areas of state and local policymaking.”⁵⁸

If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today’s statistics tell an entirely different story.⁵⁹

The Court went on to cast doubt on Section 5 itself.

Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an “extraordinary departure from the traditional course of relations between the States and the Federal Government.” Our country has changed, and

55. *Gingles*, 478 U.S. at 44–46, 50–51.

56. 133 S. Ct. 2612, 31 (2013).

57. *Id.* at 2619–20.

58. *Id.* at 2624 (quoting *Lopez v. Monterey Cty.*, 525 U.S. 266, 282 (1999)).

59. *Id.* at 2630–31.

while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.⁶⁰

Thus, should Congress choose to revert to a preclearance regime, it must demonstrate that the “exceptional conditions” that justified the Voting Rights Act in 1965 still exist today. It is doubtful that such a showing could be made in light of the current registration and turnout rates of minority voters, some of which now outpace those of white voters.⁶¹ It is also doubtful that “current conditions” can continue to justify the use of a bare statistical hair-trigger to intrude into “sensitive areas of state and local policymaking.”⁶²

IV. RESURRECTING RETROGRESSION IN SECTION 2 CASES.

The Supreme Court’s statements in *Shelby County* fell on deaf ears at the Department of Justice, which, along with other aligned organizations proceeded to resurrect Section 5 under the guise of Section 2. Using a similar new strategy, lawsuits have been waged in Texas, North Carolina, Virginia, Ohio, and Wisconsin, challenging measures designed to increase voter confidence and protect the integrity of our elections. Some courts have unfortunately been willing to graft Section 5 retrogression principles onto Section 2, while others have prudently recognized that Section 2 requires much more than bare statistical disparities. A survey of these cases follows below.

A. Texas

Two months after the Supreme Court decided *Shelby County*, the Department of Justice filed a challenge to Texas’s voter photo identification law as a violation of Section 2.⁶³ After three additional actions were filed by private plaintiff groups, the cases were consolidated for decision in *Veasey v. Perry*.⁶⁴ The challenges were

60. *Id.* at 2631 (quoting *Presley v. Etowah Cty. Comm.*, 502 U.S. 491, 500-501 (1992)).

61. See, e.g., Rachel Weiner, *Black Voters Turned Out at Higher Rate Than White Voters in 2012 and 2008*, WASH. POST. (Apr. 29, 2013), https://www.washingtonpost.com/news/the-fix/wp/2013/04/29/black-turnout-was-higher-than-white-turnout-in-2012-and-2008/?utm_term=.db24af98944e.

62. *Shelby Cty.*, 133 S. Ct. at 2624 (quoting *Lopez*, 525 U.S. at 282).

63. *United States v. Texas*, No. 2:13-cv-00263 (S.D. Tex. Aug. 22, 2013), consolidated for decision in *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *aff’d in part, rev’d in part sub nom.* *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017).

64. 71 F. Supp. 3d 627, 632 (S.D. Tex. 2014) (consolidating *United States v. Texas*, No. 13-cv-00263 (S.D. Tex. Aug. 22, 2013); *Veasey v. Abbott*, No. 2:13-cv-00193 (S.D. Tex. June 26, 2013); *Texas State Conference of NAACP Branches v. Steen*, No. 2:13-cv-00291 (S.D. Tex. Sept. 17,

based on alleged disparities in identification ownership among white and black and Hispanic voters: “Upon information and belief, Hispanic and African-American voters in Texas, as compared to Anglo voters, disproportionately lack the forms of photo ID required by SB 14.”⁶⁵

SB 14 required voters to present photo identification when voting at the polls in person.⁶⁶ The statute permitted a number of forms of identification, including a driver’s license, personal ID card, or license to carry a concealed handgun issued by the Texas Department of Public Safety (“DPS”), a United States military ID card, a United States citizenship certificate containing a photo or a passport.⁶⁷ If the voter did not have one of these forms of identification, he or she could have obtained a free election identification certificate from the DPS. Voters suffering from a disability were exempt from the requirement to have photo identification.⁶⁸

In analyzing the results prong of Section 2, the district court in *Veasey* relied very heavily on the statistical disparity in current ownership of an acceptable form of identification:

Assigning his data the ethnicity information used in the SSVR,⁶⁹ Dr. Ansolabehere found that 5.8% of all SSVR voters lacked qualified SB 14 ID compared to 4.1% of non-SSVR registered voters—a pool including Anglos, African-Americans and all other races. This 1.7% difference is statistically significant.⁷⁰

Upon this, and other bare statistical disparities, the court then purported to apply *Gingles*:

In vote denial cases, a two-part analysis is conducted under the ‘totality of the circumstances’ test. First, a court determines whether the law has a disparate impact on minorities. Second, if a disparate impact is established, the court assesses whether that impact is caused by or linked to social and historical conditions that currently or in the past produced discrimination against members of the protected class.⁷¹

2013); and *Ortiz v. Texas*, No. 2:13-cv-00348 (S.D. Tex. Nov. 5, 2013)).

65. Complaint at ¶ 35-37, *United States v. Texas*, No. 13-cv-00263 (S.D. Tex. Aug 22 2013).

66. S.B. 14, 82d Leg., Reg. Sess. (Tex. 2011).

67. *Id.*

68. *Id.*

69. SSVR stands for the “Spanish Surname Voter Registration” list. *See Veasey*, 71 F. Supp. 3d at 661.

70. *Id.*

71. *Id.* at 694-95.

The court's citation to *Gingles* does not support the "disparate impact" analysis the court believes it does. *Gingles* makes no mention of disparate impact. Instead, true to the text of Section 2, *Gingles* says:

[T]he "right" question . . . is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice. . . . In order to answer this question, a court must assess the impact of the contested structure or practice on minority electoral opportunities "on the basis of objective factors."⁷²

The only reference to "impact" in this passage refers to the impact on real-world "electoral opportunities," not the bare statistical impact estimated by the challengers' statisticians during litigation.

The court did not address the fact that there was no barrier in the law on the basis of race to obtain photo identification. Indeed, no such racial barriers exist in the law. Instead, the law grants every Texas resident the same opportunity to obtain the identification necessary to vote. Stated in terms of Section 2, members of minority groups do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" as a result of the requirement that they show identification prior to voting.⁷³

The district court's finding that SB 14 violates Section 2 was ultimately affirmed by the Fifth Circuit sitting *en banc*.⁷⁴ The Fifth Circuit adopted the lower court's two part test despite its departure from the "totality of circumstances" inquiry mandated by *Gingles*.⁷⁵ *Gingles* does not bless a statistical exercise tripping Section 2 liability whenever an election process law, equally open to all and facially race neutral, has some theoretical (and *de minimis*) statistical difference in how the law impacts racial subgroups. This *de minimis* statistical standard to find a violation of Section 2 is synonymous with the standard used to justify an objection under Section 5 of the Voting Rights Act, which asked only whether the change in law would have a retrogressive effect on minorities.

"Retrogression is not the inquiry in § 2 dilution cases."⁷⁶ Nor is it the proper standard to apply in vote denial cases. The plain language of

72. Thornburg v. Gingles, 478 U.S. 30, 44 (1986).

73. 52 U.S.C. § 10301 (2012).

74. Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (en banc).

75. *Id.* at 243.

76. Holder v. Hall, 512 U.S. 874, 884 (1994).

Section 2 mandates an inquiry into the real-world impact on the electoral *opportunity* of minority groups. Statistical impact does not equate to opportunity. The *Veasey* courts' analyses strayed from the language of Section 2 and the teachings of *Gingles*.

The Supreme Court declined to review the lower courts' decision on January 23, 2017, citing the interlocutory posture of certain claims as the reason for its refusal.⁷⁷ However, the Court hinted that it would accept review at a later time.⁷⁸

B. Wisconsin

The reviewing court in *Frank v. Walker*⁷⁹ strayed even further from *Gingles* than did the courts in *Veasey*. Like *Veasey*, *Frank* involved a Section 2 challenge to the photo identification law (Act 23) enacted by the Wisconsin Legislature in 2011.⁸⁰ The *Frank* Court dispensed with *Gingles* almost entirely, adopting instead a test that relies explicitly on disparate impact.

I conclude that Section 2 protects against a voting practice that creates a barrier to voting that is more likely to appear in the path of a voter if that voter is a member of a minority group than if he or she is not. The presence of a barrier that has this kind of disproportionate impact prevents the political process from being “equally open” to all and results in members of the minority group having “less opportunity” to participate in the political process and to elect representatives of their choice.⁸¹

The version of Section 2 that the *Frank* court endorses demands perfect racial neutrality in all election law changes. Though sometimes difficult to quantify, election law changes will undoubtedly impact some racial group, including whites, to a degree greater than other groups. For example, changing the polling location inside a given precinct will, at least to some degree, impact one racial group more than another. Indeed, it is hard to imagine *any* election law change that could satisfy the *Frank* court's standard if challenged.

77. See *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (“Although there is no barrier to our review, the discriminatory purpose claim is in an interlocutory posture, having been remanded for further consideration. As for the §2 claim, the District Court has yet to enter a final remedial order. Petitioners may raise either or both issues again after entry of final judgment. The issues will be better suited for certiorari review at that time.”).

78. *Id.*

79. *Frank v. Walker*, 17 F. Supp. 3d 837 (E.D. Wis. 2014).

80. *Id.* at 842.

81. *Id.* at 870.

On appeal, the Seventh Circuit repudiated the district court's reliance on disparate impact, explaining, "Section 2(b) tells us that §2(a) does not condemn a voting practice just because it has a disparate effect on minorities.⁸² Rather, Section 2 requires evidence that the right to vote has been denied on account of race. Act 23 did "not draw any line by race," and there was no evidence demonstrating "that blacks or Latinos have less 'opportunity' than whites to get photo IDs."⁸³ Rather, what the lower court found was that "because they have lower income, these groups are less likely to *use* that opportunity. And that does not violate §2."⁸⁴

The challengers did not show that the right to vote had been "denied" as Section 2 requires. "[U]nless Wisconsin makes it needlessly hard to get photo ID, it has not denied anything to any voter."⁸⁵

The Seventh Circuit also prudently recognized that the "totality of the circumstances" inquiry mandated by Section 2 actually requires an inquiry into the "totality of circumstances" bearing on the voting rights of minorities. That is, electoral "opportunity" under Section 2 cannot be considered on the basis of a single voting change "in isolation," but must be considered on the basis of the "entire voting and registration system."⁸⁶ To review each piece of legislation on disparate impact in "isolation" could "dismantle every state's voting apparatus."⁸⁷

At oral argument, the logic behind the challengers' new approach to litigating Section 2 claims under Section 5 standards was on full display.

[C]ounsel for one of the two groups of plaintiffs made explicit what the district judge's approach implies: that if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates §2; and if white turnout on election day is 2% higher, then the requirement of in-person voting violates §2.⁸⁸

The Seventh Circuit found such a reading of Section 2 to be "implausible," noting that under such a theory that the designation of motor-vehicle agencies as registration locations would be unlawful if it was shown that minorities were less likely to own automobiles and

82. Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014).

83. *Id.*

84. *Id.*

85. *Id.* at 753.

86. *Id.* at 753.

87. *Id.* at 754.

88. *Id.*

therefore less likely to need drivers' licenses.⁸⁹ "It is better to understand §2(b) as an equal-treatment requirement (which is how it reads) than as an equal-outcome command (which is how the district court took it)."⁹⁰

In practice, the versions of Section 2 employed by the Fifth Circuit and the *Frank* district court can effectively be used to turn any statistical disparity regarding the use of electoral procedures by different racial groups into an unlawful, discriminatory "effect" simply by pointing to a general history of discrimination within the challenged jurisdiction. It is difficult to imagine any voting change that could survive under such a relaxed application of the Voting Rights Act.

C. North Carolina

The aforementioned lawsuits were pre-enforcement challenges. That is, the challenges were brought prior to the laws' enforcement and sought to preliminarily enjoin the laws before they could go into effect and produce the discriminatory results the challengers alleged they would produce.

The litigation in North Carolina,⁹¹ however, has involved both pre- and post-enforcement challenges under Section 2, providing the reviewing court with a rare chance to assess the real-world impact of the election law change on the electoral opportunities of minorities. The post-enforcement reality was far different from the outcome the challengers predicted would occur absent relief from the court. In other words, in North Carolina, the bare statistical disparities offered by the challengers were not a successful predictor of the actual effects of the law on minority voters.

Following the *Shelby County* decision, North Carolina enacted SL 2013-381, which provided for several changes to North Carolina election procedure, including

- a requirement that voters present some form of photo identification prior to voting in person;
- elimination of the ability to register to vote and to vote simultaneously (same-day registration);

89. *Id.*

90. *Id.*

91. North Carolina State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 338 (M.D.N.C. 2014), *aff'd in part, rev'd in part sub nom.* League of Women Voters of North Carolina v. North Carolina, 769 F.3d 224 (4th Cir. 2014), *stayed in* North Carolina v. League of Women Voters of North Carolina, 135 S. Ct. 6 (2014).

- a reduction in the number of days one could vote in person before election day from 17 days to 10 days;
- a requirement that voters to cast ballots in the precinct where they actually lived; and,
- eliminated the ability of 16 and 17 year-olds to register to vote.⁹²

Plaintiffs sought an injunction on Section 2 grounds against the elimination of same-day registration (SDR). At the outset, the *McCrorry* court rejected any analysis under Section 2 that incorporated Section 5’s retrogression standard:

[T]he court is not concerned with whether the elimination of SDR will “worsen the position of minority voters in comparison to the preexisting voting standard, practice, or procedure,” . . . a Section 5 inquiry, but whether North Carolina’s existing voting scheme (without SDR) interacts with past discrimination and present conditions to cause a discriminatory result.⁹³

To meet their burden, Plaintiffs, like the other challengers, “presented un rebutted testimony that black North Carolinians have used SDR at a higher rate than whites in the three federal elections during which SDR was offered.”⁹⁴ However, following the textual mandates of Section 2, the court looked beyond the change to same-day registration and assessed the “totality of circumstances” related to black registration. The court noted the high registration rate of black North Carolinians (95.3%) and the fact that black registration presently eclipsed white registration by 7.5 percentage points.⁹⁵ Plaintiffs’ experts, not surprisingly, credited SDR for producing such high registration rates and predicted that without SDR, black registration would plunge by 3 percent.⁹⁶

Yet, under the “totality of the circumstances,” the plaintiffs could not demonstrate what mattered— unequal access to the polls. The court noted the numerous other ways residents could register to vote, including the option to register by mail.⁹⁷ No plaintiff could

92. Voter Information Verification Act, ch. SL 2013-381, 2013 N.C. Sess. Laws (2013).

93. *N.C. State Conf. of the NAACP*, 997 F. Supp. 2d at 352; *see also id.* at 351 (“Section 2 does not incorporate a ‘retrogression’ standard.”); *id.* at 348 (“Section 2 asks “whether the current electoral law interacts with historical discrimination and social conditions to cause black voters to have unequal access to the polls.”).

94. *Id.* at 348–49.

95. *Id.* at 350.

96. *Id.*

97. *Id.* at 350–351.

demonstrate “how these various other options failed to provide an equal opportunity to any black voter who otherwise wished to use SDR.”⁹⁸ The simple fact that black “voters *preferred* to use SDR over these methods does not mean that without SDR voters lack equal opportunity.”⁹⁹

McCrory would travel all the way to the Supreme Court before arriving back at the district court for a trial on the merits.¹⁰⁰ A decision by the Supreme Court staying an injunction by the Fourth Circuit allowed all of the challenged provisions to remain in effect for the 2014 election. These circumstances allowed the district court to assess on remand the real-world impact of North Carolina’s changes in voting procedure.

Following remand, the district court conducted 21 “extensive” days of trial on Plaintiffs’ claims.¹⁰¹ On April 25, 2016, the district court issued a 186-page opinion, rejecting all Section 2 attacks on the challenged provisions, as well as all other legal theories advanced by the plaintiffs.

Following guidance from the Fourth Circuit, the court stated the Section 2 inquiry as a two-element test:

- (1) whether the specific election changes, individually and cumulatively, “impose a discriminatory burden” on African Americans and Hispanics in North Carolina, such that they “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”; and
- (2) whether the “discriminatory burden” is “caused by or linked to social and historical conditions that have or currently produce discrimination against” African Americans and Hispanics.¹⁰²

Consistent with the text, the court prudently recognized that what matters in the end is “opportunity,” judged on the basis of the totality of the circumstances. For that reason, the court found that “the relative ability of [minority] voters to vote through the remaining options

98. *Id.* at 351.

99. *Id.*

100. *North Carolina v. League of Women Voters*, 135 S. Ct. 6 (2014).

101. *N.C. State Conf. of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 331 (M.D.N.C. 2016)

102. *Id.* at 465 (quoting *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 240 (4th Cir. 2014)).

available' under SL 2013-381 is relevant to whether they have an equal opportunity to participate in the political process."¹⁰³

The court proceeded to address each of the *Gingles* factors in turn, analyzing to what extent each factor aided the plaintiffs' claims.¹⁰⁴ Consistent with the new approach to Section 2, Plaintiffs' experts offered statistics showing "disproportionate use" of the eliminated mechanisms as evidence that SL 2013-381 would ultimately result in inequality of opportunity for minority voters.¹⁰⁵ More pointedly, the "[p]laintiffs claim[ed] disproportionate use reflects need."¹⁰⁶

Plaintiffs' approach was fundamentally flawed in at least one aspect. Disproportionate use statistics are merely a tool that permits a *prediction* as to the effects of the challenged law. For this reason, they are "less probative"¹⁰⁷ of the laws' actual effects. Because SL 2013-381 was in effect for the 2014 election, the court was able to "stop speculating and observe real life results."¹⁰⁸ The actual "results" showed that "African Americans fared *better* in terms of registration and turnout rates in 2014, *after the challenged mechanisms were eliminated*, than in 2010, when they were in place."¹⁰⁹

To be sure, voting prior to SL 2013-381 might have been more convenient for some. However, "the question is not whether the voting law could be made more convenient — they virtually always can be. Rather, the question is whether the electoral system as applied treats protected classes the same as everyone else, determined by the totality of the circumstances."¹¹⁰ Under the totality of the circumstances, black "North Carolinians not only did not backslide under the new law, but rather continued to increase their participation."¹¹¹ Clearly the data suggest that minorities are "more adaptable than Plaintiffs claim[ed]"¹¹² they would be under the new law.

103. *Id.* (quoting *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 556 (6th Cir. 2014)).

104. *See generally N.C. State Conf. of the NAACP*, 182 F. Supp. 3d at 422–65.

105. *Id.* at 422.

106. *Id.* at 480.

107. *Id.* at 425.

108. *Id.* at 487.

109. *See id.* ("In fact, not only did African American turnout increase at a greater rate than other groups' turnout in 2014 with SL 2013-381 in place, but that general election saw the smallest white-African American turnout disparity in any midterm election from 2002 to 2014.").

110. *Id.* at 465.

111. *Id.* at 485.

112. *Id.* at 476.

It is worth mentioning that North Carolina's voter identification law bore a striking resemblance to the law precleared under Section 5 in South Carolina, in so far as it included a "reasonable impediment" exception. Voters who could not obtain an acceptable form of identification "need only complete two forms" in order to cast a ballot in North Carolina.¹¹³ It is simply untenable to maintain that such system "denies" anyone the right to vote on account of race.

On appeal, the Fourth Circuit reversed and ordered the lower court to "permanently enjoin all of the challenged provisions, including the photo ID provision."¹¹⁴ The court skipped right over Section 2's "results" prong and held that the "North Carolina General Assembly enacted the challenged provisions of the law with discriminatory intent."¹¹⁵ While Section 2's "intent" prong is beyond the scope of this article, the Fourth Circuit's use of disparate impact to find such intent merits a few comments.

Prior to enacting SL 2013-381, "the legislature requested data on the use, by race, of a number of voting practices."¹¹⁶ Because the legislature then proceeded to modify election mechanism, which the data showed were disproportionately used by African Americans, the court determined that the legislature's actions could be explained only by "intentional racial discrimination."¹¹⁷

The Fourth Circuit has effectively taken the challengers' new approach a step further, grafting a retrogression standard onto Section 2's *intent* prong. While the inference of discrimination drawn by the court is itself troubling, the court's holding could potentially work to harm minority voting interests. Legislators may henceforth ignore data concerning minority use of voting mechanism, lest they be accused of intentional discrimination in the event their votes negatively impact minority voting preferences. All branches of government should be encouraged to consult all relevant data sources before making changes that could affect voting rights. The Fourth Circuit's opinion does the opposite.

The State of North Carolina sought review by the Supreme Court. And although the Fourth Circuit did not address Section 2's "result"

113. *Id.* at 470.

114. *Id.* at 241.

115. *Id.* at 215.

116. *Id.* at 214.

117. *Id.*

prong, the State asked the Supreme Court to resolve the following issues:

Whether a federal court has the authority to reimpose, under §2 of the Voting Rights Act, the same “anti-retrogression” preclearance standard invalidated as to §5 by Shelby County. . .

Whether statistical racial disparities in the use of voting mechanisms or procedures are relevant to a vote denial claim under §2.¹¹⁸

However, whether the Supreme Court will even have a chance to provide guidance on the aforementioned issues remains unclear. As of the date of this article, the North Carolina Attorney General has moved to dismiss its petition for a writ of certiorari.¹¹⁹ In response, the North Carolina General Assembly has moved to be added as a petitioner for purposes of defending SL 2013-381.¹²⁰

CONCLUSION

Whether through the North Carolina case or subsequent litigation, the Supreme Court will likely have to decide which version of Section 2 is correct. But the answer involves an issue more complicated than simple statutory interpretation. As Justice Thomas recognized, “Federal oversight of state election practices is a matter than risks exacting “significant federalism costs.”¹²¹ Indeed, the Supreme Court’s resolution of Section 2 implicates competing Constitutional prerogatives— the power of the states to govern their elections and the power of the Federal Government to enforce the Fifteenth Amendment. Whatever the Court’s answer, that balance of power will be affected in a way that will shape our country’s elections for the foreseeable future.

118. Petition for a Writ of Certiorari, *State of North Carolina v. North Carolina State Conference of the NAACP*, No. 16-833 (Dec. 27, 2016).

119. Motion to Dismiss Petition for a Writ of Certiorari, *North Carolina v. North Carolina State Conference of the NAACP*, No. 16-833 (Feb. 21, 2017).

120. *Id.*

121. See *Lopez v. Monterey Cty.*, 525 U.S. 266, 293 (1999) (Thomas, J., dissenting) (collecting cases discussing this issue).