GUARANTEEING THE RIGHT TO VOTE FOR TWENTY-FIRST CENTURY AMERICA

Brandon Haase[†]

INTRODUCTION

The general elections of 2008 and 2012 saw incredibly high rates of minority participation in the election process, seeming to fulfill the highest aims of the Voting Rights Act of 1965 ("VRA").[1] Shortly after the beginning of President Obama's second term, however, central provisions of this landmark piece of civil rights legislation were dismantled by the Supreme Court in *Shelby County v. Holder*.[2] In the aftermath of this ruling, state and local legislatures all over the nation scrambled to enact laws tightening the voting process.[3] Voter advocacy groups scrambled nationwide to challenge the spate of new laws made possible by the Court's new approach. Yet, despite the remedies still remaining in the VRA, these challenges have met with mixed success at best, leaving strict voting and registration laws in place across the country and prompting many to call for the reversal of *Shelby County* and the reinforcement of the VRA.[4]

This Note argues that the VRA can no longer adequately safeguard the enfranchisement of Americans, and must be replaced by new legislation that will guarantee the right to vote. Part I discusses the aims and effects of the VRA. Part II outlines the rise of new challenges to voting rights following the turbulent Presidential election of 2000. Part III focuses on the Court's decision in *Shelby County*, particularly in relation to Section 5's preclearance regime. Part IV maps the contours of a Section 2 claim after *Shelby County*. Finally, Part V examines several recent legal challenges brought in federal courts to state voting laws, arguing that the provisions of Section 2 are inadequate to combat the new vote denial, particularly in jurisdictions without a historical connection to the preclearance regime. This Note concludes by positing that only new legislation will address the inadequacies of the VRA and truly ensure enfranchisement for all Americans.

[†] J.D. Candidate, Notre Dame Law School, 2018; B.A., North Greenville University, 2014. My deepest gratitude goes out to my parents for their continual care, encouragement, and love. Thanks also to Professor Nagle for his wonderful assistance and advice, and thanks to my fellow *Journal of Legislation* staff members for their dedication and hard work. Finally, a special thanks to Dr. Paul Thompson for inspiring me to write, think, and care about the ongoing struggle for justice.

[1] 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/.

[2] Shelby Cty., Ala. v. Holder, 133 S.Ct. 2612 (2013).

[3] Kara Brandeisky, Hanqing Chen & Mike Tigas, *Everything That's Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 4, 2014), http://www.propublica.org/article/voting-rights-by-state-map.

[4] *New Voting Restrictions in Place for 2016 Presidential Election*, BRENNAN CENTER FOR JUSTICE (Sept. 12, 2016), http://www.brennancenter.org/voting-restrictions-first-time-2016.

PART I: THE VOTING RIGHTS ACT OF 1965

But for a short period of high political participation following the Civil War, African Americans would not see the benefits promised in the Fourteenth and Fifteenth Amendments for nearly another century.[5] The laws utilized by southern state legislatures to suppress the votes of African Americans encompassed a dizzying range of sinister practices, including literacy tests, poll taxes, byzantine voter-registration processes, exclusion of African Americans from "non-state" party primaries, and other measures.[6] These practices combined with physical violence and economic coercion from whites to guarantee minimal participation by African Americans in the political process for over half a century.[7]

In the decades leading up to the Civil Rights Movement of the 1960s, there were no African American representatives from the South in federal office and only a miniscule number in state legislatures.[8] In every southern state, racially-motivated voting laws reigned, ensuring that African Americans had little or no access to the vote, despite making up a quarter to over half of the population in many southern states.[9] Additionally, judicial precedents like the "state-action" doctrine set a high bar for voting-rights advocates to clear when challenging discriminatory voting practices.[10] Where challenges in federal courts were successful, southern legislatures quickly enacted new laws, pledging to take whatever efforts were necessary to thwart African American access to the ballot.[11]

In response to rising pressure from the Civil Rights Movement, Congress passed several omnibus acts which sought to ensure the voting rights and other civil liberties of African Americans throughout the nation, particularly in the South.[12] These acts included measures significantly broadening the ability of the Attorney General to challenge state voting laws in court, as well as other provisions authorizing the inspection of election proceedings by federal officials.[13] Despite these efforts, the acts failed to achieve the desired increase in voter registration, primarily because of the expense and time involved in challenging every discriminatory state law in federal court.[14]

After the failure of the first three attempts, Congress passed the VRA of 1965, one of the strongest pieces of civil rights legislation in American history, which included

---

[5] Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 LA. L. REV. 181, 202-03 (2015).

[6] *Id.* at 205-08.

[7] *Id.* at 206-09, 212-13.

[8] *Id*. at 188-89.

[9] *Id.*

[10] *See* Grovey v. Townsend, 295 U.S. 45, 53, 55 (1935) (holding that the Democratic Party was not a "state" organization and, therefore, their exclusion of blacks from the primary process was not a "state-action" within the meaning of the Fourteenth Amendment).

[11] Finkelman, *supra* note 5, at 217.

[12] Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 4-7 (1965).

[13] *Id.* at 5.

[14] *Id.* at 7-8.

both judicial and administrative remedies.[15] Sections 2 and 3 of the Act focused on judicial remedies by granting a right of action to sue state governments for discriminatory voting practices and by broadening the jurisdiction of the courts to oversee the effective enforcement of the Act.[16] Though these provisions were not dissimilar from lackluster provisions contained in earlier legislation, the scope of remedies available granted much more power to claimants, the Attorney General, and federal courts to ensure that judicial challenges to state laws were able to go forward.[17]

Although provisions similar to Sections 2 and 3 were present in prior voting rights laws, the measures adopted in Sections 4 and 5 distinguished the 1965 Act from its predecessors. Section 4 contained a "coverage formula" which mandated that any state with 1) a discriminatory election law where 2) less than 50% of the state's eligible voters were registered or voted in the previous presidential election could not bar any citizen from voting for failure to comply with a list of commonly-used voter-suppression measures.[18] Stronger still, Section 5 contained the famous "pre-clearance" provision, requiring jurisdictions covered under Section 4 to submit any change in their election laws to a federal court for a declaratory judgment that the new procedure does not discriminate on the basis of race.[19]

Later amendments to the Act in 1975 and 1982 expanded the law's reach to cover jurisdictions with non-African American minority groups, provided for bilingual ballots where needed, and attacked vote dilution in the redistricting process.[20] Notably, the 1982 amendments also added a "results" test to Section 2, specifying that any state law or practice that had a discriminatory *effect* could be within the reach of litigation.[21] Most recently in 2006, Congress reauthorized the VRA for an additional twenty-five years with few changes.[22]

Following the implementation of the VRA, African American voter registration in all covered jurisdictions jumped immediately from just under 30% to over 50%, closer to the overall white voter registration rates of over 70%.[23] Despite these initial successes, the struggle for equal access to the ballot was far from over. State legislatures opposed to the VRA were able to find new ways to circumvent or mitigate its effects; one of the most common of these tactics was vote dilution.[24]

The real strength of voter dilution practices, such as gerrymandering, lay in their subtlety; they were (and are) more likely to "reduce, rather than deny, electoral opportunity" making them "more difficult to detect."[25] While the forms taken by vote dilutive

[15] *Id.* at 9.

[16] Voting Rights Act of 1965, Pub. L. No. 89-110, §2-3, 79 Stat. 437, 437-38 (1965) (codified as amended at 52 U.S.C. § 10301-10314).

[17] *Id.* at § 3; *see* Christopher, *supra* note 12, at 7-8.

[18] Voting Rights Act of 1965 §4.

[19] *Id.* at § 5.

[20] Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 702-05 (2008).

[21] *Id.* at 704-08.

[22] Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2621 (2013).

[23] Tokaji, *supra* note 20, at 702; BERNARD GROFMAN, LISA HANDLEY AND RICHRAD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 23-24 (1992).

[24] Tokaji, *supra* note 20, at 703.

[25] Howard M. Shapiro, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE

measures vary, at their core, they are certain "electoral structural schemes, combined with past and present social and economic conditions" which diminish the effects of minority votes, further inhibiting their ability to participate meaningfully in elections.[26] After voter-advocacy groups successfully challenged dilutive practices in several southern states based on their disproportionately negative effects on minority voters, the Supreme Court concluded in *Mobile v. Bolden* that claimants must demonstrate that the measures were intentionally discriminatory in order to prevail under Section 2 of the VRA.[27] Due to the difficulties inherent in demonstrating explicit discrimination, challenges to dilutive election practices became significantly harder.[28]

The Court's holding in *Bolden* impelled Congress to significantly amend the VRA in 1982.[29] The 1982 amendment added a "results" test to Section 2 of the VRA, widening the scope of possible claims to include laws that were not discriminatory on their face but were discriminatory in their effects.[30] The courts charged with interpreting this new phrasing looked to the seven factors listed in the Senate Report accompanying the amendment, known collectively as the "Senate Factors," which provided criteria for assessing whether a measure had discriminatory effects.[31] The construction of these factors specifically targeted vote dilution practices common after the Court's holding in *Bolden*, but it explicitly avoided the controversial step of requiring proportional representation for racial minorities in Congress.[32]

The 1982 amendment to the VRA played an important role in increasing minority representation in federal and state legislatures; however, the results test and accompanying factors were primarily aimed at instances of vote *dilution* not vote *denial*.[33] As a result, courts in the years following the 1982 amendment struggled to understand and consistently apply the "results" test and Senate Factors to laws that implicated access to the ballot (vote denial measures).[34] This confusion would become immensely important

L.J. 189, 197 (1984).

[26] David D. O'Donnell, *Wading into the "Serbonian Bog" of Vote Dilution Claims Under Amended Section 2 of the Voting Rights Act: Making the Way Towards a Principled Approach to "Racially Polarized Voting*", 65 MISS. L.J. 345, 352 (1995).

[27] City of Mobile, Ala. v. Bolden, 446 U.S. 55, 66-67 (1980); Tokaji, *supra* note 20, at 704.

[28] Tokaji, *supra* note 20, at 720.

[29] *Id.* at 703-04.

[30] 52 U.S.C. § 10301(a) (1982); Tokaji, *supra* note 20, at 704-05.

[31] These factors included: 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. Tokaji, *supra* note 20, at 706-07 (citing S. REP. NO. 07 97-417, at 28-29 (1982)). *See infra* notes 80-81 for a fuller discussion of these factors. *See also* Veasey v. Abbott, 830 F.3d 216, 245 (5th Cir. 2016).

[32] O'Donnell, *supra* note 26, at 347.

[33] Tokaji, *supra* note 20, at 708-09.

[34] Tokaji, *supra* note 20, at 709.

almost two decades later, as states began to implement a new wave of election laws increasing the number of barriers to the ballot box.

PART II: NEW VOTE DENIAL MEASURES

The closely contested Presidential election of 2000 prompted Congress to pass the Help America Vote Act of 2002 ("HAVA"), a sweeping election law aimed at reforming election processes and eliminating voter fraud in the states.[35] Importantly, HAVA required states to enact a minimum level of voter-identification ("voter ID") standards.[36] In response, state legislatures across the nation enacted a series of new voter-identification requirements, the majority of which surpassed the minimum standards set forth in HAVA.[37] In addition to imposing strict voter ID requirements, states also enacted tighter restrictions on the voter registration process and alternative forms of voting (for example, absentee voting, early voting, etc.).[38]

In contrast to "first-generation" vote suppression measures that facially and explicitly discriminated against minority voters by restricting access to the vote, and "second-generation" measures that primarily "limit the collective impact of the choices minority voters make at the voting booth when aggregating their votes,"[39] the new voting laws following the enactment of HAVA constitute a novel form of vote denial. These forms of vote suppression are racially neutral in their construction, and rely on indirect methods such as voter-ID requirements to affect the same results.[40] Importantly, as will be discussed below, the provisions of the VRA have proven mostly ineffective in combating this new form of vote denial.[41]

The primary vote denial methods imposed after HAVA fell into three categories: election administration laws, changes to voting machines, and felony disenfranchisement.[42] While voter machine modifications and felony disenfranchisement represent significant challenges to voter access, this Note will focus primarily on laws affecting election administration, including voter-ID requirements, the modification of registration procedures, and changes to voting processes.

Voter-ID measures involve laws requiring the presentation of certain types of ID to vote in an election.[43] These laws are generally categorized into "strict" and "non-strict" forms, with "strict" laws directly requiring voters to present (rather than requesting) one

[35] Samuel P. Langholz, *Fashioning a Constitutional Voter-Identification Requirement*, 93 IOWA L. REV. 731, 745 (2008).

[36] *Id.* at 745-46.

[37] *Id.* at 747-48.

[38] Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL'Y REV. 471, 474-75 (2016).

[39] Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77, 82 (2010).

[40] *See* Tokaji, *supra* note 20, at 691-92. Tokaji collectively refers to these newer forms of voting restrictions as the "new vote denial." *Id.* at 692. *See* Garrett, *supra* note 39, at 81.

[41] Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 82 (2014).

[42] Tokaji, *supra* note 20, at 691-92.

[43] *Id.* at 712.

of a limited number of (usually) state-issued IDs.[44] Voters without the necessary ID are allowed to cast a "provisional ballot," which will be counted only if the proper documentation is presented within a short window after the election.[45] Non-strict laws allow election officials to *request* the presentation of an ID but do not mandate that the ID be presented.[46]

A large body of research suggests that these voter ID requirements—which constitute a major aspect of the new wave of vote denial—have a much greater potential to negatively impact minorities and lower-income voters.[47] Some studies suggest that the number of voting-age Americans without an acceptable ID for voting purposes could be between 6-10%; others place the number even higher, and minorities are more likely than whites to be within this subset.[48] This disparity stems from a variety of different economic factors and differs widely by geography.[49] In rural areas, for example, African Americans who are disproportionately disadvantaged economically often own cars in lower numbers and have minimal access to public transportation, thus making it much more difficult to obtain the requisite documents needed for an acceptable identification.[50]

Given the fact that the VRA's strongest provisions (related to preclearance) apply to jurisdictions with a clear history of official and private discrimination against African Americans and other minorities, one might expect racial disparities in the ownership of identification to differ in covered and non-covered jurisdictions. The research, however, suggests otherwise: the disparities are roughly equal in historically covered and non-covered jurisdictions.[51] In fact, formerly covered jurisdictions fare better than non-covered jurisdictions, suggesting that election laws requiring the presentation of an ID to vote would have roughly equal, if not worse, effects in formerly non-covered areas compared to covered jurisdictions.[52]

While the VRA and its subsequent amendments were tailored to attack the forms of vote denial and dilution present in the 1960s and 1980s, the VRA's provisions were ill-equipped to protect these potential victims of the new vote denial. The preclearance regime outlined in Section 5 effectively policed the highly polarized redistricting process for decades, but did little to halt the progress of the new vote denial methods listed above.[53] From the implementation of HAVA to the watershed decision in *Shelby County* (see discussion below), only a miniscule percentage of vote denial measures triggered a Section 5 action from the Department of Justice, compared to tens of thousands of redistricting laws and other vote dilution methods.[54] Furthermore, over that same period, only three vote denial measures were successfully challenged under the Section 5 preclearance

[44] *Voter ID History*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 18, 2016), http://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx#Chart.

[45] *Id.*

[46] *Id.*

[47] Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 25-26 (2013).

[48] Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 660-61 (2007).

[49] Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter Identification* 4, 10-13, BRENNAN CENTER FOR JUSTICE (2012), http://www.brennancenter.org/publication/challenge-obtaining-voter-identification.

[50] *Id.* at 4-5.

[51] Stewart, *supra* note 47, at 42-43.

[52] Stewart, *supra* note 47, at 42-43.

[53] Tokaji, *supra* note 41, at 80.

[54] Tokaji, *supra* note 41, at 80.

regime, constituting a tiny fraction of all election law changes affecting access to the vote.[55]

Another weakness of the Section 5 preclearance regime was its susceptibility to partisan influence, resulting in similar laws receiving disparate treatment based on the administration enforcing the VRA. The Attorney General was not required to provide a justification for a determination on a law's conformity to the VRA, nor were prior rulings binding as precedents.[56] In contrast to many other agency administrative rulings, judicial review is entirely unavailable for the DOJ's decisions on preclearance. Unsurprisingly, under this system, similar laws in comparable jurisdictions have received different treatment. In 2005, under the Bush Administration, the administration-appointed head of the voting rights division pre-cleared a Georgia voter-ID law over the strong objections of DOJ analysts who predicted that the law would have a retrogressive effect on minority voters.[57] By contrast, a similar South Carolina law was denied preclearance under the Obama Administration in 2011.[58]

Despite the seeming ineffectiveness of Sections 2 and 5 in addressing vote denial measures, Congress reauthorized the entirety of the VRA in 2006. During the Congressional debate over the reauthorization of the VRA, legislators amassed a voluminous record of continuing vote-suppression throughout the nation, particularly in regions falling under the Section 4 coverage formula.[59] Notably, since the last reauthorization, the preclearance mechanisms of the VRA had denied legislatures in covered jurisdictions from implementing over 700 new election laws.[60] These "second-generation" and new vote denial measures were in part what prompted the legislature to reauthorize the VRA in full, without any substantial changes to its most important provisions, including the coverage formula.[61] Vote-denial measures in covered jurisdictions prior to and following HAVA still had to go through the VRA's onerous pre-clearance process. By 2013, however, a ruling by the Supreme Court would bring the whole edifice of preclearance to the ground.

PART III: *SHELBY COUNTY* AND ITS EFFECTS

No case in recent history has reshaped American election law like the 2013 *Shelby County* decision.[62] Due to the decision's far-reaching effects and continued pertinence, this section will break down the main issues involved in the case. Of particular interest for our purposes is the Court's language related to the presence (or absence) of continued racial discrimination in areas falling within Section 4's coverage formula.

[55] Tokaji, *supra* note 41, at 80-81.

[56] Kathleen M. Stoughton, Note, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 292, 310 (2013).

[57] *Id*. at 309.

[58] *Id.* at 310.

[59] H.R. REP. NO. 109-478, at 36 (2006).

[60] *Id.*

[61] Angelica Rolong, Comment, *Access Denied: Why the Supreme Court's Decision in* Shelby County v. Holder *May Disenfranchise Texas Minority Voters*, 46 TEX. TECH L. REV. 519, 547-49 (2014).

[62] Shelby Cty. v. Holder, 133 S.Ct. 2612 (2013). A possible exception is Citizens United v. FEC, 558 U.S. 310 (2010).

In 2013, the Supreme Court granted certiorari in the case of *Shelby County v. Holder*. In 2000, Shelby County submitted a slew of redistricting proposals and annexations to the U.S. Attorney General ("AG") subject to the preclearance requirements of Section 4 of the VRA.[63] The AG denied all of their requests, citing Shelby County's failure to justify their changes with legitimate reasoning and reliable data.[64] In response, Shelby County filed suit against the office of the AG seeking a declaratory judgment that Sections 4 and 5 of the VRA were unconstitutional and requesting a permanent injunction against the AG's power to enforce them.[65] After losing at both the D.C. District and Appeals courts,[66] Shelby County appealed to the Supreme Court, which granted certiorari.

In a 5-4 decision authored by Chief Justice Roberts, the Court overturned the constitutionality of the pre-clearance formula in Section 4. Chief Justice Roberts began by pointing out that the VRA constituted an unprecedented, yet warranted encroachment by the federal government into areas previously under the exclusive purview of the states.[67] According to the majority, the continued viability of such extraordinary measures required a clear demonstration that they were still necessary in light of current conditions.[68]

While acknowledging the historical importance of the coverage formula, the majority contended that "[n]early 50 years later, things have changed dramatically."[69] Citing higher rates of minority registration, turnout, and representation, the majority argued that in its complete reauthorization of the coverage formula in 2006, Congress unjustifiably acted "as if nothing had changed."[70] The original law divided the country into "covered" and "non-covered" jurisdictions on the basis of the demonstrable disparities in restrictive election laws and voter registration between Southern and Northern states; these distinctions, the Court argued, were no longer viable.[71]

Having determined that the conditions which justified the coverage formula in 1965 were no longer valid, the Court went on to attack the AG's argument for failing to "demonstrate the continued relevance of the formula to the problem it targets."[72] The Court also dismissed the evidence compiled by both Congress in 2006 and the AG, pointing to continued discrimination in the covered jurisdictions, arguing that while this evidence may serve to justify *a* coverage formula, it could not justify a wholesale recertification of the *old* coverage formula.[73] In light of these considerations, the Court struck down the coverage formula in its entirety.

The Court's decision to strike down the coverage formula voided the applicability of the preclearance provisions of Section 5 of the VRA.[74] Without the coverage formula,

[63] Rolong, *supra* note 61, at 541-42.
[64] Rolong, *supra* note 61, at 541-42.
[65] Rolong, *supra* note 61, at 542.
[66] *Shelby*, 133 S.Ct. at 2621-22.
[67] *Id.* at 2624.
[68] *Id.* at 2429.
[69] *Id.* at 2625.
[70] *Id.* at 2626.
[71] *Id.* at 2627-28.
[72] *Id.* at 2628.
[73] *Id.* at 2628-29.
[74] Rolong, *supra* note 61, at 542-43.

no state could possibly fall within the pre-clearance requirements of Section 5, ending the prophylactic nature of the VRA's remedies to discriminatory voting laws. While the litigation route provided by Section 2 remained open as did pieces of other sections, the Civil Rights Movement's "crown jewel" was effectively gutted by the *Shelby* majority.[75]

Significantly, the majority directly addressed the dissent's argument that evidence of second-generation and new vote denial measures justified Congress' wholesale reaffirmation of the 1965 coverage formula. The majority argued that while the evidence pointing to minority vote-dilution measures was important, these impediments were completely distinct from the blatant measures addressed by the 1965 VRA and only highlighted Congress' failure to adjust the Act to match current circumstances.[76] In short, the Court dismissed the continuing relevance of the VRA's coverage formula, emphatically concluding that Congress should have drafted a new coverage formula, rather than merely re-affirming the old.[77]

Immediately following the *Shelby* decision, states that previously fell within the scope of the coverage formula began drafting and implementing new voting requirements and election laws.[78] In quick succession, North Carolina passed a stringent voter ID law, shortened the period for early voting, and mandated the discarding of ballots cast at the wrong polling station.[79] From Texas to South Carolina, covered jurisdictions scrambled to pass laws that had been held up for years by the preclearance regime.[80]

PART IV: SECTION 2 CLAIMS AFTER SHELBY COUNTY

After *Shelby*, with the fall of the preclearance regime, plaintiffs seeking to challenge laws implicating access to the vote must rely for protection on Section 2 of the VRA.[81] The provisions of Section 2, however, have failed to protect against a variety of laws that disproportionately negatively impact minority voters.[82] This failure is largely due to how the courts have shaped the doctrines surrounding the applicability of the VRA to all types

[75] Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 71 (2014) (quoting Heather Gerken, *Goodbye to the Crown Jewel of the Civil Rights Movement*, SLATE (June 25, 2013) http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/supreme_court_and_the_voting_rights_act_goodbye_to_section_5.html).

[76] *Shelby*, 133 S.Ct. at 2629-30.

[77] *Id.* at 2629.

[78] Vincent Marinaccio, *Protecting Voters' Rights: The Aftermath of Shelby v. Holder*, 35 WHITTIER L. REV. 531, 542-43 (2014).

[79] *Id.*

[80] *Id.*

[81] *Shelby*, 133 S.Ct. at 2631.

[82] *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2158 (2015); *see also* Ellen Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982 Final Report of the Voting Rights Initiative, University of Michigan Law School*, 39 U. MICH. J.L. REFORM 643, 654-56 (2006); J. Gerald Hebert and Armand Defner, *More Observations on Shelby County, Alabama and the Supreme Court*, CAMPAIGN LEGAL CTR. BLOG (Mar 1, 2013), http://www.campaignlegalcenter.org/news/blog/more-observations-shelby-county-alabama-and-supreme-court; Nicholas Stephanopoulos, *The South after Shelby County* 3, 9-10 (U. Chi. Law Sch. Pub. Law & Legal Theory Working Paper Workshop, Paper No. 451, 2013), http://www.law.uchicago.edu/files/file/451-ns-south.pdf.

of voting rights issues, including vote dilution and vote denial claims, creating legal barriers to plaintiffs seeking to vindicate their voting rights.

The basic framework of a Section 2 claim involves analyzing the respective law under a two-part framework. The first step requires that "the challenged standard, practice, or procedure must impose a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice . . . ."[83] This first step involves a "totality of circumstances" [84] test, requiring an analysis of a host of interconnected factors surrounding the passage and application of the law.[85]

If the first step is established, the court then analyzes whether there is a "sufficient causal link" between the burden imposed and the "social and historical conditions produced by discrimination."[86] This involves determining whether the negative effects of the law are "in part . . . caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class."[87] This step requires weighing the circumstances of the particular case in light of the Senate Factors listed above, including elements such as the "extent of any history of official discrimination . . . that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process," or the "extent to which members of the minority group in the state . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process."[88] Importantly, these factors are not exclusive, and no requisite number of these factors must be proven to demonstrate a violation of Section 2.[89]

While these doctrines have been recently applied to many vote denial claims, as noted above, the legal precedent established following the 1982 Amendment to Section 2 mainly dealt almost exclusively with instances of vote dilution, not denial.[90] This lack of doctrinal clarity surrounding the applicability of Section 4 to vote denial measures has huge consequences for those in non-covered jurisdictions, which, after *Shelby*, includes *all* jurisdictions.[91] Without the remedies of the provisions of Sections 4 and 5, plaintiffs

[83] Veasey v. Abbott, 830 F.3d 216, 244 (5th Cir. 2016).

[84] Laura Hunter Dietz, *Voter Identification Requirements as Denying or Abridging the Right to Vote on Account of Race or Color under § 2 of the Voting Rights Act*, 12 A.L.R. FED. 3D ART. 4 (2016).

[85] For instance, in United States v. Berks Cty., Pennsylvania, 277 F. Supp. 2d 570, 580 (E.D. Pa. 2003), a federal District Court permanently enjoined a county from continuing to require photo identification only from Hispanic voters on election day, stating that the totality of the circumstances demonstrated that "a jurisdiction's political processes are not equally open to participation by minority voters." Cases like this one demonstrate the implications of the totality of circumstances doctrine; courts evaluate not only the law, but rather "the entire voting and registration system" as well; *see* Dietz, *supra* note 84, at § 11.

[86] *Veasey*, 830 F.3d at 245.

[87] *Id.* at 244.

[88] *Id.* at 245. Here, the Court included two additional factors from prior rulings: "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."

[89] Thornburg v. Gingles, 478 U.S. 30, 45 (1986).

[90] Tokaji, *supra* note 20, at 691-92 (2006).

[91] Myrna Pérez and Vishal Agraharkar, *If Section 5 Falls: New Voting Implications*, 4-5 BRENNAN CENTER FOR

challenging vote denial measures must now operate within the murkier bounds of the Section 2 results test outlined above.

The challenges facing plaintiffs under Section 2 are compounded by two interconnected factors. The first of these factors pertains to the general historical differences between covered and non-covered jurisdictions. Due to the widespread existence in the South of official discrimination in the form of slavery and the Jim Crow regime, lawsuits in formerly covered jurisdictions tend to provide much more evidence pertaining to the Senate Factors listed above, particularly factor 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."[92] By contrast, plaintiffs in non-covered jurisdictions are often forced to point to less concrete or more distant examples of discrimination, such as general racial inequalities that contribute to socio-economic disparities in voting access.[93]

Although the low availability of evidence for official discrimination presented an obstacle in non-covered jurisdictions, the second factor weighing against plaintiffs made their odds of success significantly longer—namely, a strong judicial preference for examples of historical and/or official discrimination in addition to a showing of disparate impact in the relevant jurisdiction.[94] Unsurprisingly, strict voter-identification laws passed in states with a clear history of official minority vote suppression have been the easiest to defeat, with clear victories for voting rights advocates coming in quick succession in North Carolina[95] and Texas.[96] Similar laws in states outside of historically "covered" jurisdictions have proven tougher to challenge; Ohio[97] and Wisconsin[98] laws restricting early voting and heightening identifications requirements were affirmed by their respective federal circuit courts. The following section will outline four cases implicating voting access—two within formerly covered jurisdictions and two without, demonstrating the weaknesses inherent in judicial precedent surrounding Section 2 and its ineffectiveness in promoting equal access to the vote.

JUSTICE (2013), https://www.brennancenter.org/sites/default/files/publications/Section_5_New_Voting_Implications.pdf.

As a reminder, covered jurisdictions included states that at the time of the VRA's passage had 1) a discriminatory election law, and 2) less than 50% of the state's eligible voters were registered or voted in the previous presidential election, the strong remedies of preclearance and judicial review were available prior to Shelby (52 U.S.C. § 10303). Practically, these states were much less likely to amend their election laws in ways that would disadvantage minorities, as they would have to contend with the harsh measures of the preclearance regime.

[92] *Veasey*, 830 F.3d at 245; Rolong, *supra* note 61, at 548-49 (2014).

[93] *See generally*, Frank v. Walker, 768 F.3d 744 (7th Cir. 2014), cert. denied, 135 S. Ct. 1551 (2015).

[94] Katz et al., *supra* note 82, at 655-56 (statistical research demonstrated a higher percentage of victories for plaintiffs in Section 2 cases in covered jurisdictions, despite those jurisdictions accounting for less than one-quarter of the nation's population).

[95] *See* N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).

[96] *See Veasey*, 830 F.3d 216 (5th Cir. 2016) (en banc).

[97] *See* Ne. Ohio Coal. for the Homeless v. Husted, 837 F.3d 612 (6th Cir. 2016).

[98] *See generally*, Frank, 768 F.3d at 744.

PART V: COURTS, COVERAGE, AND SECTION 2

Veasey v. Abbot involved a Section 2 challenge to a "strict" Texas voter-ID law.[99] In 2011, the Texas State Legislature passed Senate Bill 14 ("SB 14"), a bill designed to heighten the identification requirements for voting.[100] In order to be eligible to vote, individuals had to present one of several valid forms of photo ID to poll workers, including currently valid driver's licenses, concealed weapons permits, and other forms of ID.[101] If the applicant lacked any of these, they could apply for an election-specific ID using two forms of "secondary ID," including a birth certificate, naturalization papers, and a small list of other possible forms.[102] Voters unable to provide these forms of ID could cast a "provisional ballot" on the day of the election which they could validate by supplying the necessary ID within six days.[103] The law passed, despite serious concerns that it would fail to pass through the VRA's (now defunct) preclearance regime still in effect in Texas.[104]

The law was fully implemented in June 2013, immediately following the Supreme Court's decision in *Shelby County*.[105] Shortly after its implementation, voter advocacy groups challenged the law in the Federal District Court for the Southern District of Texas, alleging the law violated various Constitutional provisions and Section 2 of the VRA.[106] Texas responded to these allegations claiming the measures were necessary to prevent voter fraud.[107]

In a lengthy opinion, the District Court held that the law violated several provisions of the U.S. Constitution and had an impermissibly discriminatory effect on minorities under Section 2 of the VRA.[108] As a result, the judge entered a permanent injunction against the law's enforcement shortly ahead of the November 2014 elections.[109] Texas, however, managed to obtain a stay of the District Court's injunction, allowing SB 14 to apply during the election cycle.[110] After several more procedural steps, the case arrived in the Fifth Circuit Court of Appeals for a determination of, among other things, whether the law was passed with discriminatory purpose under Section 2 of the VRA.[111]

---

[99] *See generally*, *Veasey*, 830 F.3d. 216.

[100] *Veasey*, 830 F.3d at 225.

[101] *Id.*

[102] *Id.* at 226.

[103] *Id.*

[104] *Id.* at 239-40.

[105] *Id.* at 227.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 227-28.

[109] *Id.* at 228.

[110] *Id.*

[111] *Id.* at 228-29 (On initial appeal, the Fifth Circuit held that the District Court made impermissible legal errors in their analysis of the legislature's alleged "discriminatory purpose," and remanded the case for further proceedings; the Fifth Circuit did affirm the District Court's holding that the law had a discriminatory effect under Section 2 of the VRA). *Id.* at 229.

The court began by dismantling the District Court's determination that SB 14 was enacted with discriminatory purpose in violation of the Equal Protection Clause, arguing that the court relied on infirm and unreliable evidence of bias.[112] The court remanded this portion of the case for a reweighing of the evidence, but it also highlighted the evidence in the record that weighed in favor of a finding of purposeful discrimination on the part of the legislature.[113]

Next, the court addressed whether the law had a discriminatory effect in violation of the "results test" of Section 2 of the VRA.[114] As a necessary preliminary consideration, the court established the applicable standard while admitting that "[a] clear test . . . has yet to emerge."[115] They pointed to the "Two-Part Framework" utilized by other circuit courts.[116] The first portion of this framework involves determining whether: "[t]he challenged standard, practice, or procedure . . . impose[s] a discriminatory burden on members of a protected class, meaning that members of the protected class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[117] This first step is mainly concerned with establishing a burden on the right to vote that has a disparate impact on minorities.[118]

The second portion of the framework adopted by the Fifth Circuit involves establishing that the burden in part one is "in part . . . caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class."[119] For this portion of the analysis, the court stressed the importance of looking to the "*Gingles*" ("Senate") factors mentioned above.[120] In keeping with prior Section 2 jurisprudence, the court stressed that the Senate Factors are not "exclusive," and there is no requirement for a specific number to be satisfied by the circumstances of the case.[121]

After establishing the relevant legal standard, the court moved on to a discussion of the merits of the case. The court examined evidence that SB 14 placed a burden in the form of travel, time, and indirect costs to minority voters, and determined this evidence sufficient to support the District Court's ruling that the law placed "significant and disparate burdens on the right to vote."[122]

The court then examined the record in light of the Senate (a.k.a. *Gingles*) factors, affirming the District Court's determination that several of the tests were satisfied in light of the evidence, especially those factors relating to a history of discrimination by the state.[123] First, the court noted that the Texas legislature amply demonstrated a history of

[112] *Id.* at 230-35 (The difficulty in demonstrating discriminatory purpose is one of the primary drawbacks to Equal Protection challenges to election laws; it is incredibly rare for politicians to explicitly admit their aim to discriminate against a particular group).
[113] *Id.* at 235-42.
[114] *Id.* at 243-44.
[115] *Id.* at 244 (quoting Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 554 (6th Cir. 2014)).
[116] *Id.* (referring specifically to League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014), and Ohio State Conference of the NAACP v. Husted, 768 F.3d at 554).
[117] *Veasey*, 830 F.3d at 244.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 245.
[121] *Id.*at 246.
[122] *Id.* at 256.
[123] *Id.* at 257-58.

official discrimination (Senate factor 1), as they had racially gerrymandered in every redistricting process since 1970.[124] Additionally, they noted the longstanding discrimination present in Texas prior to the Civil Rights Era, acknowledging that while this had "less force than more contemporary evidence," it could still weigh in favor of a finding of official discrimination.[125]

The court also confirmed the lower court's findings on the presence of racially polarized voting (Senate Factor 2) and significant effects from past discrimination (Senate Factor 5).[126] In Texas, racially polarized voting existed in 252 of Texas' 254 counties, amply meeting the *Gingles* test.[127] The court also noted that there were significant disparities in "education, employment, and health" between Texas' white population and minorities, which could be attributed to historic discrimination.[128] These factors, in the view of the court, could reasonably impede the ability of some minority individuals to effectively participate politically.[129]

In light of the foregoing considerations, as well as several others,[130] the Fifth Circuit determined that in light of the "totality of the circumstances," the District Court's holding that SB 14 had a discriminatory effect on minorities was well founded.[131] The court especially highlighted the fact that the law "specifically burdens Texans living in poverty, who are less likely to possess qualified photo ID, are less able to get it, and may not otherwise need it," and further, that these persons were disproportionately more likely to be minorities.[132]

In *Veasey*, the court clearly considered Texas' long history of official and private discrimination relevant to evaluating the discriminatory nature of the statute. Their assessment of the present effects of historical discrimination, even more distant discrimination, represents a willingness on the part of the court to incorporate the more broad effects of systemic racism into their analysis of Section 2. This willingness stands in stark contrast to that displayed by several appellate courts in formerly non-covered jurisdictions, as will be discussed below.

Veasey illustrates clearly the importance of a history of official discrimination in demonstrating a discriminatory effect under Section 2 of the VRA. Another case out of the Fourth Circuit, *North Carolina Conference of NAACP v. McCrory*, serves to further highlight this trend.[133] There, the North Carolina legislature, dominated by Republicans, passed an "omnibus" election bill immediately after the U.S. Supreme Court struck down

[124] *Id.* at 257.
[125] *Id.* at 258.
[126] *Id.* at 258-59.
[127] *Id.* at 258.
[128] *Id.*
[129] *Id.* at 259.
[130] *See id.* at 263. Specifically, evidence regarding the lack of responsiveness of the legislature towards the needs of minorities and the pre-textual nature of the rationale behind the passage of SB 14, pointing to evidence that the legislature's concerns about undocumented immigrants voting were "misplaced," and noted that the legislature failed to incorporate any ameliorative measures into the bill, despite their knowledge that the law was likely to reduce turnout.
[131] *Id.* at 264.
[132] *Id.* (quoting Veasey v. Perry, 71 F.Supp.3d 627, 664 (S.D. Tex. 2014)).
[133] 831 F.3d 204 (2016).

the preclearance regime in *Shelby*.[134] This law imposed tighter restrictions on a number of registration and voting procedures, including reducing the number of eligible government IDs, eliminating a week of early voting, ending the practice of same-day registration, eliminating provisional pre-registration for older teenagers, and declaring invalid ballots mistakenly cast in the right county, but the wrong precinct.[135]

On the same day the bill passed, a variety of civil rights advocacy groups, including the North Carolina chapter of the National Association for the Advancement of Colored People ("NAACP"), filed actions challenging the law in federal court.[136] Along with alleging violations of the Fourteenth and Fifteenth Amendments, these challengers' primary contention was that the law produced a discriminatory result in violation of Section 2 of the VRA.[137] After a variety of procedural twists and turns,[138] the District Court entered judgment against the claimants, ruling that the law effected no discriminatory results under Section 2.[139]

Upon appeal, the Fourth Circuit sought to determine whether the law was enacted with "racially discriminatory intent" in violation of the Fourteenth Amendment and Section 2 of the VRA.[140] The court began with two preliminary considerations, first pointing out that appellate courts are empowered to reverse "clearly erroneous" factual determinations on the part of inferior courts, and that in some cases, need not even remand that factual issue to the lower court.[141] Second, the court noted that a facially neutral law, like the omnibus voting bill, can be "motivated by invidious racial discrimination," and that such laws are "just as abhorrent . . . as laws that expressly discriminate on the basis of race."[142]

After discussing the legal standards required to make a showing of racial intent in the passage of a statute,[143] the court elaborated on some "principles" to be utilized in adjudicating a Section 2 claim.[144] In particular, the court noted that as a threshold matter for demonstrating a violation of Section 2, a plaintiff must establish that voting in the relative jurisdiction is racially polarized.[145] The court went on to argue that while "[u]sing race as a proxy for party may be an effective way to win . . . [but] intentionally targeting a particular race's access to the franchise because its members vote for a particular party . . . constitutes discriminatory purpose.[146]

The court then turned to discussing the substance of the plaintiff's claim under the VRA, beginning with the assertion that evaluating a violation of Section 2 requires a

[134] N.C. Conf. of NAACP v. McCrory, 831 F.3d 204, 214 (2016).
[135] *Id.* at 216-219.
[136] *Id.* at 218.
[137] *Id.*
[138] *See id.* at 218-219. Several preliminary injunctions were issued staying the law's implementation due to the immanence of the 2014 mid-term elections, but the law finally went into effect in March of 2016.
[139] *Id.* at 219.
[140] *Id.*
[141] *Id.* at 219-20.
[142] *Id.* at 220.
[143] *Id.* at 220-21, particularly in relation to demonstrating a violation of the Fourteenth Amendment's Equal Protection guarantees.
[144] *Id.* at 223.
[145] *Id.* at 221 (citing one of the Senate Factors).
[146] *Id.* at 222.

consideration of "'[the] historical background of the decision' challenged as racially discriminatory."[147] Pointing out North Carolina's long history of official discrimination and race-based voting laws, the court concluded that the District Court had erred in "ignoring or minimizing" this reality.[148] The court further chided the lower court for "inexplicably" failing to take North Carolina's past history into account, noting that the lower court blatantly dismissed this history by making the curious finding that "there [was] little evidence of official discrimination since the 1980s."[149] The Fourth Circuit found this determination by the District Court clearly erroneous, pointing to the numerous instances plaintiffs successfully challenging governmental vote denial and dilution measures in North Carolina following the 1980s.[150]

While the court went on to discuss the disparate negative impact of the bill on the access of African-Americans to the vote, as well as the sequence of events surrounding the bill's passage,[151] the core of its holding rested on the fact that the state demonstrated a clear history of official discrimination. These historical "contextual facts," concluded the court, revealed the law's true discriminatory purpose, aimed at suppressing the "unprecedented" levels of African American turnout in the past election cycles.[152] As a result,[153] the Fourth Circuit reversed the holding of the District Court and remanded the case for a permanent injunction staying the enforcement of the law.[154]

In both *Veasey* and *N.C. Conf.*, the courts ruled that the respective state voting laws violated the provisions of Section 2 of the VRA, and permanently enjoined their enforcement. While the courts took note of the current effects of historical discrimination and the disparate impact of the laws on African Americans and minorities, they focused their analyses on the evidences of historical *official* discrimination on the part of the state and local governments. By concentrating their attention on the state's historical discrimination, rather than on the Senate Factors probing the negative effects of current private discrimination, both courts seemed to implicitly prioritize evidence of historical official discrimination over indicia of the effects of recent private discrimination.

Further evidence of this implicit judicial prioritization lies in the fact that both laws passed in jurisdictions previously under the preclearance regime, due to their long history of suppressing the votes of African Americans.[155] This history provided the crucial evidence of past official discrimination on the part of the state government that the courts found dispositive to demonstrating a violation of Section 2. As will be demonstrated

[147] *Id.* at 223 (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977)).

[148] *Id.*

[149] *Id.* at 223 (quoting N.C. State Conf. of NAACP v. McCrory, 182 F. Supp. 3d 320, 497 (M.D.N.C. 2016)).

[150] *Id.*

[151] *See id.* at 227-28. The court found it particularly indicting that Republican legislators crafted the bill specifically to inhibit the forms of registration and voter ID more commonly utilized by African American voters. For example, while many forms of ID commonly possessed by whites were considered sufficient, public assistance IDs which "a reasonable legislator . . . could have surmised that African Americans would be more likely to possess . . ." (quoting *N.C. Conf.* 182 F. Supp. 3d at 497). *See also id.* at 229-30.

[152] *Id.* at 226.

[153] *See id.* at 219. The court also held that the law violated the Fourteenth Amendment, determining that the law had been passed with discriminatory intent in violation of the Equal Protection Clause.

[154] *Id.* at 242.

[155] DEP'T OF JUSTICE, *Jurisdictions Previously Covered by Section 5*, www.justice.gov (August 6, 2015), https://www.justice.gov/crt/jurisdictions-previously-covered-section-5.

below, plaintiffs in states without this history of state-sponsored vote suppression fared differently.

In 2014, the Ohio legislature enacted Senate Bill 205 ("SB 205") and Senate Bill 216 ("SB 216"), which made significant changes to provisional voting and absentee processes in Ohio precincts.[156] SB 205 prohibited any election official from helping voters fill out an absentee ballot, short of serious disabilities.[157] The bill also required voters to fill out absentee ballot identification envelopes completely, including mandatory information such as their name, address, birthdate, signature, and ID form.[158] Previously, this information was requested, not required, giving election officials discretion as to which ballots to accept.[159] Additionally, the bill mandated that election officials mark as incomplete any ballot containing information that did not exactly match that in the voter's registration file, notifying the voter that they have seven days after the election to cure the defect.[160]

The second bill, SB 216, shortened the cure period for ineligible provisional ballots from ten days to seven.[161] Within that shortened period, voters were not allowed to cure any defects other than those relating to a failure to provide a correct driver's license number, social security information, or identification.[162] Furthermore, the election board is under no obligation to notify a voter that their ballot was improperly prepared or marked.[163]

Several groups, including the Ohio Democratic Party ("ODP") and several non-profit organizations for the homeless ("charities") challenged the law in federal court.[164] ODP claimed that the heightened requirements of the law would place a significant burden on their efforts to educate and register groups of voters.[165] The charities alleged that the laws will have a serious detrimental effect on the ability of homeless persons in Ohio to vote, as illiteracy levels are very high, and their problems in filling out the voting forms with perfect accuracy are "pervasive and profound."[166] Additionally, the charities alleged that the law's new requirements would significantly divert their resources and constitute a heavy burden on their efforts on behalf of Ohio's homeless population.[167]

At trial, the plaintiffs introduced statistical and witness evidence in support of their claim that the bill placed a negative impact on voters generally, and specifically a disparate impact on minority voters.[168] Expert testimony revealed that according to a controlled study, minorities were more likely to cast provisional ballots than whites, and they were

[156] Ne. Oh. Coal. For the Homeless v. Husted, No. 2:06-CV-896, 2016 WL 3166251, 1 (S.D. Ohio June 7, 2016).
[157] *Id.* at 11. Acceptable forms of disability include illiteracy, blindness, or disability.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.* at 12.
[162] *Id.*
[163] *Id.*
[164] *Id.* at 1, 6-8.
[165] *Id.* at 8.
[166] *Id.* at 7.
[167] *Id.* at 7-8.
[168] *Id.* at 20-21.

more likely to have both their provisional and absentee ballots rejected than whites, suggesting that the law disparately impacted their ability to have their votes counted.[169] The plaintiffs also introduced testimony from numerous individuals whose votes were rejected because of mistakes they considered to be "very minor and obvious," such as accidentally switching the month and day categories in the birthdate field.[170] Furthermore, none of these voters were notified that their ballots had been filled out incorrectly, giving them no chance to correct these errors.[171]

The District Court's VRA Section 2 analysis opened with an acknowledgment that the statistical evidence suggested a negative disparate impact on minority voters resulting from the laws, requiring a further examination of the law in light of the Senate Factors.[172] The court began with Senate Factor 5, referring to 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," holding that this factor applied to the situation of a disproportionate share of Ohio's homeless population, as well as Ohio's African American population generally.[173] The court found that African Americans in Ohio faced disproportionately adverse outcomes in terms of employment, poverty, income, professional advancement, education, health, housing, loan disbursement, and many other categories, stemming from a long history of structural, official, and individual prejudice.[174]

The court then turned to an analysis of the law in light of Senate Factor 1, which denoted "the extent of any history of official [voting-related] discrimination in the state . . . ."[175] The court pointed to Ohio's nineteenth century history of explicit discrimination against African Americans in the voting process, as well as the state's official discrimination against minority voters well into the twentieth century.[176] While the court noted that Ohio was not subjected to the preclearance regime of the VRA in the 1960s, the state had passed voter ID laws that were enjoined due to their discriminatory effect.[177] In the eyes of the District Court, the law's effects combined with recent vote-suppressive actions by the Ohio legislature served to demonstrate the continued relevance of official discrimination in Ohio.[178]

After analyzing the evidence and relevant legal standards, the court applied the two-part judicial framework for Section 2,[179] determining that 1) the plaintiffs amply demonstrated the disproportionate negative impact of the two bills on African American voters, and 2) according to their analysis of the Senate Factors, all of them (except for factor 4) favored a finding that both laws "interact with social and historical conditions to decrease

[169] *Id.* at 21.
[170] *Id.* at 14-16.
[171] *Id*.
[172] *Id.* at 24-25.
[173] *Id.* at 25.
[174] *Id.* at 26.
[175] *Id.* at 25.
[176] *Id.* at 27-29.
[177] *Id.* at 29.
[178] *Id.*
[179] *See* discussion *supra* notes 73-79.

African-Americans' access to the electoral process."[180] As a result, the District Court entered judgment for the plaintiffs on their Section 2 claims.[181]

On appeal, the Sixth Circuit reviewed all VRA-related decisions by the lower court.[182] Beginning with a reiteration of the two-part framework utilized by the District Court, the Sixth Circuit confirmed the absolute necessity of demonstrating a disparate impact on minority voters to prevail in a Section 2 claim. Despite the clearly erroneous standard of review governing the appeals process, the court engaged in a rigorous re-examination of the factual findings of the District Court, particularly in respect to the court's reliance on statistical data to support a finding of disparate impact.[183]

The Sixth Circuit's close re-weighing of the facts in the record resulted in a finding that directly contradicted the lower court's, concluding with a determination that "the plaintiffs have not shown that the provision disproportionately affects minority voters."[184] This determination comprised the entirety of their analysis of the Section 2 claims.[185] The court concluded that the impact of the law overall was "insignificant;" therefore, the law could not disparately impact minority voters.[186] In reaching this conclusion, they did not analyze any of the District Court's lengthy discussion of the Senate Factors, seeming to understand that the entirety of the case hinged on the fact that the disparate impact was insignificant and could therefore not be a violation of Section 2 of the VRA.[187]

Judge Keith, writing in dissent, strongly criticized the majority for failing to correctly apply the legal standard for disparate impact.[188] According to the dissent, the majority unjustifiably added a requirement that the discriminatory impact of a law must be "significant" in order for the VRA to proscribe its enforcement.[189] This standard, argued Judge Keith, was incorrect because the VRA does not require "a certain number of affected persons" but looks instead at the impact on minorities as compared to non-minorities."[190]

The dissent's arguments and the plaintiff's failure in *Ohio Coal* highlights the difficulty of prevailing on a Section 2 claim where the outcome depends absolutely on demonstrating a disparate impact. While the majority's baffling decision to reverse the lower court's factual findings somewhat muddies the legal outcome of the case, it is clear that the Sixth Circuit did not consider the discriminatory impact of the law significant enough to warrant Section 2 protection, in spite of the District Court's lengthy discussion of the racial disparities present in Ohio's voting population. While the majority paid lip service

[180] *Ne. Oh. Coal*, 2016 WL 3166251 at 49-50.

[181] *Id.* at 53.

[182] Ne. Ohio Coal. For the Homeless v. Husted, 837 F.3d 612, 625 (6th Cir. 2016).

[183] *Id.* at 625, 627-28.

[184] *Id.* at 629. The dissent excoriated the majority for this inexplicable departure from the "clearly erroneous" standard of review for findings of fact, stating that "the Majority largely ignores these findings and instead applies a de novo standard of review . . . merely because it sees the record differently" (*Id.* at 656 (Keith, J., dissenting)).

[185] *Id.* at 628.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 662 (Keith, J., dissenting).

[189] *Id.* at 663 (Keith, J., dissenting).

[190] *Id.*

to the language of Section 2, the freedom with which they reworked the standard of review and essence of the legal standard to kill the claim "in its infancy" illustrates the difficulties posed in demonstrating a violation of the VRA in vote denial cases.[191] Not only must plaintiffs display a high level of disparate impact from lengthy statistical aggregates, but they must also compete against an uncertain, court-determined threshold for what counts as a "significant" impact.[192]

Another case within a formerly non-covered jurisdiction, *Frank v. Walker*, further illustrates the difficulties facing plaintiffs in demonstrating a violation of Section 2, particularly in districts without an obvious recent history of vote discrimination.[193] *Frank* involved challenges by voter advocacy groups to a 2011 Wisconsin law requiring all Wisconsin residents to present a photo ID to vote.[194] The District Court addressed only two of the plaintiffs' allegations—namely, that the law placed an unjustifiable burden on the right to vote under the Fourteenth Amendment and that the law violates Section 2 of the VRA.[195]

The law in question required voters to present one of nine possible forms of photo ID in order to participate in the election, including a driver's license, a passport, or a student ID from an accredited Wisconsin university, among others.[196] Notably, the law prohibited the use of IDs issued by Veterans Affairs or state technical colleges.[197] Similar to the Ohio law, ballots cast without an appropriate ID were considered provisional, to be counted only if the voter presented the appropriate form by Friday of the week following the election.[198] Voters lacking the necessary ID could obtain one by presenting "primary identification documents" at a Wisconsin DMV service center.[199]

The court's Section 2 analysis outlined the difficulty in constructing the appropriate test in instances of vote denial, rather than vote dilution.[200] After reviewing the applicability of the Senate Factors to instances of vote dilution, the court concluded that these tests were not relevant to vote denial claims as they were adopted in the context of vote dilution.[201] In the absence of this guidance, the court determined to "focus on the text of the statute."[202] The resulting test adopted by the court stated 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."[203]

After establishing this standard, the District Court examined the evidence to determine whether Wisconsin's ID requirement was "more likely to appear in the path" of a

[191] *Id.* at 661 (Keith, J., dissenting).
[192] Elmendorf & Spencer, *supra* note 82, at 2183-84.
[193] Frank v. Walker, 17 F. Supp. 3d 837, 842 (E.D. Wis.), rev'd, 768 F.3d 744 (7th Cir. 2014).
[194] *Id.*
[195] *Id.*
[196] *Id.* at 843.
[197] *Id.* at 844 (The state did promulgate an administrative rule allowing technical college ID application procedures which matched those of state-run universities to be used as a form of voter ID).
[198] *Id.*
[199] *Id.*
[200] *Id.* at 868-69.
[201] *Id.* at 869.
[202] *Id.* at 869-70.
[203] *Id.* at 870.

minority voter.[204] The court recounted the testimony of several expert witnesses to the effect that minorities in Wisconsin were less likely to possess the requisite ID.[205] This testimony, according to the court, convincingly demonstrated that the negative effects of the law were more likely to impact minorities.[206]

While the defendants conceded this point, they argued that a violation would require a showing that minorities are "incapable" of obtaining qualifying IDs.[207] The court rejected this argument, stating that "no authority supports defendants' view of the law," as the cases cited by defendants on this case merely demonstrate that a disproportionate impact on minorities must be tied "in some way to the effects of discrimination."[208] The court also pointed to the fact that even "small increases" in the costs of voting can have a major deterrent effect. Thus, total impossibility is not a useful standard for evaluating the impact of election laws heightening the requirements on voters.[209] Furthermore, even the ability of minorities, in theory, to obtain the state-issued voting ID is undercut by lower rates of ownership of the required underlying documents (such as birth certificates).[210]

The court noted that while a showing of disparate impact did not require plaintiffs to demonstrate a total barrier to voter access, Section 2 did require plaintiffs to connect that disparate impact to the effects of "past or present discrimination."[211] Reviewing the evidence related to racial disparities in the areas of wealth and income, the court found that the increased rates of poverty and unemployment in minority communities demonstrated that the Wisconsin law was "more likely to burden" minority voters.[212] This finding, combined with the court's other Fourth Amendment holdings, led the court to enjoin the enforcement of the law.[213]

On appeal to the Seventh Circuit, the court reframed the two-part test for establishing a violation of Section 2.[214] First, the challenged law must "impose a discriminatory burden on members of a protected class, meaning that members of the protected class 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'"[215] The second step stated that the burden "must in part be caused by or linked to 'social and historical conditions' that have or currently produce discrimination against members of the protected class."[216] While the court claimed to adopt this standard as binding, it remained "skeptical" about the second portion of the test because it failed to distinguish between official and unofficial discrimination.[217]

[204] *Id.*
[205] *Id.* at 870-71.
[206] *Id.*
[207] *Id.* at 874.
[208] *Id.*
[209] *Id.* at 875.
[210] *Id.* at 875-76.
[211] *Id.* at 876-77.
[212] *Id.* at 878-79.
[213] *Id.* at 879.
[214] Frank v. Walker, 768 F.3d 744, 754-55 (7th Cir. 2014).
[215] *Id.* (quoting League of Women Voters of N.C. v. N.C., 769 F.3d 224, 240 (4th Cir. 2014)).
[216] *Id.* at 754-55.
[217] *Id.* at 755.

The court then evaluated the findings of the District Court in light of the first step of the Section 2 framework. The court noted that the District Court failed to find that a large number of eligible voters were unable to obtain a qualifying ID despite attempting to procure one, indicating that voters, despite obstacles, were still technically capable of acquiring the required ID.[218] Second, the court pointed out that the record contained no evidence of the effects of voter ID laws in other states on minority turnout, which would provide "[a]ctual results" which are "more significant than litigants' predictions."[219] Nonetheless, the court accepted the lower court's finding that the law had a disparate outcome on minority voters in Wisconsin.[220]

Though the circuit court tentatively accepted the lower court's finding of a disparate impact, they disagreed that the law's negative effects were "traceable to the effects of discrimination in areas such as education, employment, and housing."[221] The court pointed out that the district judge did *not* find that the state of Wisconsin itself had discriminated against minorities in these areas.[222] This finding, argued the court, was critical, as "governments are responsible for their own discrimination, but not for rectifying the effects of other persons' discrimination."[223] As a result, the court found that the plaintiff's claim failed the second portion of the Section 2 test.

Throughout the case, the court's arguments seemed to suggest an underlying presupposition—namely, that the effects of current and historical private discrimination, even those that result in a disparate impact on the ability of minorities to vote, are not relevant to determining whether a law violates Section 2. Early on in the case, the court suggested that the term "disenfranchised" did not properly apply to Wisconsin voters who lacked IDs, as the possible reason they were without the required IDs was their "unwilling[ness] to invest the necessary time" due to the fact that in the court's view, "registering to vote in Wisconsin is easy."[224] In addition to inexplicably focusing on registration procedures as opposed to the ID requirement, this statement seems to dismiss the lower court's factual determination that it is not "easy" for everyone to obtain IDs; rather, it is disproportionately difficult for minorities.

Furthermore, while refusing to consider the record in light of the Senate Factors related to socioeconomic disparities and racially-polarized elections, the court argued that in light of the totality of the circumstances, "blacks do not seem to be disadvantaged by Wisconsin's electoral system as a whole," as they turned out to vote in higher rates than whites. In addition to seemingly suggesting that Section 2 could not be violated as long as African Americans maintained high turnout rates, this argument seems to indicate a belief on the part of the court that evidence of partial success for some in minority communities serves to absolve the government from any responsibility to other minority citizens who lack access to the vote.[225]

[218] *Id.* at 747.

[219] *Id.*

[220] *Id.* at 753.

[221] *Id.* (quoting Frank v. Walker, 17 F.Supp.3d 837, 878 (E.D. Wis., 2014)).

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.* at 753-54. The court acknowledged that this argument could lead to a conclusion that as long as blacks turned out to vote at higher rates than whites, the state could curtail their voting rights. The court responded to

Curiously, and most tellingly, the court gave no explanation for their seeming departure from the language of the Section 2 test, despite their insertion of a requirement that the disparate impact must be the result of current *official* discrimination.[226] The court does, however, appear to assume the conclusion of the very question at issue in the second portion of the test—namely, whether voters of different races in Wisconsin had equal opportunity to access qualifying IDs. The court, while explaining its skepticism about the second part of Section 2's test, stated that "in vote dilution cases . . . the government itself draws the district lines; no one else bears responsibility;" while in this case, the discriminatory act is *not* attributable to the government, because in Wisconsin, "everyone has *the same opportunity* to get a qualifying photo ID."

In framing the case this way, the court appears to be making an *a priori* determination that voter-IDs are equally obtainable by all members of the population, regardless of the effects of racial discrimination. Therefore, the government's requirement that photo-IDs be presented at the polling place could not violate Section 2. This reasoning seems to reflect an underlying assumption on the part of the court that the effects of current and historical private discrimination, even if they result in a disparate impact on the ability of minorities to vote, are not relevant to determining whether a law violates Section 2. This critical determination colors the entirety of the court's analysis, and results in a law that appears to satisfy both portions of the Section 2 test, but to no avail for the plaintiffs.[227] In light of this determination, the court reversed the lower court's holding, ruling that the law conformed to the requirements laid out in Section 2.[228]

The foregoing cases provide a small picture of what seems to be a broader trend: Section 2 operates much more effectively in states with a historical connection to the preclearance regime, and a demonstrated history of official discrimination. As Section 2 is the most important remaining pillar of the VRA, a failure on its part to curtail the effects of discriminatory laws represents a failure of the whole of the VRA. Despite the fact that these legal disputes revolved around similar laws, with similar disparate impacts on minority voting rights in their respective states, the courts came to different conclusions based on the same test. These results suggest that a reexamination and possible replacement may be in order for the VRA.

CONCLUSION

The right to vote is fundamental to our democratic system, and a failure to preserve the voting rights of any Americans results is a failure to protect those of all Americans.[229] Despite the incredible successes of the VRA in the latter half of the twentieth century, the challenges presented by a new generation of vote denial laws, combined with the death of the preclearance regime, have left the landmark statute unable to defend voting rights in the future. Without the preclearance regime, voters are left to the uncertain

this claim by saying that such a scenario *would* violate Section 2. However, its point in discussing turnout rates was to evaluate the law in light of the "totality of circumstances."

[226] *Id.* at 755.

[227] See discussion at notes 210-16.

[228] Frank v. Walker, 768 F.3d 744, 755 (7th Cir. 2014).

[229] Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)).

and expensive whims of the justice system in states with deep histories of official discrimination and must resort to the murky and ineffective provisions of Section 2 to defend their rights. Furthermore, as the cases above reveal, even this protection seems highly bound to regional considerations and judicial caprices.

The failures of the VRA to combat the new forms of vote denial suggest that a mere reworking of its provisions will not be sufficient. As others have noted, there are significant political and legal hurdles to either revising the coverage formula or strengthening the Section 2 test.[230] Politically, representatives in districts likely to come under the reach of the new formula are unlikely to vote against the interests of their districts.[231] The best alternative may lie in a legislative compromise like the one proposed by Daniel Tokaji, which involves comprehensive voting reform connected to fraud measures (i.e. voter ID).[232] Such a plan would place affirmative obligations on state and local governments to ensure maximum registration and provide voters with the requisite identification to vote, while simultaneously proposing standardized voter ID requirements and procedures to assuage those concerned about voter fraud.[233] Regardless of the exact method, a more robust protection of voting rights is crucial to ensuring that minorities and the disadvantaged have access to our institutions.

[230] Daniel P. Tokaji, *supra* note 41, at 97. *See also* Orville Vernon Burton, *Tempering Society's Looking Glass: Correcting Misconceptions about the Voting Rights Act of 1965 and Securing American Democracy*, 76 LA. L. REV. 1, 19 (2015).

[231] Tokaji, *supra* note 41, at 97.

[232] Tokaji, *supra* note 41, at 99-105.

[233] Tokaji, *supra* note 41, at 99-101.