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Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not

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TRANSFORMATION: TURNING SECTION 2 OF THE VOTING RIGHTS ACT INTO SOMETHING IT IS NOT

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I. INTRODUCTION

The Voting Rights Act of 1965[1] may be the most successful piece of federal civil rights legislation in the long history of federal civil rights legislation. The law swept away barriers to the ballot box endured by racial minorities, not only in the Deep South, but also across the United States. The law ended literacy tests, imposed federal registrars on parts of the country that have systematically denied registration to racial minorities, and banned racial discrimination in voting. The law also rearranged the constitutional order regarding federal power over state elections. That rearrangement remained in place until 2013 when the Supreme Court, in *Shelby County v. Holder*,[2] struck down as obsolete the triggering formulas that placed all or part of sixteen states under federal control for election law changes.[3] Yet, nearly all of the other provisions of the Voting Rights Act passed in 1965 were unaffected by the *Shelby County* decision and remain in full force and effect.

Notwithstanding the Supreme Court's invalidation of federal oversight of elections in sixteen states using Section 5 of the Voting

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[1] 52 U.S.C. §§ 10301-10508 (2014) (formerly cited as 42 U.S.C. §§ 1973-1973aa-6).

[2] 133 S. Ct. 2612 (2013).

[3] *Id.* at 2631.

Rights Act, litigation has commenced against multiple state election integrity statutes utilizing Section 2 of the Voting Rights Act. Challenges have been brought against election integrity statutes by the Department of Justice and private plaintiffs in Wisconsin, Texas, and North Carolina.[4] At issue in these cases were 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.[5] These challenges, however, did not use traditional theories of Section 2 liability. Instead, they advanced theories of Section 2 liability that were used to block state election law changes under Section 5 of the Voting Rights Act.[6] The legal theories utilized in these cases seek to import statistical tests for Section 2 liability, which were previously utilized under the Section 5 retrogression standard to block state election laws. If the plaintiffs are ultimately successful, the constitutional balance between states and the federal government that the Supreme Court sought to restore in *Shelby County* will be undone, and 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. Instead, courts reviewing Section 2 cases should utilize longstanding jurisprudence requiring much more than statistical disparities in analyzing election laws for compliance with the Voting Rights Act and ask whether an equal opportunity to participate and comply with the law exists.

II. OVERVIEW OF SECTIONS 2 AND 5 OF THE VOTING RIGHTS ACT

The core behavior that Section 2 sought to stop was denial of

[4] *See* McDuffee v. Miller, 327 S.W.3d 808, 822-23 (Tex. Ct. App. 2010) (holding that voters were not residents of the district and their votes were invalid); League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 834 N.W.2d 393, 396 (Wis. Ct. App. 2013) (holding that the photo identification requirement was not constitutionally unreasonable); United States v. North Carolina, No. 13-CV-861, 2014 WL 494911, at *1 (M.D.N.C Feb. 6, 2014) (alleging that the elimination of same-day voter registration and presenting a valid photo identification in order to vote violates Section 2 of the Voting Rights Act).

[5] Early voting is when polls are opened before Election Day. In some states they are open for weeks. *See* J. Christian Adams, *Eight Reasons for Halting Early Voting*, WASH. TIMES (Feb. 5, 2014), http://www.washingtontimes.com/news/2014/feb/5/adams-eight-reasons-for-halting-early-voting/?page=all. Same-day registration is when a voter may register to vote and cast a ballot simultaneously. Early voting affects the ability to monitor and police the polls and imposes significant costs on campaigns to find and place poll observers. Same-day registration has resulted in voter eligibility not being verified before their ballot is cast.

[6] Allen v. State Bd. of Elections, 393 U.S. 544, 548-49 (1969).

the right to register to vote.[7] Denial of this right was the chief tactic employed by states and local election registrars to undermine the franchise of minority voters. Disputes pertaining to registration barriers dominated voting rights litigation in the period surrounding the enactment of Section 2 of the Voting Rights Act in 1965.[8] Section 2 gave plaintiffs an equitable cause of action against racial discrimination in voting, allowing them to enjoin election practices and procedures designed to discriminate on the basis of race.[9]

But even successful injunctions against one particular barrier to registration could not prevent the emergence of a new and creative barrier to registration not contemplated by the original injunction. Registrars invented new barriers to deny registration, such as new tests invented by a county registrar. "[B]lacks 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*.' "[10] White registrants were not given the same test and, thus, the process of registration was not equally open to all. The courts provided no help.[11] Whenever a new test emerged, a plaintiff was

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[7] 52 U.S.C. § 10301(a).

[8] *See* Louisiana v. United States, 380 U.S. 145, 153 (1965) (invalidating arbitrary registration denials); United States v. Atkins, 323 F.2d 733, 740 (5th Cir. 1963) (stating it is error to deny injunction in registration denial); Reddix v. Lucky, 252 F.2d 930, 934-35 (5th Cir. 1958) (cancelling registration creates question of fact under 42 U.S.C. §§ 1971 and 1983); United States v. Mississippi, 339 F.2d 679, 682-83 (5th Cir. 1964) (holding registration practices to be illegal under 42 U.S.C. § 1971); United States v. Louisiana, 225 F. Supp. 353, 356 (E.D. La. 1963), *aff'd*, 380 U.S. 145, 150 (1965) (holding facially race-neutral registration prerequisites invalidated); United States v. Clement, 358 F.2d 89, 91 (5th Cir. 1966) (invalidating barriers to registration); United States v. Mayton, 335 F.2d 153, 156-57 (5th Cir. 1964) (finding otherwise facially insufficient registration instruments sufficient to secure registration); United States v. Wood, 295 F.2d 772, 778 (5th Cir. 1961) (stating an injunction is required against state criminal prosecution of those encouraging registration); United States v. Raines, 189 F. Supp. 121, 133 (M.D. Ga. 1960) (holding 42 U.S.C. § 1971(a) "forbids any distinction in the voting process based on race or color"); United States v. Ass'n of Citizens Councils of Louisiana, Inc., 196 F. Supp. 908, 909 (W.D. La. 1961) (seeking reinstatement of "registration" under 42 U.S.C. § 1971); United States v. McElveen, 180 F. Supp. 10, 13 (E.D. La. 1960) (holding discriminatory application of registration statute is unconstitutional even when statute is not facially discriminatory); United States v. Alabama, 192 F. Supp. 677, 682-83 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583, 593 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962) (holding racially discriminatory effects in registration procedures illegal).

[9] 52 U.S.C. § 10301(a).

[10] Lopez v. Monterey Cnty., 525 U.S. 266, 297 (1999) (Thomas, J., dissenting).

[11] *See* Miller v. Johnson, 515 U.S. 900, 937 (1995) (stating there was almost absolute exclusion of the Negro voice in state and federal elections); South Carolina v. Katzenbach, 383

forced to begin anew and file a case challenging the new test, even if an old test was enjoined.

To prevent these ever-changing barriers to the franchise, Congress enacted Section 5 of the Voting Rights Act.[12] Section 5 required targeted states to submit any election related change, no matter how small and insignificant, to the United States Attorney General for pre-approval.[13] This froze the benchmark system in place and did not permit a new and inventive barrier to become effective until it was precleared under Section 5.

A. Functioning of Section 5—Statistical Retrogression Standard

Section 5 required jurisdictions covered by Section 4[14] to preclear "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."[15] A jurisdiction may seek preclearance from the Attorney General or through a declaratory judgment from the United States District Court for the District of Columbia.[16] Under either process, the covered jurisdiction must demonstrate that the change will not have "the effect of denying or abridging the right to vote on account of race or color . . . ."[17] Section 5 employs a retrogression standard.[18] This means that if a submitting jurisdiction cannot prove the total absence of any negative statistical impact, any diminishment of electoral ability, an objection must follow.[19]

The amendments to Section 5, passed in 2006,[20] tweaked the standards for triggering an objection to a change in state voting law.

U.S. 301, 310-11(1966) (stating tests were specifically designed to prevent Negroes from voting).

[12] 52 U.S.C. § 10304.

[13] *Id.*

[14] 52 U.S.C. § 10303.

[15] 52 U.S.C. § 10304(a).

[16] *Id.*

[17] *Id.*

[18] *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.").

[19] 52 U.S.C. § 10304(a).

[20] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No.109–246, 120 Stat. 577 (2006).

An objection blocks the law from taking effect.[21] Under the 2006 amendments, if the ability of minority voters to vote is diminished, an objection to the election procedure is justified.[22] The amended Section 5 states:

> 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 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.[23]

In reviewing submissions under Section 5, the Department of Justice first looks at the status quo, or benchmark law, and then analyzes whether minority voters face any numeric or qualitative *diminishment* of electoral strength or rights under the proposed plan.[24] "[T]he 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 . . . ."[25] If any diminishment results from the proposed change, the proposed change is blocked. Adding to the difficulty for submitting jurisdictions, Section 5 shifts the burden onto the submitting jurisdiction to prove the *absence* of any diminishment.[26] The Department of Justice has no obligation to demonstrate that diminishment exists before interposing an objection to a submission. Instead, the submitting jurisdiction has the obligation to prove the absence of any diminishment, or retrogression.[27] Any doubt or statistical uncertainty decides the question against the submitting jurisdiction.[28] If submitting jurisdictions cannot establish through quantitative evidence that the proposed change had no negative effects whatsoever on minorities, that is, no retrogression exists, then

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[21] *Id.*
[22] *Id.*
[23] 52 U.S.C. § 10304(b).
[24] Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 329 (2000).
[25] *Id.* at 334.
[26] *See id.*
[27] *Id.* at 336.
[28] *See id.* at 332.

the proposed change will not be pre-cleared.[29]

In practice, the 2006 amendments to Section 5 created a statistical hair-trigger. If there was any statistically retrogressive effect, an objection followed.[30] If a submitting authority could not *prove* that there was *no statistically retrogressive effect*, an objection followed.[31] The Justice Department even blocked submissions when nobody, neither the submitting authority nor the Department, knew with certainty whether the proposed change had any discriminatory effect, simply because the submitting authority could not prove the total absence of any discriminatory effect.[32] Any statistical ambiguity or uncertainty was enough to block a proposed change. Ambiguity weighed against the submitting jurisdiction.[33] Importantly, the Department steadfastly attached little or no weight to any mitigating components of an electoral change.[34]

South Carolina, for example, suffered an objection to a voter photo identification law.[35] In the letter, the Department reveals that a statistical difference of 1.6% in ownership of photo identification between whites as compared to blacks was sufficient discriminatory effect to interpose an objection.[36] While 91.6% of whites in South Carolina appeared to have photo identification, 90% of blacks appeared to possess it.[37] Under the 2006 amendments to Section 5, this difference prompted the Justice Department's objection because it "diminished" the electoral power of minorities, even if only by a statistically miniscule margin. Little or no weight was attached by the Justice Department to the fact that the South Carolina law had a "reasonable impediment" provision. That is, if a voter affirmed that they

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[29] *Reno*, 528 U.S. at 336.

[30] *See* 52 U.S.C. § 10304.

[31] *See id.*

[32] *See* Objection Letter of Loretta King, Assistant Attorney General, to Thurbert E. Baker, Attorney General of Georgia (May 29, 2009), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/GA/l_090529.pdf. This objection against Georgia's efforts to verify the citizenship of voters was later withdrawn after Georgia sued the Attorney General and challenged the constitutionality of the statistical hair trigger application of Section 5. The Department of Justice withdrew the objection after Georgia agreed to extraordinarily minimal alterations to the citizenship verification plan as part of a settlement.

[33] McCain v. Lybrand, 465 U.S. 236, 257 (1984).

[34] *See* LaRoque v. Holder, 650 F.3d 777, 794 (D.C. Cir. 2011).

[35] *See* Objection Letter of Thomas Perez, Assistant Attorney General, to C. Havird Jones, Jr., Esq., Assistant Deputy Attorney General of South Carolina (Dec. 23, 2011), *available at* http://www.justice.gov/crt/records/vot/obj_letters/letters/SC/l_111223.pdf.

[36] *Id.*

[37] *Id.*

could not obtain photo identification because of a reasonable impediment, they were still allowed to cast a ballot and vote.[38] This mitigating mechanism, while disregarded by the Department of Justice, was not disregarded by the federal court. Indeed, the reasonable impediment affidavit became the basis for preclearance after South Carolina sued the Attorney General in the United States District Court for the District of Columbia seeking court-approved preclearance.[39] Preclearance was granted and South Carolina's voter photo identification law went into effect despite the Attorney General's very public opposition to the provision.

The 2006 amendments to Section 5 created a circumstance where the Department of Justice used the smallest statistical disparity to exercise federal power to block state election integrity laws. Ironically, Republican sponsors of the 2006 amendments supported the amendments because they perceived them as favorable to their partisan interests when it came to redistricting. They did not foresee, it seems, how Section 5 would be converted into a weapon to be used against state election integrity measures such as voter photo identification, citizenship verification, or efforts to clean voter rolls of ineligible voters. When the Department of Justice lost the ability to flex this power against states after *Shelby County*, the Department embarked on a calculated campaign that borrowed the same *de minimis* statistical thresholds in Section 5, but used them in an unprecedented way in enforcing another part of the Voting Rights Act: Section 2.

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[38] South Carolina v. United States, 898 F. Supp. 2d 30, 32 (D.D.C. 2012).

[39] The court took note of the Justice Department's intransigence:

> Yet the Department of Justice and the intervenors have oddly resisted that expansive interpretation of Act R54. They have insisted that the broad interpretation of the reasonable impediment provision advanced by the South Carolina Attorney General and State Election Commission contravenes the statutory language. But interpreting the law as the responsible South Carolina officials have done—to allow the voter's subjective interpretation of reasonable impediment to control—is perfectly consistent with the text of Act R54.

Id. at 37. A submitting jurisdiction always has the option of bypassing the Justice Department and submitting changes directly to the United States District Court for the District of Columbia. Any jurisdiction seeking a transparent review free from the biases which have infected administration of Section 5 at the Justice Department should likewise bypass the Justice Department and go straight to federal court for preclearance.

B. Functioning of Section 2—Totality of the Circumstances Standard

Section 2 is a nationwide ban on racial discrimination in voting. It forbids any "standard, 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."[40] The statute plainly bans denial of the right to vote "on account" of race.[41] It also bans election laws that were enacted with a racially discriminatory intent.[42] But after amendments to the statute in 1982, it also prohibits election laws, which have racially discriminatory results, subject to a broad non-statistical inquiry.[43]

Section 2 of the Voting Rights Act 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 10303(f)(2) [foreign language minorities] of this title, as provided in subsection (b) [of this section].
>
> (b) A violation of subsection (a) [of this section] 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) [of this section] 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 es-

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[40] 52 U.S.C. § 10301(a).

[41] *See id.*

[42] *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980).

[43] S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 117, 206-07 [hereinafter Senate Report].

> tablishes a right to have members of a protected class elected in numbers equal to their proportion in the population. [44]

1. Intent Prong

In 1980, the Supreme Court decided *City of Mobile v. Bolden*.[45] A plurality of the Court held that the original version of Section 2 passed in 1965 only banned election practices or procedures which were enacted with a racially discriminatory intent.[46] The Court ruled that Section 2 did not reach election laws, which might have a discriminatory outcome or result, but were not enacted with a racially discriminatory intent.[47] As a result of this case, an effort commenced in Congress to expand the reach of Section 2.[48]

2. Results Prong

Adopted in 1982, the "results" language in part (b) of Section 2 was a response to *City of Mobile*.[49] The 1982 amendments to Section 2 created a cause of action when a particular electoral practice was not necessarily enacted with a racially discriminatory intent, but had the result or effect of discriminating on the basis of race.[50]

In *Thornburg v. Gingles*,[51] the most important case decided by the Supreme Court after the 1982 amendments were adopted, the Court noted that the intent test in *City of Mobile* was "repudiated" by Congress and replaced with a new federal civil rights cause of action.[52] Though *Gingles* involved a challenge to a legislative redistricting plan, the case has provided the central guidance for courts addressing Section 2 challenges.[53]

The *Gingles* plaintiffs—a group of black, registered voters—

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[44] 52 U.S.C. § 10301.

[45] 446 U.S. 55 (1980).

[46] *Id.* at 101 (White, J., dissenting).

[47] *Id.* at 62, 70.

[48] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

[49] *See id.*

[50] *See id.*

[51] 478 U.S. 30 (1986).

[52] *Id.* at 44.

[53] *See, e.g.*, Growe v. Emison, 507 U.S. 25, 40-41 (1993); Johnson v. De Grandy, 512 U.S. 997, 1011-13 (1994).

challenged a legislative redistricting plan enacted by the North Carolina General Assembly.[54] Plaintiffs alleged that "the legislative decision to employ multimember, rather than single-member, districts in the contested jurisdictions" violated Section 2 because it "dilute[d] their votes by submerging them in a white majority, thus impairing their ability to elect representatives of their choice."[55]

In *Gingles*, the plaintiffs' Section 2 claim was what is commonly referred to as a "vote dilution" claim. As explained by the *Gingles* Court, "[t]he theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters," and thus the existence of racial polarization in voting becomes an essential element to a Section 2 claim.[56] Without racial polarization, a practice or procedure that has a discriminatory result cannot impair the ability to elect candidates of choice or otherwise effectuate the political will of racial minorities.

The *Gingles* Court laid out three necessary preconditions for a plaintiff to proceed with a claim that Section 2 has been violated:

Precondition #1:

> [T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.[57]

Precondition #2:

> "[T]he minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests."[58]

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[54] *Gingles*, 478 U.S. at 35.
[55] *Id.* at 46.
[56] *Id.* at 48.
[57] *Id.* at 50.
[58] *Id.* at 51.

Precondition #3:

> "[T]he minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate."[59]

Notice that the second and third preconditions, commonly referred to as "*Gingles* Two" and "*Gingles* Three," impose an element of causality, or outcome, on a Section 2 claim.[60] Under *Gingles* Two, a claim may not proceed without the existence of racially polarized voting.[61] Under *Gingles* Three, a claim may not proceed unless the practice or procedure can be shown to have a real-world electoral impact that ultimately denies to minorities the equal opportunity to effectively participate and elect candidates of choice.[62]

After establishing the three preconditions, the Court also adopted the use of additional factors to consider in order to meet the "totality of the circumstances" test before a violation of the "results" standard of Section 2 can be found in the redistricting context.[63] Taken from the Senate Judiciary Committee's majority report on the 1982 amendment, the non-exclusive list factors to consider when evaluating whether Section 2 has been violated is as follows:

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

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[59] *Gingles*, 478 U.S. at 51.
[60] *See id.* at 51.
[61] *See id.*
[62] *See id.*
[63] *Id.* at 36-38.

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.[64]

Under *Gingles*, to prove a violation of Section 2, a plaintiff must do more than show a statistical difference between how an election law impacts minority voters. Instead, a plaintiff must show that any statistical difference in the law's result impairs the ability of minority voters to participate effectively in the political process.[65] 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. Notice that *Gingles* placed multiple non-statistical hurdles in front of a plaintiff bringing a results claim.[66] A plaintiff must show some causality, where a particular election law has the demonstrable impact of altering election outcomes.[67] A plaintiff must also move beyond numbers and prove that the totality of the circumstances support liability using a multi-element Senate Factor test.[68] If Section 2 were applied to cases where a statistical disparity drove a liability finding, absent causality and supported by a broad non-quantitative package of evidence, then that version of Section 2 may well face serious constitutional challenges, especially after *Shelby County*.

C. *Shelby County*: The Supreme Court Strikes Down Triggers for Section 5 Enforcement

In *Shelby County*, the Supreme Court struck down as unconstitutional the triggers contained in Section 4 of the Voting Rights Act that determined which states were subject to Section 5 preclearance obligations.[69] Plaintiffs successfully challenged the triggering formulas, which were based on decades-old turnout data from the

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[64] Senate Report, *supra* note 45, at 28-29.

[65] *Id.* at 16.

[66] *Gingles*, 478 U.S. at 44-46, 50-51.

[67] *See id.*

[68] *See id.* at 45.

[69] *Shelby County*, 133 S. Ct. at 2631.

1964, 1968, and 1972 presidential elections;[70] "[i]f 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."[71] The Supreme Court effectively shut down Section 5 enforcement by finding that the triggers were an outdated intrusion into state sovereignty to run their own elections.[72]

> States must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own . . . . And despite the tradition of equal sovereignty, the Act applies to only nine States (and several additional counties). While one State waits months or years and expends funds to implement a validly enacted law, its neighbor can typically put the same law into effect immediately, through the normal legislative process.[73]

In striking down Section 5's coverage formula, the Court noted that the statistical standards of review within Section 5 also place a heavy burden on states.[74] This significant observation by the Supreme Court should not go unnoticed, particularly when courts are tempted to borrow aspects of a Section 5 review when considering Section 2 liability. In 2006,

> Congress expanded § 5 to prohibit any voting law 'that has the purpose of or will have the effect of *diminishing* the ability of any citizens of the United

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[70] *Id.* at 2619-20.

[71] *Id.* at 2630-31.

[72] *Id.* at 2624.

[73] *Id.* at 2624. The Court could have gone further when it referred to "funds." South Carolina was forced to spend well over $3,000,000 in fees and costs to obtain judicial preclearance of its photo voter identification law. Adam Beam, *S.C. Seeking to Recoup $53,000 from $3.5 Million Cost of Voter ID Lawsuit*, THE STATE (Jan. 15, 2013), http://www.thestate.com/2013/01/15/2591300/sc-seeking-to-recoup-53000from.html#storylink=cpy.
The millions of dollars South Carolina spent to gain approval should lay to rest any argument that states "can just go to court to get preclearance if the Justice Department objects," a common refrain voiced by both Republicans and Democrats during the 2006 reauthorization debates. *See Voting Rights Act: Section 5 Preclearance Standards: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives*, 109th Cong. 62-63 (2005) (exchange between Vice President (now President) and General Counsel for the Center of Equal Opportunity, Roger B. Clegg, and Congressman Mel Watt).

[74] *Shelby County*, 133 S. Ct. at 2631.

> States,' on account of race, color, or language minority status, 'to elect their preferred candidates of choice.' In light of those two amendments, the bar that covered jurisdictions must clear has been raised even as the conditions justifying that requirement have dramatically improved.[75]

Should Congress ever craft new and constitutional triggers for Section 4, the hair-trigger statistical elections of Section 5, whereby any diminishment of electoral clout results in an objection, may themselves face a constitutional challenge. As we shall see, just because the Supreme Court shut down Section 5 enforcement in *Shelby County* that does not mean that the Justice Department went along entirely. In the meantime, courts applying Section 2 should take note of the Supreme Court frowning on the idea that statistical diminishment justifies federal intrusion into a state's power over state elections.

III. USING SECTION 5 TO TRANSFORM SECTION 2

Understanding some of the vested factional interests associated with Section 5 enforcement over the decades facilitates a full understanding of the willingness of plaintiffs and the Justice Department to press novel Section 2 theories to reacquire a measure of power over state elections lost after *Shelby County*. Section 5 was the chief mechanism for a wide variety of interests to assert power over elections in the United States. More than half of the United States population in 2010 lived in states subject to Section 5 preclearance of election law changes.[76] Interests ranging from the political parties, incumbent administrations, racial interest groups, civil rights organizations, and even individual politicians, have used the Section 5 process to extract political advantage through a mechanism established to protect civil rights.[77] This was easy to do for multiple rea-

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[75] *Id.* at 2627 (internal citations omitted)(emphasis added).

[76] According to the U.S. Census Bureau, the population of states covered by Section 5 oversight in 2010 was 163,825,396. The total population of the United States was 308,745,538. Thus 53% of Americans lived in a state where the federal government exercised Section 5 oversight authority over every state election law change. *United States Census 2010*, CENSUS.GOV, http://www.census.gov/2010census/data/apportionment-pop-text.php (last visited Jan. 27, 2015).

[77] *See* Hans A. von Spakovsky, *The Bailout Bait and Switch: DOJ's Last-Ditch Attempt to Rescue Section 5 of the Voting Rights Act*, HERITAGE FOUND. (Apr. 18, 2011), http://www.heritage.org/research/reports/2011/04/the-bailout-bait-and-switch-dojs-last-

sons. First, the Section 5 process largely occurs behind closed doors and free from public scrutiny. Files on individual submissions at the Justice Department have both a "public" and "non-public" portion in each file. Thus, the Department jealously guarded against the release of any information which revealed the internal analysis behind an objection or preclearance, the identity of individuals advocating for an objection or preclearance, and the substance of such advocacy.[78] Indeed, abuse of this secretive process had led to withering criticism from federal courts aimed at the Justice Department Voting Section's abuse of power under Section 5 for engaging in improper and unethical conduct—so much so that the Section has been severely sanctioned.[79]

Notably, Voting Section lawyers were sanctioned $1,147,228 in *Hays v. State of Louisiana*.[80] In that case, a federal court imposed sanctions after finding that "the Justice Department impermissibly encouraged—nay, mandated—racial gerrymandering."[81] The court noted that, in drawing the redistricting plans, the Louisiana "[l]egislature succumbed to the illegitimate preclearance demands" of the Voting Section in the Section 5 process.[82] The Voting Section using the Section 5 process illegally forced Louisiana to draw election districts to generate the election of black officials solely because of their race.

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ditch-attempt-to-rescue-section-5-of-the-voting-rights-act.

[78] This secrecy did not stop voter photo identification opponents working inside the Justice Department from leaking to the *Washington Post* the internal Section 5 memorandum regarding preclearance of Georgia's photo identification law in 2005. Dan Eggen, *Criticism of Voting Law Was Overruled*, WASH. POST, Nov. 17, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/11/16/AR2005111602504.html. The newspaper published the full content of the internal legal analysis as a PDF.

[79] *See* von Spakovsky, *supra* note 77. The Justice Department's Civil Rights division, for example:

> [W]as ordered to pay $587,000 in sanctions in a redistricting case (*Miller v. Johnson*) in which both the Supreme Court and a federal district court characterized the Division's underhanded litigation tactics as 'disturbing.' In fact, the district court in the *Miller* case went much further, saying that the 'considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment.' The court added that it was 'surprising that the Department of Justice was so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote.'

Id.

[80] 936 F. Supp. 360 (W.D. La. 1996).

[81] *Id.* at 369.

[82] *Id.* at 372.

The scolding in *Johnson v. Miller*[83] was even worse. In that case, the Voting Section sought to impose an illegal, racially gerrymandered legislative redistricting plan on the state of Georgia.[84] In attempting to create as many black-controlled legislative districts as possible, Voting Section lawyers became impermissible advocates for interest groups.[85] The court found that interest groups were "in constant contact with . . . the DOJ line attorneys . . . ."[86] Finding this coordination "disturbing," the court declared, "[i]t is obvious from a review of the materials that [the ACLU attorneys'] relationship with the DOJ Voting Section was informal and familiar; the dynamics were that of peers working together, not of an advocate submitting proposals to higher authorities."[87] The court concluded, "the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment. . . . It is surprising that the Department of Justice was so blind to this impropriety . . . ."[88] Section 5 provided a wide range of groups, politicians, individuals and bureaucrats the opportunity to exert extraordinary power over American elections, and over time, these interests became accustomed to wielding such power over states and local jurisdictions.[89] When Section 5 was effectively lost in *Shelby County*, these interests sought out new ways and mechanisms for reacquiring the power over state elections which the Supreme Court had snatched from them. Thus, the theories of litigation discussed in this article emerged in part because of the loss of this power to these interests.

In the intervening years since Section 5 became law, politics and race began to become synonymous. Patterns of racial polarization began to align with patterns of partisan preferences. Cohesion levels among black voters increased, and this racial block voting had a counterpart—high degrees of partisan cohesion. Democrats became the beneficiary of extraordinary levels of racial block voting.[90]

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[83] 864 F. Supp. 1354 (S.D. Ga. 1994).

[84] *Id.* at 1360-61.

[85] *Id.* at 1362.

[86] *Id.*

[87] *Id.*

[88] *Miller*, 864 F. Supp. at 1368. The Supreme Court eventually affirmed the lower court in this case. Miller v. Johnson, 515 U.S. 900 (1995).

[89] *See generally* von Spakovsky, *supra* note 77. In multiple instances, the support or silence of one particular black state legislator was enough to justify preclearance and dispense with any serious statistical or qualitative internal review of a submission.

[90] This raises serious questions about the future of Voting Rights Act enforcement. What

The relevance of this trend to the Voting Rights Act is obvious. The use of federal power, whether through Section 2 or Section 5, to enhance minority voting clout will necessarily enhance Democratic Party clout. If racial polarization levels remain high among racial minorities while whites are less polarized, one party may benefit. This circumstance further illustrates why various interests and factions were desperate to seek out a new means to preserve as many elements of the pre-*Shelby County* mechanisms of federal power as possible. One such mechanism was using the Voting Rights Act to block election laws, which have any statistical impact, no matter how small, on the ability to elect the minority candidates of choice, who are almost always Democrats. This history of enforcement of Section 5 of the Voting Rights Act at the Justice Department provides critical context to the zeal in which advocates have sought to transform Section 2 into something resembling Section 5.

A. Justice Department Post-*Shelby County* Working Group

Even before *Shelby County* and *Northwest Austin Municipal Utility District Number One v. Holder*[91] were decided, defenders of the Section 5 preclearance scheme were realistic. They understood there was as strong likelihood that the triggers to Section 5 coverage would be struck down. Soon after the inauguration in 2009, a secretive working group was established inside the Justice Department to develop a response to the loss of Section 5 preclearance powers. If for no other reason, the Department had to consider what to do with the dozens of employees who would be idled if the Supreme Court struck down the power to review state election law changes. In fact, staff dedicated to the Section 5 review process constituted more than half of the employees in the Voting Section, so a response had to be

should happen if racial cohesion rates reach such levels such that voters of one race cast nearly all of their ballots for one party? Should federal law remain unchanged if partisan interests merge with racial voting patterns? Or, as some have suggested, should Democrats throw caution out and use the Voting Rights Act in a nakedly partisan way to bolster the electoral goals of the Democrat party? Some advocates are not so secret in their desire to see civil rights laws morph into Democrat get-out-the-vote aids. *See* Ellen D. Katz, *Democrats at DOJ: Why Partisan Use of the Voting Rights Act Might Not Be So Bad After All*, 23 STAN. L. & POL'Y REV. 415 (2012). My view is such a nakedly partisan use of the Voting Rights Act will erode support for the law and result in even more racial polarization.

[91] 557 U.S. 193 (2009). This case was an earlier challenge to Section 5 triggers. The Court declined to reach the constitutional issues.

formulated.[92] As a result, this secretive working group developed an action plan to employ if Section 5 review powers were lost. But not everyone was included in the group. Individuals in management who would have opposed transforming Section 2 into a statute resembling Section 5 were not included in the working group. Individuals who would disagree with using minimal statistical differences in the impact of election laws to support a Section 2 claim were not included. Christopher Coates was the Chief of the Voting Section while this working group was functioning.

> During the time I was Chief of the Voting Section, the administration excluded me from meetings in which there were discussions of what actions the Voting Section would take if the Court struck down Section 5 review powers. I feel certain that the use of Section 2 litigation as a substitute for Section 5's absence was one of the subjects discussed at these meetings. Although I have always been a strong supporter of filing Section 2 litigation to remedy discrimination against racial minorities, I would not have countenanced attempting to nullify a Court ruling by substituting Section 2 litigation for Section 5's non-retrogression standard. And I feel certain that my view on that subject was at least one of the reasons that I was purposefully excluded from those meetings.[93]

Instructions were given that Section Chief Coates should not even be informed about the existence of the group. One member of the secretive working group, however, informed Coates of its existence. Just fifty-eight days after the Supreme Court decided *Shelby County*, the Justice Department filed a complaint challenging a voter photo identification law in Texas as a violation of Section 2 because

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[92] It is hard to imagine a government initiative providing a better example of James Buchanan's Nobel winning Public Choice Theory. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962), *available at* http://www.econlib.org/library/Buchanan/buchCv3.html. In fact, no reduction in force was undertaken at the Voting Section even after *Shelby* idled more than half the staff.

[93] Author's conversation with Christopher Coates, former U.S. Justice Department Voting Section Chief (Jan. 15, 2015). The Voting Section Chief both administers the staff of the Voting Section as well as all litigation and administrative reviews. The Chief is the most important and logical person to *include* in any meeting affecting the Voting Section and the enforcement of the Voting Rights Act.

of statistical disparities.[94]

B. Section 2 Challenges in Texas and Wisconsin

Challenges to election integrity statutes in Texas and Wisconsin revealed a new use of Section 2 to attack election process laws designed to promote election integrity. Both courts found that voter photo identification laws in those respective states violated Section 2.[95]

1. Texas

In 2011, Texas enacted Senate Bill 14 ("SB 14").[96] Beginning on January 1, 2012, SB 14 required voters to present photo identification when voting at the polls in person.[97] 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.[98] If the voter did not have one of these forms of identification, the voter could have obtained an election identification certificate from the DPS. Voters suffering from a disability were exempt from the requirement to have photo identification.[99]

While this article is directed toward the proper means to analyze the discriminatory *results* prong of Section 2, it bears a passing mention that the court in Texas more than once departed from robust evidentiary standards in finding that SB 14 had a racially discriminatory intent.[100] For example, the court supported its intent analysis in Texas with evidence containing hyperbole ("every Republican member of the legislature would have been lynched if the bill had not

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[94] Complaint, United States v. Texas, No. 13-CV-00263, 2013 WL 4479214 (S.D. Tex. Aug. 22, 2013).

[95] Veasey v. Perry, No. 13-CV-00193, 2014 WL 5090258, at * 20 (S.D. Tex. Oct. 9, 2014); Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

[96] S. B. 14, 2011 Leg., 82d Sess. (Tex. 2011).

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] Under Section 2, a finding of a racially discriminatory intent, standing alone, can impart liability.

passed"),[101] speculations about states of mind ("Senator Ellis testified that all of the legislators knew that SB 14, through its intentional choices of which IDs to allow, was going to affect minorities the most"),[102] and conclusory assertions (law based on "*unfounded* concern about non-citizen students.").[103]

Here is another example of the court's forgiving approach toward the evidence pertaining to racial intent:

> There are no "smoking guns" in the form of an SB 14 sponsor making an anti-African-American or anti-Hispanic statement with respect to the incentive behind the bill. . . . Add to this environment that Representative Smith admitted that it was "common sense"—he did not need a study to tell him—that minorities were going to be adversely affected by SB 14. Yet SB 14 was pushed through in the name of goals that were not being served by its provisions.[104]

In other words, no direct evidence of a racially discriminatory intent existed, but one legislator, disdaining any data or formal study, testified that "common sense" told him the law had a racially disparate impact, and since the law, to him, was not a close fit with the purported goal, the law must have a racially discriminatory intent. This was the sort of evidence credited by the court in *Veasey* to establish a racially discriminatory intent against the State of Texas.

In analyzing the results prong of Section 2, the court in *Veasey* relied very heavily on the statistical disparity in how the law affected minorities compared to non-minorities.[105] The court did not address the fact that there was no barrier on the basis of race in the law to obtain photo identification. Instead, it looked at the static and inadequate data set purporting to show which Texans already had photo identification.[106] If the statistical difference between whites and non-whites possessing photo identification was greater than zero, the court in *Veasey* inferred a violation of Section 2.[107]

The demographic data in the case, however, was anything but

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[101] *Veasey*, 2014 WL 5090258, at *20.
[102] *Id.*
[103] *Id.* at *18 (emphasis added).
[104] *Id.* at *55.
[105] *Id.*
[106] *Veasey*, 2014 WL 5090258, at *25.
[107] *Id.* at *23.

clear. Nobody disputes that the exact number of people lacking identification, and further subdivided on the basis of race, cannot be calculated with absolute precision. Plaintiffs, therefore, produced a variety of experts each testifying about a separate data set, but none of them claiming to capture the difference between white and non-white precision with absolute clarity.[108] For example, the plaintiffs utilized an analysis commonly used by plaintiffs in voting cases that is fraught with error—the Spanish surname analysis.[109] In Spanish surname analysis, assumptions are made about a particular voter based on the last name of the voter. Possession of a common Spanish surname, such as Hernandez or Ortiz, led the plaintiff's experts to make racial assumptions about that particular voter.[110] The expert's attempted to scrub errors out of this perilous method by cross referencing the analysis with a variety of other data sets, including zip code sets fueled by Census responses on race, but the errors could not be eliminated.[111] For example, a Russian woman hypothetically named Rosalina (Розалина) Kidalov, upon marrying a man with the last name Hernandez likely would be counted as being Hispanic for racial purposes.

Crediting expert testimony using this method, the court in *Veasey* supported a finding that SB 14 violated Section 2 as noted:

> Assigning his data the ethnicity information used in the SSVR, Dr. Ansolabehere found that 5.8% of all SSVR [Spanish Surname Voter Registration list] 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.[112]

The *Veasey* court also credited Catalist, LLC, a data crunching company exclusively used by left of center organizations and the Democratic Party.[113] In *Veasey*, the United States offered evidence based on this political data.[114] Again, the federal court sitting in Washing-

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[108] *Id.* at *21-25.
[109] *Id.* at *23.
[110] *See id.*
[111] *See Veasey*, 2014 WL 5090258, at *23.
[112] *Id.*
[113] *Id.* at *23-24.
[114] *Id.*

ton D.C. in *Texas v. Holder*,[115] had a very different view of the accuracy of Catalist's politically-driven data than did the court in Texas.

> [W]e have serious doubts as to whether Catalist's algorithm accurately identified the racial composition of voters in this case. Although Dr. Ansolabehere's expert report states that Catalist is an industry leader in "identifying races based on names and Census data," placed second in a "Multi-Cultural Name Matching Challenge," and has been used in several academic studies, . . . the record contains no direct evidence as to the accuracy of Catalist's algorithm. To the contrary, record evidence suggests—albeit not conclusively—that Catalist's error rate in this case may be quite high. When cross-examining Dr. Ansolabehere, Texas's counsel demonstrated anecdotally that a number of voters on his no-match list do, in fact, possess state-issued photo ID, and further showed that the race listed on many of those voters' IDs differed from Catalist's racial classification.[116]

The court in *Veasey* adopted an analysis of the impact of SB 14 that matches the statistical inquiry in a Section 5 retrogression analysis, not the searching inquiry into real-world results of a particular electoral system. In a Section 5 review, the Justice Department may well conclude that an objection is warranted when "a disproportionate number of African-Americans and Hispanics populate that group of potentially disenfranchised voters."[117] But in a Section 2 claim, something more than a calculation as to how a racially neutral election administration rule lands among differing racial groups is necessary. Slight statistical differences in who has possessed photo identification in the past should not conflate to a Section 2 violation. Instead, the *Veasey* court treated any difference or disparate impact as a bridge between SB 14 and the dark days of Jim Crow.[118] "The fact that past discrimination has become present in SB 14 is apparent from both the obvious nature of the impact and the manner in which the legislature chose options that would make it harder for African-

[115] 888 F. Supp. 2d 113 (D.D.C. 2012).
[116] *Id.* at 133-34.
[117] *Veasey*, 2014 WL 5090258, at *21.
[118] *Id.* at 20.

Americans and Hispanics to meet its requirements."[119]

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. Remember, prior to *Shelby County*, an election law change could be blocked if it diminished the clout of a racial minority group.[120] "Diminishing" means any reduction whatsoever in the political capacity of a racial minority group.[121] But this *de minimis* trigger in Section 5 has never been understood to apply to Section 2. For starters, Section 2 does not rely on the concept of reduction or diminishment. Section 2 focuses on whether an equal opportunity to participate in the political process exists.[122] In fact, the plain language of Section 2 mandates a broad totality of the circumstances inquiry into the practice or procedure.[123] Section 2 incorporates concepts of causality. A violation of Section 2 in challenges to at-large election systems, for example, occurs only after racial minority groups are effectively shut out of the political process. The broad totality of the circumstances inquiry provides defendants an opportunity to establish defenses such as mitigating measures to remedy discrimination from long ago, increases in minority participation and office holding, and other measures.[124]

But the *Veasey* court's misapplication of Section 2 does not begin and end with misplaced emphasis on disparate impacts. The court gave inadequate regard for important language contained in Section 2. First, Section 2 examines whether election systems are "not equally open to participation by" racial minorities.[125] A bare statistical inquiry into the relative rates of photo identification possession by various racial sub-groups should not be an inquiry meriting priority over whether SB 14 is *equally open to future participation* by those same racial minorities. Nothing prevents a black, white or Hispanic who does not have photo identification from obtaining it in Texas on equal terms. Second, Section 2 examines whether racial minorities "have less opportunity than other members of the elec-

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[119] *Id.*

[120] *Shelby*, 133 S. Ct. at 2640-41.

[121] *Id.* at 2621.

[122] *See* 52 U.S.C. § 10301.

[123] *See* 52 U.S.C. § 10301(b).

[124] *See, e.g.*, League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993); Harvell v. Blytheville Sch. Dist. No. 5, 71 F.3d 1382 (8th Cir. 1995); Teague v. Attala Cnty., Miss., 92 F.3d 283 (5th Cir. 1996).

[125] *Veasey*, 2014 WL 5090258, at *49.

torate to participate in the political process . . . ."[126] Again, the relevant Section 2 inquiry is not aimed at the differing impacts of an election law change. The plain terms of the statute gaze forward, and ask whether a practice or procedure results in unequal opportunities to vote. "Opportunity" is the central concept that the plaintiffs and the court in *Veasey* did not adequately examine. As we shall see below, another federal district court facing a similar Section 2 challenge to election law changes made equality of opportunity the driving concept behind its analysis of Section 2.[127]

The final departure from traditional Section 2 analysis by the *Veasey* court is when it substituted poverty for race. "Evidence shows that a discriminatory effect exists because: (1) SB 14 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 . . . ."[128] Throughout the *Veasey* opinion, the court treated poverty and race as synonymous. While such an analysis may be more understandable to some social scientists or public commentators, the court is constrained by the language of the law, and the law has never recognized poverty to be a protected sub-set under Section 2.[129] Nor did the court shy away from colorful adjectives in its legal analysis. "The draconian voting requirements imposed by SB 14 will disproportionately impact low-income Texans because they are less likely to own or need one of the seven qualified IDs to navigate their lives."[130] Not only did the court in *Veasey* improperly apply a disparate impact test to Section 2, it used a protected class not found in Section 2 jurisprudence.[131]

Neither the Fifteenth Amendment nor the Voting Rights Act

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[126] *Id.*

[127] *See* Frank v. Walker, 17 F. Supp. 3d 837 (2014).

[128] *Veasey*, 2014 WL 5090258, at *25.

[129] *See* 52 U.S.C. § 10301(a).

[130] *Veasey*, 2014 WL 5090258, at *25.

[131] It is true that Senate Factor Five makes relevant an inquiry into "effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." *See Gingles*, 478 U.S. at 37 (quoting S. REP. NO. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 117, 206). But even that language does not mention poverty, it measures discrimination. Worse, Senate Factor Five opens an inquiry into only the effects of discrimination in education, employment and health. It does not produce a protected class not found in the plain language of the statute thus permitting a disparate impact analysis of any election law change that studies the impact of the election change against this fictional protected class. Section 2 certainly does not permit liability to attach after such an irrelevant statistical analysis.

makes poverty a protected class. The court in *Veasey* did what Congress has never done to Section 2, it allowed plaintiffs to establish a Section 2 violation by treating the poor as a protected class.[132] Indeed, such an expansive reading of the Voting Rights Act would certainly exceed the enforcement power of Congress under the Fifteenth Amendment.

The final, and perhaps most glaring, error in the Section 2 analysis in *Veasey* is the plain misapplication of *Gingles*. This plain misapplication led the court to embark on the disparate impact analysis even though *Gingles* aimed courts toward an analysis of the equal opportunity to participate and an analysis of real-world results of an electoral system.[133] This error is compounded by the *Veasey* court treating the Texas statute like a vote *denial* claim, but using a statistical analysis more appropriate for vote *dilution* claims.[134]

The *Veasey* court turned to *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.[135]

A closer examination of this critical passage reveals that the court cited *Gingles* for propositions it may have wished the Supreme Court would say about Section 2, but which the Supreme Court decidedly *did not* say.

The court said *Gingles* blesses a "disparate impact" analysis.[136] The citation in *Gingles* relied on for this proposition makes no mention of disparate impact. Instead, it says:

> The "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

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[132] *See Veasey*, 2014 WL 5090258, at *26-27.
[133] *See id.* at *49.
[134] *Id.* at *50.
[135] *Id.* at *49.
[136] *Id.* at *50.

> 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."[137]

What *Gingles* said here differs a great deal from the idea that a statistical disparate impact analysis gives rise to Section 2 liability. To the contrary, the Supreme Court speaks plainly about "equal opportunity" and empirical electoral results.[138] The only mention of "impacts" in the citation does not relate to a disparate impact trigger for liability but rather whether the "impact" of the election law impacts real-world "electoral opportunities."[139] Equal opportunity must be impacted.

Nowhere does *Gingles* 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. If conformity with the law is equally open to all, any discriminatory impact is highly detached from legitimate federal interests under Section 2. After all, will not every single election law change ultimately have some theoretical disparate impact on racial subgroups once the social scientists and statisticians are done crunching statistics? It is impossible to avoid *some* disparate impact on *some* racial subgroup every time the law is changed. Absent a showing that the change was enacted with a discriminatory racial intent, denies equal opportunity to participate in the process, or has real world electoral impacts in the ability to elect candidates of choice, Section 2 should not be implicated.

The second statement about *Gingles* used in *Veasey* to justify a disparate impact analysis for Section 2 liability also missed the mark. Remember, the *Veasey* court stated that "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."[140] Once again, *Gingles* said no such thing. The citation from which *Gingles* relied on here said "[p]laintiffs must demonstrate that, under

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137 *Gingles*, 478 U.S. at 44.

138 *Id.* at 44-46.

139 *See id.* at 44.

140 *Veasey*, 2014 WL 5090258, at *49.

the totality of the circumstances, the [practices] result in unequal access to the electoral process."[141] This passage, as before, focused on unequal access, not disparate impact.[142]

Here, *Gingles* is referencing equal opportunity to *participate and to elect candidates of their choice* as well as "the impact of the contested structure or practice on minority electoral opportunities."[143] The third *Gingles* precondition relates to causality in electoral defeats, not statistical disparate impacts.[144] This precondition asks if, more often than not, minority-preferred candidates lose elections because of racially polarized voting.[145] In other words, it is an uncompromising barometer gauging why minority preferred candidates lose. The court in *Veasey* did not even come close to using this robust standard of causality of electoral outcomes and indeed paid no attention whatsoever to the question of electoral defeats compared to electoral wins. In doing so, the *Veasey* court dispensed entirely with the inconvenient question of causality and whether the challenged voter photo identification law made any real difference to minorities that impaired their ability to elect candidates of choice or participate equally. "Impacts" to the *Gingles* Court meant objective tangible electoral outcomes.[146] "Impacts" to the *Veasey* court meant a contest of statisticians using datasets to conclude that an electoral change has

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[141] *Gingles*, 478 U.S at 46 (citing S. REP. 97-417, at 16 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 193).

[142] It is true that the *Veasey* court also cited *Gonzalez v. Arizona*, 624 F.3d 1162 (9th Cir. 2010), to fold in the term discriminatory "impact" into supporting the court's framework. It remains to be seen whether the Fifth Circuit Court of Appeals will import this language. More importantly, however, *Gonzalez* used the discriminatory impact analysis in vote dilution context (as opposed to the vote denial analysis the *Veasey* court purports to conduct) to emphasize the causality requirement in *Gingles* Three. The *Veasey* court could have quoted the Ninth Circuit a few paragraphs later in the opinion, but did not, when it said:

> [T]he causation requirement is crucial: a court may not enjoin a voting practice under § 2 unless there is evidence that the practice results in a denial or abridgement of the rights of a citizen on account of race or color. . . . But Gonzalez adduced no evidence that Latinos' ability or inability to obtain or possess identification for voting purposes (whether or not interacting with the history of discrimination and racially polarized voting) resulted in Latinos having less opportunity to participate in the political process and to elect representatives of their choice.

Gonazalez, 624 F.3d at 1194. Even the Ninth Circuit demands a real-world electoral outcome causality nexus.

[143] *Gingles*, 478 U.S. at 44.

[144] *Id.* at 51.

[145] *Id.* at 52.

[146] *See Gingles*, 478 U.S at 57-61.

a statistically negative impact on minorities greater than zero.[147] In adopting this numbers-driven analysis for Section 2, the *Veasey* court, in fact, replaced traditional Section 2 analysis with the statistical tripwires contained in Section 5.[148]

The *Veasey* court purported to engage in a broader inquiry beyond simply looking at a statistical difference of a few percentage points between minority and non-minority possession of photo identification. But the core of the reasoning behind the ruling in *Veasey* was this slight statistical difference, or diminishment, between the sets of voters. All of the other analysis bootstrapped back to this statistical disparity to find a Section 2 violation. The statistical disparity drove the analysis in *Veasey*, and thus, Section 2 was transformed by the court into something it is not.

2. Wisconsin

In Wisconsin, voter photo identification laws faced a similar attack utilizing Section 2 of the Voting Rights Act.[149] In *Frank v. Walker*,[150] the court held that Wisconsin's voter photo identification law violated Section 2.[151] The court in *Frank* explicitly departed from the *Gingles* framework and "largely disregarded" the Senate Factors, claiming that courts may do so in Section 2 cases not involving redistricting.[152] This leap is not entirely accurate. For example,

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[147] *See Veasey*, 2014 WL 5090258 at *20-25.

[148] Inexplicably, Texas actually challenged the constitutionality of the plaintiffs' purported use of totality of the circumstances elements under Section 2 as being vague. *Id.* at *49. The use of additional Section 2 elements beyond a basic statistical analysis both benefited Texas and was part of a longstanding and well-understood component of Section 2 litigation commencing decades earlier in *Gingles*. The court rightfully rejected arguments that a totality of the circumstances inquiry as part of plaintiffs' case was unconstitutional. *Id.* A defendant in a Section 2 case is free to use the Senate Factors as elements upon which to provide rebuttal evidence. For example, for Senate Factor One, a defendant may demonstrate an *absence* of modern official discrimination or mitigating efforts to remedy past discrimination. The Senate Factors may be both a weapon for a plaintiff and a shield for a defendant. It does not appear that Texas utilized the Senate Factors as a vehicle to introduce rebuttal evidence, something defendants in Section 2 cases are free to do. Most importantly, a defendant may argue that a plaintiff failed to establish enough Senate Factors, therefore, did not prove the case. Simply, Senate Factors are elements a defendant should welcome, not oppose. No court hearing a Section 2 claim, to my research, has ever considered the Senate Factors to be "vague," certainly not by 2013.

[149] *Frank*, 17 F. Supp. 3d at 842.

[150] 17 F. Supp. 3d 837 (2014).

[151] *Id.* at 879.

[152] *Id.* at 869.

in *United States v. Brown*,[153] another Section 2 case which did not involve redistricting, the court engaged in an exhaustive examination of the Senate Factors.[154]

The *Frank* court, after abandoning any analysis under *Gingles* or using the Senate Factors, adopted an explicit disparate impact test for Section 2:

> 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.[155]

It again bears mention that every single change in election law, no matter how small, will have a disproportionate impact on some racial group. Some changes will impact whites to a greater degree than blacks, and other changes will do the opposite. The disproportionate impact may be beyond our statistical and social science tools to quantify, but it will almost always be there. If Election Day were to be changed in Wisconsin, one race would benefit and one would suffer. If the entire election were conducted by mail instead, one race would benefit and one race would suffer. Even if a polling place were moved inside a precinct, the relocation would disproportionately impact one race and benefit another, as it is impossible to have perfect racial neutrality in any election law change. The version of Section 2 in *Frank* and *Veasey* created a one-way ratchet where federal voting law may be used to block any election change that hurts racial minorities. In other words, these cases concoct a version of Section 2 that mirrors the retrogression standard in Section 5 and mobilizes Section 2 to undertake what *Shelby County* ended, except nationwide.[156]

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[153] 494 F. Supp. 2d 440 (S.D. Miss. 2007).

[154] *Id.* at 482-85.

[155] *Frank*, 17 F. Supp. 3d at 870.

[156] Like Texas, Wisconsin apparently took a position which made the court's task simpler. "As the defendants concede, the plaintiffs' evidence 'shows that minorities are less likely than whites to currently possess qualifying ID.' " *Frank*, 17 F. Supp. 3d at 870 (quoting Defs.' Post–Trial Brief at 1). Because the defendants concede that minorities are less likely

The court has discarded the question of whether racial minorities have an equal opportunity to participate in the political process.

> There is nothing in these cases indicating that a Section 2 plaintiff must show that the challenged voting practice makes it impossible for minorities to vote or that minorities are incapable of complying with the challenged voting procedure. Therefore, I reject the defendants' argument that Act 23 could violate Section 2 only if minorities who currently lack IDs are incapable of obtaining them.[157]

The court also rejected the argument that even if the burden to obtain photo identification was minimal, and applied to everyone equally regardless of race, Section 2 will be violated because of subsequent behavioral choices by minorities.[158] "Even if the burden of obtaining a qualifying ID proves to be minimal for the vast majority of Blacks and Latinos who will need to obtain one in order to vote, that burden will still deter a large number of such Blacks and Latinos from voting."[159]

The court stated that the analysis extended beyond merely examining statistically disparate impacts.[160] But to help it get beyond a sparse statistical analysis, the *Frank* court substitutes poverty for race as the *Veasey* court did:

> [T]he disproportionate impact of the photo ID requirement results from the interaction of the requirement with the effects of past or present discrimination. Blacks and Latinos in Wisconsin are disproportionately likely to live in poverty. Individuals who live in poverty are less likely to drive or participate in other

than whites to currently possess a photo ID, it is not necessary for me to discuss the evidence adduced at trial in support of this point and make explicit findings of fact.

[157] *Id.* at 874-75.

[158] *Id.* at 875.

[159] *Id.* This conclusion was not supported by any empirical data. It was supported by the testimony of academics, including Marc Levine, a Professor of History, Urban Studies and Economic Development at the University of Wisconsin-Milwaukee and Barry Burden, Professor at the University of Wisconsin. *See also* J. Christian Adams, *Justice Department Expert Witness: Blacks 'Less Sophisticated Voters*,' BREITBART.COM (Oct. 20, 2014), http://www.breitbart.com/big-government/2014/10/20/justice-department-expert-witness-blacks-less-sophisticated/.

[160] *See Frank*, 17 F. Supp. 3d at 876-80.

activities for which a photo ID may be required . . . .[161]

In sum, the *Frank* court found that Section 2 was violated because voter photo identification has a statistically disparate impact on racial minorities because it burdens them with costs disproportionately, and the burden is significant because racial minorities will have more difficulty obtaining identification than will whites, so it goes, because they are disproportionately poor, and that poverty, according to the court, is caused by discrimination which happened in the past.[162] This is the logical structure upon which the new deployment of Section 2 is based.

IV. THE SEVENTH CIRCUIT'S REJECTION OF *FRANK*'S SECTION 2 ANALYSIS

On appeal, the Seventh Circuit reversed the judgment, noting numerous errors with the lower court's findings and conclusions.[163] Concerning the lower court's first inquiry, the Seventh Circuit explained that "Section 2(b) tells us that Section 2(a) "does not condemn a voting practice just because it has a disparate effect on minorities."[164] Rather, Section 2(b) says Section 2(a) requires that the evidence demonstrate a *denial* of the right to vote on account of race.[165] According to the court, "unless Wisconsin makes it *needlessly* hard to get photo ID, it has not denied anything to any voter" as far as Section 2 is concerned.[166] Moreover, none of the lower court's findings demonstrated that under Wisconsin law "blacks or Latinos have less 'opportunity' than whites to get photo IDs."[167] Rather, the lower court only found that "because they have lower income, these groups are less likely to *use* that opportunity."[168] According to the Seventh Circuit, "that does not violate § 2."[169]

To the extent disparate impact may bear on "opportunity," it cannot be assessed in isolation, but must be considered along with the

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161 *Id.* at 877.
162 *Id.* at 879.
163 *Frank*, 768 F.3d at 745.
164 *Id.* at 753.
165 *Id.*
166 *Id.*
167 *Id.*
168 *Frank*, 768 F.3d at 753.
169 *Id.*

"entire voting and registration system."[170] On the evidence before the court, "blacks [did] not seem to be disadvantaged by Wisconsin's electoral system as a whole."[171] An analysis that did not require the "totality of circumstances" as Section 2 did risked dismantling every piece of the state's voting system on the showing of a mere disparity among the races.[172]

The Seventh Circuit also took issue with the second prong of the lower court's analysis; whether the disparate impact is caused by or linked to the state's history of racial discrimination—because it "does not distinguish discrimination by the defendants from other persons' discrimination."[173] The distinction between discrimination by the state and discrimination in the private sector is "important, because units of government are responsible for their own discrimination but not for rectifying the effects of other persons' discrimination."[174] Notably, the lower court's findings did not establish that the state of Wisconsin has discriminated against Blacks and Latinos in the areas the lower court deemed relevant under Section 2.[175] Absent such findings, the plaintiffs were not likely to succeed on the merits, even under the lower court's erroneous Section 2 analysis.

V. NORTH CAROLINA

In 2013, SL 2013-381[176] became law in North Carolina.[177] This revision to North Carolina's election procedures included a requirement that voters present some form of photo identification at the polls, eliminated the ability to register to vote and to vote simultaneously (same-day registration), reduced the number of days one could vote in person before election day, and required voters to cast ballots

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[170] *Id.*

[171] *Id.*

[172] *Id.* at 754 ("At oral argument, counsel 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.").

[173] *Frank*, 768 F.3d at 755.

[174] *Id.* at 753.

[175] *Id.*

[176] H.B. 589, 2013 Leg., 381st Sess. (N.C. 2013).

[177] 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).

in the precinct where they actually lived.[178] Plaintiffs, including the National Association for the Advancement of Colored People (NAACP), League of Women Voters and the United States, thereafter filed an action challenging the new laws as a violation, *inter alia*, of Section 2 of the Voting Rights Act.[179]

Plaintiffs sought a preliminary injunction to prevent the changes involving same-day registration, changes to early voting, and the requirement that a voter vote in their own precinct, from being implemented for the 2014 general election.[180] In denying the motion for a preliminary injunction, the court in *Frank* provided an analysis of Section 2 liability more consistent with the language of Section 2 and the jurisprudence requiring demonstrable electoral impacts. The *McCrory* court also detected the litigation havoc that the logic in *Veasey* and *Frank* could spawn in other states, which did not have same-day voter registration, weeks of voting before election day, or did not let voters cast ballots in precincts where they do not live.[181]

Significantly, the *McCrory* court rejected any Section 2 analysis that behaves like Section 5 retrogression analysis. The proper inquiry, the court noted, is *not to compare* the new law with the old law and allow statisticians and academics opine about what they believe the disparate impacts of the new law may be on racial subgroups. "In doing so, the [*Brown v. Detzner*] court emphasized that it was not comparing the old law to the new one, because that retrogression standard applies only in a Section 5 proceeding."[182] Further, "[t]he court underscored the important role the distinction between the Section 2 standard and the Section 5 retrogression standard and their different burdens of proof played in the [Section 2] case."[183]

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[178] *Id.* at 336-38. As in Texas, these changes were made for the legislative purpose of increasing election integrity. For example, the uncontroverted record showed that because of same-day registration, 1,288 voters in 2012 had their ballots counted using same-day registration without being properly verified as eligible voters. *Id.* at 353 n.37. The problem of ballots being counted without verification of eligibility due to same-day registration was so acute in the town of Pembroke, North Carolina, the North Carolina State Board of Elections was forced to order a new election because the outcome was tainted due to same-day registration. Inexplicably, as in Texas, Wisconsin also agreed to dispense with an examination of the Senate Factors and thus abandoned a variety of defenses available to the defendants based on those factors.

[179] *Id.* at 337.

[180] *Id.* at 336.

[181] *McCrory*, 997 F. Supp. 2d at 351-52.

[182] *Id.* at 348 (citing 895 F. Supp. 2d 123 (M.D. Fla. 2012)).

[183] *Id.* at 348 n.24.

Furthermore:

> [B]ecause Section 2 does not incorporate a "retrogression" standard, the logical conclusion of Plaintiffs' argument would have rendered North Carolina in violation of the VRA before adoption of SDR simply for not having adopted it. Yet, neither the United States nor the private Plaintiffs have ever taken the position that a jurisdiction was in violation of Section 2 simply for failing to offer SDR. Indeed, "[e]xtending Section 2 that far could have dramatic and far-reaching effects" . . . .[184]

McCrory walled off any effort to import concepts germane to Section 5 into a Section 2 analysis. In doing so, the court in *McCrory* provided a differing analysis for a Section 2 claim more in keeping with the statute's purpose and plain language: "whether the current electoral law interacts with historical discrimination and social conditions to cause black voters to have unequal access to the polls."[185] The court rejected the transformation of Section 2 into a statute resembling Section 5:

> [H]ere, the 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," (internal quotation marks omitted)—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.[186]

Finally, the court noted the important constitutional concerns implicated by these competing models of Section 2 interpretation.

> The Constitution's Elections Clause reserves to the

[184] *Id.* at 351. The court also noted that the National Voter Registration Act of 1993 explicitly sanctioned a state cutting off all voter registration up to 30 days before an election. *See* 52 U.S.C. § 20507(a)(1) (2014) (formerly cited as 42 U.S.C. § 1973gg-6(a)(1)). Congress could not have envisioned that Section 2 authorized a cause of action against states which do not have (or which had) same-day registration when federal law explicitly envisions a cut off of registration long before election day.

[185] *McCrory*, 997 F. Supp. 2d at 348.

[186] *Id.* at 352 (internal citations omitted).

> States the general power to regulate "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to laws passed by Congress. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' "[187]

Whether to impose Section 2 obligations on a state using the lower thresholds in *Veasey* and *Frank*, or using the model in *McCrory* affects the Elections Clause of the Constitution.[188] States were given the power to run their own elections.[189] Naturally they must do so in conformity with the various amendments to the Constitution affecting elections. The presumption that states may manage their own elections is not some accidental choice. It was a choice informed by the lessons of history that centralized control is eventually adverse to individual freedom and liberty. The Founders knew that a central authority with control over state elections would invariably erode liberty. As the Supreme Court put it in *Shelby*, "the federal balance 'is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.' "[190]

VI. CONCLUSION

The Supreme Court may have to decide which version of Section 2 is the correct version. Does the *McCrory* court and the Seventh Circuit in *Frank* provide the best analytical model for analyzing election process issues under Section 2 when these opinions elevated equality of opportunity as the most significant inquiry? Or does the statistical inquiry into disparate impacts conducted by the district courts in *Veasey* and *Frank* and endorsed by the Fourth Circuit in *McCrory* accurately reflect the language contained in Section 2 and

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[187] *Id.* at 343 (internal citations omitted).

[188] *See* U.S. CONST. art. I, § 4, cl. 1.

[189] *Id.*

[190] *Shelby County*, 133 S. Ct. at 2623 (quoting Bond v. United States, 131 S. Ct. 2355, 2364 (2011)).

the purposes behind the Voting Rights Act? The balance of power between the states and federal government will be affected by the answer, especially considering that there appears to be no way to reconcile the two models.