NOTE

A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act

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ABSTRACT

In response to growing concerns about the integrity of the electoral process, state legislatures across the country have adopted voter ID laws, which require voters to present a qualifying form of identification before casting a ballot in person. By late 2012, nine states had passed strict voter ID laws requiring those voting in person to present a valid, government-issued photo ID. These laws disproportionately disenfranchise minority voters, who are much more likely than their white counterparts to lack a valid ID.

There are no constitutional remedies available, as the Supreme Court has upheld voter ID laws against facial constitutional challenges, and as-applied constitutional challenges are not a feasible method of challenging laws with such a widespread effect. Although section 5 of the Voting Rights Act of 1965 can keep discriminatory voter ID laws from being enacted in a limited number of jurisdictions, the Supreme Court has expressed skepticism about the provision's continued constitutionality. This Note argues that a remedy can be found in section 2 of the Voting Rights Act: plaintiffs can challenge strict voter ID laws by showing that they so disproportionately affect minority voters that they dilute the vote of the minority group as a whole, effectively abridging the right to vote on account of race or color in violation of the Voting Rights Act.

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TABLE OF CONTENTS

INTRODUCTION

Dorothy Cooper, a registered Tennessee voter who can remember just one election in which she has not cast a ballot since the 1920s,

may no longer be able to vote in any of the state's elections.[1] In 2011, Tennessee enacted a voter identification ("ID") law that requires everyone casting a ballot in person to present a valid form of photo ID issued by either the state of Tennessee or the federal government.[2] But when Cooper visited her local Driver Service Center to obtain the photo ID she needs, she discovered that she cannot obtain the ID without providing documentation linking her maiden name—the name on her birth certificate—to her married name—the name on her voter registration card.[3] She does not have a copy of her marriage certificate, thus she was denied a photo ID.[4] There are millions of Americans who, like Cooper, do not have the primary documents necessary to acquire a valid photo ID; strict voter ID laws like Tennessee's may disenfranchise these voters from the electoral process.[5]

Since 2011, seven states have passed strict voter ID laws, which require voters to present a valid, government-issued photo ID to cast a ballot in person.[6] State legislatures in five other states also passed strict photo ID laws in 2011, though these laws were vetoed.[7] As the trend toward strict voter ID laws escalates, it is critical that all potentially disenfranchised voters have an effective way to challenge these laws.

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1 Ansley Haman, *96-Year-Old Chattanooga Resident Denied Voting ID*, CHATTANOOGA TIMES FREE PRESS (Oct. 5, 2011), http://www.timesfreepress.com/news/2011/oct/05/marriage-certificate-required-bureaucrat-tells/.

2 TENN. CODE ANN. § 2-7-112(c) (2012).

3 Haman, *supra* note 1.

4 *Id.*

5 *See* Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 186 (2009) (estimating that between 3 and 4.5 million American voters were disenfranchised by voter ID laws during the 2006 election cycle).

6 *See Voter Identification Requirements*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/default.aspx?tabid=16602 (last updated Oct. 2, 2012). These laws were passed in Kansas, Mississippi, Pennsylvania, South Carolina, Tennessee, Texas, and Wisconsin. *See id.* In early 2012, a Wisconsin state judge ruled that Wisconsin's strict voter ID law is unconstitutional. League of Women Voters of Wis. Educ. Network, Inc. v. Walker, No. 11 CV 4669, slip op. at 6 (Wis. Cir. Ct. Branch 9 2012) (holding that "as a matter of law under the Wisconsin Constitution, sacrificing a qualified elector's right to vote is not a reasonable exercise of the government's prerogative to regulate elections"), *cert. denied*, 811 N.W.2d 821 (Wis. 2012).

7 These strict photo ID laws were passed in Minnesota, Missouri, Montana, New Hampshire, and North Carolina. *See Voter Identification Requirements*, *supra* note 6. Some believe this dramatic rise in the number of states considering and enacting voter ID laws is propelled by major Republican victories in the 2010 election cycle, when the number of states in which Republicans controlled both houses of the legislature increased from fourteen to twenty-six. Fredreka Schouten, *State Voter ID Laws on the Rise*, USA TODAY, June 20, 2011, at 1A, *available at* http://www.usatoday.com/NEWS/usaedition/2011-06-20-Voting-requirementsART_ST_U.htm.

Minorities are disproportionately unlikely to have a valid photo ID,[8] and the rapid pace at which states are adopting strict voter ID laws threatens to disenfranchise millions of minority voters across the country.[9] Section 2 of the Voting Rights Act of 1965,[10] which prohibits voting procedures that abridge the ability of minority voters to elect their candidate of choice, provides an avenue for disenfranchised voters to challenge discriminatory voter ID laws.[11] Part I of this Note explains that in the landmark case of *Crawford v. Marion County Election Board*,[12] the Supreme Court upheld strict voter ID laws as facially constitutional.[13] Further, as-applied constitutional challenges are not a feasible mechanism for challenging laws with such a widespread effect.[14] Part II explains that although section 5 of the Voting Rights Act can prevent discriminatory voter ID laws from being enacted in a limited number of jurisdictions, its protections are not widespread and the Supreme Court has called its constitutionality into question.[15] Finally, Part III proposes that section 2 could provide an alternative remedy for disenfranchised voters: a challenge arguing that strict voter ID laws so disproportionately affect minority voters that they dilute the vote of the minority group as a whole, effectively abridging the right to vote on account of race or color in violation of section 2 of the Voting Rights Act.

I. THE HISTORY OF VOTER ID LAWS

Since the controversial presidential election of 2000, legislators across America have prioritized issues surrounding election administration, such as the prevention of voter fraud, polling place operations, and voter registration requirements.[16] Voter ID laws have emerged as a potential way to prevent in-person voter fraud by requiring that voters present a form of ID before casting a ballot.[17] Despite empirical

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8 BRENNAN CTR. FOR JUSTICE, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (2006), http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

9 *See* de Alth, *supra* note 5, at 186.

10 Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973aa-6 (2006).

11 *See* Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

12 Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

13 *See infra* Part I.C.

14 *See infra* Part I.D.

15 *See infra* Part II.

16 *See* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1209 (2005).

17 *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 644 (2007).

data showing the negative effect of these laws on voter turnout,[18] the Supreme Court found them facially constitutional in *Crawford v. Marion County Election Board.*[19] Individual and class action as-applied challenges are possible means of addressing discriminatory voter ID laws, but several obstacles make these tactics unlikely to prevent the implementation of such laws. Without a constitutional remedy, disenfranchised voters must look to statutory provisions such as the Voting Rights Act.

A. Overview of Voter ID Laws

The presidential election of 2000 raised grave concerns about outdated voting technology, voter registration procedures, and the operation of polling places.[20] In response, The Century Foundation and American University's Center for Democracy and Election Management established the National Commission on Federal Election Reform[21] to study election administration issues.[22] Commonly known as the Carter-Ford Commission, after then-chairmen Jimmy Carter and Gerald Ford, the Commission recommended that Congress promulgate several new election regulations while allowing states to decide how best to implement them.[23]

The Carter-Ford Commission's report laid the foundation for the Help America Vote Act of 2002 ("HAVA"),[24] which funded election administration and technology improvements[25] and introduced a federal voter ID requirement.[26] The Act sought to strengthen the integrity of the electoral system by requiring voters who register by mail to present either a valid photo ID or an official document showing the voter's name and address the first time they vote in person.[27]

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18 *See* de Alth, *supra* note 5, at 185 (finding a decline in voter turnout in states that instituted photo ID laws).

19 *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 188–89 (2008).

20 Tokaji, *supra* note 16, at 1209.

21 *Commission on Federal Election Reform*, AM. UNIV. CTR. FOR DEMOCRACY AND ELECTION MGMT., http://www1.american.edu/ia/cfer/ (last visited June 28, 2012); *Election Reform*, CENTURY FOUND., http://tcf.org/elections (last visited June 28, 2012).

22 Tokaji, *supra* note 16, at 1211–12.

23 *Id.*

24 *Id.* at 1211; Help America Vote Act of 2002, 42 U.S.C. §§ 15301–15545 (2006).

25 *See* 42 U.S.C. § 15302(a)(1) (providing funding for replacement of punch card or lever voting machines).

26 *See id.* § 15483(b)(2)(A) (requiring voters to present a valid photo ID or an official document showing the voter's name and address).

27 *Id.*

Despite the passage of HAVA, additional irregularities occurred during the 2004 federal election cycle.[28] In response, American University's Center for Democracy and Election Management convened the Commission on Federal Election Reform in April 2005.[29] Known as the Carter-Baker Commission, after the Commission's chairmen Jimmy Carter and former Secretary of State James Baker,[30] the Commission recommended that all states institute photo ID laws to combat in-person voter fraud, reasoning that "[t]he electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters."[31]

Three members of the Commission dissented from this recommendation, likening the ID requirement to a "modern day poll tax" and raising concerns that voters may be disenfranchised even when offered a free ID because the required primary documents may be difficult and expensive to obtain.[32] Indeed, empirical evidence shows that voter ID laws do disenfranchise voters who are unable to obtain a valid ID.[33]

The National Conference of State Legislatures has divided voter ID laws into three distinct categories: strict photo, photo, and non-photo.[34] In states with strict photo ID laws, a voter must show a valid, government-issued photo ID to cast a ballot in person, or he may cast a provisional ballot and then present a valid ID to election officials within a designated time period after the election to have his vote counted.[35] As of 2006, only Georgia and Indiana had strict photo ID

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28 *See* Dan Balz, *Carter-Baker Panel to Call for Voting Fixes*, WASH. POST, Sept. 19, 2005, at A3. The 2004 election cycle was marred by "[d]isputes over the counting of provisional ballots, the accuracy of registration lists, long lines at some polling places, timely administration of absentee ballots and questions about the security of some electronic voting machines." *Id.*

29 *See* Balz, *supra* note 28; Sara Sanchez, Essay, *Voter Photo Identification and Section 5 Reauthorization: An Exposition of Two Carter-Baker Commission Proposals and Their Current Status*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 261, 263–64 (2006).

30 Sanchez, *supra* note 29, at 264.

31 CTR. FOR DEMOCRACY & ELECTION MGMT., BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 18 (2005).

32 *Id.* at 88–89. The dissenting members were former U.S. Senator Tom Daschle, George Washington University Law School Professor Spencer Overton, and Arizona State University Professor Raul Yzaguirre. *Id.* at 88, 94, 96, 97.

33 *See infra* Part I.B.

34 *Voter Identification Requirements*, *supra* note 6.

35 *Id.*

requirements.[36] Since 2011, however, seven additional states have passed strict photo ID laws.[37]

In states with photo ID laws, voters are asked to show a photo ID, but procedures are provided for those unable to do so.[38] For example, a voter with an ID can vouch for another voter without an ID, a voter can sign an affidavit swearing to his identity, or a voter can provide personal information like his date of birth in lieu of a photo ID.[39] As of June 2012, seven states had photo ID laws in place.[40]

In states with non-photo ID laws, voters must show an ID to cast a ballot; acceptable documents may include a utility bill or a bank statement with the voter's name and address on it.[41] As of June 2012, sixteen states utilized non-photo ID laws.[42] The remaining states have not enacted voter ID requirements.[43]

B. The Effect of Voter ID Laws on Voter Turnout

The Brennan Center for Justice estimates that eleven percent of voting-age American citizens lack a government-issued photo ID.[44] Up to twenty-five percent of voting-age African American citizens possibly do not have a photo ID, compared to just eight percent of white citizens.[45] Many of these voters, like Dorothy Cooper, would be unable to vote under a strict voter ID law.[46]

In a 2009 study comparing voter turnout in the nonpresidential elections of 2002 and 2006, Shelley de Alth concluded that voter ID laws disenfranchised between 3 and 4.5 million voters across the

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36 Overton, *supra* note 17, at 639; *see also* GA. CODE ANN. § 21-2-417 (2008); IND. CODE ANN. § 3-11-8-25.1 (West Supp. 2006). Missouri also required photo identification to vote as of 2006, but the Supreme Court of Missouri struck down this provision under the state's constitution. Overton, *supra* note 17, at 643.

37 *See* Phil Hirschkorn, *Strict Voter ID Law Passes in Battleground Pennsylvania*, CBS NEWS (Mar. 15, 2012, 6:39 PM), http://www.cbsnews.com/8301-503544_162-57398463-503544/strict-voter-id-law-passes-in-battleground-pennsylvania; *Voter Identification Requirements, supra* note 6;.

38 *Voter Identification Requirements, supra* note 6.

39 *Id.*

40 *See id.* In June 2012, the New Hampshire state legislature passed a photo ID bill, overriding the governor's veto. Jess Bidgood, *New Hampshire: Lawmakers Override Vetoes on Voting and Abortion Bills*, N.Y. TIMES, June 28, 2012, at A18.

41 *See Voter Identification Requirements, supra* note 6.

42 *See id.*

43 *See id.*

44 BRENNAN CTR. FOR JUSTICE, *supra* note 8, at 3.

45 *Id.*

46 *See* Haman, *supra* note 1.

United States in 2006.[47] Between 2002 and 2006, ten states instituted stricter voter ID requirements.[48] States that enacted new photo ID laws saw a 1.6% decline in voter turnout in 2006,[49] and those that strengthened their voter ID laws between 2002 and 2006 saw a 1.07% decline.[50] De Alth's study shows that instituting new voter ID laws and strengthening existing ones are associated with a statistically significant decline in voter turnout.[51]

Despite this empirical evidence, Hans von Spakovsky, a senior legal fellow at The Heritage Foundation and one of the most outspoken supporters of voter ID bills, suggests that minority voter turnout actually increased in Georgia in 2008 after the state instituted its strict photo ID law.[52] His assertion is without merit, however, as von Spakovsky used the percentage of registered minorities who cast ballots rather than the percentage of the overall minority population in his analysis, thus failing to account for growth in Georgia's African American population.[53] Although the debate over empirical data continues,[54] the fact remains that as more states pass strict voter ID laws,

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47 De Alth, *supra* note 5, at 186.

48 *Id.* at 194. For the purposes of her study, de Alth divided voter ID laws into three categories: photo ID, non-photo ID, and no ID. *Id.* at 195.

49 *Id.* at 198.

50 *Id.* at 201. De Alth's results are somewhat complicated, as states that strengthened their voter ID laws before 2004 saw a 2.34% decline in turnout, while those that strengthened their laws from 2004 to 2006 saw a 1.95% increase in turnout. *Id.* She attributes this paradox to the publicity given to newer voter ID laws and their corresponding public outreach and education programs. *Id.*

51 *Id.* at 198 n.109, 201 n.116.

52 *See* Hans A. von Spakovsky, Op-Ed., *Securing the Integrity of our Elections*, WASH. TIMES, July 21, 2011, at A4.

53 *See New State Voting Laws: Barriers to the Ballot?: Hearing Before the Subcomm. on the Constitution, Civil Rights and Human Rights of the S. Comm. on the Judiciary,* 112th Cong. (2011), *available at* http://www.judiciary.senate.gov/hearings/hearing.cfm?id=2072649339b2bb3b19d320ce62f6c1b8. Von Spakovsky posited that minority voter turnout increased in Georgia, which had recently implemented a strict photo ID law, at a greater rate than it increased in Mississippi in the 2008 election cycle. *Id.* However, as Senator Al Franken noted, von Spakovsky did not account for the fact that Georgia's minority population grew at a much greater rate than Mississippi's before the 2008 elections. *Id.* Although the raw number of minorities who cast a ballot in Georgia may have increased at a rate that surpassed the growth of minority voters in Mississippi, the number of minorities living in Georgia also increased at a rate that surpassed minority population growth in Mississippi. *Id.*

54 For additional empirical data regarding the effect of voter ID laws on voter turnout, see JEFFREY MILYO, INST. PUB. POL'Y, U. MO., THE EFFECTS OF PHOTOGRAPHIC IDENTIFICATION ON VOTER TURNOUT IN INDIANA: A COUNTY-LEVEL ANALYSIS 4 (2007), *available at* https://mospace.umsystem.edu/xmlui/bitstream/handle/10355/2549/EffectsPhotographicIdentificationVoter.pdf?sequence=1; R. Michael Alvarez et al., *The Effect of Voter Identification Laws on Turnout* 3 (Caltech/MIT Voting Tech. Project Working Paper No. 57, Oct. 2007); Timothy Vercellotti & David Anderson, *Protecting the Franchise, or Restricting It? The Effects of Voter*

more voters across the country are left disenfranchised and without any recourse.

C. *Facial Constitutional Challenges to Voter ID Laws*

In 2005, Indiana and Georgia passed the nation's first strict voter ID laws, mandating that all in-person voters present a valid, government-issued photo ID to cast a ballot.[55] The enactment of these laws resulted in two major facial constitutional challenges to strict voter ID laws: *Crawford v. Marion County Election Board* and *Common Cause/Georgia v. Billups*.[56] Each challenge sought to have the voter ID law at issue struck down as discriminatory on its face; each challenge was unsuccessful.[57]

In *Crawford*, several political and nonprofit organizations challenged Indiana's strict voter ID law as an unconstitutional burden on the right to vote in violation of the Fourteenth Amendment.[58] The United States Supreme Court upheld the statute based on the absence of evidence that the law was unduly burdensome.[59] Writing for the plurality, Justice Stevens adopted a sliding scale standard from *Burdick v. Takushi*,[60] weighing the asserted injury to the right to vote against the interests of the state advanced by the law and considering the extent to which those interests make it necessary to burden the plaintiff's rights.[61]

Justice Stevens first discussed the state's strong interests in the enhancement of voting technology, the detection of in-person voter fraud, and the safeguarding of voter confidence.[62] He then concluded that the burdens of "making a trip to the [Bureau of Motor Vehicles],

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Identification Requirements on Turnout 2 (2006), *available at* http://moritzlaw.osu.edu/electionlaw/litigation/documents/ex3_003.pdf.

55 *See* An Act to Amend Title 21 (2005 Photo ID Act), 2006 Ga. Laws 3, 5 (codified at GA. CODE ANN. § 21-2-417(a) (2008)); An Act to Amend the Indiana Code Concerning Elections, Pub. L. No. 109-2005, 2005 Ind. Acts 2005 (codified at IND. CODE ANN. § 3-11-8-25.1(a) (West Supp. 2006)).

56 Common Cause/Ga. v. Billups, 554 F.3d 1340 (11th Cir. 2009).

57 *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 185–89 (2008); *Common Cause/Ga.*, 504 F. Supp. 2d 1333, 1382 (N.D. Ga. 2007).

58 *Crawford*, 553 U.S. at 187.

59 *Id.* at 189 (holding that "the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute"); *see also* Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006) (holding that plaintiffs had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of [the Senate Enrolled Act] 483 or who will have his or her right to vote unduly burdened by its requirements").

60 Burdick v. Takushi, 504 U.S. 428 (1992).

61 *Crawford*, 553 U.S. at 190 (quoting *Burdick*, 504 U.S. at 434).

62 *Id.* at 191–97.

gathering the required documents, and posing for a photograph" are not so substantial as to render the law facially unconstitutional.[63] The opinion emphasized the shortcomings of the record, indicating that the Court may have applied heightened scrutiny if the plaintiffs had provided evidence of specific voters unable to cast ballots or of concrete burdens placed on voters.[64]

Following *Crawford*, the Eleventh Circuit Court of Appeals applied the *Burdick* sliding scale and Justice Stevens's *Crawford* analysis to uphold Georgia's strict photo ID law in *Common Cause/Georgia v. Billups*.[65] In the wake of these cases, strict voter ID laws like Indiana's are essentially facially constitutional.[66] The state need only demonstrate that the challenged law protects legitimate interests to have the law upheld, while the plaintiff must meet a high evidentiary threshold—providing concrete evidence that the law burdens individuals' right to vote—to prevail on a facial constitutional challenge.[67]

D. As-Applied Constitutional Challenges to Voter ID Laws

By emphasizing that the record did not provide enough evidence to trigger heightened scrutiny, Justice Stevens's plurality opinion in *Crawford* left open the possibility that plaintiffs might challenge voter ID bills as applied to their specific cases.[68] In an as-applied challenge, an individual plaintiff or a class of plaintiffs argues that an otherwise constitutional law is unconstitutional when applied to the facts of a

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63 *Id.* at 198, 201–02. Stevens also noted that the burden of the photo ID law was mitigated by additional procedures, which permit voters without a photo ID to cast a provisional ballot and return with an executed affidavit of identity. *Id.* at 199.

64 *Id.* at 200–01. Justice Stevens noted that the record did not contain the number of registered voters without proper ID or any concrete evidence of the burden on those voters to get an ID, and it did not discuss the difficulties faced by indigent voters or those with religious objections to being photographed. *Id.*; *see also* Joel A. Heller, Note, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 VAND. L. REV. 1871, 1882 (2009) ("When one such challenge manages to identify burdens on the right to vote significant enough to trigger heightened scrutiny, the courts will presumably demand more explanation from the state as to the nature of its interest in addressing fear of fraud.").

65 *See* Common Cause/Ga. v. Billups, 554 F.3d 1340, 1352–53 (11th Cir. 2009).

66 *See Crawford*, 553 U.S. at 202–03; Bryan P. Jensen, Comment, Crawford v. Marion County Election Board*: The Missed Opportunity to Remedy the Ambiguity and Unpredictability of* Burdick, 86 DENV. U. L. REV. 535, 559 (2009) ("[W]hat Justice Stevens made clear is that a facial challenge, where the record contains little or no evidence of an actual harm, has little chance of prevailing.").

67 *See* Jensen, *supra* note 66, at 559–60.

68 *See Crawford*, 553 U.S. at 202 ("[O]n the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes 'excessively burdensome requirements' on any *class* of voters." (emphasis added)).

specific case.[69] Thus, under the *Burdick* sliding scale, a plaintiff could theoretically prove that the burdens placed on *him* by a voter ID law are so great that they outweigh the state's interest in preventing in-person voter fraud.[70] Despite Justice Stevens's hint that future plaintiffs may use these challenges in voter ID cases, several obstacles make a successful as-applied claim unlikely.[71]

1. *Individual As-Applied Constitutional Challenges*

An individual who wishes to challenge a voter ID law as it applies to him faces several significant hurdles. First, plaintiffs who would bring an as-applied challenge, namely those without the means to obtain a photo ID or the necessary primary documents, are also unlikely to have the resources needed to pursue litigation.[72] Second, pro bono attorneys may be discouraged from taking on as-applied cases because the remedies would affect only the particular plaintiffs involved.[73] Each as-applied case secures an injunction for only the named plaintiffs; attorneys are simply unable to devote the time and legal resources needed to represent every potential plaintiff.[74] In sum, because as-applied challenges brought by individual plaintiffs would require a tremendous amount of resources and yield no widespread effects, they are impracticable and thus unlikely to be a nationwide solution to discriminatory voter ID bills.

2. *Class Action As-Applied Constitutional Challenges*

An as-applied challenge brought as a class action is a more viable solution than a series of as-applied challenges brought by individual plaintiffs.[75] A class action would allow for more efficient use of attor-

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69 *See* City of Chicago v. Morales, 527 U.S. 41, 78 n.1 (1999) (Scalia, J., dissenting) (explaining that plaintiffs in an as-applied challenge assert that "*even if* the statute was not unconstitutional in *all* its applications it was *at least* unconstitutional in its particular application to them"); *see also* Julien Kern, *As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After* Crawford v. Marion County Election Board, 42 LOY. L.A. L. REV. 629, 646 (2009).

70 *See* Kern, *supra* note 69, at 643.

71 *Id.* at 647.

72 *Id.*

73 *Id.* at 649.

74 *Id.*

75 Class action certification allows an individual to bring suit on behalf of a group of plaintiffs who suffer the same injury. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974). Federal Rule of Civil Procedure 23(b)(2) provides for certification of a class when injunctive or declaratory relief would be appropriate with respect to a class, as in a voter ID challenge. FED. R. CIV. P. 23(b)(2).

Plaintiffs in *Frank v. Walker*, No. 2:11-cv-01128 (E.D. Wisc. filed Dec. 13, 2011), brought a

neys' resources, as one attorney or group of attorneys could represent an entire class of voters, and one case could provide a remedy for the entire class rather than for just a single named plaintiff.[76] However, class certification presents considerable hurdles.

To certify a class in an as-applied challenge to a state's voter ID law, the class must satisfy four requirements as set forth in Federal Rule of Civil Procedure 23(a): numerosity, commonality, typicality, and adequacy of representation.[77] Under the numerosity requirement, a class may be certified if it is "so numerous that joinder of all members is impracticable."[78] Plaintiffs challenging a voter ID law could meet this requirement by presenting affidavits of a significant number of voters who are unable to cast ballots under the law.[79]

The typicality requirement limits the claims of the class "to those fairly encompassed by the named plaintiff's claims."[80] Factual differences between each class member's claim do not preclude satisfaction of the typicality requirement as long as all claims arise from the same legal theory.[81] Thus, a representative who has been disenfranchised by a voter ID law will be "typical" of a class of voters who have likewise been disenfranchised.[82]

The adequacy of class representation requirement ensures there are no conflicts of interest between the class representatives and its members.[83] Ensuring that the class representative in a voter ID challenge has been disenfranchised by a voter ID law and is not aligned with the state's interests satisfies the adequacy requirement.[84]

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class action as-applied constitutional challenge to Wisconsin's strict voter ID law. *See* Complaint at 5, *Frank v. Walker*, No. 2:11-cv-01128. As of September 2012, the case had not been scheduled for motions hearings or trial, as the federal court was waiting to see whether the Wisconsin Supreme Court would reverse the previously issued state court injunctions before moving forward with the federal case. *See* Status Conference Minutes, *Frank v. Walker*, No. 2:11-cv-01128; *Attorney General J.B. Van Hollen Asking WI Supreme Court to Reinstate Voter ID Law*, WMTV (Aug. 21, 2012, 9:47 AM), http://www.nbc15.com/election/headlines/Attorney-General-JB-Van-Hollen-Asking-WI-Supreme-Court-To-Reinstate-Voter-ID-Law-166890486.html.

76 Kern, *supra* note 69, at 652–54.

77 FED. R. CIV. P. 23(a).

78 FED. R. CIV. P. 23(a)(1).

79 *See* Kern, *supra* note 69, at 658–59 (suggesting that the numerosity requirement could be met in a challenge to Indiana's voter ID law by presenting evidence establishing that at least forty people are unable to vote under the law's requirements).

80 Gen. Tel. Co. of the Nw. v. Equal Emp't Opportunity Comm'n, 446 U.S. 318, 330 (1980).

81 Donaldson v. Pillsbury Co., 554 F.2d 825, 831 (8th Cir. 1977), *cert. denied*, 434 U.S. 856 (1977).

82 Kern, *supra* note 69, at 661.

83 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997).

84 *See* Kern, *supra* note 69, at 661–62.

Although the numerosity, typicality, and adequacy of representation requirements for class certification would probably not pose any difficulty in a voter ID challenge, the commonality requirement could present a real obstacle. The commonality requirement mandates that "questions of law or fact common to the class" be present.[85] Under the *Burdick* standard, the outcome of a voter ID challenge will depend on the extent to which the law burdens an individual's right to vote,[86] thus a court may find it necessary to examine the facts of each plaintiff's claim separately to determine whether the burdens on that particular plaintiff outweigh the state's interests.[87] Should a court decide that each individual's claim must be weighed separately, it would likely hold that there is no common nucleus of operative fact among the class members and that the commonality requirement is not met,[88] making certification of the class impermissible. Because as-applied individual and class action constitutional challenges to voter ID laws are likely to fail, and because the Supreme Court has already upheld voter ID laws against facial constitutional challenges, disenfranchised voters must turn to statutory remedies.

II. VOTER ID CHALLENGES UNDER SECTION 5 OF THE VOTING RIGHTS ACT OF 1965

Congress passed the Voting Rights Act of 1965 "to banish the blight of racial discrimination in voting, which [had] infected the electoral process in parts of our country for nearly a century."[89] The Act was designed to provide new remedies for voting discrimination and to strengthen existing ones.[90] Congressional authority to create these remedies originates in Section 2 of the Fifteenth Amendment, which authorizes legislation that ensures that citizens are not denied the right to vote on account of race or color.[91]

The Voting Rights Act contains two major enforcement mechanisms: section 5, which requires "covered jurisdictions" to submit all changes to voting administration procedures to the federal government for approval before implementation,[92] and section 2, which for-

85 FED. R. CIV. P. 23(a)(2).

86 *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008) (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

87 *See* Kern, *supra* note 69, at 659–60.

88 *Id.* at 660.

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

90 *Id.*

91 *See* U.S. CONST. amend. XV; *Katzenbach*, 383 U.S. at 308.

92 42 U.S.C. § 1973c(a) (2006); *see also* Gilda R. Daniels, *A Vote Delayed Is a Vote Denied:*

bids voting procedures that discriminate based on race, color, or language minority status.[93] Section 5 requires covered jurisdictions to submit proposed voting procedures to the federal government for preclearance and prove that the procedures do not have a discriminatory purpose or a retrogressive effect on minority voters.[94] These jurisdictions may seek preclearance from either the Department of Justice ("DOJ") or from the United States District Court for the District of Columbia ("DDC").[95] Although section 5 has dramatically improved opportunities for minority participation in the electoral process since its enactment in 1965,[96] several factors prevent its provisions from adequately safeguarding against discriminatory voter ID laws.

A. Overview of Section 5

Congress passed section 5 of the Voting Rights Act to ensure that states could no longer use discriminatory procedures or techniques to destroy minority participation in the political process.[97] Under section 5, a covered jurisdiction "enact[ing] or seek[ing] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," must have the qualification or procedure approved by the federal government in a process called "preclearance."[98] Covered jurisdictions include states or political subdivisions of a state where (1) as of November 1, 1964, any test or device was used to restrict the right to vote, and (2) either less than half of the voting-age population was registered to vote or less than half of the registered voters cast ballots in the presidential election of November 1964.[99] Under this formula, Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are

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A Preemptive Approach to Eliminating Election Administration Legislation That Disenfranchises Unwanted Voters, 47 U. LOUISVILLE L. REV. 57, 66 (2008).

93 42 U.S.C. § 1973(a); *see also* Daniels, *supra* note 92, at 66.

94 *See* 42 U.S.C. § 1973c(a).

95 *Id.*

96 Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 201 (2009).

97 *See* Beer v. United States, 425 U.S. 130, 140–41 (1976) ("Section 5 was intended 'to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques.'" (quoting S. REP. NO. 94-295, at 19 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 785)).

98 42 U.S.C. § 1973c(a).

99 *Id.* § 1973b(b).

covered jurisdictions,[100] as are several counties in California, Florida, New York, North Carolina, and South Dakota.[101]

Section 5 offers two procedural options to a covered jurisdiction seeking to change its voting regulations: the jurisdiction may submit the proposed procedure to the DOJ, where the Attorney General has sixty days to interpose an objection to the submission,[102] or the jurisdiction may institute an action before the DDC for a declaratory judgment approving the procedure.[103] Because section 5 puts the burden of proof on the jurisdiction, and because parties challenging a law are able to introduce evidence of both discriminatory intent and discriminatory effect, section 5 provides a more effective basis for voter ID challenges than does the Constitution.

In a challenge to an election regulation under the Equal Protection Clause of the Fourteenth Amendment, the *plaintiff* must prove that the interests of the state achieved by the procedure are outweighed by the undue burdens on the right to vote.[104] Under section 5, however, the *jurisdiction* must prove that the new procedure does not "lead to a retrogression in the position of racial minorities with

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100 *Section 5 Covered Jurisdictions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/covered.php (last visited June 28, 2012).

101 *Id.*

102 42 U.S.C. § 1973c(a).

103 *Id.* Georgia, South Carolina, and Texas have each sought preclearance of a strict voter ID law through the DOJ. *See* Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 How. L.J. 785, 817 (2006) (noting that the DOJ precleared the Georgia law in 2005); Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to Keith Ingram, Dir. of Elections, Office of the Tex. Sec'y of State (Mar. 12, 2012), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_031212.php (denying preclearance of the Texas law in 2012); Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice Civil Rights Div., to C. Havird Jones, Jr., Assistant Deputy Att'y Gen. of S.C. (Dec. 23, 2011), *available at* http://www.justice.gov/crt/about/vot/sec_5/ltr/l_122311.php (denying preclearance of the South Carolina law in 2011).

At the end of 2011, no state had sought initial preclearance of a voter ID law through the DDC. However, Mississippi's Secretary of State speculated that the state would seek preclearance of its strict voter ID law through the court rather than through the DOJ. Geoff Pender, *Hosemann: DOJ Unlikely to Approve Mississippi Voter ID Law*, CLARIONLEDGER.COM (Sept. 19, 2012, 12:24 PM), http://www.clarionledger.com/article/20120919/NEWS/120919015/Hosemann-Legal-battle-brewing-over-Miss-voter-ID-law?odyssey=nav—head. Additionally, South Carolina and Texas both sought review of the Attorney General's denial of preclearance before the DDC. The court denied preclearance of Texas's law in August 2012, Texas v. Holder, No. 12-cv-128, 2012 WL 3743676, at *9 (D.D.C. Aug. 30, 2012), but it precleared South Carolina's law in October 2012, South Carolina v. United States, No. 12-203, 2012 WL 4814094, at *1 (D.D.C. Oct. 10, 2012).

104 *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 190 (2008) (explaining that in a constitutional challenge to an election regulation, the Court weighs the asserted injury to the right to vote against the state interests put forth as justifications for the rule).

respect to their effective exercise of the electoral franchise."[105] This "retrogression" standard requires the jurisdiction to prove that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color."[106]

Both the DOJ and the DDC will find a discriminatory purpose when there is direct or indirect evidence of invidious intent.[107] Direct evidence includes public statements of members of the legislative body that adopted the procedure.[108] Courts find indirect evidence of discriminatory intent by evaluating the impact of the procedure on minorities, the historical background of the decision to implement the procedure, the events leading up to the decision, whether the new procedure departs procedurally or substantively from the existing practice, and statements and viewpoints held by the decisionmakers.[109] In 2006, Congress amended section 5 to emphasize that "discriminatory purpose" is not limited to the intent to cause a retrogressive effect; rather, the statute forbids *any* discriminatory purpose, such as maintaining the status quo with an invidious intent.[110]

To determine whether a retrogressive effect exists, the federal government evaluates the proposed voting practice in light of the status quo.[111] If the proposed practice would abridge minorities' right to vote relative to the status quo by "worsen[ing] the position of minority voters,"[112] the evaluating body will not preclear the proposed law, and the status quo remains in effect.[113] Both the DOJ and the DDC apply these standards for discriminatory purpose and retrogressive effect when evaluating a procedure for preclearance.[114]

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105 Beer v. United States, 425 U.S. 130, 141 (1976).

106 42 U.S.C. § 1973c(a).

107 *See* 28 C.F.R. § 51.54 (2012).

108 *See* Busbee v. Smith, 549 F. Supp. 494, 508, 517 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983) (analyzing overtly racial statements made by Representatives on the floor of the Georgia House of Representatives as direct evidence of discriminatory purpose).

109 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977). These factors have been expressly adopted into the DOJ's Procedures for Administration of Section 5 of the Voting Rights Act. *See* 28 C.F.R. § 51.57(e).

110 Shelby Cnty., Ala. v. Holder, 811 F. Supp. 2d 424, 437 (2011); *see also* 28 C.F.R. § 51.54(a), (d).

111 Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 334 (2000).

112 *Id.* at 324.

113 *Id.* at 334.

114 *Id.* at 333 n.2.

B. *Preclearance of Voter ID Laws Through the Department of Justice*

When a covered jurisdiction opts to submit its proposed procedure to the DOJ for preclearance, the Attorney General determines whether the jurisdiction has adequately shown the absence of a discriminatory purpose or a retrogressive effect on minorities' right to vote.[115] Should the Attorney General conclude that the jurisdiction has not met its burden of proof, he will interpose an objection to the procedure.[116] The Attorney General considers factors such as whether the jurisdiction has provided a reasonable and legitimate justification for the new procedure, whether it followed "fair and conventional procedures" when adopting the procedure, whether it provided opportunities for minorities to participate in the decisionmaking process, and whether it considered the concerns of minorities.[117]

The DOJ may also request additional information from the jurisdiction.[118] For example, the DOJ analyzed the possible effects of Texas's strict voter ID law on Hispanics by asking the state to provide specific data about voters known to lack an accepted form of ID, detailing their race, where they live, and whether they have Hispanic surnames.[119] The DOJ also requested information about educational efforts directed toward those without a valid ID to determine whether the state would adequately mitigate any potentially discriminatory effects.[120]

The DOJ has successfully used section 5 to preempt the implementation of discriminatory voting practices since the Act's inception in 1965.[121] Despite its successes, however, the preclearance requirement raises some grave concerns. A serious flaw in the DOJ preclearance structure is that political pressures may improperly influ-

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115 28 C.F.R. § 51.52(a). The Attorney General has delegated authority to make determinations regarding section 5 preclearance to the Assistant Attorney General of the Civil Rights Division. *Id.* § 51.3. Thus, the Assistant Attorney General of the Civil Rights Division in practice takes all actions attributed to the Attorney General in the text of this Note.

116 *Id.* § 51.52(c).

117 *Id.* § 51.57.

118 *See* Kate Alexander & Tim Eaton, *Justice Department Seeks More Details on Texas' Voter ID Law*, STATESMAN.COM (last updated Sept. 23, 2011, 8:44 PM), www.statesman.com/news/texas-politics/justice-department-seeks-more-details-on-texas-voter-1876307.html (explaining that the DOJ requested additional information from Texas because the data originally sent to the DOJ was insufficient to enable a determination of whether the proposed voter ID law would have a discriminatory purpose or effect).

119 *Id.*

120 *Id.*

121 *See* Daniels, *supra* note 92, at 69.

ence the Attorney General's decision to preclear a law. For example, after evaluating Georgia's 2005 Photo ID Act,[122] four out of five DOJ analysts recommended objecting to the law.[123] Substantial evidence convinced these career attorneys and analysts that the law would have a retrogressive effect on minority voters. They specifically noted that legislators in Georgia failed to consider whether African Americans were more likely than their white counterparts to lack a valid ID[124] and that several nonretrogressive alternatives were available.[125] The DOJ team also noted that the bill was passed almost completely on racial lines, as every African American member of the Georgia Legislature but one opposed the voter ID provision.[126] The day after the DOJ's staff released their memorandum, the Chief of the Voting Rights Section of the Bush Administration DOJ disregarded the recommendation and approved Georgia's voter ID law.[127] The career attorneys voted to deny preclearance based on evidence of a retrogressive effect, but the political players cleared the law in a move thought to result from partisan political considerations.[128]

Contrasting the preclearance of Georgia's law with the objection interposed to South Carolina's voter ID law underscores the possibility of partisan manipulation. Both laws allow voters to cast a ballot by presenting a state-issued or federal ID,[129] and both permit a voter without an ID to cast a provisional ballot and then present an ID to a county board of registration to have his vote counted.[130] Georgia and South Carolina both justified their strict voter ID laws based on their interest in combating voter fraud.[131] Despite these similarities, the

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122 GA. CODE ANN. § 21-2-417 (2008).

123 Section 5 Recommendation Memorandum from Robert Berman, Deputy Chief of U.S. Dep't of Justice Voting Rights Div. et al., at 1 (Aug. 25, 2005), *available at* http://www.washingtonpost.com/wp-dyn/content/custom/2005/11/16/CU2005111601869.html.

124 *Id.* at 33.

125 *Id.* at 33–34. Among the alternatives suggested by the DOJ career attorneys was the retention of any forms of previously accepted ID for which there were no substantiated security concerns, such as birth certificates. *Id.*

126 *Id.* at 33.

127 *See* Tokaji, *supra* note 103, at 816–17.

128 *Id.* ("[T]he apparently cavalier treatment of the DOJ career staff's thoughtful memorandum appear[ed] to be motivated by partisan political considerations rather than evenhanded application of section 5's retrogression standard.").

129 *See* GA. CODE ANN. § 21-2-417(a) (2008); 2011 S.C. Acts 90, 94.

130 GA. CODE ANN. § 21-2-417(b) (2008); 2011 S.C. Acts 90, 95.

131 *See* Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1355–57 (N.D. Ga. 2007) (discussing Georgia's concerns about voter fraud); Letter to C. Havird Jones, Jr., *supra* note 103, at 2 (explaining that South Carolina's offered justification for requiring photo ID to vote in person is to combat voter fraud).

DOJ reached opposite conclusions under the Bush and Obama Administrations, respectively.

In 2011, the Voting Rights Division of the DOJ under President Obama interposed an objection to South Carolina's strict voter ID law.[132] The Attorney General acknowledged South Carolina's interest in preventing voter fraud and safeguarding voter confidence but noted that no evidence showed that existing non-photo ID requirements were not properly addressing in-person voter fraud.[133] Empirical evidence indicated that minority voters in South Carolina were nearly twenty percent more likely than white voters to lack an appropriate photo ID, leading the DOJ to conclude that the law would have a retrogressive effect on minorities' ability to participate in the electoral process.[134] That the DOJ came to opposite conclusions in such similar cases under different administrations suggests that politics have the potential to undermine section 5's goal of protecting minorities' voting rights.

Compounding the concern about improper partisan influence is the fact that the Attorney General is not bound by previous preclearance decisions when considering a new voter ID law.[135] Nor is the Attorney General required to provide any reasoning for his decision.[136] The result of this unpredictable and insulated decisionmaking process is a lack of accountability and transparency, a problem that is amplified because the DOJ's decision to grant preclearance is not subject to judicial review.[137] The possibility of improper political influence and the lack of accountability make it imprudent to rely solely on the DOJ to prevent the implementation of discriminatory voter ID laws.

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132 Letter to C. Havird Jones, Jr., *supra* note 103, at 2.

133 *Id.*

134 *Id.*

135 The DOJ considers each preclearance case on its own merits, so the decision not to preclear one state's voter ID law does not affect the consideration of another state's law. *See* Raju Chebium & Deborah Barfield Barry, *Experts: Impact of S.C. Voter ID Law Rejection Limited*, USA TODAY (Dec. 30, 2011, 7:27 PM), http://www.usatoday.com/news/nation/story/2011-12-30/south-carolina-voter-ID-law/52295760/1 (explaining that the DOJ's decision not to preclear South Carolina's voter ID law applies only to South Carolina, thus it is unlikely to have a significant national impact).

136 *See* Daniels, *supra* note 92, at 97 (noting that the DOJ's internal preclearance memorandum is not released to the submitting jurisdiction or to the general public).

137 *See* 28 C.F.R. § 51.49 (2012); Tokaji, *supra* note 103, at 823. Although plaintiffs may challenge the law under the Equal Protection Clause of the Fourteenth Amendment or under section 2 of the Voting Rights Act, the precleared law would remain in effect unless and until one of those challenges is successful. Tokaji, *supra* note 103, at 823.

C. *Preclearance of Voter ID Laws Through the Federal Courts*

Rather than seeking preclearance from the Attorney General, covered jurisdictions may file suit before a three-judge panel of the DDC for a declaratory judgment that a proposed procedure does not have the purpose or effect of abridging minorities' right to vote.[138] Jurisdictions may choose to seek preclearance directly from the DDC when officials fear their new procedures will not get approval from the DOJ on political grounds.[139] Alternatively, if the jurisdiction first submits the voting plan to the DOJ and the Attorney General interposes an objection, the jurisdiction must obtain a declaratory judgment from the DDC before implementing the proposed procedure.[140] In preclearance cases before the DDC, as with cases before the DOJ, the jurisdiction bears the burden of proving that the plan does not have a discriminatory purpose or a retrogressive effect.[141] Decisions of the three-judge panel may be appealed directly to the Supreme Court.[142]

After the DOJ objected to South Carolina's strict voter ID law, the state sought a declaratory judgment from the DDC that its voter ID law neither had the purpose nor would have the effect of denying or abridging the right to vote on account of race or color.[143] South Carolina argued that it had no discriminatory intent; the voter ID requirement was aimed only at preventing voter fraud and "enhancing public confidence in the integrity of the electoral process."[144] The law did not formally bar anyone from voting, thus, South Carolina argued, there could be no retrogressive effect on minorities.[145] The three-judge panel ultimately precleared South Carolina's voter ID law as nondiscriminatory and nonretrogressive, holding that it "allows citizens with non-photo voter registration cards to still vote without a

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138 42 U.S.C. § 1973c(a) (2006).

139 *See* Richard L. Hasen, *Disenfranchise No More*, N.Y. TIMES, Nov. 18, 2011, at A33 (noting that Texas Republicans opted for preclearance of their redistricting plan before the DDC because they feared that the plan would not be approved by the DOJ); Pender, *supra* note 103 (explaining that Mississippi state officials will petition the DDC for preclearance of their photo ID law because they believe the DOJ would not approve the law).

140 42 U.S.C. § 1973c(a).

141 *See id.*

142 *Id.*

143 Complaint for Declaratory Judgment at 1, South Carolina v. United States, No. 12-203, 2012 WL 4814094 (D.D.C. Oct. 10, 2012); *see also* 42 U.S.C. § 1973c(a) (requiring the jurisdiction to prove that the proposed procedure "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" when seeking preclearance from either the DOJ or the DDC).

144 Complaint for Declaratory Judgment, *supra* note 143, at 8–9.

145 *See id.* ("Because these photo identification requirements are not a bar to voting . . . they do not have a racially discriminatory effect.").

photo ID so long as they state the reason for not having obtained one; it expands the list of qualifying photo IDs . . . ; and it makes it far easier to obtain a qualifying photo ID."[146]

Although South Carolina sought a declaration that the state's voter ID law was entitled to preclearance under section 5, the state also warned the court of the possible constitutional ramifications of striking down its voter ID law.[147] In its complaint, South Carolina relied heavily on the Supreme Court's holding in *Crawford*, arguing that the South Carolina law was substantially similar to Indiana's strict voter ID law, which the Supreme Court found facially constitutional.[148] South Carolina posited that its law, like Indiana's, merely imposes a "minor inconvenience" on the ability to vote.[149] The state argued that striking down South Carolina's law would create a situation in which covered jurisdictions, like South Carolina, could not enact the same constitutional legislation permitted in noncovered jurisdictions, like Indiana, thereby raising grave constitutional concerns.[150] South Carolina's threat to challenge the constitutionality of the preclearance regime is part of a greater movement to strike down section 5 and is one of the major reasons why section 5 is not an adequate safeguard against strict voter ID laws.

D. The Failure of Section 5 to Protect Adequately Against Discriminatory Voter ID Laws

Although the Voting Rights Act has been credited with eliminating numerous barriers to voter registration and voter turnout for minorities,[151] there are several problems with relying solely on section 5 to challenge voter ID bills. First, Congress may have exceeded its constitutional authority by reauthorizing section 5 in 2006.[152] In 2009, the Supreme Court in *Northwest Austin Municipal Utility District Number One v. Holder*[153] ("*NAMUDNO*") unanimously noted that the Voting Rights Act's preclearance requirements and coverage formula raise "serious constitutional questions."[154] The Court ex-

146 *South Carolina v. United States*, 2012 WL 4814094, at *1.

147 *See* Complaint for Declaratory Judgment, *supra* note 143 at 10–11.

148 *Id.* at 1–2.

149 *Id.* at 6–7.

150 *Id.* at 11. DDC did not address this argument when considering whether to preclear South Carolina's voter ID law. *See South Carolina v. United States*, 2012 WL 4814094.

151 *See* Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 201 (2009) ("The historic accomplishments of the Voting Rights Act are undeniable.").

152 *Id.* at 202.

153 Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2009).

154 *Id.* at 204.

pressed several "federalism concerns," such as the intrusion of the federal government into areas of state policymaking, uncertainty as to whether the current needs for section 5 justify the burdens it imposes, and the differentiation between states despite the tradition of "equal sovereignty."[155]

In 2011, voters in Kinston, North Carolina, the State of Florida, and Shelby County, Alabama brought direct challenges to the constitutionality of the section 5 preclearance regime,[156] and the Supreme Court granted certiorari on the issue in November 2012.[157] Although the DDC has upheld the constitutionality of section 5, the increasing number of challenges and the uncertainty expressed by the Supreme Court in *NAMUDNO* render voter ID challenges based solely on section 5's preclearance regime unwise.

The second problem with relying on section 5 to challenge voter ID laws is that its requirements apply to only nine states and a handful of counties in five other states.[158] Further, just four of the nine states that have enacted strict voter ID laws are subject to preclearance.[159] Although Georgia, Mississippi, South Carolina, and Texas have to prove to the DOJ or the DDC that their voter ID laws do not have the purpose and will not have the effect of abridging minorities' right to vote before their laws can be implemented, Indiana, Kansas, Penn-

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155 *Id.* at 202–04.

156 In *LaRoque v. Holder*, 831 F. Supp. 2d 183, 187 (D.D.C. 2011), four private citizens and a citizens' group brought a facial challenge to the constitutionality of section 5's preclearance requirements. *Id.* at 187. The DDC granted the Attorney General's motion for summary judgment. *Id.* at 238. While on appeal, the Attorney General withdrew his objection to the proposed change, causing the D.C. Circuit to vacate the case and remand it to the district court with instructions to dismiss for lack of jurisdiction. LaRoque v. Holder, 679 F.3d 905, 909 (D.C. Cir. 2012).

In *Florida v. United States*, 820 F. Supp. 2d 85 (D.D.C. 2011), the State of Florida brought an action against the United States and the Attorney General seeking either preclearance of changes to its election laws or a declaration that section 5's preclearance coverage formula and requirements are unconstitutional. *Id.* at 86.

In *Shelby County, Alabama v. Holder*, 811 F. Supp. 2d 424 (D.D.C. 2011), *cert. granted*, 2012 WL 3018430 (U.S. Nov. 9, 2012) (No. 12-96), Shelby County sought a declaratory judgment that section 5's preclearance procedures were unconstitutional. *Id.* at 424. The district court granted the Attorney General's motion for summary judgment, holding that Congress's reauthorization of section 5 was a congruent and proportional response to a specific problem, *id.* at 502–03, and that the disparate geographic coverage of the statute was sufficiently related to that problem, *id.* at 507.

157 Shelby Cnty. v. Holder, 133 S. Ct. 594, 594 (2012) (mem.).

158 *See Section 5 Covered Jurisdictions*, *supra* note 100.

159 Georgia, Mississippi, South Carolina, and Texas are the only states with strict voter ID laws that are subject to preclearance. *See id.*; *Voter Identification Requirements*, *supra* note 6 (listing which states have passed photo ID laws).

sylvania, Tennessee, and Wisconsin are not subject to the same oversight.[160] Therefore, even if the Supreme Court does uphold section 5's preclearance procedures as constitutional, the provisions protect only a small portion of the population. Voters in noncovered jurisdictions still lack a way to prevent the enactment of discriminatory voter ID laws.

Thus, because the ongoing vitality of section 5 is in doubt, and because the preclearance procedures apply to such a small number of jurisdictions, section 5 does not provide adequate nationwide protection against voter ID laws. However, section 2 of the Voting Rights Act provides a viable solution.

III. VOTER ID CHALLENGES UNDER SECTION 2 OF THE VOTING RIGHTS ACT OF 1965

Section 2 of the Voting Rights Act was amended in 1982 to ensure that "[n]o voting qualification 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 . . . ."[161] The essence of a section 2 claim is that the challenged voting procedure "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed" by minority voters to elect their representative of choice.[162] Section 2 allows for challenges to all forms of voting discrimination,[163] including vote denial claims, where a voter is not allowed to cast a ballot because of a voting qualification or restriction,[164] and vote dilution claims, where a voter is permitted to cast a ballot but the ballot is not weighted equally with other votes.[165] Vote denial

160 *See Section 5 Covered Jurisdictions*, *supra* note 100.

161 Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2(a), 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(a) (2006)); *see* S. REP. No. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179. Prior to the 1982 amendments, section 2 stated that "[n]o voting qualification . . . or procedure shall be imposed or applied by any State or political subdivision *to deny or abridge* the right of any citizen of the United States to vote on account of race or color." Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (emphasis added).

162 Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

163 *See id.* at 44–45.

164 A literacy test requiring a voter to read and understand a statute or constitutional provision is a type of voting qualification that could result in a vote denial claim. *See* Daniels, *supra* note 92, at 66–67; *see also* Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45, 53 (1959) (noting that a literacy test may be facially constitutional but employed in a manner that perpetuates discrimination).

165 Multimember districts and at-large voting schemes may engender vote dilution claims, as they may minimize minority voting strength by submerging minority votes in a white majority. Daniels, *supra* note 92, at 66–67; *see also* Burns v. Richardson, 384 U.S. 73, 88 (1966) (noting that

claims usually implicate an individual's right to cast his ballot, while vote dilution claims generally refer to a group's right to cast its votes equally.[166] Voter ID laws bar single voters from casting a ballot, but these individual denials so disproportionately affect minorities that they dilute the group's ability to elect the candidate of its choice in violation of section 2.

A. *Overview of Section 2*

Section 2 was created to address voting discrimination, "not step by step, but comprehensively and finally."[167] In 1973, the Supreme Court in *White v. Regester*[168] developed a "results test" to determine whether a minority group's right to vote was diluted in violation of section 2.[169] Under this test, plaintiffs in section 2 cases could prevail by showing *either* that a law was passed with a discriminatory intent or that it had discriminatory results.[170] Plaintiffs also had to carry their burden of showing that minority voters had less opportunity than other residents of the jurisdiction to participate in the political process.[171]

The *White* "results test" was the leading standard for section 2 vote dilution cases until 1980, when the Supreme Court's decision in *City of Mobile v. Bolden*[172] "completely changed" the way courts assessed electoral procedures alleged to discriminate against a minority group.[173] In *Bolden*, the Supreme Court held that the Fifteenth Amendment "prohibits only purposefully discriminatory denial or abridgement" of the right to vote.[174] The Court reasoned that because section 2 was meant to have the same effect as the Fifteenth Amendment, plaintiffs in section 2 claims had to prove a discriminatory *intent* to deny or abridge the right to vote.[175] This holding marked the movement of the section 2 standard from the *White* results test to a purely intent-based test.

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apportionment schemes including multimember districts "constitute an invidious discrimination" only where it can be shown that the particular scheme would "minimize or cancel out the voting strength of [minority voters]").

166 Daniels, *supra* note 92, at 68.

167 S. REP. No. 97-417, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182.

168 White v. Regester, 412 U.S. 755 (1973).

169 *See* S. REP. No. 97-417, at 23.

170 *See id.* at 27.

171 *White*, 412 U.S. at 766.

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

173 Jones v. City of Lubbock, 640 F.2d 777, 777 (5th Cir. 1981).

174 *Bolden*, 446 U.S. at 65.

175 *See id.* at 60–61.

This sudden change in the standard employed in section 2 challenges wreaked havoc in the lower courts.[176] The 1982 amendments to the Voting Rights Act rejected the *Bolden* intent test and codified the *White* "results test"[177] by changing the language of section 2 from a prohibition on any procedure applied "to deny or abridge" the right to vote,[178] to a prohibition on any procedure that could be applied "in a manner which results in a denial or abridgement" of the right to vote.[179] This change clarified that plaintiffs may prevail by showing that, "under the totality of the circumstances, the [challenged] devices result in unequal access to the electoral process."[180] In short, the critical issue is not intent but rather "whether the political processes are equally open to minority voters."[181]

B. Vote Dilution and Vote Denial Claims

The language of section 2 does not differentiate between vote denial and vote dilution claims; it bans *all* voting procedures that deny *or* abridge the right to vote on account of race or color.[182] However, in the Voting Rights Act's "first generation," cases addressed primarily vote denial in the form of literacy tests and poll taxes[183] because denial of voter registration was the main device used to disenfranchise minorities prior to the adoption of the Voting Rights Act in 1965.[184] The Act banned the use of literacy tests,[185] and the Supreme Court struck down poll taxes as unconstitutional shortly thereafter.[186] As a result, state legislatures quickly understood that the Voting Rights Act would no longer permit the outright denial of minorities' voting rights.[187]

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176 *See* S. REP. No. 97-417, at 26 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 203–04 (explaining that *Bolden* failed to articulate a new standard to guide courts).

177 *See id.* at 2.

178 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

179 Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2(a), 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(a) (2006)).

180 Thornburg v. Gingles, 478 U.S. 30, 46 (1986).

181 S. REP. No. 97-417, at 2.

182 *See* 42 U.S.C. § 1973(a).

183 *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 702 (2006).

184 S. REP. No. 97-417, at 5. Violence, harassment, and literacy tests or other screening methods were the primary devices used to deny minorities the right to vote. *Id.*

185 *See* 42 U.S.C. § 1973b. The Voting Rights Act initially banned the use of literacy tests in covered jurisdictions for a period of five years. *See* S. REP. No. 97-417, at 8. In 1975, the Voting Rights Act was extended and literacy tests were permanently banned in all jurisdictions. *See id.* at 9.

186 Harper v. Va. Bd. of Elections, 383 U.S. 663, 668–69 (1966).

187 *See* S. REP. No. 97-417, at 7 (explaining that state legislatures began to employ vote dilution schemes after the Voting Rights Act banned vote denial schemes like literacy tests).

The implementation of the Voting Rights Act and subsequent vote denial cases led to a dramatic increase in the number of registered minority voters,[188] and states responded by implementing mechanisms like at-large elections and gerrymandered districting plans to dilute the strength of these new votes.[189] The "second generation" of the Voting Rights Act, beginning in the late 1960s and continuing into the present day, utilizes section 2 to challenge these vote dilution mechanisms.[190] As state legislatures continued to implement procedures that diluted the new minority vote and the number of section 2 vote dilution claims continued to increase, Congress passed the 1982 amendments to return to the "results test," requiring proof only that the challenged procedure had a discriminatory result on minorities' right to vote.[191]

The Report published by the Senate Committee on the Judiciary, which accompanied the 1982 amendments to section 2, shows that the Senate intended that courts apply this results test by using objective factors to assess the impact of the challenged procedure on the right to vote.[192] Plaintiffs can show unequal access to the political process using a variety of factors, including: (1) the history of voting-related discrimination in the jurisdiction; (2) the degree of racial polarization of voting in the jurisdiction; (3) voting practices in the jurisdiction that "may enhance the opportunity for discrimination against the minority group;" (4) the exclusion of minorities from the candidate slating process; (5) the extent to which minorities in the jurisdiction "bear the effects of [past] discrimination," hindering their ability to participate effectively in the political process; (6) the use of racial appeals in political campaigns; and (7) whether minorities have been elected to public office in the jurisdiction.[193] Additional considerations include the degree of responsiveness to the particularized needs of minorities and whether the policy underlying the jurisdiction's proposed procedure is tenuous.[194] There is no requirement that a plaintiff meet a certain number of these factors or even a majority of them to bring a successful section 2 claim.[195]

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188 *See id.* at 6.

189 *See id.*

190 *See* Tokaji, *supra* note 183, at 703.

191 S. REP. NO. 97-417, at 15–16.

192 *Id.* at 27; *see also* Thornburg v. Gingles, 478 U.S. 30, 45 (1986).

193 S. REP. NO. 97-417, at 28–29; *see also Gingles*, 478 U.S. at 44–45.

194 S. REP. NO. 97-417, at 29; *see also Gingles*, 478 U.S. at 45.

195 *Gingles*, 478 U.S. at 45.

In *Thornburg v. Gingles*,[196] the Supreme Court adopted the aforementioned factors from the Senate Report, establishing a framework for vote dilution cases that structured an entire generation of Voting Rights Act cases.[197] *Gingles* requires that courts use the Senate factors to determine whether, given the totality of the circumstances, the political process is equally available to the minority group.[198] Since the Court's holding in *Gingles*, the Senate factors have become the primary tool used by courts evaluating section 2 vote dilution claims.[199]

Section 2 cases have been brought almost exclusively as vote dilution claims since the 1960s, resulting in a rich body of case law applying the *Gingles* standard.[200] Despite this historical focus on vote dilution, the Senate and the Supreme Court have both acknowledged that some valid section 2 claims may not fit into the broader category of vote dilution claims, and the proof in such cases may "not necessarily involve the same factors as the courts have utilized when dealing with permanent structural barriers."[201] Indeed, "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot,"[202] and any system or practice that di-

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

197 Luke P. McLoughlin, *Section 2 of the Voting Rights Act and* City of Boerne*: The Continuity, Proximity, and Trajectory of Vote-Dilution Standards*, 31 VT. L. REV. 39, 68 (2006).

198 *Gingles*, 478 U.S. at 44–46. A plaintiff must first meet three preconditions. First, the plaintiff bears the burden of proving that the challenged device results in unequal access to the electoral process. *Id.* Second, the plaintiff must present more than proof of dilution of the minority vote combined with a lack of proportional representation. *Id.* Finally, the plaintiff must affirmatively prove the existence of racially polarized voting. *Id.*

199 *See* Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 CARDOZO L. REV. 947, 953 (2011) (noting that *Gingles* established the framework for vote dilution claims).

200 *See* Tokaji, *supra* note 183, at 708–09; *see, e.g.*, Bush v. Vera, 517 U.S. 952, 973 (1996) (rejecting Texas redistricting plan that impermissibly diluted minority voting strength); Johnson v. De Grandy, 512 U.S. 997, 1024 (1994) (holding no violation of section 2 when state created district in which minority voters comprised the voting majority). Although most section 2 cases have been brought as vote dilution claims, the most notable exceptions are vote denial claims challenging felon disenfranchisement statutes. *See* Lynn Eisenberg, Note, *States as Laboratories for Federal Reform: Case Studies in Felon Disenfranchisement Law*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 539, 540 n.8 (2012).

201 *See* S. REP. NO. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207; *see also Gingles*, 478 U.S. at 45 ("While the enumerated factors will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims, other factors may also be relevant and may be considered." (footnote omitted)).

202 Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969); *see also* Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1373 (N.D. Ga. 2005) ("Section 2 of the Voting Rights Act prohibits all forms of voting discrimination, not simply vote dilution.").

lutes the right to vote is just as impermissible as an "outright denial of access to the ballot box."[203]

Although the majority of section 2 claims brought during the 1970s and 1980s dealt with electoral schemes like at-large elections, majority vote requirements, and districting plans,[204] the Committee clearly stated that section 2 also forbids *all* procedures "which, while episodic . . . , result in the denial of equal access to *any phase* of the electoral process for minority group members."[205] The Report lists factors that courts now use in vote dilution cases, but it specifically states—and the Supreme Court has held—that no particular number of these factors must be proven to show a section 2 violation and that other factors may better indicate a discriminatory effect.[206] In sum, the Senate Report, which the Supreme Court has described as "the authoritative source" for the construction of the 1982 amendments,[207] sought to ensure that section 2 allowed challenges to any voting procedure that denies or abridges minorities' right to vote.

C. *Applying the Senate Factors to Voter ID Challenges*

On an individual level, voter ID laws prohibit a single voter without an acceptable photo ID from casting a ballot.[208] In this respect, voter ID laws are similar to poll taxes and literacy tests, both of which interfere with an individual's right to register to vote or to cast a ballot.[209] Plaintiffs use section 2 vote denial claims when such qualifications or restrictions prohibit a voter from casting a ballot.[210] However, unlike a literacy test, which could be discriminatorily applied to deny all minorities the right to register to vote, a voter ID law does not formally disqualify anyone from registering to vote; rather, it imposes an extra burden on already registered voters, requiring them to present a photo ID before casting a ballot.[211]

On a grand scale, this requirement has a disproportionate impact on minority voters and ultimately dilutes the voting strength of minor-

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203 S. REP. NO. 97-417, at 28.

204 *Id.* at 30.

205 *Id.* (emphasis added).

206 *Id.* at 29; *see also Gingles*, 478 U.S. at 45.

207 *Gingles*, 478 U.S. at 43 n.7.

208 *See, e.g.*, GA. CODE ANN. § 21-2-417 (2008); IND. CODE ANN. § 3-11-8-25.1 (West Supp. 2006).

209 *See supra* note 164.

210 *See* Daniels, *supra* note 92, at 66–67.

211 *See* Complaint for Declaratory Judgment, *supra* note 143, at 10.

ity groups.[212] In 2006, the New York University Brennan Center for Justice estimated that up to ten percent of voting-age American citizens do not have a government-issued photo ID.[213] Up to twenty-five percent of voting-age African American citizens lack photo IDs, as compared to just eight percent of their white counterparts.[214] To receive a state-issued photo ID, most states require residents to present proof of full name and date of birth (including a birth certificate, passport, or military ID card and a complete trail of documents showing all name changes since birth), proof of Social Security number, proof of lawful status in the United States, and proof of residency in the state.[215] Many voters, like South Carolina resident Delores Freelon, have incomplete birth certificates.[216] Others, like South Carolina resident Larry Butler, were born at home and never issued a birth certificate.[217] Still others, like Dorothy Cooper, simply no longer have access to primary documents like their marriage or divorce certificate, passport, or social security card.[218] A strict voter ID law like Tennes-

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212 In early 2012, plaintiffs in Wisconsin filed a complaint in federal court, alleging that the state's strict voter ID law violates section 2 of the Voting Rights Act by effectively denying and abridging the voting rights of thousands of African American and Latino voters. *See* Complaint at 10, Jones v. Deininger, No. 12-cv-00185 (E.D. Wisc. filed Feb. 23, 2012). As of September 2012, the case had not been scheduled for motions hearings or trial, because the federal court was waiting to see whether the Wisconsin Supreme Court would reverse the previously-issued state court injunctions before moving forward with the federal case. *See* Status Conference Minutes, *Jones v. Deininger*, No. 12-cv-00185; *Attorney General J.B. Van Hollen Asking WI Supreme Court to Reinstate Voter ID Law*, *supra* note 75.

213 BRENNAN CTR. FOR JUSTICE, *supra* note 8, at 3.

214 *Id.*

215 *See, e.g.*, *Identification Requirements for a Texas Driver License or Identification Card*, TEX. DEP'T. OF PUB. SAFETY, http://www.txdps.state.tx.us/DriverLicense/identificationrequirements.htm (last visited June 28, 2012) (requiring proof of full name, date of birth, lawful status in the United States, and residency in Texas); *New to Georgia: Driver License or Instructional Permit*, GA. DEP'T. OF DRIVER SERVS., http://www.dds.ga.gov/drivers/dldata.aspx?con=1744173714&ty=dl (last visited June 28, 2012) (requiring proof of Georgia residency, proof of United States citizenship or lawful residency, and proof of full name and date of birth).

216 *See* Robert Kittle, *Group Protests SC's New Voter ID Law*, WSPA.COM (July 8, 2011, 6:37 PM), http://www2.wspa.com/news/2011/jul/08/2/group-plans-protest-scs-new-voter-id-law-ar-2084929.

217 *See* Judith Browne Dianis, *Voting Limits Put Democracy in Peril*, CNN (Nov. 8, 2011, 9:48 AM), http://www.cnn.com/2011/11/08/opinion/dianis-voting-rights/index.html.

218 *See, e.g.*, Haman, *supra* note 1. In states with strict voter ID laws, birth certificates can cost up to $22 to replace, *see, e.g.*, *Certified Copy of a Birth Certificate*, TEX. DEP'T OF STATE HEALTH SERVS., http://www.dshs.state.tx.us/vs/reqproc/certified_copy.shtm (last visited June 28, 2012), and copies of marriage and divorce certificates can cost as much as $20 each, *see, e.g.*, *How To Get a Copy of a Birth, Death, Marriage, or Civil Union Certificate*, STATE OF R.I. DEP'T. OF HEALTH, http://www.health.ri.gov/records/howto/getacopy/ (last visited June 28, 2012).

see's would disenfranchise all of these voters,[219] many of whom are racial, ethnic, and language minorities.[220]

Individual stories like those of Freelon, Butler, and Cooper accumulate to serve as evidence that strict voter ID laws burden minority voters as a group. The crux of a section 2 claim is the law's disparate impact on the group as a whole.[221] Because minorities are up to three times more likely to lack an acceptable ID than their white counterparts,[222] strict voter ID laws have the potential to disenfranchise significantly more minority voters than white voters. In this respect, voter ID laws are similar to gerrymandered districts and at-large voting schemes, which technically allow minorities to register and cast ballots but decrease the strength of the overall minority vote.[223] Voter ID laws do not explicitly prohibit minorities from voting, but because they significantly impair the ability of minority groups to elect the candidate of their choice,[224] these laws can be challenged using section 2 of the Voting Rights Act.[225]

Voter ID laws thus have characteristics of both vote dilution and vote denial schemes, making them a hybrid of the two. Minority voters are disproportionately denied the right to vote under strict voter ID laws, and the accumulation of each individual denial effectively dilutes the vote of the minority group as a whole. Although voter ID challenges may not fit precisely into either category, several of the *Gingles* factors are directly applicable to these cases, including (1) the history of voting-related discrimination in the jurisdiction; (2) the existence of voting practices that tend to enhance the opportunity for discrimination; (3) the extent to which minorities in the jurisdiction continue to bear the effects of past discrimination; (4) whether minorities have been elected to public office in the jurisdiction; and (5) whether the policy underlying the proposed procedure is tenuous.[226] Plaintiffs in voter ID challenges could use each of these factors to

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219 *See* TENN. CODE ANN. § 2-7-112(c) (2012) (requiring a valid government-issued photo ID to vote in person).

220 CTR. FOR DEMOCRACY & ELECTION MGMT., *supra* note 31, at 88.

221 This distinguishes section 2 challenges from as-applied constitutional challenges, where the focus is on individual barriers to the ballot rather than group political power. *See supra* Part I.D.

222 *See* BRENNAN CTR. FOR JUSTICE, *supra* note 8, at 3.

223 Daniels, *supra* note 92, at 66–67.

224 *See* Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

225 *See* Daniels, *supra* note 92, at 66–67; *see also* Burns v. Richardson, 384 U.S. 73, 88 (1966).

226 *See Gingles*, 478 U.S. at 44–45.

prove that individual denials of the right to vote combine to have a dilutive effect on minorities' right to vote in violation of section 2.[227]

1. *The History of Voting-Related Discrimination*

The first applicable *Gingles* factor is "'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.'"[228] Because the essence of a section 2 claim is that the challenged procedure "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed" by minority voters to participate in the electoral process,[229] a history of official discrimination in the jurisdiction indicates that the challenged procedure is part of a larger scheme that has disenfranchised voters. Discriminatory voter registration requirements and racially gerrymandered districting plans are acts of official discrimination,[230] as is certain conduct by state and local government officials, such as the failure to hire minority poll officials.[231]

In the context of voter ID challenges, plaintiffs can prove a history of official discrimination by showing that previous acts by the jurisdiction have touched other aspects of the right to vote, such as prerequisites to voting or the counting of the ballot. Voter ID bills keep an individual from actually casting a ballot; evidence that the

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227 It is important to note that the section 2 standard of "unequal access to the electoral process," *id.* at 46, is distinct from the section 5 standard of "denying or abridging the right to vote," 42 U.S.C. § 1973c(a). Under section 5, the federal government will object to a change in voting procedures if it has a retrogressive effect on minorities' right to vote. Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 334 (2000). By contrast, although section 2 may be sensitive to retrogression, a plaintiff in a section 2 case must show more than a retrogressive effect to have a law struck down. *Id.* There is some overlap between the two standards, but this Note is not attempting to mold the section 2 standard into an antiretrogression test.

228 *Gingles*, 478 U.S. at 36–37 (quoting S. REP. NO. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206). Some courts in vote dilution cases have divided this factor into two components: a history of official discrimination and evidence that the history "touched" the contemporary right to vote. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 695–96 (2006).

229 *Gingles*, 478 U.S. at 47.

230 *See, e.g.*, Rural W. Tenn. African Am. Affairs Council, Inc. v. Sundquist, 29 F. Supp. 2d 448, 448–49 (W.D. Tenn. 1998) (analyzing the State of Tennessee's reapportionment plan for House of Representatives districts as a violation of section 2); Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1245 (N.D. Miss. 1987) (analyzing state's dual registration requirement as a violation of section 2).

231 *See, e.g.*, United States v. Berks Cnty., Penn., 277 F. Supp. 2d 570, 581–82 (E.D. Penn. 2003) (holding that severe underrepresentation of Hispanic residents as poll workers violated section 2 of the Voting Rights Act).

jurisdiction has harmed minorities' right to vote by interfering with other stages of the electoral process shows a history of discriminatory intent. For example, in *Gonzalez v. Arizona*,[232] the plaintiffs argued that Arizona's voter registration procedures violated section 2 by diluting Latino voting strength.[233] The plaintiffs showed a history of official voting-related discrimination against Latinos in the form of codes that prohibited voting by nonwhite persons and literacy tests that targeted Mexican Americans.[234] Although a showing of discriminatory intent is not required by the results test, evidence of a history of official voting-related discrimination is circumstantial evidence that the procedure has a discriminatory result.[235]

2. *The Existence of Voting Practices that Tend to Enhance Discrimination*

The second factor is "the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group."[236] The Court in *Gingles* applied this factor to vote dilution claims, explaining that such procedures include "unusually large election districts, majority vote requirements, and prohibitions against bullet voting."[237] Procedures resulting in individual vote denials, such as "purge laws" based on voting frequency[238] and a short time period between an initial election and a runoff may also increase opportunities for discrimination by interfering with minorities' ability to cast a ballot.[239] As with the first factor, a showing that a jurisdiction has used such discriminatory procedures in the past indicates that the

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232 Gonzalez v. Arizona, 677 F.3d 383 (9th Cir. 2012).

233 Opening Brief of Appellants at 47–60, *Gonzalez*, 677 F.3d 383 (No. 08-17094).

234 *Id.* at 21.

235 United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1571 (11th Cir. 1984) ("[E]vidence that a voting device was intended to discriminate is circumstantial evidence that the device has a discriminatory result.").

236 Thornburg v. Gingles, 478 U.S. 30, 45 (1986).

237 *Id.*

238 Purge laws based on voting frequency provide that registered voters who fail to vote for a certain period of time shall be purged from voter registration lists after being provided notice. *See* Ortiz v. City of Phila. Office of City Comm'rs Voter Registration Div., 28 F.3d 306, 307 (3d Cir. 1994) (analyzing Pennsylvania's law, which purged voters who failed to vote for two years). Circuit Courts have upheld automatic purge laws in challenges brought under the Voting Rights Act of 1965. *See id.* at 313–15.

239 *See* Katz, *supra* note 228, at 697–98 (noting the number of cases studied in which courts found enhancement of discrimination).

challenged provision is part of a larger scheme to disenfranchise voters.[240]

In voter ID challenges, plaintiffs can use empirical data to show that the existence of the ID requirement enhances opportunities for discrimination. Plaintiffs can provide information such as the percentage of registered voters and percentage of voting-age citizens without an ID, broken down along racial lines to show that minorities are disproportionately affected and that their vote as a group is thus diluted. Statistical data demonstrating that minorities are significantly less likely to possess an acceptable form of ID than their white counterparts reveal that the ID requirement will likely increase discrimination against minorities and disparately impact members of the minority group.

3. The Continuing Effects of Past Discrimination

The third factor is "the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process."[241] Many courts require a nexus between a history of discrimination, lower socioeconomic status, and the ability to participate in the political process.[242] This factor is traditionally applied in vote dilution cases by analyzing socioeconomic status and its relation to issues like minority-candidate fundraising and isolation from other members of the minority community.[243] Plaintiffs in voter ID challenges can analyze the extent to which past discrimination results in lower socioeconomic status, which in turn hampers minorities' ability to comply with the challenged procedure.

Plaintiffs can provide statistical evidence showing that past discrimination has resulted in lower education levels, employment rates, income levels, and living conditions for minorities in the jurisdiction. Data regarding the number of minorities who live below the poverty line as compared to their white counterparts can show that a disproportionate number of minorities may be unable to pay for the underlying documents needed to obtain an ID, such as a new birth certificate.[244] For example, roughly thirty-seven percent of African

240 *See supra* Part III.C.I.

241 *Gingles*, 478 U.S. at 45.

242 Katz, *supra* note 228, at 703; *see, e.g.*, Old Person v. Cooney, 230 F.3d 1113, 1129 (9th Cir. 2000) (noting history of discrimination against American Indians, their lower socioeconomic status, and their decreased ability to participate fully in political processes).

243 Katz, *supra* note 228, at 703–04.

244 *See* Letter to C. Havird Jones, Jr., *supra* note 103, at 2.

Americans in South Carolina lived below the poverty line in 2010, compared to fifteen percent of white residents,[245] and the DOJ determined that minority registered voters in South Carolina are nearly twenty percent less likely than white registered voters to have a photo ID that complies with the state's strict voter ID law.[246] Lower income levels are associated with lack of photo ID,[247] thus minorities feeling the effects of past discrimination in areas like education and employment—as reflected in their lower income levels—would continue to be excluded from the political process because they are more likely to be disenfranchised by a strict voter ID law. In sum, plaintiffs in voter ID challenges can use socioeconomic data to prove that the continuing effects of past discrimination in areas such as education and employment have yet to be remedied, and that the voter ID requirement will perpetuate those effects by further disenfranchising minority voters.

4. The Number of Minorities Elected to Public Office

The fourth factor is "the extent to which members of the minority group have been elected to public office in the jurisdiction."[248] The number of minorities elected to public office can be used to indicate whether the interests of minorities were represented when the challenged practice or procedure was enacted.[249]

In a voter ID challenge, plaintiffs can emphasize the lack of minority representation in the legislature to show that the possible effects of the law on minorities were not adequately considered. Additionally, empirical data demonstrating that minorities in the legislature voted overwhelmingly against the procedure show that minority interests were underrepresented during legislative debates. For example, the DOJ staff attorneys who analyzed Georgia's voter ID law found it particularly concerning that the bill was passed almost entirely along racial lines with just one minority representative voting for the bill.[250] Such evidence that minority interests were grossly un-

245 *South Carolina: Poverty Rate by Race/Ethnicity*, STATEHEALTHFACTS.ORG, http://www.statehealthfacts.org/profileind.jsp?rgn=42&ind=14 (last visited July 15, 2012).

246 Letter to C. Havird Jones, Jr., *supra* note 103, at 2.

247 *See* BRENNAN CTR. FOR JUSTICE, *supra* note 8, at 3.

248 Thornburg v. Gingles, 478 U.S. 30, 45 (1986).

249 S. REP. NO. 97-417, at 29 n.115 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207 n.115. Although the Senate Report states that the extent to which minorities have been elected to public office is an indication of unequal access to the political process, the Report goes to great lengths to clarify that a section 2 claim can never be remedied by mandating proportional representation. *See id.* at 2.

250 Section 5 Recommendation Memorandum, *supra* note 123, at 32–33.

derrepresented in the jurisdiction's legislature is an important indicator that the voter ID law was passed without any consideration of the disparate impact that the voter ID requirement might have on minority voters.

5. *The Tenuousness of the Policy Underlying the Proposed Procedure*

The fifth factor is "whether the policy underlying the state or political subdivision's use of such voting . . . procedure is tenuous."[251] A tenuous explanation for a state's voting procedure is circumstantial evidence that the policy was motivated by a discriminatory purpose, and a discriminatory purpose is evidence of a discriminatory effect.[252] The tenuousness of the justification may also indicate that the procedure is unfair.[253]

The chief justification for strict voter ID laws is combating voter fraud and maintaining the integrity of the electoral process.[254] However, most states that have passed strict voter ID laws have zero cases of confirmed in-person voter fraud.[255] For example, supporters of South Carolina's voter ID law justify the ID requirement by claiming that dead people voted more than 950 times in the last election, but a report by the state's election commission found no proof of fraud, citing clerical errors for the discrepancies.[256] Similarly, the Administrative Office of the Pennsylvania Courts could not identify a single conviction for in-person voter fraud in the past five years.[257] As an attempt to solve this illusory problem, these laws jeopardize the integrity of the electoral process by disenfranchising lawfully registered voters who are unable to comply with the photo ID requirement. The justification for these laws is tenuous, and in practice the laws serve to contravene the very interest the state claims it is protecting.

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251 *Gingles*, 478 U.S. at 37 (quoting S. REP. NO. 97-417, at 28–29).

252 United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1571 (11th Cir. 1984).

253 *Id.*

254 *See, e.g.*, Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1355–57 (N.D. Ga. 2007) (citing Georgia's concerns about voter fraud); Letter to C. Havird Jones, Jr., *supra* note 103, at 2 (explaining that South Carolina's stated justification for requiring photo ID to vote in person is to combat voter fraud).

255 *See* Hirschkorn, *supra* note 37 (noting that sponsors of voter ID laws in every state have been hard-pressed to provide examples of in-person voter ID fraud).

256 Phil Hirschkorn, *SC Election Officials Push Back on "Dead Voters,"* CBS NEWS (Feb. 23, 2012, 9:21 PM), http://www.cbsnews.com/8301-503544_162-57384191-503544/sc-election-officials-push-back-on-dead-voters/?tag=contentMain;contentBody.

257 Hirschkorn, *supra* note 37.

As discussed above, voter ID laws are a hybrid of vote denial and vote dilution mechanisms. The laws may not fit precisely into either category, but several of the Senate factors adopted by the Supreme Court in *Gingles* are directly applicable in voter ID challenges. Plaintiffs in these cases can use statistical evidence of the impact of strict voter ID laws on minorities to argue that these laws so disproportionately deny individual minorities the right to vote that they ultimately dilute the voting strength of the minority group as a whole, thereby violating section 2 of the Voting Rights Act of 1965.

CONCLUSION

As the number of states instituting stricter voter ID laws rises, so does the number of Americans who are seeing their right to vote disappear. These laws have been challenged as facially unconstitutional, and the Supreme Court has upheld them. While the possibility of as-applied constitutional challenges has not been ruled out, the obstacles they face make them unlikely to succeed. With no available constitutional remedy, disenfranchised voters must turn to the statutory protections provided by the Voting Rights Act of 1965.

Section 5 of the Voting Rights Act continues to require that covered jurisdictions have their voter ID laws precleared, but the Supreme Court has expressed serious doubts about the constitutionality of this provision. Additionally, political pressures have the potential to sway the DOJ's preclearance decisions, and the preclearance requirements apply in just nine states, excluding several states in which strict voter ID laws have already been passed. Section 5 alone thus cannot be relied upon to prevent the enactment of discriminatory voter ID laws.

Section 2 of the Voting Rights Act provides the only alternative remedy for challenging voter ID laws. Although the section 2 "results test" has developed two distinct uses in vote denial and vote dilution claims, the factors set forth in the Senate Report can easily be modified to fit the hybrid case of voter ID challenges. Plaintiffs can bring successful voter ID challenges under section 2 using the Senate factors because strict voter ID requirements deny minority groups an equal opportunity to elect the candidate of their choice.


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