A Call for Prophylactic Measures to save Souls to the Polls: Importing a Retrogression Analysis in Sec. 2 of the Voting Rights Act

Ruby J. Garrett
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INTRODUCTION

Sunday and the African-American community’s ability to exercise its right to vote are historically connected. On Sunday, March 7, 1965, six hundred people marched from Selma to Montgomery to peacefully protest both the recent murder of a key voting rights activist and the ongoing exclusion of African Americans from the electoral process. The police violently beat the peaceful marchers with billy clubs and blinded them with tear gas. The disturbing set of events constantly played on television and became known as “Bloody Sunday.” Months later, Federal District Court Judge Frank M. Johnson ruled in favor of the marchers, holding that they had the constitutional right to seek redress through peaceful marching. Subsequently, in August, President Lyndon Johnson signed the Voting Rights Act of 1965.

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1 Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2643 (2013) (Ginsburg, J., dissenting) (“Just as buildings in California have a greater need to be earthquake-proofed, places where there is greater racial polarization in voting have a greater need for prophylactic measures to prevent purposeful race discrimination.”).


3 See id.

4 See id.

5 Williams v. Wallace, 240 F. Supp. 100, 106 (M.D. Ala. 1965) (holding that “[t]he law is clear that the right to petition one’s government for the redress of grievances may be exercised in large groups”).

6 See Yang, supra note 2.
Programs such as “Souls to the Polls” created a positive spin on the historical connection between Sunday and the right to vote.⁷ “Souls to the Polls” became a call to action.⁸ Immediately following a Sunday church service, African-American congregations go together to the ballot box. Churches provide rides for those who lack transportation⁹ and even offer refreshments to those waiting in line.¹⁰ “Souls to the Polls” is a cultural event suitable for all ages. In 2014, thirteen-year-old Kandace Moore of Cary, North Carolina marched to the ballot box for a “Souls to the Polls” event.¹¹ Fully aware that she would be unable to vote, she was happy to be there.¹² She stated, “[o]ur ancestors fought for a reason.”¹³

Unfortunately, these efforts to encourage African Americans to exercise their right to vote, after generations of exclusion from the electoral process, are under attack. Nationwide, legislators are working diligently to restrict voting. For example, in Georgia, State Senator Fran Millar (R) and State Representative Mike Jacobs (R) initiated an investigation to “stop this action” and “eliminate [the] election law loophole” that allows “Souls to the Polls” events to occur.¹⁴ Senator Millar remains committed

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⁷ See Michael C. Herron & Daniel A. Smith, Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355, 11 ELECTION L.J. 331, 332 n. 3 (2012) (“The National Association for the Advancement of Colored People is credited with creating the slogan, ‘Get all souls to the polls.’”).


⁹ See, e.g., id. at 340 (“We go to church on Sunday, and then we go together and early-vote . . . . People try to help each other because transportation was a problem and knowing where to vote was a problem with some people who were new in the community.”).


¹² See id.

¹³ Id.

to ending Sunday voting in the face of opposition from a local pastor. Nationwide, other clergymen are protesting recent legislation that eliminates Sunday voting.

This newsworthy topic features prominently in recent election law cases. The African-American vote is at stake. A new discriminatory practice—eliminating Sunday voting—has surfaced and election law must once again adapt to address it. Those recognizing the threat to an inclusive electoral process have brought claims under §2 of the Voting Rights Act, which grants a private right of action for discriminatory voting practices or laws. The courts, however, are applying different standards.

This Comment notes that while courts consistently recognize that the proposals to eliminate Sunday voting warrant a detailed analysis, they hold differing opinions on whether §2 claims warrant a retrogression analysis. Generally, a retrogression analysis tests whether a new law places voters in a worse state than they were previously. Further adding to the discord, courts also have differing opinions on what a retrogression analysis should entail. This Comment contends that vote denial claims under §2 should incorporate a

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19 "Eliminate" is used throughout this paper for every measure that restricts Sunday voting in anyway. Not only does each day lost decrease the amount of votes, but also each successful restrictive measure makes it easier for the next one to be implemented. A proponent of decreasing electoral participation can chip away at Sunday voting until it is eliminated.

20 See discussion infra Part I.B.

21 See infra Part IV.
retrogression analysis and provides clarity on how retrogression should be defined. After Part I of this Comment discusses the mechanics of the Voting Rights Act, Part II describes the federal courts' differing opinions on §2 violations designed to eliminate Sunday voting. In addition, Part II introduces the Purcell Principle, the theory behind the Supreme Court's recent election law decisions. The theory posits that the amount of time between the case and the next election is often the key variable in decisions. Part III addresses the need for a concrete test to create consistency among the courts and Part IV proposes that a new prophylactic measure, Retrogression Plus, can fill the need by analogizing to the success of retrogression in another area of constitutional law.

I. THE MECHANICS OF THE VOTING RIGHTS ACT

As one of the most influential pieces of legislation of the twentieth century,22 the Voting Rights Act secured the “the promise of equality and political enfranchisement for African Americans.”23 This Part lays the foundation of this Comment by examining the history of the Voting Rights Act, the foundation of a §2 claim, and the operation of a §5 claim pre-Shelby.24

A. Brief Glance at the Development of the Voting Rights Act

Following the Civil War, Congress attempted to integrate African Americans into society. The legislative body passed the Reconstruction Amendments: the Thirteenth Amendment abolished slavery and involuntary servitude;25 the Fourteenth


24 The term “pre-Shelby” refers to the period before the Court invalidated the formula that triggers §5.

25 U.S. CONST. amend. XIII.
Amendment guaranteed due process and equal protection to all citizens;\textsuperscript{26} and the Fifteenth Amendment aimed to prevent voting rights discrimination on the basis of race.\textsuperscript{27} But, White Southerners were unprepared to relinquish their privilege gained from nearly 250 years of slavery.\textsuperscript{28} The opposition to the Reconstruction Amendments effectively nullified the recently gained rights; it recast blacks as three-fifths of a person—their lives did not matter. "The slave went free; stood a brief moment in the sun; then moved back again towards slavery."\textsuperscript{29} The Voting Rights Act, however, fortified the Fifteenth Amendment and provided the opportunity for all minorities to stand in the sun.

1. Shortcomings of the Fifteenth Amendment.

In 1870, under the Fifteenth Amendment, African-American men finally received an opportunity to obtain a fundamental right—the right to vote.\textsuperscript{30} The Fifteenth Amendment states:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.\textsuperscript{31}

Notably, the text of the Fifteenth Amendment is prohibitive. It indicates that the right to vote cannot be denied on the basis of race, but it does not grant the right to citizens of all races.

On March 31, 1870, Thomas Peterson-Mundy of New Jersey became the "first African American to vote under the authority of the 15th amendment," but this victory was short lived.\textsuperscript{32}

\textsuperscript{26} U.S. Const. amend. XIV.
\textsuperscript{27} U.S. Const. amend. XV.
\textsuperscript{28} See Carlson, supra note 23, at 73–76 (detailing the White Southerner's opposition to each of the remedial amendments).
\textsuperscript{31} U.S. Const. amend. XV (emphasis added).
\textsuperscript{32} Marion Thompson Wright, Negroes as Citizens, 28 J. Negro Hist. 189, 189 (1943).
Within thirty years, African Americans effectively lost access to the franchise and were no longer able to exercise their right to vote. 33 Those holding public office did not receive enough support to maintain their positions of power, which eliminated one way for African Americans to fight the discrimination. 34 Furthermore, the Justice Department lacked discretion under the Fifteenth Amendment to create an efficient system to prevent voting rights abuses; they handled matters on a case-by-case basis. 35 Cases could take years to resolve and by the time one discriminatory practice ended, another manifested. 36 For example, after the authorities determined literacy tests designed to result in failure were unconstitutional, the states implemented “poll taxes which disenfranchised thousands of poor minority citizens.” 37 In addition to overt discrimination, covert methods, such as multi-member voting systems, plagued society as well. 38 Though well intentioned, the Fifteenth Amendment simply could not thwart the ingenuity of white attacks on the black vote. Something more was needed.

33 See T. B. Edgington, The Repeal of the Fifteenth Amendment, 188 N. AM. REV. 92, 93–94 (1908) (detailing legislation—which instituted poll taxes, property requirements, educational qualifications, and legal interpretation requirements—enacted by several states as barriers to the right to vote for African Americans that effectively nullified the progress of the Fifteenth Amendment); see also Ryan P. Haygood, Symposium, The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections, 64 RUTGERS L. REV. 1019, 1022 (2012) (detailing the brief surge of African American participation in the electoral process and the swift dismantling of the Reconstruction-era protections).


Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 manhours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration.

37 See Michaloski, supra note 35, at 275.

38 See id. (defining a multimember system as one that allows voters to vote for candidates outside of their respective district; indicating that “multimember voting systems tend to allow the majority to exert much greater influence in the election”).

Congress enacted the Voting Rights Act to accomplish what the Fifteenth Amendment could not. The legislation contained two key goals: (1) to eliminate the historical practices and procedures that encumbered the black vote; and (2) to prevent jurisdictions from replacing existing discriminatory measures with new ones. Section 2 of the Voting Rights Act initially prohibited only voting practices or procedures that discriminated on the basis of race or color. While §5 of the Voting Rights Act prohibited changes in election procedures in covered jurisdictions until the new procedures were determined to have neither a discriminatory purpose nor effect. President Lyndon B. Johnson praised the Voting Rights Act as "the most powerful instrument ever decided by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men."

B. Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act applies to all states and counties. It grants citizens a private right of action against discriminatory voting legislation or practices. In part, it states:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner

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39 See id. at 274 ("Although the Fifteenth Amendment gave all Americans the legal right to vote in 1870, for nearly a century thereafter states employed various discriminatory tactics and techniques to prevent African-American citizens from ever actually reaching the voting booth.").


Overall, Congress hoped by passage of the Voting Rights Act to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally. Thus, as Senator Javits put it, the purpose of the Voting Rights Act was 'not only to correct an active history of discrimination, the denying to negroes of the right to register and vote, but also to deal with the accumulation of discrimination . . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs.


42 Id. (noting that changes must survive administrative review by the Attorney General or a lawsuit before the United States District Court for the District of Columbia for declaratory judgment).

43 See Conroy, supra note 22, at 664.
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. 44

In 1982, Congress clarified that “it is unnecessary to prove that certain registration and voting practices have been established with discriminatory intent.”45 A §2 violation occurs when a voting practice results in discrimination against minority voters.46 Section 2 applies in instances where the result is vote dilution or vote denial based on one’s minority status. Vote dilution receives significantly more coverage than vote denial in the courts and legal scholarship;47 therefore, it will be discussed first.

1. Contours of vote dilution claims.

Vote dilution occurs when a racial minority group cannot aggregate their votes in order to form a numerical majority.48 With diluted voting strength, the minority group lacks currency in the political marketplace.49 A common example of a vote dilution claim is the drawing of district lines to ensure that there are not enough minority voters in any district to band together to control the vote. Frequent redistricting efforts provide the courts with many opportunities to refine the test.

46 Id.

Vote-denial claims under Section 2 have thus far been relatively rare, perhaps due in part to the fact that since 1965, many jurisdictions — including many North Carolina counties — were under federal control and barred from enacting any new voting procedure without first obtaining ‘pre-clearance’ under Section 5 of the VRA from the DOJ or the United States District Court for the District of Columbia.

See also Daniel P. Tokaji, Symposium, The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S.C. L. REV. 689, 708 (“The substantial majority of cases interpreting Section 2 have addressed issues of vote dilution rather than vote denial.”).
49 See id.
In *Thornburg v. Gingles*, black citizens of North Carolina sued the Attorney General of North Carolina. The plaintiffs alleged that the redistricting diminished their ability to elect chosen representatives in violation of the Constitution and §2 of the Voting Rights Act. The district court held that the multimember electoral structure caused black voters in the challenged districts to have less opportunity than white voters to elect representatives of their choice. The Supreme Court affirmed.

The *Gingles* court looked to the Senate Judiciary Committee Report that accompanied the bill for guidance. The report emphasized nine non-exhaustive factors to consider when analyzing a §2 claim. Those factors became the starting point for the "totality of the circumstances" analysis required by subsection (b) of §2. The factors include an examination of the history of discrimination in the state, racial polarization, elected officials ignoring needs of minority groups, and the tenuousness of the voting process. Courts still apply this articulation of the test.

2. Ambiguity of vote denial claims.

The Supreme Court has not yet designated a test specifically for vote denial claims under §2 of the Voting Rights Act. As addressed later in the Comment, some courts assess vote denial under the "totality of the circumstances" analysis, while others suggest that the Senate factors are of little help and assess the claims under different criteria. Scholars also

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51 Id. at 30.
52 See id. at 35.
53 See id. at 80.
54 *Gingles*, 478 U.S. at 80.
55 Id. at 36 (citing S. Rep. No. 97-417 at 28 (1982)).
56 Paul L. McKaskle, *The Voting Rights Act and the "Conscientious Redistricter,"* 30 U.S.F. L. REV. 1 (1995) (noting that totality of the circumstances "as a general requirement is nothing more than an instruction that all relevant evidence should be considered before making [a] finding").
57 *Gingles*, 478 U.S. at 36 ("The Senate Judiciary Committee majority Report accompanying the bill that amended §2 elaborates on the circumstances that might be probative of a §2 violation.").
58 Id.
59 See *infra* Part II.
disagree; they have worked to synthesize the case law and discern what factors are crucial in determining the outcome in the limited, but rapidly growing amount of $2 vote denial cases.\textsuperscript{60} The lack of guidance from the Supreme Court has created discord among the courts when assessing the elimination of Sunday voting—arguably, a vote denial claim.

C. Section 5 of the Voting Rights Act (Pre-Shelby)

In contrast to §2, §5 of the Voting Rights Act applied only to those states and counties that were subject to preclearance as determined by the formula in §4(b).\textsuperscript{61} Those covered states and counties had to submit all election law changes for approval. Although the Supreme Court, in \textit{Shelby County v. Holder},\textsuperscript{62} held that the preclearance formula is unconstitutional, the Court did not rule on the text of §5 itself.\textsuperscript{63} Congress can still update the formula to "speak[ ] to current conditions."\textsuperscript{64} However, in the interim, §5 cannot be enforced.\textsuperscript{65}

Though inoperable, the remaining portion of §5 strives to "protect the ability of [minority] citizens to elect their preferred candidates of choice."\textsuperscript{66} The prophylactic measure states:

Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the

\textsuperscript{60} See Janai S. Nelson, Article, \textit{The Causal Context of Disparate Vote Denial}, 54 B.C. L. Rev. 579 (2013) (discussing the history of the totality of the circumstances test and recommending a causal context test); see also Tokaji, \textit{supra} note 47, at 709 (analyzing the tests employed in three branches of election reform and concluding that none "have articulated a wholly adequate test for evaluating [the] claims").


\textsuperscript{62} 133 S. Ct. 2612 (2013).

\textsuperscript{63} \textit{Id.} at 2631 ("We issue no holding on §5 itself, only on the coverage formula.").

\textsuperscript{64} \textit{Id.} However, given the current, extreme polarization in Congress, it is unlikely both sides will agree on a new coverage formula in the near future.

\textsuperscript{65} It is worth noting, that though inoperable, compliance with §5 may still be a compelling interest under an Equal Protection Clause analysis. \textit{See} Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1274 (2015).

right to vote within the meaning of subsection (a) of this section.\textsuperscript{67}

This version, amended in 2006, was spurred by Congress’s disapproval of two Supreme Court decisions that weakened the Voting Rights Act.\textsuperscript{68} The changes strengthened the two reasons that a plan can be denied under §5: (1) discriminatory purpose or (2) retrogressive effect.\textsuperscript{69} Each fortified prong is discussed, in turn, below.

1. Discriminatory purpose.

Discriminatory purpose is the first way to violate §5; a proposed voting procedure cannot purposefully discriminate against the categories protected by the Act. In 2006, Congress clarified that it can be any discriminatory purpose.\textsuperscript{70} The purpose does not have to be attached to an attempt to cause retrogression.\textsuperscript{71} In scrutinizing a plan for a discriminatory purpose, the Department of Justice has wide latitude when considering what evidence is acceptable.\textsuperscript{72} Ill will towards minorities is not required; the Department of Justice can investigate for discriminatory purpose if part of the “underlying motivation is nonetheless discriminatory.”\textsuperscript{73}

2. Retrogressive effect.

The second way to violate §5 is by imposing a policy with retrogressive effect. This restriction prohibits voting procedure changes that could lead to deterioration “in the position of racial

\textsuperscript{67} Id.

\textsuperscript{68} 120 Stat. 578 (“The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in \textit{Reno v. Bossier Parish II} and \textit{Georgia v. Ashcroft}, which have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act.”).


\textsuperscript{70} Id.

\textsuperscript{71} Id.

\textsuperscript{72} Id. (indicating that the Department of Justice may consider circumstantial evidence and statements of those involved in the legislative change).

\textsuperscript{73} Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. at 7471 (citing Judge Kozinski’s example that if you do not harbor ill will towards minorities, but you join a pact to not sell your house to minorities out of fear of losing value in your home, there is a discriminatory purpose).
minities with respect to their effective exercise of the electoral franchise."74 A retrogression analysis compares a proposed voting procedure to the most recent legally enforceable plan, which serves as a benchmark.75 In 2006, Congress clarified that the analysis focuses on the minority group’s "ability to elect" their ideal candidate.76 This straightforward standard depends on percentages. For example, if the black population is split into districts in which it accounts for only 30% of the district population, Blacks do not have the ability to elect their ideal candidate.77 Simply put, the "ability to elect either exists or it does not in any particular circumstance."78 The Department of Justice’s analysis may utilize both the census information and the voting history of the specific location. In the event that retrogression is unavoidable due to a significant change, the least regressive plan prevails.79 Before Shelby disabled §5, the retrogression prong prevented and discouraged election law changes that would place minorities in a worse situation; the Retrogression Plus standard advanced in Part IV.A functions similarly.

II. DIVERGENCE: DOES A RETROGRESSION ANALYSIS APPLY TO §2 CLAIMS?

The courts have differing opinions on whether a retrogression analysis should occur when assessing a §2 claim. The Sixth80 and the Fourth81 Circuit imported a retrogression analysis into §2 claim assessments. However, two district court

76 See id.
77 It may be acceptable, however, to decrease the black population from 70% to 63%. See Ala. Legis. Black Caucus v. Alabama, 135 S. Ct. 1257, 1273 (2015) ("Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior plan. Rather, §5 is satisfied if minority voters retain the ability to elect their preferred candidates."). In such instances, the court will look to "voting behavior" and other factors to determine if the ability to elect is still present. Id.
78 Id.
79 Id.
80 See Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014).
cases in the Eleventh Circuit declined to do so.\textsuperscript{82} Notably, the Supreme Court has yet to determine a case based on these principles. This Part critically examines the reasoning provided behind the divergent decisions on measures eliminating Sunday voting.\textsuperscript{83}

A. Importing a Retrogression Analysis for §2 Claims

This Section examines the reasoning and mechanisms of circuits that employ a §2 retrogression analysis. While the Retrogression Plus standard, introduced in Part IV.A, functions differently, the outcomes of the cases would be mostly the same. The only difference is that in the second case discussed, the court would not have been bound by the time crunch.

The Sixth Circuit imports a retrogression analysis. In \textit{Ohio State Conference of the NAACP v. Husted},\textsuperscript{84} Jon Husted, the Ohio Secretary of State, appealed the district court's order granting a preliminary injunction on a recent election law change that reduced early voting.\textsuperscript{85} The NAACP Ohio State Conference and other interested parties sued, alleging that the proposed legislative changes violated the Equal Protection Clause and §2 by "disproportionately burdening African American voters' ability to participate effectively in the political process."\textsuperscript{86} The district court granted the preliminary injunction and held that the State of Ohio and Secretary Husted were prohibited from reducing the early voting period.\textsuperscript{87} The court of appeals affirmed.\textsuperscript{88}


\footnotesize\textsuperscript{83} The term "elimination" is used throughout this Comment even though the assessed measures technically provide at least one day of Sunday voting. This is done for two reasons. First, the limited resources preclude every voter from voting on Sunday. For a number of voters, the right to vote on Sunday is effectively eliminated. Second, these decisions are creating precedent and opening the door for future reductions. It is not difficult to imagine legislators, who have been successful reducing the Sunday voting to one day, passing another proposal to eliminate Sunday voting completely—especially without retrogression serving as a barrier to the proposal.

\footnotesize\textsuperscript{84} \textit{Ohio State Conf. of the NAACP}, 768 F.3d at 524.

\footnotesize\textsuperscript{85} See \textit{id.} at 529.

\footnotesize\textsuperscript{86} \textit{id.}

\footnotesize\textsuperscript{87} \textit{id.} at 529–30.

\footnotesize\textsuperscript{88} \textit{id.} at 561.
The Sixth Circuit affirmed the district court's use of a retrogression analysis in assessing a §2 claim. The court found the defendant's contention, that there was not an objective benchmark, unpersuasive. The court of appeals stated:

The district court did not improperly engage in a retrogression analysis in considering the opportunities available to African Americans to vote [early in person] under the prior law as part of the "totality of circumstances" inquiry. No case explicitly holds that prior laws or practices cannot be considered in the Section 2 "totality of circumstances" analysis. The Supreme Court has in fact found a Section 2 violation under the "totality of circumstances" in part based on changes to the electoral system.

The Husted court also addressed the difference between §5 and §2 retrogression. Section 5 retrogression emphasizes minority-voting power both in the current and proposed regimes. The relevant questions are: How do minorities fare under the current system? How will minorities fare under the proposed system? Under §2 retrogression, the comparison includes other voters. The elimination of voting opportunities for minorities is relevant to an analysis that compares their standing to other voting groups.

In terms of Sunday voting, the Sixth Circuit reiterated the district court's findings that "African Americans are more likely to vote on Sundays through 'Souls to the Polls' initiatives because of the free transportation church groups can provide."

Furthermore, people with relatively low income in hourly-wage

89 Ohio State Conf. of the NAACP, 768 F.3d at 557.
90 Id. at 556 (noting that while it is difficult to find a benchmark for vote dilution claims under §2 it is relatively clear for vote denial claims under §2).
91 Id. at 557.
92 Id.
93 Ohio State Conf. of the NAACP, 768 F.3d at 558.
94 Id. ("The fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is therefore relevant to an assessment of whether, under the current system, African Americans have an equal opportunity to participate in the political process as compared to other voters.").
95 Id. at 555.
jobs lack flexibility during the weekday when polls are open. Building on the differences between retrogression under §2 and §5, the court of appeals reasoned that the plaintiff's assertion went beyond what is required for §5. The plaintiffs did not state merely that removing voting times available under the current law burdened African-American voters. Instead, plaintiffs demonstrated that African Americans disproportionately used the voting times slated for removal. This evidence, coupled with proof that inequalities (racial and socioeconomic) would make it difficult for African-American voters to vote at the remaining times, demonstrated that the status quo provided a better forum for an equally accessible electoral process than the proposed changes.

Another circuit court recently imported the retrogression analysis to assess a §2 claim as well. In *League of Women Voters of North Carolina v. North Carolina*, several plaintiffs joined the United States Government and sued the state of North Carolina. During the floor debates about the challenged law, one senator warned, "you all are going back to the sorry old history that we should not embrace." His warning about laws resulting in discrimination was not heeded. Immediately after the bill passed, the plaintiffs asked the court to enjoin:

[T]he elimination of same-day voter registration; the elimination of out-of-precinct voting; the reduction of early-voting days; an increase in at-large observers at the polls and the deputizing of any resident to challenge ballots at the polls; the elimination of the discretion of county boards of elections to extend poll hours under extraordinary circumstances; and the soft roll-out of voter identification requirements to go into effect in 2016.

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96 *Id.* (noting that lower-income individuals often need the ability to register on the same day as well because they are more likely to move or have transportation issues).
97 *See Ohio State Conf. of the NAACP, 768 F.3d at 558.*
98 *Id.* at 558–59.
99 769 F.3d 224, 232 (4th Cir. 2014).
101 *League of Women Voters of N.C., 769 F.3d at 232.*
The district court denied the injunction, but the Fourth Circuit reversed in part. It granted the injunction for the elimination of same-day voter registration and voting in an incorrect precinct. It affirmed the district court’s denial of the remaining challenged provisions.

The Fourth Circuit chastised the district court’s refusal to conduct a retrogression analysis, finding that “[a] close look at the district court’s analysis [ ] reveals numerous grave errors of law that constitute an abuse of discretion.” The court’s decision to import a retrogression analysis stood firmly on a textualist argument augmented by legislative history. After recognizing the applicability of the retrogression analysis, the court set a standard for its application: the determination depends on the opportunity of minorities to vote as compared to other voters; the current and proposed voting systems are relevant to the analysis. The court applied this standard to two provisions of the omnibus legislation that warranted an injunction.

With respect to Sunday voting, the Fourth Circuit followed the reasoning of the Supreme Court; it denied the injunction because voting was set to begin in two weeks. The dissent agreed with the denial of the injunction because the district court’s rejection of evidence that restricting Sunday would negatively affect African-American voters was unwise, but not

102 Id. at 230.
103 Id. at 248–49.
104 Id.
105 League of Women Voters of N.C., 769 F.3d at 248–49.
106 Id. at 241 (“Contrary to the district court’s statements, Section 2, on its face, requires a broad ‘totality of the circumstances’ review. Clearly, an eye toward past practices is part and parcel of the totality of the circumstances. Further, as the Supreme Court noted, ‘some parts of the [Section] 2 analysis may overlap with the [Section] 5 inquiry.’”).
107 Id. at 241 (assessing the term “abridged” and referring to the §2 legislative record that indicated “[if] [a challenged] procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact”).
108 Id. at 241–42.
109 League of Women Voters of N.C., 769 F.3d at 244 (“The[ ] flaws in the district court’s Section 2 analysis make it clear that the district court both misapprehended and misapplied the pertinent law. Accordingly, the district court abused its discretion.”).
110 See infra Part II.C.
111 League of Women Voters of N.C., 769 F.3d at 236 (deciding that the “tight timeframe represents a burden not only on the State, but also on the county boards of elections”).
clearly erroneous. In fact, the dissent believed that all of the plaintiff's requests for an injunction should have been denied because clear error is a relatively high standard.

Both the Sixth and Fourth Circuit employed different versions of a retrogression analysis. In one case, the analysis prevented a measure that would have further marginalized the experience of African-American voters. In the other case, the retrogression analysis would have achieved the same result, but the court denied the injunction due to a time crunch—a phenomenon of the Supreme Court to be discussed in Part II.C of this Comment.

B. Rejection of a Retrogression Analysis for §2 Claims

This Section analyzes cases in the Eleventh Circuit that have rejected the applicability of a retrogression analysis in §2 claims in order to provide a point of comparison for those cases that have welcomed retrogression. The first case discussed below directly addresses Sunday voting. It has not been subsequently reviewed. The second case deals with a proposed redistricting scheme. It has been reviewed by the court of appeals and affirmed on different grounds. Other Georgia district courts have continued to follow the district court's reasoning.

12 Id. at 252 (Motz, J., dissenting):

In short, had I been overseeing this case in the district court, I might have reached a different conclusion about Plaintiffs' chances of success on the merits. But neither I nor my colleagues oversaw this case and its 11,000-page record. Nor did we consider the evidence and arguments produced in five days of hearings. And though I share some of my colleagues' concerns about the district court's legal analysis, those concerns do not establish that plaintiffs have shown a clear likelihood of success on the merits.

13 Id. at 235 ("Clear error occurs when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").


16 See Lowery v. Governor of Ga., 506 F. App'x 885 (11th Cir. 2013) (affirming the dismissal after determining that the Governor lacked the power to provide the requested relief and declining to address the district court's reasoning).

In *Brown v. Detzner*, Congresswoman Corrine Brown united with the Southern Christian Leadership Conference Jacksonville Florida Chapter and other parties. They filed for a preliminary injunction against the State of Florida and local election authority. The Florida Republican Party joined the suit as defendants in order to protect the law reducing Sunday voting. Brown and others claimed "that 2011 amendments to Florida's early voting law disproportionately and adversely affect[ed] African American voters and [were] therefore not only unlawful under the Voting Rights Act, but also violate[d] the United States Constitution." The Florida district court expedited its decision on Brown's §2 preliminary injunction request because the early voting period was rapidly approaching. Then the court denied the injunction because the plaintiffs failed to show that they were substantially likely to prevail on either claim.

The *Brown* court declined to perform a retrogression analysis when assessing the plaintiff's likelihood of success on the merits of the §2 claim. Instead, the district court set out to determine "whether, under the totality of the circumstances, application of the 2011 Early Voting Statute serve[d] to deny African American voters equal access to the political process."

Throughout the totality of the circumstances analysis, the Florida district court contrasted its findings with what would have been the outcome if the retrogression analysis were applicable. Under the retrogression analysis, it would have been material that the proposed early voting procedural changes

118 895 F. Supp. 2d. 1236
119 Id. at 1239.
120 Id.
121 Id. at 1240.
122 Brown, 895 F. Supp. 2d at 1240.
123 Id.
124 Id. at 1238 (noting that voter awareness and certainty about the early voting laws were important in its decision to expedite the process).
125 See id. at 1251:

Moreover, in contrast to the Section 5 case before the Florida court, this Court, as Plaintiffs conceded at the hearing, is not conducting a "retrogression" analysis, meaning, this Court is not comparing the new statute against the old to determine whether these voting changes will "worsen the position of minority voters' in comparison to the preexisting voting standard, practice, or procedure."

126 Brown, 895 F. Supp. 2d at 1251.
could impose a significant burden on African-American voters.\textsuperscript{127} However, using the totality of the circumstances analysis, the district court focused on the possibility that the proposed changes could increase the overall amount of time for people to vote.\textsuperscript{128} The \textit{Brown} court also noted that there is no fundamental right to an early voting period.\textsuperscript{129}

In terms of Sunday voting, the district court viewed the proposed legislative changes as a shift from an optional Sunday to a mandatory Sunday for "Souls to the Polls" efforts.\textsuperscript{130} Indeed, the district court noted that the counties' redistribution of the total ninety-six hours could potentially expand weekend voting and help "third-party efforts to provide transportation to the polls for such voters."\textsuperscript{131} The \textit{Brown} court conceded that most counties would likely not use the full ninety-six hours, but that this was irrelevant because no county had indicated they would use the minimum of forty-eight hours.\textsuperscript{132}

Another district court in the Eleventh Circuit rejected the importation of a retrogression analysis in a §2 claim. In \textit{Lowery v. Deal}, Joseph Lowery united with the Georgia Legislative Black Caucus, Inc. and other interested parties.\textsuperscript{133} They sued Nathan Deal in his official capacity as the Governor of the State of Georgia.\textsuperscript{134} The plaintiffs claimed that both the created and proposed municipalities diluted their voting rights. The Georgia district court dismissed the case because the plaintiffs failed to state a claim under either the Voting Rights Act or the Equal Protection Clause.\textsuperscript{135}

\begin{footnotes}
\item[127] \textit{See id.} at 1252. (noting that the change could impose a material burden on "African-American voters' effective exercise of the electoral franchise").
\item[128] \textit{See id.} at 1252. (noting that while the supervisors could decrease the voting hours to forty-eight, there was also room for supervisors to increase the hours to ninety-six).
\item[129] \textit{See id.} at 1254 (highlighting that at the time, eighteen states did not allow early voting at all).
\item[130] \textit{Brown}, 895 F. Supp. 2d at 1253 (basing the finding on the fact that under the old law, Sunday hours could range from 0–16; under the new law, Sunday hours could range from 6–12).
\item[132] \textit{Id.}
\item[133] \textit{Lowery v. Deal}, 850 F. Supp. 2d 1326, 1328 (N.D. Ga. 2012) (noting that the plaintiffs, aside from the non-individual plaintiff, are all also registered voters).
\item[134] \textit{Id.} at 1329.
\item[135] \textit{Id.} at 1336.
\end{footnotes}
The Lowery court declined to perform a retrogression analysis when assessing the plaintiff’s likelihood of success on the §2 claim. The district court stood firmly on the notion that §2 is about vote “dilution, not retrogression.” An entire section of the opinion is devoted to distinguishing §2 dilution and §5 retrogression. While §5 by definition requires the comparison of the new plan and old plan, §2 provides for a comparison with a hypothetical, undiluted plan. The court notes that while there is overlap, the two sections are distinct and must be treated as such.

In lieu of a retrogression analysis, the district court employed a different benchmark test. The purpose of the benchmark test is to find a “reasonable alternative practice.” The court must (1) consider the state’s interest; (2) recognize the wide latitude that states have traditionally been granted; and (3) work within the confines of each state’s governmental structure. The Lowery court determined that the status quo was not a suitable benchmark because it effectively limited the State’s options to form local governments. In the absence of retrogression, the Georgia plaintiffs met a similar fate as those in Florida. The Georgia district court dismissed the claims due to the lack of an acceptable benchmark.

C. Prioritizing Timing and Avoiding the “Political Thicket”

The Supreme Court has yet to determine if a retrogression analysis belongs in a §2 assessment. The Court stayed both the

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136 Id. at 1335.
137 Lowery, 850 F. Supp. 2d at 1335:

The[ ] differences [between the §2 analysis and the §5 analysis] also prevent the Court from automatically accepting a prior practice as the appropriate benchmark under §2. Again, §2 is concerned with dilution, not retrogression. A violation of §2 cannot be established “merely by showing that a challenged voting practice involved a retrogressive effect on the political strength of a minority group.

138 Id.
139 See id. at 1334.
140 Id. at 1334-35.
141 Lowery, 850 F. Supp. 2d at 1335.
142 Id.
143 Id. at 1335–36.
144 Id. at 1336.
145 Lowery, 850 F. Supp. 2d at 1336.
Fourth and Sixth Circuit cases discussed above that employed a retrogression analysis. However, the stays were not on the merits, but determined by the amount of time remaining until the election and the extensive nature of the proposed change. In their analysis, the Supreme Court relied on the "Purcell Principle." In Purcell v. Gonzalez, Arizona residents joined with Indian tribes and community groups to challenge the State's new voter identification requirements. The district court denied the request for a preliminary injunction, but took time to issue a finding of fact. The court of appeals granted the injunction without an explanation or the district court's findings. Subsequently, the district court released findings indicating that the injunction should have been denied. The Supreme Court vacated the decision of the court of appeals and denied the injunction.

Timing is at the forefront of the Purcell decision. The Court stated that the court of appeals incorrectly neglected to weigh the effect of its decision while examining the harms of the

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147 See Veasey v. Perry, 769 F.3d 890, 895 (5th Cir. 2014):

While the Supreme Court has not explained its reasons for issuing these stays, the common thread is clearly that the decision of the Court of Appeals would change the rules of the election too soon before the election date. The stayed decisions have both upheld and struck down state statutes and affirmed and reversed district court decisions, so the timing of the decisions rather than their merits seems to be the key.


"[T]here is a consistent theme in the court's actions, which we can call the 'Purcell principle' after the 2006 Supreme Court case Purcell v. Gonzalez. Lower courts should be very reluctant to change the rules just before an election, because of the risk of voter confusion and chaos for election officials.

150 See id. at 3.
151 See id.
152 See id.
153 See Purcell, 549 U.S. at 4.
154 See id. at 6.
proposed election registration requirements.\textsuperscript{155} It should have considered that a last minute decision could create voter confusion and an incentive not to vote.\textsuperscript{156} "As an election draws closer, [the] risk [of harms] will increase."\textsuperscript{157} Therefore, the decision was based on the imminence of the election, not the merits.\textsuperscript{158} Since the decision, other courts have decided cases using the \textit{Purcell} Principle.\textsuperscript{159} And, until the Supreme Court reins in the \textit{Purcell} Principle,\textsuperscript{160} discord and/or restrictive measures can reign freely.

III \textbf{THE NEED FOR A CONCRETE TEST}

Either the Supreme Court or Congress must develop a test and determine the role that retrogression plays in a §2 claim. As already discussed, the courts are not aligned on the issue.\textsuperscript{161} Furthermore, without clarity, the states impose wrongful burdens on the right to vote when assessing proposals that eliminate Sunday voting. The unlawful burdens and the lack of clarity about the role that retrogression plays in a §2 analysis work together to create: (1) an unconstitutional condition, (2) a "time tax," and (3) a roadmap for evasion and discrimination. If the courts or Congress adopt the standard advanced in the next Part, these pitfalls can be avoided.

A. Unconstitutional Condition

Restrictions on the right to vote can implicate the doctrine of unconstitutional conditions, under which, the government cannot "grant a benefit on the condition that the beneficiary

\textsuperscript{155} See id. at 4.

\textsuperscript{156} See id. at 4–5.

\textsuperscript{157} See \textit{Purcell}, 549 U.S. at 5.

\textsuperscript{158} See id. at 5–6.

\textsuperscript{159} See, e.g., Frank v. Walker, 135 S. Ct. 7, 7 (2014) (vacating a stay of injunction against Wisconsin’s voter identification laws); North Carolina v. League of Women Voters, 135 S. Ct. 6, 6 (2014) (staying an injunction against North Carolina’s elimination of same-day registration and ban on counting out-of-precinct ballots); Husted v. Ohio State Conf. of the NAACP, 135 S. Ct. 42, 42 (2014) (staying an injunction ordering the restoration of Ohio’s early voting hours); Veasey v. Perry, 769 F.3d 890, 896 (5th Cir. 2014) (staying an injunction against Texas’s voter identification laws).


\textsuperscript{161} See discussion \textit{supra} Parts II.A, II.B.
surrender a constitutional right, even if the government may withhold that benefit altogether.\footnote{Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1415 (1989).} Benefits tend to be readily identified.\footnote{Adam B. Cox & Adam M. Samaha, Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory, 5 J. Legal Analysis 61, 70 (2013):}

Due to the nexus of race and hourly employment, an unconstitutional condition can be created when a state is permitted to eliminate Saturday or Sunday voting. Statistically, African Americans are more likely to work hourly jobs.\footnote{See Daniel S. Hamermesh, 12 Million Salaried Workers are Missing, 55 Ind. & Lab. Rel. Rev. 649, 654 (2002).} Within the pool of hourly employees, employers pay African Americans at or below the federal minimum wage at a higher percentage than white employees.\footnote{U.S. Bureau of Labor Statistics, Characteristics of Minimum Wage Workers, 2013, Report 1048 (March 2014), available at http://www.bls.gov/cps/minwage2013.pdf; see also Rebecca Theiss, The Future of Work: Trends and Challenges for Low-wage Workers, Economic Policy Institute Briefing Paper #941 (Apr. 2012).} Employers compensate hourly employees only for hours worked and, furthermore, hourly employees often struggle to receive enough hours to pay the bills.\footnote{Nantiya Ruan & Nancy Reichman, Hours Equity Is The New Pay Equity, 59 Vill. L. Rev. 35, 38–39 (2014) (detailing the plight of an hourly worker trying to make ends meet).}

Is it reasonable to expect these individuals to take time off work to vote? While most hourly jobs accept scheduling requests, research shows that employees who do so often face repercussions.\footnote{See id. at 39; see also Haygood, supra note 33, at 1047.} Therein lies the unconstitutional condition. The benefit is the freedom to contract with employers that are subject to the Department of Labor’s Wage and Hour Division (WHD). The WHD has the power to enforce federal labor laws and protect hourly employees from discrimination and substandard working conditions.\footnote{Resources for Workers, Wage and Hour Division, available at http://www.dol.gov/whd/workers.htm, archived at http://perma.cc/83FH-HAHN:}

\begin{footnotesize}
\begin{itemize}
\item[163] Adam B. Cox & Adam M. Samaha, Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory, 5 J. Legal Analysis 61, 70 (2013):
\begin{quote}
As it happens, such a benefit can pretty much always be identified. All it takes is willingness to expand the frame of reference in a given political community, allowing otherwise unconstitutional burdens on rights to be joined with gratuitous government benefits. If these benefits are enjoyed by the complaining party, any constitutional claim asserted by that party becomes an unconstitutional conditions question.
\end{quote}
\item[167] See id. at 39; see also Haygood, supra note 33, at 1047.
\end{itemize}
\end{footnotesize}
make this benefit dependent on a waiver of the constitutional right to participate in the electoral process. While the Supreme Court has made clear that there is no constitutional right to vote, there is a right not to be discriminated against on the basis of race and a right to free speech. Nevertheless, both rights are infringed upon in the current regime.

B. Time Tax

A time tax occurs when a government practice "forces one citizen to pay more in time to vote compared with her neighbor across town, across the state, across state lines, or even across the street." In 1969, a district court invalidated an election because the long lines deprived qualified voters the opportunity to vote. The court determined that the constitutional guarantee of a reasonable opportunity to vote includes both "reasonable access to the voting place" and the ability to "vote within a reasonable time." In 2005, the Ohio General

The Department of Labor's Wage and Hour Division (WHD) is responsible for enforcing some of the nation's most comprehensive federal labor laws on topics including the minimum wage, overtime pay, recordkeeping, child labor, family and medical leave, migrant and seasonal worker protections, lie detector tests, worker protections in certain temporary guest worker programs, and the prevailing wages for government-funded service and construction contracts. Collectively, these laws cover most private, state, and local government employment, and protect over 135 million workers in more than 7.3 million establishments nationwide.

While the government has not directly stated that hourly employees are not permitted to vote, it has knowingly created an environment that will decrease the votes of hourly workers. The legislative branch created the environment by allowing the formula to become outdated and neglecting to reinstate a new formula. The judicial branch also played a key role by invalidating the formula without another safeguard in place. When viewed through this lens, the government's actions are direct enough. In the alternative, should society permit the government to escape liability when the government builds a gun, purchases the ammo, places it in the hands of employers, aims the gun, and begins applying pressure to the trigger button? This Comment proceeds on the premise that the answer is no; the government should not escape the unconstitutional conditions doctrine when it manipulates employers and/or the market.

See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 59 n. 2 (1973) (advancing the principle that if there were a constitutional right to vote, Congress would not have needed to enact either the Fifteenth or Nineteenth Amendment).


See Ury v. Santee, 303 F. Supp. 119, 127 (N.D. Ill. 1969). But see In re Election Contest As to Watertown Special Referendum Election, 628 N.W.2d 336, 339 (SD 2001) ("Mere inconvenience or delay in voting is not enough to overturn an election.").

Ury, 303 F. Supp. at 126.
Assembly passed a bill to remedy the long polling lines that plagued Ohio in the 2004 election.\textsuperscript{174} In that election, citizens were forced to wait up to twelve hours to vote and at least one polling place did not close until 4:00 am.\textsuperscript{175} Voters who needed to attend school, report to work, take care of their families, or attend to their physical disabilities were “effectively disenfranchised and unable to vote.”\textsuperscript{176} Recently in 2008, a district court recognized that long lines at the polls could surpass the threshold of “annoyance” and enter into the realm of a “constitutional violation.”\textsuperscript{177} The court acknowledged that due to the nature of some jobs, many people must vote early in the morning or late into the evening if they are able to vote at all. “Life does not stop on election day.”\textsuperscript{178}

Eliminating Sunday voting or weekend voting in general can create a time tax. As addressed above, the elimination of weekend voting disproportionately affects African Americans, who represent the majority of hourly employees.\textsuperscript{179} Eliminating weekend voting forces hourly employees to find time during the week to vote. This shift places a large number of African Americans in poll lines during the remaining available times: immediately before work, during lunch, and immediately following work. These are short windows of time. African Americans already wait twice as long as Whites to exercise their right to vote.\textsuperscript{180} If this data point is developed further to show that African-American voters are not only subjected to vastly different wait times as compared to majority white precincts,

\textsuperscript{174} See Ohio State Conf. of the NAACP v. Husted, 768 F.3d 524, 531 (6th Cir. 2014).
\textsuperscript{175} See id.
\textsuperscript{176} See id.
\textsuperscript{177} See NAACP State Conf. v. Cortes, 591 F. Supp. 2d 757, 768 (E.D. Pa. 2008) (addressing the abundance of malfunctioning machines creating long lines at polling places in minority districts).
\textsuperscript{178} Id. at 765:

Nonetheless, we would be blind to reality if we did not recognize that many individuals have a limited window of opportunity to go to the polls due to their jobs, child care and family responsibilities, or other weighty commitments. Life does not stop on election day. Many must vote early or in the evening if they are to vote at all.

\textsuperscript{179} See Hamermesh, supra note 164, at 654 (discussing the statistics).
\textsuperscript{180} See Charles Stewart III, Waiting to Vote in 2012, 28 J.L. & Pol. 439, 457–58 (2013) (“At the individual level, the factor that stands out is race. Viewed nationally, African Americans waited an average of 23 minutes to vote, compared to 12 minutes for Whites; Hispanics waited 19 minutes.”).
but also are unable to vote due to the long lines, a §2 claim becomes viable.181

The time tax created is analogous to historical discriminatory practices deemed unconstitutional.182 For over a century, literacy tests were used to “disenfranchise ‘undesirable’ voters.”183 The tests meant nothing for Whites, yet served as a barrier to Blacks.184 Similarly, the time tax created by eliminating Sunday voting will not affect Whites to the same extent as Blacks due to their lower representation in the pool of hourly workers and “Souls to the Polls” participants, but it will create a sizeable barrier for Blacks to exercise their constitutional right to vote. Furthermore, as recent scholarship has noted, one of the most troubling features of discriminatory practices ended by the Voting Rights Act was the discretion granted to officials within each practice.185 Imagine for a moment that the elimination of mandatory Sunday voting and the move to optional Sunday voting were racially neutral on their face. Election officials would have broad discretion on whether to permit Sunday voting. The practice grants officials room to “discriminatorily administer facially race neutral laws.”186

C. Roadmap for Evasion and Discrimination

Without a test that directly applies to the elimination of Sunday voting, the key deciding factor will continue to be the Purcell Principle. This focus on timing creates a roadmap for evasion and discrimination. Those seeking to suppress the African-American vote can be strategic.187 They can lie in wait.

181 See Mukherjee, supra note 171, at 180 (“Where state or local policies or practices disproportionately produce long lines in precincts with higher than average concentrations of minorities, a Section 2 claim may be viable.”).

182 See id. (“Like the poll tax, the time tax burdens a citizen’s fundamental right to vote.”).


184 Id. at 365–66.

185 Id. at 364–65 (“However, little attention is paid to how voter ID laws recreate a ‘key disenfranchising feature[ ]’of Jim Crow era voter qualifications, like literacy tests, by vesting local officials with the broad discretion to discriminatorily administer facially race neutral laws.”).

186 Id.

187 See Nicholas O. Stephanopoulos, The South After Shelby County, 2013 SUP. CT.
Shortly before the electoral process is set to unfold, they can enact omnibus legislation. By the time affected voters are able to bring a claim, the Purcell Principle will likely block an injunction.

The states that have recently constructed barriers that suppress voting are often the same states that “experienced high rates of minority population growth and political participation over the last decade.”\textsuperscript{188} For example, Florida had over 2.6 million votes during the early voting period in 2008.\textsuperscript{189} African Americans represented 22% of the voters for the first week of early voting even though they were only 13% of the Florida electorate.\textsuperscript{190} Furthermore, 54% of African American voters in Florida voted during the early voting period.\textsuperscript{191} On “Souls to the Polls” Sunday, African Americans comprised one-third of the entire statewide turnout.\textsuperscript{192} Nevertheless, the push to eliminate early voting was successful without a retrogression analysis.\textsuperscript{193}

Republicans are passing the majority of restrictive election rule changes.\textsuperscript{194} This one-sided partisan movement is alarming. If both Democrats and Republicans were pushing for the

\textsuperscript{188} Haygood, supra note 33, at 1030 (“For example, block the vote efforts proliferated in three states that together account for nearly 22% of all African American voters in 2008: Georgia (1,334,000), Texas (1,253,000), and Florida (1,026,000). Moreover, the eight states that had turnout rates of more than 70% of their eligible African American voters—Nevada, Missouri, Maryland, Mississippi, South Carolina, Michigan, Wisconsin, and Ohio—are all participants in this block the vote campaign.”).

\textsuperscript{189} Haygood, supra note 33, at 1048.

\textsuperscript{190} Id.

\textsuperscript{191} Id. at 1048–49.

\textsuperscript{192} Id. at 1049 (“African Americans comprised one-third of the entire statewide turnout on the last Sunday before the 2008 election.”).

\textsuperscript{193} See supra Part IV.B.

changes, there would be an argument that franchise enhancement is occurring and the restrictions achieve a greater good.\footnote{Not all bipartisan efforts are for the greater good. In the 1950s and 1960s, both of the main political camps supported legislation and practices that discriminated against Blacks. This Section merely contends that if there is bipartisan support, there is a higher likelihood that both parties are working together towards the greater good for all citizens.} However, Republicans are effectively increasing partisanship. Their efforts to restrict Sunday voting focus on the swing states that cushioned President Obama’s 2012 victory.\footnote{See Samuel Issacharoff, Ballot Bedlam, 64 DUKE L.J. 1363, 1371–72 (2015) (depicting the Republican-led efforts to restrict early voting state by state); 2012 Swing States, POLITICO (July 2, 2013 10:02 AM), available at http://www.politico.com/2012-election/swing-state, archived at http://perma.cc/E2HG-Q9FX (listing the swing states).} The Republicans’ continuing interest in stifling Democrat voters encourages them to take advantage of the how-to guide gleaned from the recent Supreme Court decisions. Without a clear standard to assess these attacks on early voting, the \textit{Purcell} Principle will continue to provide a roadmap for evasion and discrimination. Something more is needed.

\section*{IV. A New Standard: Retrogression Plus}

A Retrogression Plus standard should be incorporated into the §2 analysis. The goal of this prophylactic standard is to encourage an inclusive democratic process and align with the question “that every American should [be asking]: How can we collectively encourage more people to participate in the political process?”\footnote{Haygood, supra note 33, at 1020.} After detailing the proposed Retrogression Plus standard, this Part highlights the success of retrogression in other areas of constitutional law.

\section*{A. Retrogression Plus}

The text of §2 warrants a retrogression analysis. Section 2 prohibits any practice that results in the “denial or \textit{abridgement}” of the right to vote.\footnote{Voting Rights Act of 1965, Pub. L. No. 97-205, 96 Stat. 131 (1982) (emphasis added).} Abridge means “to reduce the length of,” “to cut short,” or to “curtail.”\footnote{The American Heritage College Dictionary 5 (4th ed. 2004).} To illustrate this, imagine that you are given a stick and you need to determine whether the stick was cut short, and if so, how much was cut off? Rubbing
A CALL FOR PROPHYLACTIC MEASURES

your fingers over the ends searching for a sign of fracture is not best solution. Even if you guess correctly that it was cut, how will you determine by how much? The best solution is to compare an accurate replica of the stick before it was handed to you. At that point, you can measure the loss of the stick by comparing the length of the stick now to what it used to be. This logic comports to the elimination of Sunday voting. How can the extent of abridgment be assessed accurately without considering the procedure in place before the new initiative? "It makes no sense to suggest that a voting practice 'abridges' the right to vote without some baseline with which to compare the practice."\(^\text{200}\)

The Retrogression Plus Standard is a three-step process that includes a baseline. In accordance with the goal—to encourage an inclusive democratic process—both the plaintiff and the defendant will be permitted to submit their best proposal. The proposals can cite occurrences such as sudden changes in the population for explanatory purposes. The steps of the Retrogression Plus standard are: (1) the selection of a flexible benchmark and proposal, (2) an effects test, and (3) a cost-benefit analysis.

A hypothetical plan is scrutinized under the Retrogression Plus standard introduced below. The scenario goes as follows: The state of Blanche has successfully passed a change to the election law with the last-minute support from Senator Rose Nylund. Under the new law, the early voting period will span fifteen days with an option to close the polls for up to three days within that period. Though this change to the law will save the state of Blanche $5,000, the People’s Party of Sophia refuses to support the initiative because it reduces the period of early voting. Under the old law, the early voting period spanned thirty days with the option to close the polls for up to five days within that period. The Blanche Secretary of State, Dorothy Zbornak, is prepared to defend the new law and stymy the attack of the People’s Party.\(^\text{201}\)


1. Flexible benchmark and proposal.

The first step of the Retrogression Plus standard is the selection of a benchmark and proposal. Both the benchmark and proposal contain elements of flexibility. Flexibility in each stage allows the standard to evolve with the malleable nature of election law.

First, a flexible benchmark must be selected to serve as the initial source of comparison. Unlike the §5 retrogression analysis, the parties are not limited to the most recent practice. Each party can advocate for the most suitable benchmark. Though all benchmarks are welcome, more weight shall be given to the most recent district or state practice unless there is compelling evidence signaling another benchmark is more appropriate. Placing more weight in the recent practice, as the default, is not an uncontroversial decision. There is a valid concern that a state or district could be liable for eliminating voter protections that no other state has implemented. It would be counteractive to penalize the most progressive state for reverting to be the second most progressive state. The opportunity for the state to provide compelling evidence that another benchmark is more appropriate allays this concern. The state or district can prove that they are only one of two states that provided the protection and that the appropriate benchmark is the state of the law two iterations ago.

Next, comes the proposal phase. Proposals containing plans that other states have implemented are not precedential, but they can be used for guidance. The plaintiff will present an alternative plan to the challenged election law change. Ideally, the plan should be within the budget of the challenged change and highlight how it better achieves an inclusive democracy. In the response to the plaintiff’s proposed plan, the defendants have three options. They can either (1) adopt the proposal and end the litigation, (2) amend the law in some measure and continue the litigation if the plaintiffs still disagree, or (3) leave the law unchanged and continue the litigation.

Building on the hypothetical scenario established above, the People’s Party of Sophia decides to challenge the recently enacted law. It selects the most recent practice as the benchmark and State Secretary Dorothy does not provide an alternative. Next, the proposal process begins. The People’s Party of Sophia is able to present a proposal that both increases
the early voting period to thirty-seven days, mirrors the ability to close the poll for up to three days, and decreases the overall cost by $5,000. It achieves the decrease in cost by streamlining the process and reducing the amount of employees required to administer the election. Unpersuaded, State Secretary Dorothy decides to leave the law unchanged and the litigation continues. The finder of fact must move to the second step of the Retrogression Plus standard.

2. Effects test.

The second step of the Retrogression Plus standard is an effects test. This test directly compares the benchmark with the new election law. At this stage, the finder of fact determines and compares both what is possible and what is most likely to happen. This addresses the scenario in which it is possible election officials will increase Sunday voting under the new requirements, but an examination of past relations and ideologies indicate that Sunday voting will most likely be decreased. Lastly, the finder of fact may use the plaintiff's proposal for informative purposes, but it cannot be used in the direct comparison portion of the analysis. Only the benchmark and the new election law can be compared directly.

Resuming the hypothetical scenario, the finder of fact must administer the effects test. Since State Secretary Dorothy did not contest the plaintiff's selection of the prior practice as the benchmark, the prior practice is the first data point. Similarly, because State Secretary Dorothy declined to adopt a new law in light of the plaintiff’s proposal, the initial update to the law serves as the second data point. Under the old law, counties usually reserved the weekend for the allotted five days of closure. At least four Sundays and one Saturday would be eliminated. In some instances, five Sundays were eliminated. This resulted in four days of early voting on the weekend. Under the new law, there are only two Sundays and two Saturdays total. While it is possible that counties could close the polls on three weekdays, it is more likely that they will continue to close the polls on the weekend. This would result in only one Saturday or Sunday being available during the early voting period. "Souls to the Polls" events could be eliminated entirely. Under the People Party of Sophia's proposed plan, there would be at least eight weekend days of early voting. While this is
informative, the State of Blanche is under no obligation to comply with the plaintiff’s proposal. However, the plaintiff’s proposal may prove to be useful in the next step of the Retrogression Plus Standard.


The third and final step of the Retrogression Plus standard is a cost-benefit analysis that is dispositive. Up until this point, the plaintiff has had to establish that the new law is retrogressive. The final burden shifts to the state or district to demonstrate that the benefit gained from the new election law is worth the loss of participants (if any) in the electoral process. The purpose of the burden shift is two-fold: (1) it aligns with the goal of the standard and will potentially cause those shaping history to realize the negative effect their actions are having on the democracy; and (2) it compensates (at least in part) for the cost discrepancies between §2 and §5 claims. The plaintiff’s proposed plan can be particularly illuminating during this final step. If their plan achieves the same benefit, but significantly reduces the loss, the plan can challenge the validity of the State’s assertion that the benefit justifies the cost. Similar to the second stage, the plaintiff’s proposed plan is only informative; it cannot become the new law. In the event the new election law is deemed unconstitutional, the state or district must return to the old law.

Concluding the hypothetical scenario, the finder of fact must perform a cost-benefit analysis. First, the cost must be thoroughly examined. As realized in the second step, the primary cost is more likely than not the loss of almost all weekend voting. The elimination of weekend voting

202 See Hasen, supra, note 194, at 1867:

There are early signs that some Republicans are considering pulling back on efforts that have made it harder for people to register and vote in the name of fraud prevention or election integrity.... Republican legislators in Florida passed legislation to restore early voting days in an effort to eliminate long lines after evidence mounted that their earlier voting reform efforts were intended to suppress Democratic votes.

203 See Stephanopoulos, supra note 187, at 65 (“Litigation under Section 2 is more expensive than administrative preclearance under Section 5.... Private parties thus incur much of the cost of litigation under Section 2, while the DOJ shoulders much of the expense of preclearance under Section 5.”).

204 See discussion supra Part IV.A.2.
disproportionately affects African-American voters because they make up the largest percentage of hourly workers.\textsuperscript{205} Under the new law, polling lines will likely be unreasonably long on the one day of weekend voting. It follows that the state of Blanche risks creating an unconstitutional condition for and imposing a time tax on African-American voters.\textsuperscript{206} Second, the benefit must be examined. State Secretary Dorothy has established that the realized benefit is $5,000, which will allow Blanche to use those funds for polling machine maintenance, signage, and voting rights pamphlets. The improvements are salient, but as the People's Party of Sophia's proposed plan indicates, there are other, less vote-diminishing ways to free up space financially. Simply put, $5,000 is not worth creating additional barriers for African Americans to exercise a fundamental, constitutional right—the right to vote. The new law is invalidated and State must return to the old law.

Contrary to congressional intent,\textsuperscript{207} this hypothetical scenario would come out differently without the Retrogression Plus standard. The counties within Blanche have not indicated that under the new plan they would continue to reserve the weekend for the allotted days of closure. Theoretically, they could select three weekdays, and allow four days on the weekend for early voting. Under the old law, four days on the weekend were dedicated to early voting as well. In terms of weekend voting, the plans are equal. There is no fundamental right to an early voting period; the People's Party of Sophia would have no basis for their claim.\textsuperscript{208} The new election law would be constitutional. Retrogression under §2 can prevent cases similar to this hypothetical from falling through the gap.

B. Transferring Retrogression's Success in Other Areas of Law

Retrogression has been successful in other areas of the law.\textsuperscript{209} Importing it into the §2 analysis can deter jurisdictions

\textsuperscript{205}See discussion supra Part III.A.

\textsuperscript{206}See discussion supra Parts III.A, III.B.

\textsuperscript{207}H.R. REP. No. 97-227, at 4 (1982) (stating that one of the goals is to prevent measures encumbering the black vote).

\textsuperscript{208}See supra Part II.B; see also Brown, 895 F. Supp. 2d at 1254 (highlighting that at the time, eighteen states did not allow early voting at all).

from expanding voter access because they can become locked into a provision; however, the cost-benefit analysis of the Retrogression Plus standard can catch those rescinded expansions that were not worth the trouble. Furthermore, the chilling effect will likely be less than when §5 was intact because not every election law change will undergo mandated review. First, this Section looks at retrogression in another area of the law. Then, it refutes the claim that importing retrogression into the §2 analysis will jeopardize the electoral process of those states that have never offered Sunday voting.

One area of constitutional law that has employed a retrogression analysis is the Fifth Amendment. Among other protections, the Fifth Amendment protects a person from being “compelled in any criminal case to be a witness against himself.” In *Dickerson v. United States*, an accused person moved to have statements suppressed because he had not received Miranda warnings. The district court suppressed the evidence, but the Fourth Circuit reversed the ruling because of compliance with 18 U.S.C §3501. Section 3501 permitted the admissibility of all voluntary statements, regardless of a Miranda warning. The Supreme Court reversed the Fourth Circuit decision and suppressed the statements. The Court stated, “any legislative alternative must be at least as effective in appraising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.” It accurately assessed the extent of abridgment by considering the procedure in place before the new initiative.

Retrogression in both the context of Sunday voting and Miranda warnings is similar in one key way; it does not require jurisdictions to match the improvements that another

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210 See discussion supra Part IV.A.3.
211 U.S. CONST. amend. V.
213 Id. at 432.
214 Id.
215 Id.
216 *Dickerson*, 530 U.S. at 422.
217 Id. at 440 (2000) (quotations omitted) (emphasis added).
jurisdiction makes.\textsuperscript{218} For example, if Arizona decides that in order to address the needs of the rapidly growing Hispanic community Miranda must be given in both English and Spanish before statements are admissible, Maine would not be held to the standard. Similarly, if one jurisdiction introduces early voting to accommodate the prevalence of hourly employees in its workforce, another jurisdiction is not held to this standard. A prophylactic measure in both instances does not violate the basic principle of federalism; it prevents the loss of a fundamental right.

CONCLUSION

Progress does not warrant complacency; it should only compel the desire for more progress. America is touted as a democratic nation. The flood of restrictive measures post-\textit{Shelby}, however, is a serious threat to the democracy. A levee must be built to protect those areas that have a greater need to prevent racial discrimination. Arguably, if the preclearance formula was no longer indicative of race relations in America, the flood of drastic changes should not have occurred.\textsuperscript{219} Furthermore, the division among courts on how to assess the restrictive measures presents a roadmap to those seeking to increase partisanship.

\textsuperscript{218} \textit{But see N.C. State Conf. of the NAACP,} 997 F. Supp. 2d at 352, \textit{aff'd in part, rev'd in part sub nom. League of Women Voters of N.C.,} 769 F.3d 224:

Furthermore, because Section 2 does not incorporate a 'retrogression' standard, the logical conclusion of Plaintiffs' argument would have rendered North Carolina in violation of the VRA before adoption of SDR [(same-day registration)] simply for not having adopted it. Yet, neither the United States nor the private Plaintiffs have ever taken the position that a jurisdiction was in violation of Section 2 simply for failing to offer SDR. Indeed, "[e]xtending Section 2 that far could have dramatic and far-reaching effects," placing the laws of at least 36 other states which do not offer SDR in jeopardy of being in violation of Section 2.

\textsuperscript{219} \textit{League of Women Voters of N.C.,} 769 F.3d at 242–43:

Immediately after \textit{Shelby County,} i.e., literally the next day, when 'history' without the Voting Rights Act's preclearance requirements picked up where it left off in 1965, North Carolina rushed to pass House Bill 589, the 'full bill' legislative leadership likely knew it could not have gotten past federal preclearance in the pre-\textit{Shelby County} era. Thus, to whatever extent the Supreme Court could rightly celebrate voting rights progress in \textit{Shelby County,} the post-\textit{Shelby County} facts on the ground in North Carolina should have cautioned the district court against doing so here.
The Retrogression Plus standard comports with Gingles, the landmark §2 case memorializing Congress’s stance that emphasis should be on results not intent because the latter is divisive and presents too difficult a burden. The standard recognizes that though America is no longer tolerant of beating people with billy clubs, the nation still has a long way to go. It builds upon the progress that those brave souls in Selma fought for. Retrogression Plus is a prophylactic measure that can foster an inclusive, democratic process—it can bring “Souls to the Polls.”