
NEW APPLICATIONS OF SECTION 2 OF THE VOTING RIGHTS ACT TO VOTE DENIAL CASES

By Maya Noronha

Note from the Editor:

This article discusses recent federal appellate court decisions with respect to Section 2 of the Voting Rights Act, criticizing new applications of that law.

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- Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579 (2013), http://www.naacpldf.org/files/case_issue/The%20Causal%20Context%20of%20Disparate%20Vote%20Denial.pdf.
- Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439 (2015), <http://harvardcrcl.org/wp-content/uploads/2015/11/Applying-Section-2-to-the-New-Vote-Denial.pdf>.
- Note, Kathleen M. Stoughton, *A New Approach to Voter ID Challenges: Section 2 of the Voting Rights Act*, 81 GEO. WASH. L. REV. 293 (2013), http://www.gwlr.org/wp-content/uploads/2013/01/Stoughton_81_1.pdf.

About the Author:

Maya M. Noronha is an associate at Baker & Hostetler LLP, where she focuses her practice on voting rights, redistricting, and campaign finance. Thank you to E. Mark Braden, Richard B. Raile, and Katie McClendon for your comments.

INTRODUCTION

Challengers to voting laws in North Carolina, Ohio, Virginia, and Wisconsin recently raised claims under Section 2 of the Voting Rights Act.¹ In the past, plaintiffs had argued that a Section 2 violation had occurred when a new election law (such as redistricting legislation) *diluted* the votes of minorities, but the complaints in this recent batch of cases allege under Section 2 that members of minority groups had their right to vote *denied*,² rarely claimed prior to 2013.³ While vote dilution involves a reduction in the impact of votes already cast, vote denial occurs when an eligible voter does not even have the opportunity to cast that vote.

Plaintiffs in *Ohio Democratic Party v. Husted* challenged Ohio's elimination of "Golden Week," which had allowed voters to register and conduct early voting within the same seven days.⁴ In *NAACP v. McCrory*⁵ and *League of Women Voters v. North Carolina*⁶ (later consolidated with *McCrory*), plaintiffs sought to invalidate several changes to North Carolina election procedures, such as new voter ID requirements, reduced early voting, and the end of out-of-precinct voting, pre-registration, and same day registration. In *Lee v. Virginia State Board of Elections*, Virginia's voter ID requirement was challenged.⁷ Similarly, Wisconsin's voter ID law was challenged in *Frank v. Walker*.⁸ Upon appeal, the Fourth, Sixth, and Seventh Circuits addressed how to analyze these Section 2 vote denial claims.

The Sixth and Seventh Circuits, along with the Fourth Circuit in *Lee*, upheld voting law reforms in Ohio, Wisconsin, and Virginia against challenges under Section 2. However, another Fourth Circuit panel preliminarily enjoined North Carolina's laws⁹ and ultimately invalidated them.¹⁰ These differing results among different panels of the Fourth Circuit (Judges Paul V. Niemeyer, Dennis W. Shedd, and G. Steven Agee were on the *Lee* panel, and Judges James A. Wynn, Diana Gribbon Motz, and Henry F. Floyd were on the *League of Women Voters* panel) can be explained not just by the differences among the provisions of the state voting laws, but also by the different ways the panels applied Section 2. While the *Lee* court's analysis resembled that of the other circuits,

1 42 U.S.C. § 1973 (current version at 52 U.S.C. § 10301) (as amended by Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982)).

2 See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 688 (2006).

3 997 F. Supp. 2d 322, 346 (M.D.N.C. 2014).

4 No. 15-01802 (6th Cir. Aug. 23, 2016).

5 No. 14-1845 (4th Cir. July 29, 2016).

6 No. 14-1845 (4th Cir. Oct. 1, 2014). Because the ultimate holding in *McCrory* rested on discriminatory intent, the prior ruling in *League of Women Voters* on the preliminary injunction better demonstrates how the panel applied Section 2.

7 No. 16-1605 (4th Cir. Dec. 13, 2016).

8 No. 11-01128 (7th Cir. Oct. 6, 2014).

9 *League of Women Voters*, No. 14-1845 at 56.

10 *McCrory*, No. 14-1845 at 77-78.

the *League of Women Voters* court took a similar tack to the district courts in Wisconsin and Ohio.

A recent trend in vote denial cases involves plaintiffs challenging voting law reforms using Section 2 as a substitute for Section 5.¹¹ Characteristics of recent Section 2 analysis include: (1) requiring plaintiffs to prove less of a burden on voting rights; (2) relying only on disparate impact evidence, as opposed to a showing of causation; (3) using retrogression to determine the impact of reforms on voters; (4) ignoring the state actor requirement; and (5) calling for more involvement of the judiciary in reviewing state voting laws.

I. SECTION 2 V. SECTION 5

In the Civil Rights era, the federal government and individual plaintiffs used the Voting Rights Act to address racially discriminatory voting laws passed in certain states. The Section 5 preclearance provision was enacted to prevent Southern states from quickly passing new voting laws before they could be fully addressed in lawsuits. While Section 2 only permits challenges to voting laws that have already been enacted, Section 5 requires that a voting law be precleared by the D.C. Circuit or the Justice Department Voting Rights Section before taking effect. Section 2 places the burden on the plaintiff to demonstrate that the voting law is discriminatory, but Section 5 puts the onus on the state to defend its legislation. Section 5 applies to certain jurisdictions with a history of voting tests and with low voter registration and turnout in the 1960s. The U.S. Supreme Court's 2013 decision in *Shelby County v. Holder* invalidated the Section 4 formula used to determine which jurisdictions are covered under Section 5, rendering the Section 5 preclearance requirement inoperable.¹²

Section 2 is an inappropriate substitute for Section 5 for a number of reasons. First, Section 5 was initially set to expire after five years. It was intended as a temporary stopgap to address "first generation barriers" to voting.¹³ Consequently, the formula identifying covered jurisdictions was tied to states which had voting tests or lower minority turnout and voter registration in the 1960s and 1970s. The requisite elements of a Section 5 violation were easier to prove than those of a Section 2 violation. When the Voting Rights Act was passed, Section 5 was needed because Section 2 was insufficient to combat the series of discriminatory Southern laws faced by minorities in the 1960s and 1970s. Additionally, Section 5 preclearance has been recognized as a procedure that "imposes substantial federalism costs."¹⁴ The

federal government's intrusion on state sovereignty was justified by deep-seated discrimination in states where minority voter registration and turnout was exceedingly limited in the 1960s. The nexus of preclearance coverage and low minority political participation and success no longer exists.¹⁵

II. BURDEN V. INCONVENIENCE

For a court to find a vote denial under Section 2 of the Voting Rights Act, the plaintiff must prove that the challenged voting law imposes a burden. There is a burden when members of a minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.¹⁶

In four of the five recent voting rights cases described above, the appellate courts found that a state's failure to accommodate voter preferences or simply inconveniencing voters falls short of the vote denial prohibited by Section 2. The Fourth Circuit in *Lee* noted that the Supreme Court has held that a "minor inconvenience of going to the registrar's office to obtain an ID does not impose a substantial burden,"¹⁷ and also affirmed the district court's opinion that, "while the law added 'a layer of inconvenience to the voting process, it appear[ed] to affect all voters equally.'"¹⁸

The Sixth and Seventh Circuits distinguished between states failing to accommodate voters' preferences and erecting barriers to voting. The Sixth Circuit found that "some African-American voters *may prefer* voting on Sundays, or avoiding the mail, or saving on postage, or voting after a nine-to-five work day," but held that the lower court inappropriately characterized those preferences as sufficient to establish a burden under Section 2.¹⁹ The Seventh Circuit found that a "matter of choice" does not rise to a Section 2 violation.²⁰ Unless the state "makes it needlessly hard to" vote, some level of inconvenience that still permits voters to cast ballots is permissible.²¹ The Seventh Circuit found that Section 2 would be violated if the government gave blacks or Latinos less opportunity than whites to vote, but that the fact that "these groups are less likely to *use* that opportunity" because of lower incomes is not a violation of Section 2.²² Like the Sixth Circuit, the Seventh Circuit took a pragmatic approach. Because any change to election laws is likely to affect some portion of the electorate, these courts would limit Section 2 violations to significant burdens.

The Fourth Circuit panel in *League of Women Voters* took a sharply different approach. That court reversed the finding of the court below that the burden of eliminating same-day registration

11 J. Christian Adams, *Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not*, 31 *TOURO L. REV.* 297 (2015) (criticizing the conversion of Section 2 into Section 5); Roger Clegg and Hans A. von Spakovsky, "Disparate Impact" and Section 2 of the Voting Rights Act, Heritage Legal Memorandum #119 (2014), <http://www.heritage.org/research/reports/2014/03/disparate-impact-and-section-2-of-the-voting-rights-act>. But see Tokaji, *supra* note 2 (advocating for a Section 2 disparate-impact test). See also Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 *COLUM. L. REV.* 2143 (2015).

12 133 S.Ct. 2612 (2013).

13 *Id.* at 2625.

14 *Id.* at 2621 (quoting *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 202 (2009)).

15 See *Shelby County*, 133 S. Ct. at 2619.

16 52 U.S.C. § 10301(b).

17 *Lee*, No. 16-1605 at 19 (referencing *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 (2008)).

18 *Id.* at 12.

19 *Husted*, No. 15-01802 at 13.

20 *Frank*, No. 11-01128 at 23.

21 *Id.*

22 *Id.*

was minimal because voters could still register and vote by mail.²³ The Fourth Circuit relieved the plaintiffs of the requirement of actually showing a denial of the right to vote, finding instead that “nothing in Section 2 requires a showing that voters cannot register or vote under any circumstance.”²⁴

III. CAUSATION V. CORRELATION

Section 2 prohibits states from imposing a voting qualification “which results in” the denial of the vote.²⁵ After a court determines that a burden is present, it proceeds to the second step of analysis which deals with causation. In this step, the court asks whether the burden was caused by social or historical conditions that produce discrimination.²⁶ The Sixth Circuit explained that the analysis is “not just whether social and historical conditions ‘result in’ a disparate impact, but whether the challenged voting standard or practice *causes* the discriminatory impact as *it* interacts with social and historical conditions.”²⁷ The “results” test is, thus, “a requirement of causal contribution by the challenged standard or practice itself.”²⁸

In order to find a Section 2 violation, the court must find a causative nexus between the change in law and the burden on minority voting. In their review of North Carolina’s voting laws, the Fourth Circuit granted an injunction because “the disproportionate impacts of eliminating same-day registration and out-of-precinct voting are clearly *linked* to relevant social and historical conditions.”²⁹ The Sixth Circuit, on the other hand, held that Section 2’s causation requirement “cannot be construed as suggesting that the existence of a disparate impact, in and of itself, is sufficient to establish the sort of injury that is cognizable and remediable under Section 2.”³⁰ The Fourth Circuit’s *League of Women Voters* panel seems to reduce Section 2’s requirement of causation to just a link or correlation between voting statistics and voting laws, while the Sixth Circuit requires the full-fledged causation that Section 2 calls for.

IV. THE STATE ACTOR V. OTHER FACTORS

Section 2 only prohibits voting restrictions improperly “imposed or applied by any State or political subdivision.”³¹ The Seventh Circuit emphasized that “a state-created obstacle” is mandatory for a finding that a Section 2 violation occurred.³² The district court in Wisconsin struck down the state voting

law based on its findings that minorities are disproportionately likely to live in poverty, and that that fact can be traced to racial discrimination in education, employment, and housing.³³ However, the Seventh Circuit reversed because “[t]he judge did not conclude that the state of Wisconsin has discriminated in any of these respects . . . [and] units of government are responsible for their own discrimination but not for rectifying the effects of other persons’ discrimination.”³⁴

V. PRESENT V. PAST

The tension between the traditional understanding of Section 2 and the new post-*Shelby* approach of voting rights plaintiffs can be seen most clearly in a comparison of two opinions in the North Carolina cases. The Middle District of North Carolina upheld North Carolina’s voting changes, but the Fourth Circuit granted a preliminary injunction to the challengers. The lower court framed the inquiry as whether minorities had less of an opportunity to vote than whites under the new election law scheme, as courts have long done in their Section 2 analyses.³⁵ It held that “Section 2 does not incorporate a ‘retrogression’ standard,” and that the court therefore was “not concerned with whether the elimination of [same-day registration and other features] will worsen the position of minority voters in comparison to the preexisting voting standard, practice or procedure—a Section 5 inquiry.”³⁶

But the appellate court compared whether minorities had less of an opportunity to vote than they had prior to the change in voting laws. North Carolina had eliminated early voting, pre-registration, out-of-precinct voting, and same-day registration, and the Fourth Circuit compared minorities’ access to voting under the new procedures with the access they had enjoyed under the preexisting voting procedures in its Section 2 analysis.³⁷ The Fourth Circuit even criticized the district court for committing “grave errors of law” by failing to apply what would ordinarily be considered Section 5 inquiries when conducting a Section 2 analysis.³⁸ Notably, the Fourth Circuit cited *Reno v. Bossier Parish School Board*, a Section 5 case, to conclude that Section 2 analysis “necessarily entails a comparison” and requires “some baseline with which to compare the practice.”³⁹

VI. DEFERENCE V. ENTANGLEMENT

The Sixth Circuit expressed grave concerns that courts using Section 2 to strike down laws reducing voting hours and making other voting changes would result in a “federal floor” or “one-way ratchet” imposed by federal courts on state governments.⁴⁰ If that were to happen, once any increase in voting periods or expanded

²³ No. 14-1845 at 41.

²⁴ *Id.* at 42.

²⁵ 52 U.S.C. § 10301(a).

²⁶ See *Thornburg v. Gingles*, 478 U.S. 30 (1986) (applying a multi-factored test to a Section 2 inquiry into the requisite “social and cultural conditions”).

²⁷ *Husted*, No. 15-01802 at 7 (emphasis added).

²⁸ *Id.* at 24.

²⁹ *League of Women Voters*, No. 14-1845 at 41 (emphasis added).

³⁰ *Husted*, No. 15-01802 at 23.

³¹ 52 U.S.C. § 10301(a).

³² *Frank*, No. 11-01128 at 23.

³³ *Frank v. Walker*, 17 F. Supp. 3d 837, 877 (E.D. Wisc. 2014).

³⁴ *Frank*, No. 11-01128 at 23.

³⁵ NAACP v. McCrory, 997 F.Supp.2d 322, 324 (M.D.N.C. 2014).

³⁶ *Id.* at 351-52.

³⁷ *McCrory*, No. 14-1845 at 38.

³⁸ *Id.* at 36.

³⁹ *Id.* at 37.

⁴⁰ *Husted*, No. 15-01802 at 2.

procedures is passed, states would only be allowed to “add to but never subtract from” that baseline.⁴¹ Any reforms reining in expansive laws would be struck down by the courts.

Plaintiffs in Ohio’s *Husted* case and North Carolina’s *McCrorry* and *League of Women Voters* cases challenged the reduction of early voting days: Ohio had reduced 35 days of early voting to 29, and North Carolina had reduced 17 days of early voting to 10.⁴² According to the district court’s logic in its *Husted* decision, because Ohio once allowed 35 early voting days, the legislature should be barred from reducing the number of early voting days even if it had legitimate policy reasons for the reform, such as reduced election administration burdens or counteracting same day registration and early voting fraud.⁴³ Future, differently composed legislatures could never reduce early voting, even if only by one week (as North Carolina did). The judiciary would have the power to cement certain election rules on the books forever. The Sixth Circuit’s ultimate concern was that “states would have little incentive to pass bills expanding voting access if, once in place, they could never be modified in a way that might arguably burden some segment of the voting population’s right to vote.”⁴⁴ Notably, many states—including New York and Connecticut—do not allow for *any* early voting, so allowing a period of 29 or even 10 early voting days is actually a generous provision comparatively.⁴⁵ Determining whether an early voting period is sufficient involves courts intimately in crafting voting laws. For this reason, the Sixth Circuit was concerned with judges becoming “entangled, as overseers and micromanagers, in the minutiae of state election

processes.”⁴⁶ Instead, the court recommended “[p]roper deference to state legislative authority.”⁴⁷

VII. CONCLUSION

Since the Supreme Court’s decision in *Shelby County* suspended the Voting Rights Act’s Section 5 preclearance in 2013, plaintiffs have taken a new approach to voting rights challenges by filing vote denial claims under Section 2. Some courts have been persuaded to find Section 2 violations in cases involving mere voter inconvenience, disparate impact, and comparisons of minority voting before and after the voting law changes rather than comparisons of minority and white voting under the new laws. What results from such analyses is, according to one Sixth Circuit judge, “astonishing” precedent⁴⁸ and an open door for more judicial involvement in voting law.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Husted*, No. 15-01802 at 6. State legislatures might also reasonably conclude that early voting has a negligible impact on increasing voter access and turnout since early voters tend to vote anyway, as several studies have shown. Barry C. Burden, David T. Canon, Kenneth R. Mayer, and Donald P. Moynihan, *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AMERICAN JOURNAL OF POLITICAL SCIENCE 95 (2013); Joseph D. Giammo, and Brian J. Brox, *Reducing the Costs of Participation*, 63 POLITICAL RESEARCH QUARTERLY 295 (2010); Paul Gronke, Eva Galanes-Rosenbaum, and Peter A. Miller, *Early Voting and Turnout*, 40(4) POLITICAL SCIENCE AND POLITICS 639 (2007); Jeffrey A. Karp and Susan A. Banducci, *Absentee Voting, Mobilization, and Participation*, 29 AMERICAN POLITICS RESEARCH 183 (2001). *See also* Reid J. Epstein, *Early Voting Didn’t Boost Overall Election Turnout, Studies Show*, WALL STREET JOURNAL (Dec. 30, 2016), <http://www.wsj.com/articles/early-voting-didnt-boost-overall-election-turnout-studies-show-1483117610> (analysis of 2016 election).

⁴⁴ *Husted*, No. 15-01802 at 20.

⁴⁵ *Absentee and Early Voting*, National Conference of State Legislatures (Mar. 20, 2017), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>.

⁴⁶ *Husted*, No. 15-01802 at 2.

⁴⁷ *Id.* at 3.

⁴⁸ *Id.* at 2.

