

## Section 2 After Section 5: Voting Rights and the Race to the Bottom

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SECTION 2 AFTER SECTION 5: VOTING RIGHTS AND THE  
RACE TO THE BOTTOM

ELLEN D. KATZ\*

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## INTRODUCTION

Five years ago, *Shelby County v. Holder*<sup>1</sup> released nine states and fifty-five smaller jurisdictions from the preclearance obligation set forth in section 5 of the Voting Rights Act (VRA).<sup>2</sup> This obligation mandated that places with a history of discrimination in voting obtain federal approval—known as preclearance—before changing any electoral rule or procedure.<sup>3</sup> Within hours of the *Shelby County* decision, jurisdictions began moving to reenact measures section 5 had specifically blocked.<sup>4</sup> Others pressed forward with new rules that the VRA would have barred prior to *Shelby County*.<sup>5</sup>

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1. 133 S. Ct. 2612 (2013).

2. *Jurisdictions Previously Covered by Section 5*, CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [<https://perma.cc/7KFN-PNH5>] (data as of Aug. 6, 2015).

3. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 52 U.S.C. § 10305 (Supp. III 2016)) (formerly 42 U.S.C. § 1973c).

4. See, e.g., Sandy Hodson, *City Wins Lawsuit over Change in Election Date for Local Offices*, AUGUSTA CHRON. (May 13, 2014, 5:39 PM), <http://www.augustachronicle.com/news/government/elections/2014-05-13/city-wins-lawsuit-over-change-election-date-local-offices> [<https://perma.cc/5RYJ-69WW>] (reporting that Augusta changed the date of its elections shortly after *Shelby County* even though the Justice Department had blocked a similar measure in 2012); Ed Pilkington, *Texas Rushes Ahead with Voter ID Law After Supreme Court Decision*, GUARDIAN (June 25, 2013, 3:32 PM), <https://www.theguardian.com/world/2013/jun/25/texas-voter-id-supreme-court-decision> [<https://perma.cc/KF76-9MBK>] (reporting that, on the day the Supreme Court decided *Shelby County*, Texas moved to implement a voter ID law that had been denied preclearance); Harvy Rice, *Lawsuit Says Galveston Remap Discriminatory*, HOUSTON CHRON. (Aug. 26, 2013), <http://www.houstonchronicle.com/news/houstontexas/texas/article/Lawsuit-says-Galveston-remap-discriminatory-4761878.php> [<https://perma.cc/4523-2E7K>] (reporting on Galveston County's change from nine justices of the peace to four shortly after *Shelby County*, a move the Justice Department rejected in 2012).

5. See, e.g., Associated Press, *Voting Rights Act Ruling Clears Path for Mississippi Voter ID Use in 2014 (Updated)*, GULFLIVE.COM (June 25, 2013, 5:41 PM), [http://blog.gulflive.com/mississippi-press-news/2013/06/voting\\_rights\\_act\\_ruling\\_clear.html](http://blog.gulflive.com/mississippi-press-news/2013/06/voting_rights_act_ruling_clear.html) [<https://perma.cc/4XJZ-ZZB9>] (reporting, the day after *Shelby County* was decided, that a new voter ID law would be enacted); Kim Chandler, *Alabama Photo Voter ID Law to Be Used in 2014, State Officials Say*, AL.COM (June 25, 2013, 5:07 PM), [http://blog.al.com/wire/2013/06/alabama\\_photo\\_voter\\_id\\_law\\_to.html](http://blog.al.com/wire/2013/06/alabama_photo_voter_id_law_to.html) [<https://perma.cc/2J57-LH3T>] (explaining that *Shelby County* paved the way for a stricter voter ID law in Alabama); Sylvia Garcia & Larry Peacock, *Redistricting Proposal Targets Hispanic Gains*, HOUSTON CHRON. (Nov. 1, 2013, 5:23 PM), <http://www.chron.com/opinion/outlook/article/Garcia-Peacock-Redistricting-proposal-targets-4947300.php> [<https://perma.cc/3YK7-AKVU>] (explaining that new legislation that would change single-member to at-large districts in Pasadena would decrease Latino representation); Laura Leslie, *NC Voter ID Bill Moving Ahead with Supreme Court Ruling*, WRAL.COM (June 25, 2013), <http://www>

*Shelby County* opened a spigot. From it, new electoral restrictions flowed, regulating both how voters cast ballots and the structures in which they cast them. These practices make electoral participation demonstrably more difficult for minority voters and hence were—or would have been—deemed “retrogressive” under the section 5 preclearance regime.<sup>6</sup> Prior to *Shelby County*, section 5 prevented covered jurisdictions from implementing such retrogressive electoral practices.<sup>7</sup>

In the years since *Shelby County*, plaintiffs have relied on section 2 of the VRA to challenge those retrogressive electoral practices that section 5 would have blocked. Section 2 proscribes practices that “result[] in a denial or abridgment of the right ... to vote,” and defines such practices as those that leave minority voters with “less opportunity ... to participate ... and to elect representatives of their choice” than white voters.<sup>8</sup> This standard has been construed to involve a comparison between the challenged practice and a “hypothetical alternative” of “what the right to vote ought to be,” rather than a mandated comparison between a present practice and a prior one.<sup>9</sup>

Courts, nevertheless, have long considered prior practices as part of section 2’s “totality of circumstances” review.<sup>10</sup> Specifically, they have treated evidence that a challenged practice diminishes elec-

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wral.com/nc-senator-voter-id-bill-moving-ahead-with-ruling/12591669 [https://perma.cc/5NET-EYUE] (reporting that North Carolina’s new voting law enacting stricter requirements for photo IDs would move forward without the preclearance requirement).

6. See *infra* Part II.

7. See, e.g., *Beer v. United States*, 425 U.S. 130, 141 (1976); *Texas v. Holder*, 888 F. Supp. 2d 113, 144 (D.D.C. 2012) (three-judge court), *vacated*, 133 S. Ct. 2886 (2013); *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 73-74 (D.D.C. 2002) (three-judge court), *vacated*, 539 U.S. 461 (2003).

8. 52 U.S.C. § 10301(a)-(b) (Supp. III 2016) (formerly 42 U.S.C. § 1973(a)).

9. *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 528 U.S. 320, 320, 334 (2000) (emphasis omitted); see also *Reno v. Bossier Parish Sch. Bd. (Bossier Parish I)*, 520 U.S. 471, 477-80 (1997) (“[W]e have consistently understood [sections 2 and 5] to combat different evils and, accordingly, to impose very different duties upon the States.” (citing *Holder v. Hall*, 512 U.S. 874, 893 (1994) (plurality opinion))); *Johnson v. De Grandy*, 512 U.S. 997, 1016-17 (1994) (holding that failure of a districting plan to maximize minority representation was not a violation of section 2 because such maximization went beyond what the Court considered fair and equal participation); *Holder v. Hall*, 512 U.S. 874, 880-82 (1994) (plurality opinion) (dismissing as irrelevant the widespread use of a five-person commission in a section 2 challenge, claiming a one-person commission dilutes minority voting strength).

10. See 52 U.S.C. § 10301(b).

toral opportunities for minority voters as relevant—though, notably, not dispositive—evidence of legal injury under section 2.<sup>11</sup> A number of courts considering section 2 challenges since *Shelby County* have continued to engage in such comparisons, treating evidence of backsliding and the relish with which some jurisdictions have engaged in it to be probative evidence of a section 2 injury.<sup>12</sup>

Since *Shelby County*, this established approach has sparked increasing opposition. A number of states and local governments—both in once-covered jurisdictions<sup>13</sup> and in places where section 5 never applied<sup>14</sup>—have argued that retrogression was a concern under section 5 and section 5 alone, and thus that the backsliding retrogression described is no longer suspect in *Shelby County*'s wake. Under this view, comparing a challenged electoral practice with its predecessor has no place in section 2 litigation. Instead, the equality of opportunity section 2 protects is thought satisfied so long as the challenged practice compares favorably to practices employed in other jurisdictions. More specifically, the disputed practice, no matter how retrogressive, is permissible so long as it is no worse than the most restrictive practice used in other places.<sup>15</sup> After all,

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11. See, e.g., *LULAC v. Perry*, 548 U.S. 399, 435 (2006) (cataloging ways in which the “old District 23” served the Latino population better than “new District 25”); see also *infra* Part I.

12. See, e.g., *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 612 (2017); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017); *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part en banc*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017); see also *infra* Part I.

13. See, e.g., Defendant City of Pasadena's Reply Brief in Support of Its Motion for Summary Judgment at 10, *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017) (No. 4:14-cv-03241) (arguing that plaintiff's claim that the move from eight to six single-member districts places plaintiffs in a less advantageous position rests on retrogression analysis that is impermissible under section 2); Petition for Writ of Certiorari at 6, *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 1735 (2015) (No. 14-780) (arguing that the court below erred by improperly conducting a section 5 retrogression analysis for an alleged section 2 violation); see also *infra* Part II.

14. See, e.g., Reply Brief of Appellant, *The Ohio General Assembly* at 2-3, *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014) (No. 14-3877) (arguing that appellees “resort[] to an impermissible retrogression analysis” in their section 2 claim); see also *infra* Part II.

15. *N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 367 (M.D.N.C. 2014) (recognizing the argument that a state could not be held liable under “Section 2 merely for maintaining a system that does not count out-of-precinct provisional ballots” when most

the argument goes, why should a state be held liable for making an electoral practice less generous when other states employ that very practice without penalty?

The most direct response comes from section 2's text, its history, and the long-standing precedent construing it.<sup>16</sup> Section 2's "totality of circumstances" review means what it says—namely, that all circumstances are relevant to the statutory inquiry.<sup>17</sup> No single factor standing alone—be it retrogression or an unfavorable comparison to practices elsewhere—establishes a violation of section 2.<sup>18</sup> Nor does compliance with any particular factor or condition—be it nonretrogression or a favorable comparison to practices in other places—offer immunity from liability.

There is, however, an even more fundamental problem with recent efforts to immunize retrogressive practices when comparable or more restrictive practices exist elsewhere. Animating these efforts is the belief that an electoral rule is best examined independently from the system in which it operates. Excising evidence of backsliding from the section 2 inquiry isolates the challenged practice from the practice it supplants. Immunizing an electoral practice when a more restrictive one may be found elsewhere similarly ignores how an electoral rule operates in context. Reinforcing one another, both moves insist that the context in which the challenged practice operates is irrelevant to the section 2 inquiry. The statutory prohibition is not simply narrowed, but transformed. What was a nuanced inquiry into the opportunities for political participation is reduced to an ever-sinking floor with jurisdictions inoculating each other by adopting increasingly restrictive electoral practices.

The resulting race to the bottom is cause for serious concern. The validity of an electoral practice under section 2 has always depended critically on the context in which states used the practice. The new

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states "have made the decision not to count such ballots"), *aff'd in part, rev'd in part sub nom. League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014).

16. See Michael J. Pitts, *Rescuing Retrogression*, 43 FLA. ST. U. L. REV. 741, 742 (2016) (arguing "that the section 5 retrogression test should be 'rescued' by importing it into the section 2 results framework" and that evidence of backsliding "should create a strong presumption that the newly adopted voting law violates the section 2 results test").

17. See 52 U.S.C. § 10301(b) (Supp. III 2016).

18. See, e.g., *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 675-76 (S.D. Tex. 2017).

approach, which has seen mixed success so far, would derail that. It ignores how voters experience the electoral process in terms of both the benefits they derive and the burdens they face. Instead, it limits cognizable injuries to practices that fall below the least protective extant practice, which it also views in isolation from the rules with which that practice operates. In so doing, this decontextualized approach redefines what constitutes the injury under section 2 in a way that betrays Congress's intent and the role section 2 needs to play at this moment.

Part I of this Article examines the scope and application of sections 2 and 5 of the VRA in the years preceding *Shelby County*, noting salient differences between the two provisions, as well as the ways in which they overlap. This Part looks at how courts have treated backsliding in section 2 cases that predate *Shelby County*, the treatment of section 2 in *Shelby County* itself, and the role the decision suggests the provision should play going forward.

Part II looks at the ways in which litigants and courts have addressed backsliding in section 2 cases that postdate *Shelby County*. While evidence of retrogression continues to be treated as relevant to the legal inquiry under section 2, a number of defendants, their amici, and a few courts have sought to excise all evidence of backsliding from section 2 cases.

Part III argues that backsliding is not immaterial under section 2 but instead is a critical component of the local appraisal the statute mandates. It shows how the effort to excise evidence of backsliding from section 2 threatens to replace this multifaceted contextual analysis with a fixed rule that would immunize an electoral practice from challenge so long as it is no more restrictive than the most restrictive electoral practice presently in use. The result would be a troublesome race to the bottom in electoral practice, in which the equality of opportunity section 2 guarantees would be satisfied by whatever limited opportunities the most restrictive extant electoral practice allows.

A short conclusion follows.

## I. SECTION 2 AND SECTION 5

Prior to *Shelby County*, the two core provisions of the VRA operated side by side. Distinct provisions, sections 2 and 5 differed in purpose and application.

Section 5, the preclearance standard first enacted in 1965, applied only in places that utilized voting tests or devices and had very low voter participation on designated dates.<sup>19</sup> Section 5 required these “covered” jurisdictions to obtain preclearance, or approval from federal officials, before changing “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting.”<sup>20</sup> To obtain preclearance and, thus, be able to implement new electoral rules, covered jurisdictions needed to demonstrate that the proposed change “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color” or, as of 1975, membership in specified language minority communities.<sup>21</sup> Jurisdictions bore the burden of proof, and those unable to make the required showing were unable to implement the proposed change.<sup>22</sup>

Under section 5, an electoral change has long been understood to “deny[ ] or abridg[e] the right to vote” if it made electoral participation more difficult for the groups it protected.<sup>23</sup> The Supreme Court explained that “the purpose of § 5 has always been to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>24</sup> The Justices accordingly read section 5 to mandate a comparison between a proposed

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19. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4-5, 79 Stat. 435, 438-39 (codified as amended at 52 U.S.C. §§ 10303-10304 (Supp. III 2016)) (designating for coverage political subdivisions that on dates in 1964, 1968, and 1972 used identified prerequisites for voting and in which less than 50 percent of eligible voters registered or voted in the presidential election during that cycle).

20. *Id.* § 5.

21. 52 U.S.C. § 10304(a).

22. *See, e.g.,* *City of Rome v. United States*, 446 U.S. 156, 183 n.18 (1980) (noting that covered jurisdictions bear the burden of proof in the preclearance process), *abrogated by* *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

23. *Beer v. United States*, 425 U.S. 130, 139 (1976).

24. *Id.* at 141.



electoral practice and the one it would supplant to determine whether the change would make voting more difficult for minority voters.<sup>25</sup> Notably, the retrogression standard allowed jurisdictions to maintain discriminatory practices so long as changes to them did not make matters even more difficult for minority voters.<sup>26</sup>

Section 2 differs in scope and substance. The provision applies nationwide, rather than just in designated jurisdictions.<sup>27</sup> It lacks an expiration date and hence was never subject to periodic renewals. Section 2 does not employ section 5's unusual burden-shifting apparatus, and instead places the burden on the plaintiffs to prove the invalidity of a challenged practice.<sup>28</sup> Section 2 thus more closely resembles conventional antidiscrimination law than section 5 ever did.

Section 2's substantive requirements also differ from section 5's. Since the 1982 Amendments to the VRA, section 2 has barred electoral practices that "result[] in a denial or abridgment of the right ... to vote."<sup>29</sup> It defines such practices as those that leave minority voters with "less opportunity ... to participate in the political processes and to elect representatives of their choice" than white

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25. See *Georgia v. Ashcroft*, 539 U.S. 461, 478-79, 487-91 (2003), *superseded by statute on other grounds*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, *as recognized in Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Bossier Parish II*, 528 U.S. 320, 334 (2000); *Bush v. Vera*, 517 U.S. 952, 982-83 (1996) (plurality opinion); *Miller v. Johnson*, 515 U.S. 900, 926 (1995); *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion).

26. See, e.g., *Bossier Parish I*, 520 U.S. 471, 498-99 (1997) (Stevens, J., dissenting in part and concurring in part) (noting the majority's view that the disputed plan lacked a retrogressive effect because the parish lacked Black representation prior to the plan's adoption); *City of Lockhart v. United States*, 460 U.S. 125, 134-35 (1983) (holding that maintenance of practices that could be discriminatory "under some circumstances" should be precleared because "the new plan did not increase the degree of discrimination").

27. Compare 52 U.S.C. § 10301(a) (Supp. III 2016) (prohibiting "any State or political subdivision" from imposing voting practices that "result[] in a denial or abridgement of the right of any citizen ... to vote"), with *id.* § 10304(a) (requiring preclearance whenever "a State or political subdivision" identified in § 10303(a) attempts to change voting procedures).

28. See *id.* § 10301; see also *Bossier Parish I*, 520 U.S. at 480 ("Section 5 ... imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect.").

29. Compare Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a) (Supp. III 2016)), with Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, 96 Stat. 134 (codified as amended at 52 U.S.C. § 10301(a) (Supp. III 2016)).

voters have.<sup>30</sup> The statute, moreover, dictates that standard be assessed based on “the totality of circumstances.”<sup>31</sup>

Thus, in contrast to section 5, which imposed what Congress intended to be a relatively straightforward standard,<sup>32</sup> section 2 rejects a bright line in favor of a multifactored inquiry under which a single factor can neither establish liability nor immunize a challenged practice. In part, section 2 allows for a more complex and flexible assessment because it does not depend on section 5’s inverted burden allocation, which placed on subject jurisdictions the obligation to prove the legality of their rules prior to implementation.<sup>33</sup>

The complexity of the section 2 inquiry also reflects the nature of the substantive right the statute protects. While section 5 “prevents nothing but backsliding,” section 2 combats “discrimination more generally,”<sup>34</sup> which it locates in those electoral practices that leave minority voters with “less opportunity ... to participate and to elect representatives of their choice.”<sup>35</sup> In crafting this standard, Congress was explicit that the conditions that provide an equal opportunity to participate in the political process hinge on context.<sup>36</sup> Hence, it mandated an assessment “based on the totality of circumstances”<sup>37</sup> and further instructed that these circumstances be “of the

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30. 52 U.S.C. § 10301(b).

31. *Id.*; see also S. REP. NO. 97-417, at 16 (1982) (stating that section 2 requires an assessment “of the total circumstances of the local electoral process”).

32. See *Holder v. Hall*, 512 U.S. 874, 883-84 (1994) (noting that “[t]he baseline for comparison is present by definition; it is the existing status” and thus “[w]hile there may be difficulty in determining whether a proposed change would cause retrogression, there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur” (citing 28 C.F.R. § 51.54(b) (1993))); cf. *Abrams v. Johnson*, 521 U.S. 74, 95-98 (1997); *Beer v. United States*, 425 U.S. 130, 145-46 (1976) (Marshall, J., dissenting).

33. See 52 U.S.C. § 10304(a); *Bossier Parish I*, 520 U.S. 471, 480 (1997) (“Section 5 already imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect.... To require a jurisdiction to litigate whether its proposed redistricting plan also has a dilutive ‘result’ before it can implement that plan ... is to increase further the serious federalism costs already implicated by § 5.” (citing *Elkins v. United States*, 364 U.S. 206, 219 (1960))); *City of Rome v. United States*, 446 U.S. 156, 183 n.18 (1980) (stating covered jurisdictions bear the burden of proof in the preclearance process), *abrogated by Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

34. *Bossier Parish II*, 528 U.S. 320, 334-35 (2000); *Bossier Parish I*, 520 U.S. at 477, 480-82.

35. 52 U.S.C. § 10301(b).

36. *Id.*

37. *Id.*

local electoral process.”<sup>38</sup> As such, section 2 rejects reliance on “[a]n inflexible rule”<sup>39</sup> and requires instead “a searching practical evaluation of the ‘past and present’ reality, and on a ‘functional’ view of the political process.”<sup>40</sup>

Practices challenged under section 2 are not assessed in the abstract nor judged along a single dimension. They must instead be evaluated as part of the web of electoral rules that organize the way voters vote in the jurisdiction. In other words, section 2’s totality of circumstances standard means just that, namely, that all circumstances are relevant. No single factor standing alone establishes a violation of section 2 nor does the failure of a jurisdiction to satisfy a specific factor mean it violated the statute.<sup>41</sup> Context means that an electoral practice might run afoul of section 2 in one place but operate benignly in another.<sup>42</sup>

For these reasons, retrogression alone does not suffice to establish a section 2 violation. Not sufficient, however, does not mean wholly irrelevant. The Senate Report accompanying the 1982 Amendments to section 2 states that “[p]laintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group.”<sup>43</sup> As one federal appellate panel pointed out, the Report’s use of the word “merely’ ... simply establishes that challengers cannot show a Section 2 violation *only* on the basis of retrogressive effects.”<sup>44</sup>

The Senate Report, moreover, anticipates comparisons between past practice and a challenged law. Discussing Senate factor 9,

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38. S. REP. NO. 97-417, at 16 (1982).

39. *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994).

40. *See Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (quoting S. REP. NO. 97-417, at 30 & n.120).

41. *See De Grandy*, 512 U.S. at 1018-20; *id.* at 1026 (O’Connor, J., concurring) (finding a “[l]ack of proportionality can never by itself prove dilution, for courts must always carefully and searchingly review the totality of the circumstances,” while “the presence of proportionality ... is not a safe harbor for the States; it does not immunize their election schemes from § 2 challenge” (citation omitted)).

42. *See Gingles*, 478 U.S. at 48 (holding “at-large election schemes ... are not *per se* violative” of section 2, even though many such schemes do minimize or cancel out minority voting power in violation of the statute).

43. S. REP. NO. 97-417, at 68 n.224.

44. *See Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 558 (6th Cir. 2014), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

which calls for an assessment of “tenuousness,” the Report deems the fact that “the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction ... bears on the fairness of its impact.”<sup>45</sup> Hardly immune from scrutiny under the statute, backsliding was instead seen as one circumstance within the totality.

The Supreme Court confirmed that backsliding is relevant to the section 2 inquiry. *Thornburg v. Gingles* stated that section 2 requires “a searching practical evaluation of the ‘past and present reality.’”<sup>46</sup> *Georgia v. Ashcroft* would not “equate a § 2 vote dilution inquiry with the § 5 retrogression standard,” but still recognized that “some parts of the § 2 analysis may overlap with the § 5 inquiry.”<sup>47</sup>

More concretely, *LULAC v. Perry* relied on evidence of retrogression to hold that Texas violated section 2 when it displaced nearly one hundred thousand Latino residents from a congressional district that included Laredo to protect the Republican incumbent the residents refused to support.<sup>48</sup> Justice Anthony Kennedy’s plurality opinion in *LULAC* noted that before Texas adopted the contested plan, Latino voters in Laredo were “cohesive,” “politically active,” and “poised to elect their candidate of choice.”<sup>49</sup> The new district “undermined [their] progress” and “[i]n essence ... took away the Latinos’ opportunity because Latinos were about to exercise it.”<sup>50</sup> In short, evidence of backsliding fueled the Court’s conclusion that “the State must be held accountable for the effect of [its districting] choices in denying equal opportunity to Latino voters.”<sup>51</sup>

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45. See S. REP. NO. 97-417, at 29 n.117; see also *Ohio State Conference of the NAACP*, 768 F.3d at 558 (observing that the Senate Report “invites” comparison between present and past practice in its discussion of tenuousness).

46. See 478 U.S. at 45 (quoting S. REP. NO. 97-417, at 30).

47. 539 U.S. 461, 478 (2003) (citing *Holder v. Hall*, 512 U.S. 874, 883 (1994) (plurality opinion), *superseded by statute on other grounds*, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendment Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, as recognized in *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015)); see *Bossier Parish I*, 520 U.S. 471, 486 (1997) (holding that “some ... ‘§ 2 evidence’ may be relevant” under section 5).

48. 548 U.S. 399, 439 (2006); see also *id.* at 435 (noting that “the Latino population in District 23 was split apart particularly because it was becoming so cohesive”).

49. *Id.* at 438-39.

50. *Id.* at 439-40.

51. *Id.* at 441-42.

Section 2 and section 5 operated concurrently until 2013 when the Court decided *Shelby County v. Holder*.<sup>52</sup> That decision struck down section 4(b) of the VRA, a provision that set forth the coverage formula under which jurisdictions came to be subject to the preclearance requirements of section 5.<sup>53</sup> By invalidating section 4(b), *Shelby County* rendered section 5 inoperative.<sup>54</sup> In so doing, however, *Shelby County* made clear that “Section 2 ... is not at issue in this case” and that the Court’s “decision in no way affects the permanent, nationwide ban on racial discrimination” set forth in that provision.<sup>55</sup> *Shelby County*, accordingly, did not narrow section 2. Indeed, the Court’s suggestion that section 2 alone provided adequate protection against racial discrimination in voting indicates that it anticipated section 2 would continue to operate as it had in the past.

## II. BACKSLIDING

After the Supreme Court handed down *Shelby County*, various jurisdictions moved quickly to implement restrictive electoral procedures that section 5 would have blocked.<sup>56</sup> Lawsuits followed, challenging the legality of these new restrictions under section 2 of the VRA.<sup>57</sup> In response, defendant jurisdictions maintained that evidence of backsliding has no place in the section 2 inquiry and that courts are precluded from comparing challenged practices to the ones they supplant.<sup>58</sup>

Consider, for example, what happened in North Carolina. The state legislature there had been discussing a relatively modest election bill when *Shelby County* was decided.<sup>59</sup> Freed from the constraints of section 5, state legislators moved quickly to pass more

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52. 133 S. Ct. 2612 (2013).

53. *Id.* at 2631.

54. *See id.*

55. *Id.* at 2619, 2631.

56. *See supra* notes 4-5.

57. *See supra* notes 8-9.

58. For an example of this argument long before *Shelby County*, see *Little Rock School District v. Pulaski County Special School District No. 1*, 56 F.3d 904, 910 (8th Cir. 1995) (holding that the district court erred in a section 2 case by comparing a challenged redistricting plan to the prior plan).

59. H.B. 539, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013).

comprehensive legislation.<sup>60</sup> Enacted on August 12, 2013, Session Law 2013-381 (SL 2013-381) eliminated or reduced various electoral practices that had increased voter participation in North Carolina in the preceding years.<sup>61</sup> Specifically, SL 2013-381 scrapped same-day registration and out-of-precinct voting,<sup>62</sup> reduced the period of early voting from seventeen to ten days, expanded allowable poll observers and voter challenges, eliminated the discretion of county boards of election to keep the polls open an additional hour in extraordinary circumstances, and eliminated “preregistration” of sixteen- and seventeen-year-olds who would not be eighteen by the next general election.<sup>63</sup> The new law also mandated a new, more burdensome voter ID provision.<sup>64</sup>

The U.S. Department of Justice, along with a number of private plaintiffs, challenged the new law, claiming it violated both section 2 of the VRA and the Constitution. On July 29, 2016, a panel for the U.S. Court of Appeals for the Fourth Circuit held that the legisla-

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60. N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 339 (M.D.N.C. 2016) (noting that the day after *Shelby County*, the “Republican Chairman of the [Senate] Rules Committee[] publicly stated, ‘I think we’ll have an omnibus bill coming out’ and ... that the Senate would move ahead with the ‘full bill’”), *rev’d and remanded*, 831 F.3d 204 (4th Cir. 2016), *cert. denied sub nom.* North Carolina v. N.C. State Conference of the NAACP, 137 S. Ct. 1399 (2017).

61. Voter Information Verification Act, 2013 N.C. Sess. Laws 381. For details on the repealed provisions, see Danielle Chemtob, *A Brief Overview of North Carolina’s Tumultuous Voting Rights History*, DAILY TAR HEEL (Aug. 29, 2016, 11:55 PM), <http://www.dailytarheel.com/article/2016/08/a-brief-overview-of-north-carolinas-tumultuous-voting-rights-history> [<https://perma.cc/UB9P-UPB7>]; *see also* N.C. State Conference of the NAACP, 182 F. Supp. 3d at 332 (observing that the new provisions “repeal certain voting and registration mechanisms enacted since 1999”).

62. Same-day registration (SDR) allowed eligible voters to register and vote on the same day. *Same Day Voter Registration*, NAT’L CONF. ST. LEGISLATURES (July 27, 2017), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx> [<https://perma.cc/7SQW-8XAM>]. Out-of-precinct voting allowed for the counting of ballots for selected races if registered voters cast ballots in the incorrect precinct within the proper county. *Provisional Ballots*, NAT’L CONF. ST. LEGISLATURES (June 19, 2015), <http://www.ncsl.org/research/elections-and-campaigns/provisional-ballots.aspx> [<https://perma.cc/L6Z8-JYT9>].

63. §§ 11.1, 12.1, 16.1, 20.2, 25.1, 33.1, 49.1, 2013 N.C. Sess. Laws 381.

64. *Id.* § 2.1; *see N.C. State Conference of the NAACP*, 182 F. Supp. 3d at 496 (noting the new voter ID provision eliminated public assistance IDs and other government, state university, and community college IDs from the list of acceptable IDs); *id.* at 344-45 (discussing amendments to the ID measure, enacted weeks before the trial was to start, that expanded types of qualifying IDs and voting opportunities for voters who lack qualifying IDs, including the ability to cast a provisional ballot after attesting “a reasonable impediment” kept them from obtaining a qualifying ID).

ture crafted the law to “target African Americans with ... surgical precision” and hence with racially discriminatory intent in violation of section 2 and the Constitution.<sup>65</sup> On May 15, 2017, the Supreme Court denied North Carolina’s petition for certiorari.<sup>66</sup>

During this litigation, North Carolina never denied that SL 2013-381 made voting more difficult for minority voters and African American voters in particular. That is, North Carolina never denied that its new electoral rules were retrogressive within the meaning of section 5.<sup>67</sup> Instead, both the State and the district court maintained that retrogression was no longer a problem after *Shelby County*.<sup>68</sup> By this, they meant not only that, as has long been established, retrogression alone is insufficient to establish a violation of section 2,<sup>69</sup> but also, more radically, that such evidence was not relevant in any way to the inquiry under section 2.<sup>70</sup>

Under this view, comparisons between new electoral practices and the ones they supplant have no place in section 2 litigation.<sup>71</sup>

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65. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017); *see also* *N.C. State Conference of the NAACP v. McCrory*, 997 F. Supp. 2d 322, 334 (M.D.N.C. 2014) (denying a preliminary injunction for the plaintiffs), *aff’d in part, rev’d in part sub nom.* *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014).

66. *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399 (2017).

67. *N.C. State Conference of the NAACP*, 182 F. Supp. 3d at 498 (noting that the voting bill expanded from sixteen to fifty-seven pages after *Shelby County*, and that “it would not be unreasonable for the legislature to have believed that some voting changes may survive a § 2 challenge but not one under § 5”).

68. *Id.* at 504-05.

69. *See, e.g., N.C. State Conference of the NAACP*, 997 F. Supp. 2d at 367 (stating that North Carolina should not be held to be “in violation of Section 2 merely for maintaining a system that does not count out-of-precinct provisional ballots”).

70. *See id.* (stating that considerations of prior practice “would import the retrogression standard of Section 5 into Section 2 cases,” and make the section 2 claim “at least *partially* dependent on whether a State” previously used a more generous electoral practice (emphasis added)); Brief of Appellees at 11, *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (No. 14-1845) (arguing that plaintiffs were impermissibly seeking to “[i]mport a [r]etrogression [s]tandard into Section 2” and that “Section 2 is not concerned with whether the elimination of a preferred election practice will ‘worsen the position of minority voters in comparison to the preexisting’ election system” (quoting *N.C. State Conference of the NAACP*, 997 F. Supp. 2d at 352)).

71. *See* Petition for a Writ of Certiorari and Volume I of the Appendix at 18, *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399 (2017) (No. 16-833) (charging that the appellate court “employed a variant of §5’s anti-retrogression analysis” by “[o]ver and over again ... return[ing] to the fact that North Carolina had *changed* its law to remove voting mechanisms that had existed before,” by “accus[ing] the legislature of ‘re-erect[ing] ...

Indeed, such comparisons are seen as unauthorized.<sup>72</sup> They are also believed to be dangerous. Both North Carolina and the district court warned that comparing SL 2013-381 to the rules it replaced could have “dramatic and far-reaching’ effects” given that many states never provided the expansive practices SL 2013-381 reduced or eliminated.<sup>73</sup> Put differently, basing section 2 liability, even in part, on North Carolina’s decision to restore rules used widely in other states “could place in jeopardy the laws of the majority of the States.”<sup>74</sup>

Variations on these arguments have been pressed elsewhere. In Texas, for instance, both the State and smaller jurisdictions within it responded to *Shelby County* by enacting retrogressive voting measures that the preclearance regime had, or would have, blocked.<sup>75</sup> In the section 2 litigation that followed, the relevance of retrogression has been disputed.

For example, back in 2014, a federal district court held a Texas voter identification measure known as Texas Senate Bill 14 (SB 14) violated section 2.<sup>76</sup> That ruling,<sup>77</sup> and the appellate panel and en

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barriers’ ... previous legislatures had lowered,” and by insisting that “removing voting tools ... meaningfully differs from not initially implementing such tools”); Petition for Writ of Certiorari at 3, 7-8, *North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 1735 (2015) (No. 14-780) (arguing that the appellate court engaged in impermissible “*de facto*” retrogression analysis by viewing state’s prior practices—namely, of allowing SDR and out of precinct voting—as “centrally relevant’ and a ‘critical piece’ of its § 2 analysis” (quoting *League of Women Voters of N.C.*, 769 F.3d. at 242)).

72. *N.C. State Conference of the NAACP*, 997 F. Supp. 2d at 351 (noting for example that deciding that the failure to offer same-day registration as a violation of section 2 would “plac[e] the laws of at least 36 other states [that did] not offer [same-day] registration in jeopardy”); Brief of Appellees, *supra* note 70, at 12 (stating that precedent under section 2 did not support “analyzing an election practice’s effect on minority voters under Section 2 by comparing it to previous practice”).

73. Brief of Appellees, *supra* note 70, at 12 (quoting *N.C. State Conference of the NAACP*, 997 F. Supp. 2d at 351).

74. See *N.C. State Conference of the NAACP*, 997 F. Supp. 2d at 351, 367; see also *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 506 (M.D.N.C. 2016) (“This court has no way to assess where ‘more equal’—but nevertheless allegedly discriminatory—ends and the ‘equal opportunity’ § 2 mandates begins. This is a significant problem given that the scope of any remedy imposed by this court ‘must be proportional to the scope of the violation, and the order must extend no further than necessary to remedy the violation.’” (citing *Brown v. Plata*, 563 U.S. 493 (2011))), *rev’d and remanded*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017); Brief of Appellees, *supra* note 70, at 11-12.

75. See *supra* note 4.

76. *Veasey v. Perry*, 71 F. Supp. 3d 627, 632-33 (S.D. Tex. 2014), *aff’d in part, vacated in part, rev’d in part en banc*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017); see



banc rulings that affirmed it, noted that SB 14 had been blocked as retrogressive prior to *Shelby County* and that Texas opted to implement it within hours of the *Shelby* decision.<sup>78</sup> The district court, moreover, found, and the appellate rulings affirmed, that SB 14 made voting more difficult for minority voters in Texas than it had been under the prior regime.<sup>79</sup> Both the trial and appellate courts viewed these facts and findings as relevant evidence contributing to the holding that SB 14 violated section 2. In response, amici supporting Texas charged that both the trial and appellate courts impermissibly imported retrogression analysis into the section 2 inquiry.<sup>80</sup>

A similar charge was lodged when plaintiffs argued and a federal district court held that a districting plan used to elect city council members in Pasadena, Texas, violated section 2.<sup>81</sup> Under that plan, council members were elected from six single-member districts and two at-large districts.<sup>82</sup> The district court held the plan to be dilutive, finding, *inter alia*, that Latino voters enjoyed greater influence under the prior plan, under which the council was elected from eight single-member districts.<sup>83</sup> The court also noted that the new plan

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also 2011 Tex. Gen. Laws 622-23 (describing five forms of qualifying identification).

77. *Veasey*, 71 F. Supp. 3d at 636 n.23, 684.

78. *Veasey v. Abbott*, 830 F.3d 216, 227 & n.7 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017); *Veasey v. Abbott*, 796 F.3d 487, 498 (5th Cir. 2015), *aff'd in part, vacated in part, and rev'd in part en banc*, 830 F.3d 216 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 612 (2017).

79. *Veasey*, 830 F.3d at 264-65; *Veasey*, 796 F.3d at 512; *Veasey*, 71 F. Supp. 3d at 693-94.

80. Brief of *Amici Curiae* Members of Congress Representing States in the Fifth Circuit Supporting Petitioners at 11-12, *Abbott v. Veasey*, 137 S. Ct. 612 (2017) (No. 16-393) (stating that, by considering “whether a change makes minorities worse off,” the en banc court “ignor[ed] the requirement of an objective benchmark, ... [and] converted Section 2 into a statute that requires states to adopt *whichever* voting regime would most increase the voting rates and voting power of minorities”); Brief for *Amicus Curiae* Eagle Forum Education & Legal Defense Fund in Support of Defendants-Appellants’ Petition for Rehearing *En Banc* at 9, *Veasey*, 830 F.3d 216 (No. 14-41127) (stating the appellate panel’s approach suffered from the same deficiency it identified in the Fourth Circuit’s assessment of North Carolina’s SL 2013-381, namely, that it “imported the VRA §5 retrogression analysis ... in a transparent effort to expand federal authority over states that neither the Constitution nor Congress has ever sanctioned”).

81. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 673-74 (S.D. Tex. 2017).

82. *Id.* at 673.

83. *Id.* at 715 (finding that Latino voters were better able to elect representatives of choice under the old plan than under the new plan, which had fewer and hence larger single-member districts, and that “Pasadena changed to the 6-2 map and plan precisely because Latinos were

would not have passed muster prior to *Shelby County* and that the city moved to enact it only after the decision lifted the preclearance requirement.<sup>84</sup> For its part, Pasadena denied that the new plan left Latino voters worse off, but argued that even if it did, retrogression did not give rise to an injury under section 2, and, thus, evidence of it should not be considered when evaluating the new plan.<sup>85</sup>

The relevance of retrogression has also been disputed in section 2 cases brought in places that were never subject to section 5. Ohio, for instance, has argued that impermissible concerns about retrogression underlie a series of section 2 challenges brought against SB 238, a state law that imposed a variety of new electoral restrictions.<sup>86</sup> In Ohio's view, these section 2 claims, and the selected rulings that recognized them, impermissibly compared the new practices to the ones they replaced.<sup>87</sup> Hence, a section 2 challenge brought against SB 238's reduced opportunities for early in-person voting, "resort[ed] to an impermissible retrogression analysis that compares SB 238 to the prior early voting regime."<sup>88</sup> Similarly, a lower court characterization of new rules governing provisional and

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becoming more successful at winning City Council seats").

84. *See id.* at 697.

85. *Id.* at 712; *see* Defendant City of Pasadena's Reply Brief in Support of its Motion for Summary Judgment at 10, *Patino*, 230 F. Supp. 3d 667 (No. 4:14-CV-03241-LHR) (arguing that the plaintiff's argument is based on an impermissible retrogression analysis "that might have been cognizable under the now-inapplicable section 5, but not under section 2"); Defendant's Proposed Findings of Fact and Conclusions of Law at 74-75, *Patino*, 230 F. Supp. 3d 667 (No. 4:14-CV-03241-LHR) (arguing that retrogression should not be the standard under section 2, that the plaintiff's argument is based on a faulty premise and that "[r]etrogression is not the legal standard under Section 2 of the Voting Rights Act" and "[r]etrogression was the inquiry under section 5 but not in section 2 dilution cases"); Defendant's Memorandum of Law at 2-3, *Patino*, 230 F. Supp. 3d 667 (No. H-14-3241) (also stating that retrogression is not part of the section 2 standard); *cf.* Memorandum and Opinion Setting Out Findings of Fact and Conclusions of Law at 47, 73-74, *Patino*, 230 F. Supp. 3d 667 (S.D. Tex. 2017) (No. H-14-3241) (claiming that retrogression and a dilution analysis would reach the same result in this case and "plaintiffs are not impermissibly pursuing a retrogression claim").

86. Reply Brief of Appellant, Ohio General Assembly, *supra* note 14, at 2-3.

87. *Id.*

88. *Id.*; *see also id.* at 26 (stating that plaintiffs' desired remedy, invalidation of SB 238 and hence a return to the prior regime, "is precisely the retrogression analysis Plaintiffs admit is not proper under a Section 2 analysis"); Brief of Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine at 57, *Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016) (No. 16-3561) ("[I]n word and deed, retrogression is exactly what [the district court] did. It evaluated whether Ohio's new law 'eliminates voting opportunities that used to exist.'").

absentee ballots “as a ‘rollback’ or ‘retrenchment’ from previous law” erroneously evaluated the rules against “the one unavailable [benchmark] under Section 2—Ohio’s prior law.”<sup>89</sup>

Ohio insisted that such comparisons are impermissible, regardless of whether they are invoked as dispositive<sup>90</sup> or merely probative<sup>91</sup> evidence of a section 2 violation. Either way, Ohio argued, such comparisons are not relevant under section 2 and violate *Shelby County’s* instruction that retrogression’s “intrusive inquiry” is no longer warranted.<sup>92</sup>

To date, the effort to excise evidence of backsliding from the section 2 inquiry has been met with mixed success. In *Patino*, the district court rejected the city’s claim that comparisons to past practice were impermissible, noting “§ 2 does not prohibit retrogression.... But in this case, both dilution and retrogression analyses lead to the same result.”<sup>93</sup> In the litigation over North Carolina’s SL-381, the Court of Appeals for the Fourth Circuit flatly rejected the effort to exclude evidence of backsliding from section 2’s totality of

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89. First Brief of Appellants/Cross-Appellees Ohio Secretary of State Jon Husted and State of Ohio at 52, *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016) (Nos. 16-3603, 16-3691) (quoting *Ne. Ohio Coal. for the Homeless v. Husted*, No. 2:06-CV-896, 2016 WL 3166251 (S.D. Ohio June 7, 2016)).

90. Reply Brief of Appellant, The Ohio General Assembly, *supra* note 14, at 30 (arguing the district court erred when it granted relief “on the basis of a retrogression analysis that *merely* compared the number of early voting days before and after SB 238’s enactment” (emphasis added)).

91. Brief of Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine, *supra* note 88, at 4, 17, 56-58 (noting that “the district court *used* retrogression” when it said “*changes*” from the prior practice “disparately affected African Americans because they used the reduced options” (first emphasis added)); Third Brief of Appellants/Cross-Appellees Ohio Secretary of State Jon Husted and State of Ohio at 28, *Ne. Ohio Coal. for the Homeless*, 837 F.3d 612 (Nos. 16-3603, 16-3691) (evidence of retrogression does not belong in section 2’s “totality of circumstances” review, because section 2 requires “a benchmark *before* the totalities”).

92. Brief of Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine, *supra* note 88, at 56-57 (“The district court ... read Section 2 as incorporating intrusive retrogression rules for *all 50* States just three years after the Supreme Court struck down that intrusive inquiry only for *certain covered* States” and “[s]ection 2 does *not* bar such retrogression. That is Section 5’s domain.”); Reply Brief of Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine at 1, 5, 7-9, 20-21, *Ohio Democratic Party*, 834 F.3d 620 (No. 16-3561) (arguing that the plaintiffs were asking for an impermissible use of the retrogression standard to compare the law to the “previous one, rather than a hypothetical alternative”).

93. *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 712 (S.D. Tex. 2017).

circumstances review.<sup>94</sup> In its 2014 ruling, the court stated that prior practices “disproportionately used” by minority voters are relevant to section 2’s inquiry into equal opportunity.<sup>95</sup> In its 2016 ruling, that court stated that “*removing* voting tools ... meaningfully differs from not initially implementing such tools.”<sup>96</sup> Similarly, the Court of Appeals for the Fifth Circuit treated as relevant evidence that SB 14, the Texas’s voter ID measure, made voting more difficult for minority voters in Texas than it had been under the prior regime.<sup>97</sup>

The Court of Appeals for the Sixth Circuit, by contrast, has been more receptive to the effort to exclude evidence of backsliding from the section 2 inquiry. Initially, a panel in 2014 rejected the claim outright stating explicitly it was “not improper[ ] engage[ment] in a retrogression analysis [to] consider[ ] the opportunities available to African Americans to vote EIP under the prior law as part of the ‘totality of circumstances’ inquiry.”<sup>98</sup> The panel invoked section 2’s text, history, and precedent construing it as supporting the inclusion of evidence of backsliding in its section 2 inquiry.<sup>99</sup> The panel’s decision, however, was subsequently vacated,<sup>100</sup> and a later panel decision issued in 2016 disregarded past practice as relevant to the

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94. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 241-42 (4th Cir. 2014).

95. *Id.* (quoting *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 558 (6th Cir. 2014)).

96. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016) (citing *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966)) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”); *see also League of Women Voters of N.C.*, 769 F.3d at 241-42 (rejecting the lower court’s holding that section 2 does not include a retrogression standard and stating that “past practices is part and parcel of the totality of the circumstances” and “North Carolina’s previous voting practices are centrally relevant under Section 2”).

97. *See Veasey v. Abbott*, 830 F.3d 216, 264-65 (5th Cir. 2016) (en banc), *cert. denied.*, 137 S. Ct. 612 (2017); *Veasey v. Abbott*, 796 F.3d 487, 512 (5th Cir. 2015), *aff’d in part, vacated in part, and rev’d in part en banc*, 830 F.3d 216 (5th Cir. 2016), *cert. denied.*, 137 S. Ct. 612 (2017); *Veasey v. Perry*, 71 F. Supp. 3d 627, 693-94 (S.D. Tex. 2014), *vacated in part, and reversed in part*, 830 F.3d 216, *cert. denied.*, 137 S. Ct. 612.

98. *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 557 (6th Cir. 2014), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

99. *Id.* at 557-58 (observing, *inter alia*, that the Senate Report “invites comparison” between present and past practice in its discussion of tenuousness).

100. *Ohio State Conference of the NAACP v. Husted*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

section 2 injury.<sup>101</sup> This decision relied on registration and turnout data to hold that SB 238 had no racially disparate impact on minority voters.<sup>102</sup> It also emphasized that opportunities for early voting in Ohio were “really quite generous” when compared to practices in other states.<sup>103</sup> As such, the panel held that SB 238 did not violate section 2.<sup>104</sup> The panel treated as immaterial the fact that minority voters disproportionately relied on the practices that SB 238 cut back.<sup>105</sup>

It remains to be seen whether evidence of backsliding will ultimately fall out of the section 2 inquiry. The argument that it should continues to be pressed again and again by defendant jurisdictions<sup>106</sup> and their amici in post-*Shelby County* section 2 cases.<sup>107</sup> So

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101. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 636-40 (6th Cir. 2016).

102. *Id.* at 639-40.

103. *Id.* at 623.

104. *Id.*

105. *See id.*

106. *See, e.g.*, Brief and Short Appendix of Defendant-Appellants, Cross-Appellees at 39, *One Wis. Inst., Inc. v. Thomsen*, Nos. 16-3083, 16-3091 (7th Cir. Sept. 12, 2016) (“Importantly, a State’s prior law is not the comparator in a Section 2 case.”); *cf.* Plaintiffs-Appellees’ Response and Cross-Appeal Brief at 51, *One Wis. Institute, Inc.*, Nos. 16-3083, 16-3091 (7th Cir. Oct. 19, 2016) (“The State’s claim that the vote-denial analysis requires comparison of the challenged practice with an ‘objective benchmark’ is mistaken.”); Reply Brief of Appellants at 12-13, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (No. 16-1605) (arguing that the court’s decision in *League of Women Voters v. North Carolina* indicates that retrogression can be used in a section 2 analysis); Brief of Appellees at 55, *Lee*, 843 F.3d 592 (No. 16-1605) (arguing that section 2 does not allow a retrogression inquiry).

107. Brief of the Public Interest Legal Foundation as *Amicus Curiae* in Support of Petitioners at 15, *North Carolina v. N.C. State Conference of the NAACP*, 137 S. Ct. 1399 (2017) (No. 16-833); Brief of the States Indiana, Alabama, Arizona, Arkansas, Georgia, Kansas, Michigan, North Dakota, Ohio, Oklahoma, South Carolina, Texas, West Virginia, and Wisconsin as *Amici Curiae* in Support of Defendants-Appellees and Supporting Affirmance at 7, 18, *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (Nos. 16-1468(L), 16-1469, 16-1474, 16-1529); Brief of *Amicus Curiae* American Civil Rights Union in Support of Defendants/Appellees and Affirmance at 3-4, *N.C. State Conference of the NAACP*, 831 F.3d 204 (No. 16-1468(L)); Brief of *Amicus Curiae* of Pacific Legal Foundation, Center for Equal Opportunity, and Project 21 in Support of Defendants-Appellees at 7, 11, 18-19, *N.C. State Conference of the NAACP*, 831 F.3d 204 (Nos. 16-1468(L), 16-1469, 14-1474, 16-1529); *Amicus Curiae* Brief of Judicial Watch, Inc. and Allied Educational Foundation in Support of Defendants-Appellees and Affirmance at 12-13, *N.C. State Conference of the NAACP*, 831 F.3d 204 (Nos. 16-1468(L), 16-1469, 16-1474, 16-1529); Brief of Senators Thom Tillis, Lindsey Graham, Ted Cruz, Mike Lee, and the Judicial Education Project as *Amici Curiae* in Support of Defendants-Appellees and Affirmance at 18, 28, *N.C. State Conference of the NAACP*, 831 F.3d 204 (Nos. 16-1468(L), 16-1469, 16-1474, 16-1529); Brief of the Michigan State Chamber of Commerce, as *Amicus Curiae*, in Support of Secretary Johnson’s Emergency Motion for

too, Chief Justice John Roberts felt inclined to remind us that a denial of certiorari in the North Carolina litigation should not be mistaken as a judgment on the merits,<sup>108</sup> a statement that suggests a degree of unhappiness with the lower court's analysis, and, perhaps, retrogression's role in the section 2 violation it identified. The Chief Justice's apparent interest in a better vehicle through which to explore post-*Shelby County* section 2 issues makes clear that the final word on the relevance of backsliding lies ahead.

### III. THE RACE TO THE BOTTOM

The claim that backsliding is immaterial under section 2 rests on several flawed arguments. As this Part explains, *Shelby County* does not mandate the exclusion of retrogression from section 2. Nor is the exclusion necessary either to ensure jurisdictions are able to modify electoral rules or to prevent the most expansive extant voting practice from becoming the minimum practice section 2 allows. The insistence that backsliding is immaterial also ignores a critical distinction under section 2 between the elimination of an existing electoral practice and the failure to enact it in the first place. Perhaps most problematic, treating backsliding as immaterial portends a destructive race to the bottom in electoral practice. This Part explains why.

#### A. Retrogression's Relevance

Retrogression alone never provided sufficient cause to invalidate an electoral practice under section 2.<sup>109</sup> Section 2's "totality of circumstances" test bars judging challenged practices along a single

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Stay at 19, Mich. State A. Phillip Randolph Inst. v. Johnson, 833 F.3d 656 (6th Cir. 2016) (No. 16-2071).

108. *N.C. State Conference of the NAACP*, 137 S. Ct. at 1400 ("Given the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law, it is important to recall our frequent admonition that '[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923))).

109. S. REP. NO. 97-417, at 68 n.224 (1982) ("Plaintiffs could not establish a section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group.").

dimension.<sup>110</sup> Still, retrogression's insufficiency on this point never meant that it was to be ignored entirely.<sup>111</sup> To the contrary, section 2's "totality of circumstances" test means all aspects "of the local electoral process" are to be considered.<sup>112</sup> This includes evidence that a practice causes backsliding, as such evidence ties together "the 'past and present reality'"<sup>113</sup> and "bears on the fairness of its impact."<sup>114</sup>

Nothing in *Shelby County* changed that approach.<sup>115</sup> *Shelby County* rendered section 5 inoperative by invalidating the coverage formula that defined where it applied.<sup>116</sup> The decision meant that once-covered jurisdictions were no longer subject to section 5's proscription on the implementation of retrogressive changes. *Shelby County*, however, never suggested that the decision rendered the consideration of retrogression taboo in section 2 cases. In fact, *Shelby County* never mentioned retrogression at all. Instead, the Court seemed to think that section 5 was no longer needed, largely because section 2 itself provided a sufficient mechanism to address the racial discrimination in voting that persists.<sup>117</sup> Section 2's ability to perform this function—as the Court saw it—would have been greatly impaired had *Shelby County* itself significantly narrowed section 2's reach. Indeed, the Court disavowed making any such change.<sup>118</sup> And yet, excising retrogression from the section 2 inquiry would do just that.<sup>119</sup> *Shelby County* provides no support for the claim that evidence of retrogression is immaterial under section 2.<sup>120</sup>

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110. See 52 U.S.C. § 10301 (Supp. III 2016).

111. See *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 557 (6th Cir. 2014), vacated, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

112. S. REP. NO. 97-417, at 16.

113. See *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (quoting S. REP. 97-417, at 30).

114. See S. REP. NO. 97-417, at 29 n.117 (emphasizing the fact that whether a contested practice "markedly departs from past practices ... bears on the fairness of its impact"); see also *Ohio State Conference of the NAACP*, 768 F.3d at 558 (observing that the Senate Report "invites comparison" between present and past practice in its discussion of tenuousness); *supra* notes 45-47 and accompanying text.

115. See 133 S. Ct. 2612 (2013).

116. *Id.* at 2631.

117. See *id.* at 2619-20.

118. *Id.* at 2619, 2631 (stating that "Section 2 ... is not at issue in this case" and that the Court's "decision in no way affects the permanent, nationwide ban on racial discrimination" set forth in that provision).

119. See *infra* notes 127-30 and accompanying text.

120. Cf. Petition for Writ of Certiorari and Volume 1 of the Appendix, *supra* note 71, at 2,

Similarly flawed is the claim that consideration of backsliding necessarily gives rise to a dangerous “one-way ratchet[.]”<sup>121</sup> This claim posits that section 2 would bar jurisdictions from reducing or eliminating more generous electoral practices were retrogression to be treated as probative of a statutory injury.<sup>122</sup> Section 2, however, does not entrench existing policy in this way. Instead, it mandates “a searching practical evaluation of the ‘past and present’ reality and on a ‘functional’ view of the political process.”<sup>123</sup> Challenged practices are not evaluated as abstract rules but rather as part of the web of electoral practices that organize the way voters vote in the jurisdiction.<sup>124</sup>

Under this framework, a retrogressive electoral practice might run afoul of section 2 in one place but cause no injury in another.<sup>125</sup> In some circumstances, evidence of backsliding will be of little consequence given the context in which the new rule operates. In others, it will bolster the claim that a challenged practice violates section 2. Either way, evidence of backsliding operates not as a “one-way ratchet[.]”<sup>126</sup> but instead as one circumstance within the totality. Put differently, whether or not a practice violates section 2 is not determined by one factor, assessed independently from the web

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16 (arguing that appellate court’s decision “guts” *Shelby County* and “restores the ... preclearance standard”); Brief of the Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine, *supra* note 88, at 57 (arguing that the district court erroneously included retrogression in the section 2 inquiry “just three years after the Supreme Court struck down that intrusive inquiry” in *Shelby County*); *see also supra* notes 109-14 and accompanying text.

121. *See* Brief of Appellants Ohio Secretary of State John Husted and Ohio Attorney General Mike DeWine, *supra* note 88, at 4, 56-58 (arguing that the lower court ruling blocking cutbacks from an expansive voting law will discourage states from expanding voting opportunities).

122. *See id.*

123. *See Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (quoting S. REP. 97-417, at 30 & n.30 (1982)).

124. *Cf. id.*

125. *See id.* at 46 (recognizing that “at-large elections[ ] may not be considered *per se* violative of § 2,” even though many such schemes do minimize or cancel out minority voting power in violation of the statute); *see also* Appellees’ Brief at 52-53, Ohio State Conference of the NAACP v. Husted, 768 F.3d 524 (6th Cir. 2014) (No. 14-3877) (“Section 2 neither prohibits nor freezes into place any particular set of election practices for all time across all jurisdictions, but rather conditions liability on the ‘totality of circumstances,’ which may render particular voting practices unlawful in some contexts but not others.” (quoting 52 U.S.C. § 10301(b))).

126. Brief of Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine, *supra* note 88, at 4.



of practices within which it is situated, but instead through “a searching practical evaluation”<sup>127</sup> of a rule as it operates within the network of rules comprising the local electoral process.<sup>128</sup>

This searching evaluation exposes the error not only with the “one-way ratchet,” but also with the related claim that the consideration of backsliding poses a threat to similar practices wherever they are found.<sup>129</sup> This claim posits that a section 2 injury based, even in part, on a comparison between a challenged practice and the practice it supplants necessarily calls into question every practice that compares unfavorably to the supplanted practice.<sup>130</sup> The result, the argument goes, is an unjustified race to the top, in which the most generous existing practice becomes the minimum practice section 2 permits.<sup>131</sup> Not so. Evidence that a contested practice is retrogressive does not mean the practice necessarily violates section 2. Instead, evidence of backsliding is but one factor within the totality of circumstances that inform the section 2 inquiry.

### *B. The Endowment Effect and the Race to the Bottom*

Backsliding alone does not violate section 2, but it may nevertheless offer powerful evidence of a section 2 injury. While only one factor within the totality, backsliding may cause distinct harm. As has been long recognized, we value what we have more than what we might obtain.<sup>132</sup> As such, a departure from the status quo is often more costly and requires greater justification than simply maintaining the conditions the departure would create.<sup>133</sup> For this reason, the elimination of an existing electoral practice may cause cognizable harm even when the failure to implement that practice in the first instance may be unobjectionable. As one appellate court recently

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127. See *Gingles*, 478 U.S. at 45 (quoting S. REP. 97-417, at 30).

128. See 52 U.S.C. § 10301(b) (Supp. III 2016).

129. Brief of Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine, *supra* note 88, at 4, 17, 56-58 (arguing that punishing Ohio for changing its voting laws “discourage[s] other States, like New York or Michigan, from following Ohio’s lead [of creating expansive laws]”).

130. See *id.*

131. *Id.*

132. See, e.g., Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 197-98 (1991).

133. See, e.g., *id.*

observed, “*removing* voting tools ... meaningfully differs from not initially implementing such tools.”<sup>134</sup>

The idea that retrogressive electoral practices do distinct damage to voters is not new. Nearly sixty years ago, *Gomillion v. Lightfoot* read the Fifteenth Amendment to bar a notorious Alabama gerrymander that removed almost every African American resident from the City of Tuskegee.<sup>135</sup> Justice Felix Frankfurter’s opinion for the Court observed that the disputed legislation “fenc[ed] Negro citizens out of town so as to deprive them of their *pre-existing* municipal vote.”<sup>136</sup> For Justice Frankfurter, it was Alabama’s affirmative decision to withdraw what was a “pre-existing” vote that critically distinguished the gerrymander from what he viewed to be nonjusticiable electoral disputes.<sup>137</sup> *Colegrove v. Green*, in which Justice Frankfurter famously warned against entering the “political thicket,”<sup>138</sup> involved a complaint “only of a dilution of the strength of ... votes as a result of legislative inaction over a course of many years.”<sup>139</sup> The *Gomillion* plaintiffs, by contrast, challenged “affirmative legislative action” that gave state “approval ... to unequivocal *withdrawal* of the vote solely from colored citizens.”<sup>140</sup>

Justice Frankfurter’s effort to immunize legislative inaction of this sort failed. Just two years after *Gomillion*, the Court rejected the idea that malapportionment resulting from such inaction was nonjusticiable, with *Gomillion* itself propelling the Court’s decision to enter the thicket.<sup>141</sup> Still, the action-inaction distinction Justice Frankfurter pressed in *Gomillion* rested on the sound intuition that backsliding resulting from affirmative legislative acts causes distinct injury. The VRA’s preclearance regime promoted this idea both by using retrogression to define the substance of the section 5 prohibition and by requiring covered jurisdictions to prove proposed electoral changes were nondiscriminatory.<sup>142</sup> Likewise, section 2 itself

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134. N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 232 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

135. 364 U.S. 339, 346-348 (1960).

136. *Id.* at 341 (emphasis added).

137. *See id.* at 346-47.

138. 328 U.S. 549, 556 (1946) (plurality opinion).

139. *Gomillion*, 364 U.S. at 346.

140. *Id.* (emphasis added).

141. *See Baker v. Carr*, 369 U.S. 186, 202-04 (1962) (overruling *Colegrove*, 328 U.S. 549).

142. *See South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) (upholding Congress’s

long recognized the distinct harm retrogression may cause, with both the Senate Report accompanying the 1982 Amendments and precedent construing the statute making clear that backsliding may contribute to conditions that leave minority voters with less opportunity to participate in the electoral process.<sup>143</sup>

The value we place on what we have helps explain why backsliding in voting often proves so damaging.<sup>144</sup> Plaintiff Rosanell Eaton emphasized this point when she testified against North Carolina's SL 2013-381.<sup>145</sup> Eaton, who is African American, had voted regularly in North Carolina since 1942, when she passed the state's literacy test and first registered to vote.<sup>146</sup> In 2013, Eaton nevertheless found herself without identification that qualified under SL 2013-381 and unable to vote in person without it.<sup>147</sup> Eaton ran into trouble because her voter registration card listed her name as "Rosanell Eaton" while her driver's license said, "Rosa Johnson Eaton."<sup>148</sup> To resolve the discrepancy, Eaton testified that she made repeated trips to state DMV offices, two Social Security offices, and three banks.<sup>149</sup> She estimated that she traveled two hundred miles and devoted at least twenty hours of effort in order to secure qualifying identification.<sup>150</sup> Eaton said that this effort was "[a lot of] headache,"

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decision "to shift the advantage of time and inertia from the perpetrators of the evil to its victims"); see also *Beer v. United States*, 425 U.S. 130, 141 (1976).

While Congress arguably intended for the preclearance standard to reach beyond backsliding, see *Bossier Parish II*, 528 U.S. 320, 341-42 (2000) (Souter, J., concurring in part and dissenting in part), there was always good cause to understand section 5, at a minimum, as a device to stop jurisdictions from "pour[ing] old poisons into new bottles," *id.* at 366.

143. See *supra* notes 109-14 and accompanying text.

144. See *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

145. See *N.C. State Conference of the NAACP v. McCrory*, 182 F. Supp. 3d 320, 361 (M.D.N.C. 2016), *rev'd and remanded*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

146. Ari Berman, *The 94-Year-Old Civil-Rights Pioneer Who Is Now Challenging North Carolina's Voter-ID Law*, *NATION* (Jan. 25, 2016), <https://www.thenation.com/article/the-92-year-old-civil-rights-pioneer-who-is-now-challenging-north-carolinas-voter-id-law/> [<https://perma.cc/6N4W-J2JD>].

147. *Cf. North Carolina State Conference of the NAACP*, 182 F. Supp. at 361 (finding that Eaton's expiring driver's license "would have been compliant for voting" so long as it met the law's "reasonable resemblance" requirement, which Eaton's arguably did).

148. See *id.* at 360-61; see also Berman, *supra* note 146.

149. Berman, *supra* note 146.

150. *Id.*

and that “[i]t was really stressful and difficult.”<sup>151</sup> Eaton knew she could have spared herself this “headache” by voting absentee, but stated that she persevered to secure qualifying ID because she places great value on casting her ballot in person. She testified, “[A] lot [has been] done to get that opportunity and I personally love to do it myself... I wanted to exercise my rights ... and make that last step to perform or maintain what I want to do.”<sup>152</sup>

North Carolina, of course, is under no obligation to ensure that each voter gets to vote in the manner he or she most prefers. But Eaton never claimed otherwise. Instead, her testimony, and that of other witnesses who similarly valued voting in person,<sup>153</sup> was presented to show the impact SL 2013-381 had on the voters most affected by it.<sup>154</sup> Far from asserting a right to some hypothetical improvement to electoral practice,<sup>155</sup> these witnesses spoke of their personal experiences as voters and why SL 2013-381 hit them with distinct force.<sup>156</sup>

Their experiences, however, are irrelevant insofar as backsliding is immaterial under section 2. Under this view, the equality of opportunity section 2 protects does not depend on and, thus, must be assessed independently of, the context in which the contested practice operates.<sup>157</sup> Relentlessly abstract, this assessment mandates indifference to the web of circumstances that comprise the local electoral process.

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151. *Id.*

152. Plaintiffs’ Designations of Deposition Testimony: Transcript Excerpts Exhibit 7 at 23, N.C. State Conference of the NAACP v. McCrory, 997 F. Supp. 2d 322 (M.D.N.C. 2014) (Nos. 1:13-cv-658, 1:13-CV-660, 1:13-CV-861).

153. See Elizabeth M. Ryan, Injury and the Right to Vote: What North Carolina Teaches About the Role of Dignity 4 (unpublished manuscript) (draft on file with author) (cataloging testimony from North Carolina litigation and observing that “[w]itnesses testified that voting is an act of pride and empowerment for many African Americans in North Carolina and emphasized the significance of casting a ballot in person at a polling place”).

154. See N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 360-62 (M.D.N.C. 2016), *rev’d*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017).

155. See Brief of Appellees at 12-13, N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) (Nos. 14-1845(L), 14-1856, 14-1859) (observing that “plaintiffs can almost always hypothesize fewer restrictions on the manner of voting that could increase minority opportunities or participation”).

156. See N.C. State Conference of the NAACP, 182 F. Supp. 3d at 360-62.

157. See *supra* notes 86-92 and accompanying text.

It is accordingly far from happenstance that those insisting backsliding is immaterial under section 2 also claim that a challenged practice comports with the statute so long as it is no worse than the most restrictive practice presently in use. This claim posits that exogenous electoral practices provide the best benchmark against which to gauge whether a challenged practice violates section 2.<sup>158</sup> In other words, it promotes a retrogression rule of a different sort, one that immunizes all but the worst extant practice.<sup>159</sup> This retrogression rule fosters a destructive race to the bottom in which an ever-sinking floor defines the scope of the section 2 prohibition.

North Carolina, for example, repeatedly invoked outside practice as a full defense for the cutbacks SL 2013-381 imposed. In the district court, the State emphasized “[t]he fact that the legislative bodies of a majority of States have not adopted the measures” that 2013-381 cut back.<sup>160</sup> The State told the appellate court that “[a] determination that ... North Carolina is in violation of Section 2 because it does not offer SDR or out-of-precinct voting could ‘place in jeopardy the laws’ of dozens of states that do not offer these practices.”<sup>161</sup> Later, seeking Supreme Court review, North Carolina argued that the appellate court had given insufficient weight to the fact that new law “simply aligned North Carolina with [practices] in other states.”<sup>162</sup>

Ohio, too, invoked practices in other states in response to the argument that its cutbacks in early in-person voting violated section 2. Ohio insisted that this argument would have “‘far-reaching implications’ for the States with fewer [early voting] options today.”<sup>163</sup> Offering a similar response to the constitutional challenge to the cutbacks, the State queried, “If a complete lack of EIP voting does not burden the fundamental right to vote, how can having ‘only’ 22

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158. See, e.g., Brief of Appellees, *supra* note 155, at 12.

159. See, e.g., *id.*

160. *N.C. State Conference of the NAACP*, 182 F. Supp. 3d at 465.

161. Brief of Appellees, *supra* note 155, at 12.

162. Petition for Writ of Certiorari and Volume I of the Appendix, *supra* note 71, at 18.

163. See Brief of Appellants Ohio Secretary of State Jon Husted and Ohio Attorney Gen. Mike DeWine, *supra* note 88, at 49 (quoting *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1254 (M.D. Fla. 2012)).

days of no-excuse EIP voting do so?”<sup>164</sup> In a similar vein, an amicus defending Texas’s long-contested voter ID measure insisted that, “[p]rior to *Shelby County*, a state law making superior voting laws less superior, but still superior to the minimum requirements, would not have been actionable under VRA §2.”<sup>165</sup>

Courts have also relied on more restrictive exogenous practices as cause to reject section 2 challenges. For instance, a panel of the Court of Appeals for the Sixth Circuit dismissed past practice as irrelevant under section 2, while emphasizing that opportunities for early voting in Ohio were “really quite generous” when compared to practices in other states.<sup>166</sup> Similarly, the district court in the North Carolina litigation observed that various provisions in SL 2013-381 simply brought state practice into parity with “less generous” electoral practices that were “in the mainstream of other States.”<sup>167</sup>

Surrounding practice, of course, is not irrelevant under section 2. Like retrogression, the practices used in other jurisdictions are properly included as part of section 2’s “totality of circumstances” review.<sup>168</sup> But just as retrogression alone does not suffice to establish a section 2 violation, exogenous practices cannot alone render a challenged practice either compliant or noncompliant with section 2.<sup>169</sup> The section 2 inquiry is unavoidably complex. Electoral practices are evaluated as part of the web of electoral rules that organize the way voters vote in the jurisdiction, such that an electoral prac-

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164. Reply Brief of Appellant, The Ohio General Assembly, *supra* note 14, at 9; see Brief of Appellants Ohio Secretary of State Jon Husted and Ohio Attorney General Mike DeWine, *supra* note 88, at 49.

165. Brief for Amicus Curiae Eagle Forum Education & Legal Defense Fund in Support of Defendants-Appellants’ Petition for Rehearing *En Banc*, *supra* note 80, at 9.

166. Ohio Democratic Party v. Husted, 834 F.3d 620, 623, 639-40 (6th Cir. 2016).

167. N.C. State Conference of the NAACP v. McCrory, 182 F. Supp. 3d 320, 404-05, 455, 506-07, 512, 527, 529-530 (M.D.N.C. 2016), *rev’d and remanded*, 831 F.3d 204 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 1399 (2017); see also Jacksonville Coal. for Voter Prot. v. Hood, 351 F. Supp. 2d 1326, 1335-36 (M.D. Fla. 2004) (citing practices in other states among reasons to deny section 2 claim).

168. See 52 U.S.C. § 10301(b) (Supp. III 2016); cf. S. REP. 97-417, at 29 n.117 (1982) (noting that the fact “the procedure markedly departs from ... practices elsewhere in the jurisdiction ... bears on the fairness of its impact” without addressing the relevance of practices in other jurisdictions (emphasis added)).

169. See, e.g., Holder v. Hall, 512 U.S. 874, 881-82 (1994) (plurality opinion) (observing that the prevalence of a more generous practice elsewhere in the state “tells us nothing” about the effect of the more restrictive practice within the county where it operated).

tice might violate section 2 in one place and cause no injury in another.<sup>170</sup>

For these reasons, those claiming backsliding is immaterial under section 2 are not proposing a minor or technical adjustment to the statute, but instead a radical move that would displace the foundational premise on which the statute rests. Section 2 rejects bright-line rules, be they floors or ceilings, in favor of a multifaceted local assessment premised on the understanding that electoral practices operate differently in different contexts and communities. The effort to excise backsliding insists that context does not matter and that electoral practices are best understood as abstract rules evaluated independently of the environment in which they operate. This construction of section 2 guts the statute as thoroughly as would a congressional repeal.

#### CONCLUSION

To critics of *Shelby County*, the deluge of electoral restrictions enacted in the decision's wake was proof the Court terminated section 5 prematurely.<sup>171</sup> Justice Ruth Bader Ginsburg had warned that the progress evident in places where the preclearance obligation applied depended critically on the statute's continued operation,<sup>172</sup> and the zeal with which public officials moved to make voting more difficult, particularly for the most vulnerable voters, seemed to prove her point.<sup>173</sup> Others, however, were more sanguine, seeing the new regulations simply as the manifestation of the exercise of sovereignty that had been unlawfully compromised.<sup>174</sup>

*Shelby County* was emphatic that its decision to lift the preclearance obligation "in no way affects the permanent, nationwide ban on

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170. See *supra* notes 123-31 and accompanying text.

171. See *supra* notes 4-5 and accompanying text.

172. See *Shelby County v. Holder*, 133 S. Ct. 2612, 2650 (2013) (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.").

173. See *supra* notes 4-5 and accompanying text.

174. See, e.g., Ilya Shapiro, *Supreme Court Recognizes Jim Crow's Demise, Restores Constitutional Order*, SCOTUSBLOG (June 25, 2013, 7:51 PM), <http://www.scotusblog.com/2013/06/supreme-court-recognizes-jim-crows-demise-restores-constitutional-order/> [<https://perma.cc/3EBT-NRLB>].

racial discrimination” set forth in section 2.<sup>175</sup> This assertion was arguably crucial to *Shelby County*’s holding insofar as the Court’s willingness to terminate preclearance reflected its view that section 2 itself provided adequate protection against whatever racial discrimination remained in the electoral process. While Justice Ginsburg appropriately disputed section 2’s adequacy in this regard,<sup>176</sup> the majority’s insistence that section 2 was “not at issue in this case”<sup>177</sup> made clear the Justices anticipated that section 2 would continue to operate as it had. Nothing in *Shelby County* suggests the Court anticipated that section 2’s reach would contract dramatically.

Making backsliding immaterial under section 2 would radically narrow the statute’s reach. It would do so in contravention of *Shelby County* as well as decades of precedent construing the VRA and Congress’s intent in crafting the statute. Far from an incremental adaptation, the move launches a restructuring of section 2 so foundational as to constitute its repeal.

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175. *Shelby County*, 133 S. Ct. at 2631; John Yoo, *Why Today Is Better Than Yesterday*, NAT’L REV.: THE CORNER (Jun. 25, 2013, 7:29 PM), <http://www.nationalreview.com/corner/3519851/why-today-better-yesterday-john-yoo> [<https://perma.cc/6HXS-H5WV>].

176. See *Shelby County*, 133 S. Ct. at 2636, 2640 (Ginsburg, J., dissenting) (explaining ways in which section 2 provided incomplete protection).

177. *Id.* at 2619 (majority opinion).