Indiana Law Journal

Volume 94 | Issue 2 Article 3

Spring 2019

The Democracy Ratchet

Derek T. Muller
Pepperdine University, derek.muller@pepperdine.edu

THE DEMOCRACY RATCHET

DEREK T. MULLER*

---

* Associate Professor of Law, Pepperdine University School of Law. Special thanks to participants at the Ohio State University Moritz College of Law, University of Notre Dame Law School, University of Iowa College of Law, and the University of St. Thomas School of Law faculty workshops for their valuable feedback. Added thanks to Terri Enns, Ann Estin, Ned Foley, Rick Garnett, Steve Huefner, Randy Kozel, Mike Morley, Todd Pettys, and Dan Tokaji for their thoughtful input. Edrina Nazaradeh and Greg Herbers provided important research and editing.

When litigants present a court with a dispute over a recently changed election law, should it handle the case any differently than a dispute over a longstanding election law? Imagine, for instance, two states. State A has no early voting. State B used to provide thirty-five days of early voting but has recently cut that period back to twenty-eight days. A federal court is probably more likely to conclude that State B has improperly burdened the right to vote.[1]

Litigants seeking to lift burdens on the right to vote and judges adjudicating these claims have an unremarkable problem—what is the benchmark for measuring these burdens? Legal theories abound for claims under the constellation of rights known as the "right to vote."[2] And when a legislature changes a voting practice or procedure, courts may have an easy benchmark—they can consider what the right to vote looked like before and after the enactment of the new law, and they can evaluate a litigant's claim on that basis. Recently, federal courts have been relying on this benchmark for the main causes of action litigants might raise after a new law has been enacted—a Section 2 challenge under the Voting Rights Act, a freedom of association claim subject to the *Burdick* balancing test, and an Equal Protection analysis derived from *Bush v. Gore*.[3] And frequently, courts have found that new laws that eliminate once-available voting practices or procedures fail.[4]

I describe this new practice as the Democracy Ratchet. The concept of a judicial ratchet is hardly a new concept in constitutional law,[5] nor is the concept of a particular rule of interpretation when it comes to election law.[6] And one form of review under the Voting Rights Act, non-retrogression, once functioned as a ratchet.[7] But it is only recently that a convergence of factors have driven courts to (often unwittingly) adopt the Democracy Ratchet more broadly: the demise of Section 5 of

---

1. *Cf.* Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299, 305 (2016) ("Ohio would have had more early-voting days than most states, and certainly more than my home state of New York, which has none. Can the Ohio law be legally challenged without also declaring New York's failure to allow early voting to be even more unlawful?").

2. *See generally* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–20 (1993) (distinguishing voting as participation, voting as aggregation, and voting as governance); Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763 (2016) (discussing the relationship between the right to vote and the right of association).

3. *See infra* Part III.

4. *See infra* Part I.

5. John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law*, 86 CALIF. L. REV. 1211 (1998); *see also* ARTHUR J. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT 65–97 (1971).

6. *See, e.g.*, Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051 (2010); Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369 (2012); Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009).

7. *See* Voting Rights Act of 1965 § 5, 52 U.S.C. § 10304 (2012 & Supp. 2016); *see also* Jeffries & Levison, *supra* note 5; *infra* Section III.A.1.

the Voting Rights Act, the trend toward raising vote denial claims under Section 2, the lack of guidance surrounding the *Burdick* balancing test, the increase of litigation surrounding election laws generally, partisanship in state legislatures, and many tweaks to election laws.[8]

Ratchets operate in one direction and cannot move in the other direction, absent extraordinary effort.[9] The same holds true for many laws concerning voting practices and procedures. A legislature can expand such opportunities, but courts scrutinize cutbacks on such opportunities with deep skepticism—deeper than had no such opportunity ever existed. The ratchet tightens options, squeezing the discretion that legislatures once had. This Article seeks to solve the puzzle of how courts have scrutinized, and should scrutinize, legislative changes to election laws.

This Article proceeds in five Parts. Part I identifies recent instances in which federal courts have invoked a version of the Democracy Ratchet. It identifies the salient traits of the Democracy Ratchet in these cases. Part II describes why the Democracy Ratchet has gained attention, primarily as a tactic of litigants and as a convenient benchmark in preliminary injunction cases. Part III examines the history of the major federal causes of action concerning election administration—Section 2 of the Voting Rights Act, the *Burdick* balancing test, and the Equal Protection Clause. In each, it traces the path of the doctrine to a point where a version of the Democracy Ratchet might be incorporated into the test. It concludes that these causes of action do not include a substantive Democracy Ratchet. Part IV turns to determine how the Democracy Ratchet might be used. It concludes that the Democracy Ratchet is best identified as an evidentiary device and a readily available remedy for courts fashioning relief. It then offers suggestions for its appropriate use. Part V identifies some concerns with existing use of the Democracy Ratchet and instances in which litigants or courts may incorrectly use the Democracy Ratchet. It offers guidance for courts handling changes to election laws.

I. THE DEMOCRACY RATCHET IN ACTION

In a handful of cases in recent years, federal courts have faced disputes about a new election law. The law in question eliminated some portion of a previously-existing voting practice or procedure. Litigants sought to strike down the law. And courts in the cases below invoked a form of the Democracy Ratchet in doing so.

While the merits and details of the specific legal claims raised will be discussed in Part III, federal courts have used the Democracy Ratchet regardless of the cause of action—a Voting Rights Act claim under Section 2;[10] a Fourteenth Amendment claim under the Supreme Court's balancing test set forth in cases like *Anderson v.*

---

8. *See infra* Part III.

9. A ratchet is distinct from a socket wrench, which performs the functions of a ratchet but permits movement in another direction with little effort. Handcuffs and subway turnstiles are two of the most common types of ratchets—they move in a single direction and do not permit movement in the other direction. There are ways to release a ratchet—the keys to the handcuffs, for instance, would permit one to move the cuffs in the other direction—but they require something extra designed to disable the ratchet's function.

10. *See infra* Section III.A.

Celebrezze and *Burdick v. Takushi*;[11] or a *Bush v. Gore*-style claim for arbitrary treatment of voters.[12]

At the outset, it is worth noting that procedural oddities sometimes ultimately dominate these cases and may limit their precedential value. For instance, some occur in short-fused litigation, especially on a preliminary injunction standard, and may not survive in their present form when the case reaches the merits on a permanent injunction. Appellate courts stayed or vacated other decisions. Nevertheless, they are emblematic of courts beginning to develop the contours of the legal doctrine. These courts tend to find that the previously existing legal framework is the baseline for the "right to vote," and litigation is viewed through the lens of burdens placed upon that preexisting constellation.

A. Ohio Early Voting, 2014

Before 2005, Ohio had no early in-person voting, and absentee voting was only available for individuals who met one of several exceptions.[13] In 2005, the legislature enacted changes to this system.[14] It permitted no-excuse early voting and allowed for early in-person voting at least thirty-five days before the election.[15] Because Ohio voters must register at least thirty days before an election, there was a five-day period in which a voter could register to vote and cast a ballot on the same day.[16] In 2014, the legislature enacted a new law with more changes, including moving the first day of early voting to the day after the close of voter registration, which reduced the number of days of early voting to twenty-nine.[17]

In *Ohio State Conference of the NAACP v. Husted*, the Sixth Circuit affirmed a preliminary injunction that prevented implementation of the new law.[18] It concluded that the burden on African American, lower-income, and homeless voters was "significant" under *Anderson-Burdick*, and that such groups "disproportionately" used early in-person voting.[19] That voters might change their behavior "such that overall turnout might not be affected 'is not determinative of the Equal Protection analysis.'"[20]

The Sixth Circuit in *Husted* also construed the disparate treatment analysis in *Bush v. Gore*. It concluded that the "motivating principle" of *Bush v. Gore* was "instructive," that "'[h]aving once granted the right to vote on equal terms'—such as expanding early voting opportunities—'the State may not, by later arbitrary and

11. *See infra* Section III.B.

12. *See infra* Section III.C.

13. Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 531 (6th Cir. 2014), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 524.

19. *Id.* at 544–45

20. *Id.* at 541.

disparate treatment, value one person's vote over that of another'—for example, by making it substantially harder for certain groups to vote than others."[21]

Finally, in an analysis under Section 2 of the Voting Rights Act, the court concluded that a comparison to previously available opportunities was "relevant to an assessment of whether, under the current system, African Americans have an equal opportunity to participate in the political process as compared to other voters."[22] Because black voters disproportionately used the early voting procedures that had been scaled back, the change to the law ran afoul of Section 2.[23]

B. Florida Signature Matching, 2016

Before 2004, each county in Florida had different procedures for curing problems with signatures on vote-by-mail ballots.[24] If there was no signature, or if the signature on the vote-by-mail ballot mismatched the signature on file, counties had procedures on how to solve this problem.[25] In 2004, Florida enacted a law that required all counties to reject vote-by-mail ballots that lacked a signature or had a mismatched signature, with no opportunity to remedy these deficiencies.[26] In 2013, the Florida legislature amended the law to permit voters to remedy ballots that lacked a signature, but it did not include opportunities for voters to remedy ballots that had a mismatched signature.[27]

A federal district court in 2016 found that the law ran afoul of the *Burdick* balancing test.[28] It determined that the burden was "severe," because ballots returned by mail with a mismatched signature would not be counted without adequate justification—going so far as to call it "illogical, irrational, and patently bizarre."[29] It concluded that there was "no reason that same procedure cannot be implemented (rather, re-implemented) for mismatched-signature ballots," because "prior to 2004 . . . voters had the ability to cure both mismatched-signature ballots and no-signature ballots."[30]

---

21. *Id.* at 542 n.4 (quoting Bush v. Gore, 531 U.S. 98, 104–05 (2000) (per curiam)).

22. *Id.* at 558.

23. *Id.* The parties would ultimately settle this litigation, and a subsequent challenge in Ohio was unsuccessful. Ohio Democratic Party v. Husted, 834 F.3d 620, 629 (6th Cir. 2016) (emphasizing that states need not "maximize voting convenience").

24. Fla. Democratic Party v. Detzner, No. 4:16cv607-MW/CAS, 2016 WL 6090943, at *2 (N.D. Fla. Oct. 16, 2016).

25. *Id.* at *2–3.

26. *Id.* at *3.

27. FLA. STAT. ANN. § 101.68(4)(a) (West 2015). The final vote on House Bill 7013 was 115-1 in the House and 27-13 in the Senate, and the bill became law. *CS/HB 7013: Elections*, FLA. SENATE, http://www.flsenate.gov/Session/Bill/2013/7013/?Tab=VoteHistory [https://perma.cc/R8P8-XX5X].

28. *Detzner*, 2016 WL 6090943, at *18–19.

29. *Id.* at *22.

30. *Id.* at *25.

C. Arizona Ballot Harvesting, 2016

In 2016, Arizona enacted a law that generally precluded individuals from collecting early ballots from voters.[31] The statute authorized exceptions to this general rule, such as "election officials, mail carriers, [and] family members."[32] Arizona permitted a variety of early voting opportunities and allowed early ballots to be deposited at any polling place on Election Day.[33] This law, however, trimmed back the practice of "ballot harvesting," which the Arizona Democratic Party had used extensively since at least 2002.[34] After a district court[35] and the Ninth Circuit[36] upheld the law, the Ninth Circuit en banc would have enjoined the law as running afoul of the *Burdick* balancing test and the Voting Rights Act.

The en banc court adopted a finding by the dissenting judge in the previous case that the law placed a "substantial" burden on voters in urban and rural areas, particularly in places that lacked home mail delivery and reliable transportation.[37] The dissent weighed that burden against the "weak" interest in preventing voter fraud, where specific instances of illegal ballot collection, which had previously been permitted in Arizona, were nonexistent.[38] In particular, the dissent found that "a substantial number of minority voters used ballot collection as their means of voting,"[39] a reflection of reliance on the past practice:

> [W]hen 80% of the electorate uses early absentee voting as the method by which they cast their ballots, the method has transcended convenience and has become instead a practical necessity. Thus, when severe burdens are placed on this form of voting, it has a significant impact on elections and the right to vote.[40]

The dissent also found that the regulation would have run afoul of Section 2, as the harm disproportionately fell on minority voters and the "totality of the circumstances" established that plaintiffs would win on a Section 2 challenge.[41]

---

31. ARIZ. REV. STAT. ANN. § 16-1005 (2017); *see* Feldman v. Ariz. Sec'y of State's Office, 840 F.3d 1057 (9th Cir.), *reh'g granted en banc*, 841 F.3d 791 (9th Cir.), *injunction pending appeal granted*, 843 F.3d 366 (9th Cir. 2016), *stay granted*, 137 S. Ct. 446 (2016).

32. *Feldman*, 840 F.3d at 1063.

33. *Id.*

34. *Id.* at 1064.

35. Feldman v. Ariz. Sec'y of State's Office, 208 F. Supp. 3d 1074 (D. Ariz. 2016).

36. *Feldman*, 840 F.3d at 1086.

37. *Id.* at 1088–90 (Thomas, C.J., dissenting), *adopted en banc*, 843 F.3d 366 (9th Cir. 2016), *stay granted*, 137 S. Ct. 446 (2016).

38. *Feldman*, 840 F.3d at 1089–90 (Thomas, C.J., dissenting).

39. *Id.* at 1088.

40. *Id.* at 1089.

41. *Id.* at 1096–97.

D. Michigan Straight-Ticket Voting, 2016

Michigan had a practice of "straight-ticket" voting since 1891.[42] The practice permitted voters to cast a vote for all nominees of a particular political party for all offices on the ballot with a single mark.[43] The Sixth Circuit applied the *Burdick* balancing test and concluded that the burden placed upon voters because of the elimination of straight-ticket voting was moderate. That burden was found moderate because wait times would increase, African American voters would be disproportionately affected, and voters could be confused because of a change to the ballot marking system.[44] The state lacked sufficient justifications for the law.[45]

The court also concluded that the law ran afoul of Section 2 because African American voters disproportionately used straight-ticket voting, and that the burden was linked to historical conditions regarding African American voters.[46]

E. Examining the Democracy Ratchet

These courts all took similar approaches in approaching the changes to election laws. They each share four hallmarks of what I would identify as the Democracy Ratchet.

First, a state changed an election law in such a way that it eliminated a previously available voting practice or procedure (sometimes, a practice or procedure of recent vintage). Ohio eliminated six days of early voting that had only been available for a couple of election cycles. Florida prohibited signature correction for mismatched or absence of signature, and later permitted signature correction for absence of signature only. Arizona limited ballot harvesting. Michigan ended the practice of straight-ticket voting.[47]

Second, in the ensuing litigation, under whichever federal cause of action the case arises under, the new law was compared against the preexisting benchmark of the old law. In each case, courts and litigants examined the availability and use of previous voting opportunities that no longer existed.

Third, the court expressed heightened skepticism, explicit or implicit, as a result of the change, sometimes presuming that the right to vote has been burdened in some way. A stronger version of the Democracy Ratchet would call for a high evidentiary showing from the new law's proponents before the law could take effect; a weaker version would require less. In each case, courts found the state's justification for the change wanting—because the states' justification was relatively weak, the burden on voters was relatively heavy, or both.

Fourth, the court is more likely to restore the old practice or procedure as a result of its heightened skepticism. In each of these cases, the courts restored the old practice (at times, subject to appeal or a hearing on the merits).

---

42. Mich. State A. Philip Randolph Instit. v. Johnson, 833 F.3d 656, 660 (6th Cir. 2016).
43. *Id.*
44. *Id.* at 662–69.
45. *Id.* at 666.
46. *Id.* at 666–69.
47. *See supra* Section I.A–D.

F. Resistance to the Democracy Ratchet

It would be an overstatement to say that the Democracy Ratchet exists with full force across jurisdictions or that it has been consistently applied. In 2004, for instance, Florida enacted a law that permitted up to fourteen days of early voting, including the Sunday before Election Day.[48] In 2011, it enacted a law that reduced the total number of early voting days to eight, permitting up to ninety-six hours of early voting (the same as the old law), and abolishing voting the Sunday before Election Day, among other changes.[49] At the time, five counties in Florida were subject to preclearance under Section 5 of the Voting Rights Act.[50] In 2012, the Attorney General revealed that he would not object—the five counties would offer ninety-six hours of early voting, the same as was available under the old law, and the new law was precleared.[51] Plaintiffs then challenged the law under Section 2 of the Voting Rights Act.[52] Examining whether the law would "result[] in a denial or abridgment of the right . . . to vote," the court recognized that it would not conduct a retrogression analysis.[53] Instead, it would conduct a "practical evaluation of the 'past and present reality.'"[54]

It is worth noting that the Democracy Ratchet, at least in its present form, has only been used in cases affecting the right to vote. It has not (yet) been used in the broader set of election law-related cases.[55]

---

48. Brown v. Detzner, 895 F. Supp. 2d 1236, 1239 (M.D. Fla. 2012).

49. *Id.* at 1239.

50. *Id.* at 1241–42.

51. *Id.*

52. *Id.* at 1243.

53. *Id.* at 1249–51 (quoting 42 U.S.C. § 1973(a) (2012) (current version at 52 U.S.C. § 10301 (2012 & Supp. 2017)).

54. *Id.* at 1251 (quoting Thornburg v. Gingles, 478 U.S. 30, 45 (1986)).

55. Consider campaign finance laws. When a state reduces the amount of money that individuals may contribute to political campaigns, courts do not require the state to justify the change in the contribution limits. Instead, courts examine whether the limits, in their present form, are appropriately tailored. Lair v. Motl, 873 F.3d 1170, 1181 n.6 (9th Cir. 2017) ("At oral argument, the plaintiffs contended Montana must justify the *change* between the pre-1994 limits and today's limits. Every contribution limit case of which we are aware, however, evaluates the *current* limits, and the plaintiffs point to no authority suggesting otherwise. In *Randall*, for example, the Court evaluated Vermont's existing limits without discussing whether the *change* from Vermont's previous regime was justified." (citing Randall v. Sorrell, 548 U.S. 230, 237 (2006) (emphasis in original)); *see also* Thompson v. Dauphinais, 217 F. Supp. 3d 1023 (D. Alaska 2017), *appeal filed*, Thompson v. Hebdon, No. 17-35019 (9th Cir. filed Jan. 10, 2017) (upholding new lower contribution limits without comparing to benchmark of old limits); Ognibene v. Parkes, 671 F.3d 174, 189 (2d Cir. 2011) (upholding new lower contribution limits without comparing to benchmark of old limits) ("[T]hey argue that these initial limits have been successful, so that lower limits are unnecessary. This determination, however, is a matter of policy better suited for the legislature . . . ."). *But cf.* Ala. Democratic Conf. v. Att'y Gen. of Ala., 838 F.3d 1057, 1070 (11th Cir. 2016) (suggesting that question of whether plaintiff could sufficiently participate in political dialogue may turn in part upon evidence of plaintiff's behavior "prior to the ban" on political action committee transfers). This might be a reason to call this the "Voting Rights Ratchet," or something narrower, but it's still a device that might be extended to other election law-related cases in the future.

II. THE DEVELOPMENT OF THE DEMOCRACY RATCHET

Some courts have independently moved toward adopting a version of the Democracy Ratchet—even if their decisions are not always affirmed on appeal. A handful of factors may be driving courts toward the Democracy Ratchet.

A. Litigants Attacking New Laws

One reason that courts may be using the Democracy Ratchet is because *litigants* are using the Democracy Ratchet. Courts, after all, do not decide election law cases *sua sponte*. They only consider cases and controversies presented to them.

Of course, legal doctrines like Section 2 of the Voting Rights Act and the *Burdick* balancing test apply to all election laws, including laws that have long been on the books. But in recent years, litigants have lacked success in challenging long-existing laws. Consider felon disenfranchisement laws. Many of these statutes have been on the books for decades. And many have persuasively shown that these statutes disproportionately disenfranchise racial minorities and those from lower socioeconomic classes.[56] But courts have consistently rejected challenges to such laws, primarily because felon disenfranchisement laws have a sufficiently historical pedigree.[57]

The historic pedigree of such laws has hardly been sufficient justification in ballot access disputes under the *Burdick* balancing test.[58] Indeed, laws that have been on

---

56. *See, e.g.*, Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 261–62 (2004); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1899–1900 (1999); Janai S. Nelson, *The Causal Context of Disparate Vote Denial*, 54 B.C. L. REV. 579, 603–04 (2013); Franita Tolson, *What Is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 440 n.26 (2015); *see also* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1280–81 n.268 (2012) (addressing the possibility that Congress could invoke its power under the Reconstruction Amendments to legislate in the area of felon disenfranchisement due to its disparate impact on racial minorities); Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584 (2012).

57. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (rejecting claim under the Fourteenth Amendment due in part to "the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons"); Farrakhan v. Gregoire, 623 F.3d 990 (9th Cir. 2010) (en banc) (rejecting claim under Section 2); Simmons v. Galvin, 575 F.3d 24, 34 (1st Cir. 2009) (finding that felon disenfranchisement laws could not violate Section 2 because they "are deeply rooted in our history, in our laws, and in our Constitution"); *cf.* Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (concluding that Congress intended not to address felon disenfranchisement when it enacted and amended Section 2); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005) (en banc) (concluding once again, that Congress intended not to address felon disenfranchisement when it enacted and amended Section 2).

58. *See infra* Section III.B.

the books for decades and have yielded few minor party candidacies are among the ripest targets.[59]

But plaintiffs, understandably, choose to marshal their resources as effectively as possible.[60] Litigants, therefore, are inclined to choose the ripest targets for victory. New legislation presents unique opportunities for plaintiffs, particularly for organizations who have vocally opposed the new legislation in the media and have a chance to stake out opposition in court. An easy benchmark, then, is to compare the new law to the old law. These are precisely the types of claims litigants have brought. Aggressive litigant skepticism of new election laws has, in turn, put courts in a skeptical posture of new election laws.

Additionally, these older cases emphasizing the historical pedigree of election laws work in favor of courts implementing a Democracy Ratchet. Under the older cases, the long historical pedigree of laws, such as those causing felon disenfranchisement, was a thumb on the scale against a finding that they violated Section 2 or the Reconstruction Amendments. Under the newer cases, then, recent changes to election laws would require a thumb on the scale in favor of a judicial finding that the recent changes are legally problematic.[61] Historical practice is not simply background research; it dictates which way the court's inclinations ought to lean.[62]

Unfortunately for courts, new legislation also means they must speculate about the future impact that a new law might have. It's not truly a ripeness issue—the law has been enacted, and it will take effect in the upcoming election. Instead, it is a matter of assessing whether the state legislature had the authority to promulgate such a law based on the potential impact it might have. Too significant an impact, and the law cannot take effect. But litigants, of course, do not want to wait an election cycle—much less multiple election cycles—for additional evidence. The evidentiary issue is another problem for courts.

B. The Preliminary Injunction Standard

Litigants challenging new election laws typically seek injunctive relief.[63] They also request a preliminary injunction, a remedy with a framework hospitable to the application of the Democracy Ratchet.

---

59. *See infra* Section III.B.

60. *Cf.* Nicholas O. Stephanopoulos, *The South After* Shelby County, 2013 SUP. CT. REV. 55, 71 (2013) (explaining that "private parties will need to make difficult choices as to which policies they will challenge" after the demise of Section 5).

61. Frank v. Walker, 17 F. Supp. 3d 837, 869 (E.D. Wis.) ("This reasoning [concerning a 'long history' of a voting practice] obviously does not apply to voter photo identification requirements, which are a recent phenomenon."), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

62. Isaacharoff, *supra* note 1, at 319–20 (identifying historical consideration as a factor courts use in evaluating the validity of changes to election laws).

63. The cases described in Part I are typical of litigants who seek to prevent a law from taking effect. Indeed, Congress created three-judge district courts in certain election law cases in anticipation of injunctive relief. *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J.L. REFORM 79, 91–92 (1996).

Generally, a preliminary injunction is designed to protect the plaintiff from "irreparable injury" before the court is able to render a decision after hearing the merits of the claim.[64] The Supreme Court has explained that a party seeking a preliminary injunction must "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[65]

The preliminary injunction has also been described as necessary to preserve the status quo. The Supreme Court has articulated that the purpose of the preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held."[66] This description is not without criticism[67] and has had an uneven application in federal courts.[68] Nevertheless, the preservation of the status quo was one factor the Ninth Circuit cited in the Arizona ballot harvesting case,[69] and the Sixth Circuit in the straight-ticket voting case.[70]

In cases like these, the Democracy Ratchet serves to return the parties to the status quo before the new law was enacted, and specifically, to the legal opportunities of voters under the old regime. Given the uncertainty of weighing the future in these cases,[71] the Democracy Ratchet offers a convenient benchmark lacking in other contexts.

The status quo, however, has traditionally been a way a court can ensure that it retains jurisdiction through a trial on the merits. That way, the plaintiff can continue to seek relief without the risk that the defendant may harm a legally protected interest such that the district court cannot fashion relief.[72] In election law litigation, that

---

64. *See generally* 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS, A. BENJAMIN SPENCER & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 2947 (3d ed. 2018) (discussing Rule 65(a) and "the procedure on an application for a preliminary injunction").

65. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *accord* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017) (per curiam).

66. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981).

67. *See, e.g.*, John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 546 (1978) ("The status quo shibboleth cannot be justified as a way to limit interlocutory judicial meddling, because a court interferes just as much when it orders the status quo preserved as when it changes it.").

68. Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109 (2001) (identifying split of authority in federal courts as to the relevance of preserving the "status quo"); *see also* James Powers, Note, *A Status Quo Bias: Behavioral Economics and the Federal Preliminary Injunction Standard*, 92 TEX. L. REV. 1027 (2014).

69. Feldman v. Ariz. Sec'y. of State's Office, 843 F.3d 366, 368–69 (9th Cir.) *stay granted*, 137 S. Ct. 446 (2016) ("Here, the injunction preserves the *status quo* prior to the recent legislative action in H.B. 2023. . . . So, the injunction in this case does not involve any disruption to Arizona's long standing election procedures. To the contrary, it restores the *status quo ante* to the disruption created by the Arizona legislature that is affecting this election cycle for the first time." (emphasis in original)).

70. Mich. State A. Philip Randolph Inst. v. Johnson, 833 F.3d 656, 669 (6th Cir. 2016) ("Of particular significance here, the district court's grant of a preliminary injunction maintained the status quo in Michigan that was in place for 125 years . . . .").

71. *See infra* Section IV.A.

72. *See supra* Section II.B.

justification may not be as persuasive. For instance, the *Purcell* principle stands for the proposition that courts should avoid changing the enforcement of election laws—suspending their enforcement or reinstituting them—shortly before an election.[73] The Court there explained that "just weeks before an election," the "issuance or nonissuance of an injunction" in cases "affecting elections" could cause "voter confusion and consequent incentive to remain away from the polls."[74] It has counseled against changes to the status quo, whether in the issuance or nonissuance of an injunction.[75]

While the Democracy Ratchet might lean toward constraining the power of the legislature, the *Purcell* principle might permit such laws to take effect, at least for one election, when courts lack sufficient time to address the merits of a claim before the election. The Democracy Ratchet would traditionally favor a plaintiff seeking to maintain the status quo, but *Purcell* looks to maintain the status quo as it currently exists for voters to avoid uncertainty. The status quo, then, is a less persuasive reason for the Democracy Ratchet—at least as long as *Purcell* remains good (if undertheorized)[76] law from the Supreme Court.

And this can only partially explain its use. While courts might cite a form of the Democracy Ratchet to justify preserving the status quo, they are also citing it when considering the underlying likelihood of the merits.[77] The preliminary injunction standard may help explain the rise of the Democracy Ratchet—but only in part.

III. REJECTING A SUBSTANTIVE DEMOCRACY RATCHET

These are reasons *why* the Democracy Ratchet has gained some attention—driven by litigants to preserve the status quo. But does the law compel such a result? Recall that courts and litigants employ the Democracy Ratchet *regardless* of the substantive legal theory advanced in the underlying litigation—it transcends any particular cause of action.[78]

Litigants who go to federal court to challenge a law affecting voting rights have a variety of legal claims at their disposal. Three of the more popular routes to challenge a law are a Voting Rights Act claim, a freedom of association claim under the *Burdick* balancing test, and an Equal Protection claim after *Bush v. Gore*. Each claim has its own winding history. This Part examines each in turn and concludes that none of these legal theories includes the Democracy Ratchet as a part of its substantive legal framework.

---

73. Richard L. Hasen, *Reining in the* Purcell *Principle*, 43 FLA. ST. U. L. REV. 427, 428 (2016).

74. Purcell v. Gonzalez, 549 U.S. 1, 4–5 (2006).

75. *See* Hasen, *supra* note 73, at 447–56 (collecting cases from Ohio, North Carolina, Wisconsin, and Texas).

76. *See id.* at 428.

77. *See supra* Part I.

78. *See supra* Part I.

A. The Voting Rights Act

Congress enacted the Voting Rights Act of 1965 to protect the right to vote, particularly in jurisdictions in the South that had subjected minority voters to suppression tactics, which yielded substantial disparities between white and black voter registration and turnout.[79] Understanding the current framework for adjudicating claims under Section 2 of the Voting Rights Act begins with an understanding of Section 5, and of the Voting Rights Act generally. Through this history is a story of the Democracy Ratchet in Voting Rights Act litigation, including its demise and its subsequent reintroduction.

1. The Demise of Section 5

Congress enacted the Voting Rights Act to "banish the blight of racial discrimination in voting," in the words of the Supreme Court in *South Carolina v. Katzenbach*.[80] Among other things, Sections 4 and 5 of the Voting Rights Act established a preclearance regime for proposed changes to certain states' voting laws: Section 4(b) created a formula for coverage, and Section 5 created the remedy.[81] States and other political subdivisions would be subject to preclearance from the Department of Justice (or a federal court) for election laws if they were identified as a "covered" jurisdiction; no election law could take effect without prior approval from the Department of Justice.[82]

In 1965, covered jurisdictions had used a prohibited test or device (often a literacy test) and had less than fifty percent voter registration in November 1964 or less than fifty percent voter turnout in that year's presidential election.[83] The requirements of the Act mostly captured Southern states, including Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia.[84]

The preclearance regime was originally designed to expire after five years, but Congress renewed it repeatedly, most recently in 2006 and it is set to expire in 2031.[85] Congress included more jurisdictions subject to coverage in 1970 based on benchmarks in November 1968, and in 1975 based on benchmarks in November 1972.[86] But the coverage formula was not wholly static.[87] A covered jurisdiction

---

79. Portions of this Section have been adapted from Derek T. Muller, *Judicial Review of Congressional Power Before and After* Shelby County v. Holder, 8 CHARLESTON L. REV. 287 (2013) [hereinafter Muller, *Judicial Review*].

80. 383 U.S. 301, 308 (1966).

81. Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 438 (codified at 52 U.S.C. §§ 10303(b), 10304 (2012 & Supp. 2017)).

82. *Id.*

83. 52 U.S.C. § 10303(b) (2012 & Supp. 2017).

84. *Section 4 of the Voting Rights Act*, DEP'T JUST. (Dec. 21, 2017), https://www.justice.gov/crt/section-4-voting-rights-act [https://perma.cc/MFG7-FD4T] [hereinafter *Section 4*].

85. Pub. L. 109-246, 120 Stat. 580 (codified at 52 U.S.C. §§ 10101–10102 (2012 & Supp. 2017)).

86. *Section 4*, *supra* note 84.

87. *See* Justin Levitt, *Section 5 as Simulacrum*, YALE L.J. ONLINE (2013), http://www.yale

could petition for "bailout" under the Act, so that individual jurisdictions could move out from under the coverage formula if they had established that preclearance was unnecessary.[88] And a political jurisdiction could be subject to "bail-in," facing a kind of judicially supervised preclearance if a federal court found that the jurisdiction acted with intentional racial discrimination.[89]

While Section 5 originally may have plausibly been interpreted to extend a preclearance requirement only to changes in voter qualifications or the manner of elections,[90] the Supreme Court interpreted Section 5 broadly. It included essentially all election-related laws as subject to preclearance—to cite a few, changes concerning single-member and at-large districts, write-in ballots, and independent candidacies;[91] changes to polling locations and boundary lines;[92] and reorganization of voting districts and the creation of multimember districts to replace single-member districts.[93] Given the sheer breadth of Section 5, there were over half a million election-related changes in covered jurisdictions,[94] but there have been a "trivial number of objections" from the Department of Justice concerning these changes, particularly since the 1982 renewal.[95]

For a new law to pass scrutiny under Section 5, the jurisdiction bears the burden of proving that the law does not have a discriminatory purpose or a discriminatory effect.[96] The Supreme Court construed this provision as a doctrine of "non-retrogression," asking whether a change to voting procedures "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[97] Non-retrogression offered a fairly clear benchmark: changes to the law should be compared against the previous state of the law. But it offered its own weaknesses as a limited test for those who believed that Section 5 might extend to more than just non-retrogression.[98]

Section 5, of course, only extended to covered jurisdictions. And in 2013, the Supreme Court in *Shelby County v. Holder* concluded that the coverage formula, which had not been legislatively updated since 1975, was unconstitutional.[99] That

---

lawjournal.org/forum/section-5-as-simulacrum [https://perma.cc/5ZE8-AMHN].

88. *See* 52 U.S.C. § 10303(a) (2012 & Supp. 2017).

89. *See* 52 U.S.C. § 10302 (2012 & Supp. 2017).

90. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 582–94 (1969) (Harlan, J., dissenting).

91. *See id.* at 550–55.

92. *See* Perkins v. Matthews, 400 U.S. 379 (1971).

93. *See* Georgia v. United States, 411 U.S. 526 (1973).

94. *Section 5 Changes by Type and Year*, DEP'T JUST. (Aug. 6, 2015), http://www.justice.gov/crt/about/vot/sec_5/changes.php [https://perma.cc/FX7P-87KU] (identifying 549,302 changes received by the Department of Justice through 2013).

95. Richard L. Hasen, *Congressional Power to Renew Preclearance Provisions*, *in* THE FUTURE OF THE VOTING RIGHTS ACT 91 (David L. Epstein et al. eds., 2006).

96. 52 U.S.C. § 10304 (2012 & Supp. 2017).

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

98. *Cf.* Jeffries & Levinson, *supra* note 5, at 1214–15 ("As used in the Voting Rights Act, non-retrogression is admittedly incomplete and perhaps unwise, but it cannot be condemned as irrational.").

99. 570 U.S. 529, 549 (2013); *see generally* Muller, *Judicial Review*, *supra* note 79, at 307–13. The scope of the Court's holding of Section 4(b) in relation to other provisions of the

left litigants who sought to challenge election laws scrambling to fill the void left by *Shelby County*. In addition, litigants sought opportunities to challenge election laws in jurisdictions that had not been covered by Section 5.

2. The Rise of Section 2

Following the demise of Section 5, proposals arose for a more robust use of Section 2.[100] Indeed, even before *Shelby County*, Professor Dan Tokaji was an early proponent of using Section 2 for "new" vote denial claims—the kind of laws that burden voting practices or procedures in the form of "nuts and bolts" election laws—with a two-part test[101]: "(1) that the practice challenged results in the disproportionate denial of minority votes (i.e., that it has a disparate impact on minority voters); and (2) that this disparate impact is traceable to the challenged practice's interaction with social and historical conditions."[102] The burden would then shift to the state to justify that the practice is "narrowly tailored to a compelling government interest"; and that slight or de minimis burdens might be justified with something greater than mere rationality.[103]

The contemporary version of Section 2 begins with the Supreme Court's voting rights jurisprudence under the Reconstruction Amendments. Until 1982, Section 2 of the Voting Rights Act largely mirrored the guarantees of the Fifteenth Amendment[104] and was ultimately treated as having "an effect no different from that of the Fifteenth Amendment itself."[105]

In 1973, the Supreme Court in *White v. Regester* found that plaintiffs could successfully challenge a state redistricting plan under the Equal Protection Clause,

---

Voting Rights Act apart from Section 5 is uncertain. *See* Cody Gray, *Savior Through Severance: A Litigation-Based Response to* Shelby County v. Holder, 50 HARV. C.R.-C.L. L. REV. 49, 68–71 (2015); Eric Licthblau, *Why the Justice Dept. Will Have Far Fewer Watchdogs in Polling Places*, N.Y. TIMES (Oct. 24, 2016), https://www.nytimes.com/2016/10/25/us/politics/why-the-justice-dept-will-have-far-fewer-watchdogs-in-polling-places.html [https://perma.cc/3LQ4-THQP].

100. *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143 (2015); Michael J. Pitts, *Rescuing Retrogression*, 43 FLA. ST. U. L. REV. 741 (2016); Stephanopoulos, *supra* note 60, at 106–18.

101. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 690 (2006) [hereinafter Tokaji, *New Vote Denial*]. Professor Tokaji later updated this proposal as a three-part test. *See infra* notes 145–147 and accompanying text.

102. Tokaji, *New Vote Denial*, *supra* note 101, at 724.

103. *Id.* at 725–26.

104. *Compare* U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."), *with* Voting Rights Act of 1965, § 2, Pub. L. 89-110, 79 Stat. 437 ("No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.").

105. City of Mobile v. Bolden, 446 U.S. 55, 61 (1980).

even without a finding of discriminatory intent.[106] But in 1980, in *City of Mobile v. Bolden*, a plurality of the Court found that the Fifteenth Amendment covers laws "only if motivated by a discriminatory purpose."[107] It concluded that *White v. Regester* was consistent with the need to find a "discriminatory purpose" for striking down a law.[108] And because Section 2 added nothing to the Fifteenth Amendment, the plaintiff's claim failed there too.[109]

Significantly, Congress's 1982 amendments to the Act codified a results test, which specified that intent was not required, a response to Supreme Court precedent.[110] The amended text of Section 2 of the Voting Rights Act provides:

> A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[111]

Congress specifically cited *White v. Regester* as the source of this results test to overturn *City of Mobile* and bring Section 2 jurisprudence back to its earlier standing.[112] Thus, "[t]he 'right' question . . . is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'"[113] But the renewed results test itself was not abundantly clear:[114] which circumstances should courts consider in the "totality," by what standard should courts view the circumstances, and what did it mean for an electoral arrangement to result in members of a racial group having less of an opportunity to participate in the political process?[115]

Courts would adopt the "Senate factors" to evaluate the "totality of the circumstances."[116] The factors derive from the Senate Judiciary Committee's

---

106. 412 U.S. 755, 766 (1973) (requiring plaintiffs to show that political processes "were not equally open to participation by the group in question—that its members had less opportunity").

107. 446 U.S. at 61–62, 69 (plurality opinion) (quoting *White*, 412 U.S. at 765) ("The Court stated the constitutional question in *White* to be whether the 'multimember districts [were] *being used invidiously* . . . .'" (emphasis in original)).

108. *Id.* at 68–70.

109. *See id.*

110. 52 U.S.C. § 10301(b) (2012 & Supp. 2017).

111. *Id.*

112. *See* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 387 (2012) [hereinafter Elmendorf, *Making Sense of Section 2*].

113. Thornburg v. Gingles, 478 U.S. 30, 44 (1986) (quoting S. REP. NO. 97-417, at 28 (1982)).

114. One court called it "exceptionally vague." Elmendorf, *Making Sense of Section* 2, *supra* note 112, at 387 (citing Goosby v. Town Bd. of Hempstead, 180 F.3d 476, 500 (2d Cir. 1999) (Leval, J., concurring)).

115. *See* Elmendorf, *Making Sense of Section* 2, *supra* note 112, at 387–88.

116. *See Gingles*, 478 U.S. at 43 n.7, 46.

majority report on the 1982 amendments to Section 2, with reference to the Supreme Court precedent. The factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[117]

According to the Senate Report, courts should consider two other factors of "probative value": whether "there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group," and whether the justification for the election practice or procedure is "tenuous."[118] Professor Ellen Katz identified what might qualify as a tenth factor, a proportionality analysis in redistricting cases.[119]

In the vote dilution context, the Supreme Court adopted a three-prong test in *Thornburg v. Gingles*.[120] Vote dilution claims arise when minority voters allege that their votes have been diluted in a multimember district or at-large voting system, or because existing district lines dilute their votes across districts. The Court explained, "[t]he essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the [voting] opportunities enjoyed by black and white voters to elect their preferred

117. S. REP. NO. 97-417, at 28–29 (1982).

118. *Gingles*, 478 U.S. at 37.

119. Ellen Katz, Margaret Aisenbrey, Anna Baldwin, Emma Cheuse & Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 730–32 (2006).

120. 478 U.S. at 50–51.

representatives."[121] The Court ratified consideration of the Senate Report factors, but it refined the judicial analysis for vote dilution claims.[122]

To succeed, claimants must demonstrate three things. First, the voters challenging the district must be "sufficiently large and geographically compact to constitute a majority"; second, the minority voters must be "politically cohesive"; third, the group must demonstrate that the "white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority's preferred candidate."[123] If they can demonstrate these things, the jurisdiction must establish a district in which those minority voters constitute a majority of the voting age population.[124] Vote dilution claims under *Gingles* have been fairly well-established in the last few decades of redistricting, albeit not without controversy that *Gingles* went too far or failed to go far enough.[125]

Vote denial claims, however, are another matter. Litigants rarely raised vote denial claims before *Shelby County v. Holder*, and these claims are still rarely successful.[126] But federal appellate courts quickly adopted a two-prong test for vote denial claims under Section 2. To quote one typical judicial holding from 2014:

> We read the text of Section 2 and the limited relevant case law as requiring proof of two elements for a vote denial claim. First, as the text of Section 2(b) indicates, the challenged "standard, practice, or procedure" must impose a discriminatory burden on members of a protected class, meaning that members of the protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Second, the Supreme Court has indicated that that burden must in part be caused by or linked to "social and historical conditions" that have or currently produce discrimination against members of the protected class. In assessing both elements, courts should consider "the totality of circumstances."[127]

Federal courts rapidly adopted this two-part articulation of the test.[128] But the devil is in the details of the "totality of the circumstances." The Fourth, Fifth, Sixth, and Ninth Circuits have been inclined to adopt the *Gingles* factors to determine the

---

121. *Id.* at 47.

122. *Id.*

123. *Id.* at 49–51.

124. *See* Bush v. Vera, 517 U.S. 952 (1996).

125. *Compare* ABIGAIL M. THERNSTROM, WHOSE VOTE COUNTS?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987), *with* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993).

126. *See* Katz et al., *supra* note 119.

127. Ohio State Conf. of NAACP v. Husted, 768 F.3d 524, 554 (6th Cir.) (citations omitted), *stayed*, 135 S. Ct. 42, *vacated*, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

128. *See, e.g.*, League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 240 (4th Cir. 2014); *cf.* Feldman v. Ariz. Sec'y of State's Office, 843 F.3d 366 (9th Cir.), *stay granted*, 137 S. Ct. 446 (2016); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016); Frank v. Walker 768 F.3d 744 (7th Cir. 2014).

effect of a law in the vote denial context.[129] The Seventh Circuit, in contrast, has been "skeptical" of using the *Gingles* factors.[130] Nonetheless, courts had adapted some version of Section 2 jurisprudence to examine under the "totality of the circumstances" whether members of a protected class have "less opportunity"[131] than others.

3. Distinguishing Section 2 and Section 5

Even though Section 2 and Section 5 are both parts of the Voting Rights Act, they have significantly different procedural and substantive differences.[132] The Supreme Court has been careful not to conflate Section 2 and Section 5. In its first *Reno v. Bossier Parish School Board* decision, the Court held that Section 5's non-retrogression standard was distinct from Section 2.[133] Preclearance should not be denied simply because of a violation of Section 2.[134] Non-retrogression compares the "benchmark" of the previous plan to the new practice; there is no such benchmark needed to succeed under Section 2.[135]

The Court has also distinguished Section 2 and Section 5 to suggest that non-retrogression is exclusive to Section 5—at least, the Court so suggested in vote dilution cases. In *Holder v. Hall*, the Court explained, benchmarks to evaluate Section 5 claims are easy: "We require preclearance of changes in size under § 5, because in a § 5 case the question of an alternative benchmark never arises—the benchmark is simply the former practice employed by the jurisdiction seeking approval of a change."[136] "The baseline for comparison is present by definition; it is the existing status."[137] "Retrogression is not the inquiry in § 2 *dilution* cases."[138] And the Court cited Congress in this respect: "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."[139] In a Section 2 challenge to the size of a government body, "[t]here is no principled reason why one size should be picked over another as the benchmark for comparison."[140]

Other courts have followed suit, refusing to import non-retrogression into Section 2.[141] Indeed, sometimes plaintiffs have prevailed on a Section 2 claim on a law that

---

129. *See supra* note 128.
130. *Frank*, 768 F.3d at 755.
131. 52 U.S.C. § 10301(b) (2012 & Supp. 2016).
132. *See* Stephanopoulos, *supra* note 60, at 64–118.
133. 520 U.S. 471, 480 (1997).
134. *See id.*
135. *Id.* at 478.
136. 512 U.S. 874, 888 (1994) (O'Connor, J., concurring).
137. *Id.* at 883 (plurality opinion).
138. *Id.* at 884 (emphasis added).
139. *Id.* (quoting S. REP. NO. 97–417, at 68 n.224 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177).
140. *Id.* at 881.
141. *See, e.g.*, Metts v. Murphy, 363 F.3d 8, 12 (1st Cir. 2004) (finding that "plaintiffs cannot prevail merely by showing that an alternative plan gives them a greater opportunity to

had been precleared.[142] At other times, however, courts have read a Section 5 gloss into Section 2 claims,[143] sometimes implicitly.[144]

4. Section 2 and the Democracy Ratchet

The demise of Section 5 and new litigation surrounding vote denial claims launched not just attention on Section 2, but attention focused on how to treat *changes* to laws. That is, when the legislature eliminates a previously available voting practice or procedure, how should a court scrutinize the new law?

Professor Tokaji's approach to Section 2 vote denial claims is a three-part test that resembles, in part, the judicial test:

> (1) Plaintiffs must show that the challenged standard, practice, or procedure causes a disproportionate burden on members of a protected class that an alternative standard, practice, or procedure would avoid.
> (2) Plaintiffs must show that the disproportionate burden is traceable to interaction of the challenged standard, practice, or procedure with "social and historical conditions" that have produced or currently produce discrimination against members of the protected class.
> (3) If the plaintiffs satisfy (1) and (2) then the defendants must show by clear and convincing evidence that the burden on voting is outweighed by the state interests in the challenged standard, practice, or procedure.[145]

When it comes to *changes* in laws, Professor Tokaji explains, "context matters a great deal."[146] Courts ought to examine "how the practice fits in (or does not fit in) with the body of election rules and practices in the state."[147]

As for changes to election laws, Professor Tokaji recommends that "the relevant question is whether the challenged practice has a disparate impact on racial

---

win the election," for doing so would "convert section 2's all-circumstances test into the far more stringent 'anti-retrogression' test of section 5").

142. *See, e.g.*, Miss. State Chapter, Operation Push v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987).

143. *See, e.g.*, Brown v. Dean, 555 F. Supp. 502 (D.R.I. 1982) (citing a Section 5 case, *Perkins v. Matthews*, 400 U.S. 379 (1971), when evaluating a Section 2 claim concerning a change of voting precinct).

144. *See* Spirit Lake Tribe v. Benson County, No. 2:10-CV-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010) (finding on preliminary injunction standard that elimination of two polling places that served Native American voters likely violated Section 2, even with expansive mail-in voting options, based on polling evidence of likelihood of voting and based on tribal transience and distrust of postal services that made mail-in voting insufficient; but rejecting that finding for a third polling place).

145. Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 474 (2015) [hereinafter Tokaji, *Applying Section 2*].

146. *Id.* at 483.

147. *Id.*

minorities *relative to other voters* that could be avoided by some other practice."[148] If the practice affects white voters and minority voters in the same way, there is no disproportionate burden.[149]

Professor Pamela Karlan has suggested that changes to voting laws should properly be considered a "burden" in a Section 2 claim—"[g]iving evidentiary weight to the existence of a change does not impermissibly import the retrogression standard of section 5 into section 2."[150] She persuasively argues that a racially disproportionate effect "cannot be *necessary* to establishing a section 2 violation," in part because turnout data is unavailable until after the election, and that relief must be available before the election.[151] She argues that "abridgment" may include any practice with "'less' (and not 'no') opportunity to participate equally."[152] Where voters "disproportionately" use a particular mechanism, such as voting on Sundays, cutbacks on that mechanisms will, "as a practical matter, disproportionately burden or abridge" the right to vote.[153] "Abridgement" includes "overcoming new or different burdens."[154] To survive a Section 2 claim, a jurisdiction would need to demonstrate that it would have adopted the change to the voting law "in the absence of any political consequences," which is likely "impossible" in most cases.[155]

Professor Michael Pitts has proposed "rescuing retrogression" by offering an "additional layer" to the Section 2 test to specifically handle a "newly adopted law."[156] A law with a retrogressive effect would "presumptively" violate Section 2, and the burden shifts to the government "to provide a legitimate, nondiscriminatory reason for the retrogression in order to avoid section 2 liability."[157]

5. Section 2 Resists a Substantive Ratchet

The text of Section 2 of the Voting Rights Act does not necessarily support implementing the Democracy Ratchet—at least not in its stronger forms.

To start, the text of Section 2 contains succinct language that ought to begin. A voting practice is forbidden if it is "not equally open to participation" so that members have "less opportunity than other members . . . to participate in the political process and to elect representatives of their choice."[158] It's worth noting that this statutory language has been modified through some judicial interpretations in cases adopting the Democracy Ratchet. In the Ninth Circuit decision considering Arizona's

---

148. *Id.* at 478 (emphasis in original).

149. *Id.*

150. Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 768 (2016) [hereinafter Karlan, *Getting Results*].

151. *Id.* at 771 (emphasis in original).

152. *Id.* at 773.

153. *Id.* at 773–74.

154. *Id.* at 774.

155. *Id.* at 788.

156. Pitts, *supra* note 100, at 750–51; *see also* Ruby J. Garrett, Comment, *A Call for Prophylactic Measure to Save "Souls to the Polls": Importing a Retrogression Analysis in § 2 of the Voting Rights Act*, 2015 U. CHI. LEGAL F. 633 (2015).

157. Pitts, *supra* note 100, at 751.

158. 52 U.S.C. § 10301(b) (2012 & Supp. 2017).

ban on ballot harvesting, for instance, the court noted that the law places "a disproportionate burden on the voting opportunities of members of the Tohono O'odham tribe in comparison with the population of white voters."[159] The statutory language "less opportunity . . . to participate . . . and to elect" became "disproportionate burden on the voting opportunities" in the Ninth Circuit's holding.[160]

There is a risk in cases like these of over-reading the statute to conclude that *any* facially neutral practice that any group has ever used runs afoul of the language of Section 2.[161] But perhaps that overstates the claim. It's not that the voting practice or procedure has *ever* been used by a racial group. It's that, as Professor Karlan notes, the practice or procedure—say, early voting or Sunday voting—has been "disproportionately" used by (in this case) black voters, and that a cutback on the practice or procedure would "disproportionately" burden black voters.[162] That is, overcoming "new or different burdens" would qualify as "less opportunity."[163] But even here, the Court's consistent rejection of importing a non-retrogression standard from Section 5 into Section 2 makes the introduction of the Democracy Ratchet problematic. And there is a constitutional concern too: if Section 2 is construed too broadly, it might exceed Congress's powers under the Reconstruction Amendments.[164]

Put another way, the text of the statute requires "less opportunity"—not "fewer opportunities."[165] The simple fact that voters have benefited from a mechanism in the past, and that mechanism no longer exists, cannot be enough. "Less opportunity" in the context of vote dilution includes a finding that the majority racial voting block votes "usually to defeat the minority's preferred candidate."[166] Likewise, elimination of a voting mechanism—or the lack of a voting mechanism in a non-Democracy Ratchet context—that would work to "usually" defeat the minority's ability "to participate in the political process and to elect representatives of their choice" might rise to the level of a Section 2 violation.[167] The abolition of a voting opportunity alone is not enough to assert "less opportunity."

Importing non-retrogression into Section 2 would also exacerbate the problem for states trying to justify election laws. With Section 5 preclearance, jurisdictions would go to the Department of Justice or a three-judge panel, with a fairly settled

---

159. Feldman v. Ariz. Sec'y of State's Office, 843 F.3d 366, 402–03 (9th Cir. 2016).

160. *Id.*

161. *See, e.g.*, Ohio Democratic Party v. Husted, 834 F.3d 620, 628–30 (6th Cir. 2016); Frank v. Walker, 768 F.3d 744, 754 (7th Cir. 2014).

162. Karlan, *Getting Results*, *supra* note 150, at 770–71.

163. *Id.* at 774.

164. *See, e.g.*, Michael T. Morley, *Prophylactic Redistricting? Congress's Section 5 Power and the New Equal Protection Right to Vote*, 59 WM. & MARY L. REV. 2053, 2059–62 (2018) (considering the validity of Section 2 under the Reconstruction Amendments' Enforcement Clauses); Pitts, *supra* note 100, at 758 n.84. *See generally* Muller, *Judicial Review*, *supra* note 79 (discussing litigation surrounding the Voting Rights Act).

165. *See infra* notes 315–316 and accompanying text.

166. Thornburg v. Gingles, 478 U.S. 30, 31 (1986); *see supra* notes 120–125 and accompanying text.

167. *Gingles*, 478 U.S. at 43, 49–51.

expectation of what they needed to demonstrate out of the legislative process.[168] Reading non-retrogression into Section 2, however, the parties would head directly to court, before a single district court judge, with an ordinary litigation posture but an expectation that the defendant carries a heavier burden than has typically been required under Section 2 claims.

Rethinking how Section 2 claims ought to look, then, there must necessarily be a "gap" left by the demise of Section 5. Some practices that constituted "retrogression" under Section 5 cannot constitute "less opportunity" under Section 2; otherwise, Section 2 would, at the very least, be coextensive with Section 5, and even broader given its national application. That would not only render Section 5 historically superfluous—an anachronistic take at best—but also contradict existing Court precedent on how to construe Section 2 differently from Section 5. It's essentially the reverse of *Reno v. Bossier*: just as Section 2 standards cannot be imported into Section 5, Section 5 standards cannot be imported into Section 2.[169]

So what kinds of practices might fail the non-retrogression standard but still pass muster under Section 2? It could be the case that this gap is somewhat narrow, or at least apparently narrow given the posture of the cases courts see. It may be that litigants are challenging the most egregious laws (but perhaps out of a preference for challenging the laws they consider, and perhaps subjectively, to be the most egregious—particularly statewide laws). It might be that more modest changes, some of which may have failed Section 5—the closing of certain polling place locations, for instance, unless the jurisdiction affirmatively demonstrated that the change would not have a retrogressive impact—are not so dramatic and have not garnered much attention from litigants.

Recent proposals to use Section 2 to address changes to election laws are best when they avoid the peril of reading retrogression back into the statute. Changes to election laws remain a relevant part of the inquiry, but their relevance arises as a matter of evidence that can be introduced to demonstrate that minority voters have "less opportunity" than others. Put differently, the Democracy Ratchet is not a substantive component of Section 2. It is simply a means of demonstrating that, under the "totality of the circumstances," the plaintiffs may win under Section 2—an evidentiary claim.[170]

In contract, one suggests that incorporating the Democracy Ratchet into Section 2 itself would provide this portion of the Voting Rights Act with a consistent standard operating within this broader legal framework. The legal standard is fairly open-ended: "less opportunity," for example, is hardly a term of precision. Courts, then, might look at the overall purpose of the statute in question and evaluate changes to election laws given a broader statutory framework. For instance, Professor Karlan has noted that because the Voting Rights Act is designed to ensure broad opportunities for voters to take advantage of election procedures and practices, the statute ought to be applied so that it best achieves these ends.[171] The Democracy Ratchet would be one such tool to achieve those ends.

---

168. *See supra* Section III.A.1 (describing preclearance regime under Section 5).
169. *See supra* Section III.A.3.
170. *See infra* Section IV.A.
171. Karlan, *Getting Results*, *supra* note 150, at 771–72.

But this interpretation risks smuggling a Section 5 non-retrogression analysis back into the statute, something flatly forbidden.[172] Furthermore, such an interpretation may overstate the "opportunities" available to voters under the status quo, inflate the burden placed upon them, and understate the costs of changing the law.[173] The Democracy Ratchet may still play a role, but simply an evidentiary or remedial role—separate from the substantive elements of a Voting Rights Act claim.[174]

6. Revisiting the Development of the Democracy Ratchet

Finally, to return to the descriptive claim from earlier: why has the Democracy Ratchet attracted such attention in Section 2 claims? Undoubtedly, litigants question new election laws and challenge them in court, and courts have become skeptical of new election laws.[175] Indeed, after *Shelby County*, it simply became easier for states to change their election laws—and many did so, to the consternation of those who endorsed a robust Section 5.[176] After all, that was precisely what states could do.

Commentators skeptical of *Shelby County* sought alternative ways to preserve the essential elements of Section 5 through not simply Section 2[177] but existing law[178] or new legislation.[179] For supporters of Section 5 who lamented the Court's decision in *Shelby County*, filling the gap left after *Shelby County* has been an understandably natural focus. But *Shelby County* still controls, and there is no preclearance under Section 5 of the Voting Rights Act at the moment. Until Congress acts, it is simply the case that changes to election laws receive no kind of heighted judicial scrutiny under the Voting Rights Act. Section 2 does not demand it, no matter how much litigants and supporters of Section 5 may desire it.

B. The Burdick *Balancing Test*

Another major way for litigants to challenge election laws is under a test commonly known as the *Burdick* balancing test. It derives from a series of cases

---

172. *See supra* Section III.A.3.

173. *See supra* note 161 and accompanying text; *infra* Section V.A.

174. *See infra* Section IV.A.

175. *See supra* Section II.A.

176. *See, e.g.*, Tomas Lopez, *'Shelby County': One Year Later*, BRENNAN CTR. FOR JUST. (June 24, 2014), http://www.brennancenter.org/analysis/shelby-county-one-year-later [https://perma.cc/L9PR-FHSN] (identifying string of changes to election laws after *Shelby County*).

177. *See supra* Section III.A.3.

178. *See, e.g.*, Anthony J. Gaughan, *Has the South Changed?* Shelby County *and the Expansion of the Voter ID Battlefield*, 19 TEX. J. ON C.L. & C.R. 109 (2014); Stephanopoulos, *supra* note 60, at 71; Michael Ellement, *Precelarance Without Statutory Change: Bail-In Suits Post-*Shelby County, YALE L. & POL'Y REV. INTER ALIA (Sept. 7, 2013, 11:45 AM), https://ylpr.yale.edu/inter_alia/preclearance-without-statutory-change-bail-suits-post-shelby-county [https://perma.cc/SU8D-NCAA].

179. *See, e.g.*, James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote*: Shelby County v. Holder, 8 HARV. L. & POL'Y REV. 39 (2014); Samuel Issacharoff, Comment, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013); Spencer Overton, *Voting Rights Disclosure*, 127 HARV. L. REV. F. 19 (2013).

involving the freedom of voters and candidates to associate with one another by means of the ballot.

1. Voting and Association

The First Amendment includes no express guarantee of the "freedom of association."[180] But in 1958, the Court examined an attempt by the Alabama Attorney General to force the National Association for the Advancement of Colored People (NAACP) to disclose its membership list.[181] The Court concluded that the right asserted by members of the NAACP was a freedom of association: "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[182] By choosing to root the freedom of association in the Due Process Clause and the First Amendment,[183] the Court acknowledged "the close nexus between the freedoms of speech and assembly."[184]

The Court wasted no time in introducing the doctrine into ballot access disputes. By the 1960s, the Court had already begun to inject itself into traditionally state-administered areas of election law.[185] And ten years after *NAACP v. Alabama*, the Supreme Court found that the state-administered ballot included an associational right.[186] In 1968, the Court examined a challenge to Ohio's ballot access law.[187] Ohio required presidential candidates nominated by new parties to secure voter-signed petitions totaling at least fifteen percent of the ballots cast in the previous gubernatorial election.[188] Republican and Democratic candidates qualified for ballot space if their parties secured just ten percent.[189] In its decision in *Williams v. Rhodes*, the Court identified "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of

---

180. Some portions of this subsection have been adapted from Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693 (2016).

181. NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 451 (1958).

182. *Id.* at 460.

183. *Id.*

184. *Id*. This freedom would eventually be identified more clearly by the Supreme Court as a component of the First Amendment. *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 82–96 (2012) (discussing the evolution of the freedom of association after *NAACP*).

185. *See, e.g*., Derek T. Muller, *Perpetuating* "*One Person, One Vote*" *Errors*, 39 HARV. J.L. & PUB. POL'Y 371, 375–78 (2016) [hereinafter Muller, *One Person, One Vote*] (discussing federal courts' use of the Equal Protection Clause to invalidate state election laws); Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603, 607–08 (2001) (discussing how the Court has found election disputes to be justiciable).

186. *See generally* Tokaji, *Voting Is Association*, *supra* note 2 (discussing the relationship between the First Amendment associational right and the Fourteenth Amendment right to vote).

187. Williams v. Rhodes, 393 U.S. 23 (1968).

188. *Id.* at 24–25.

189. *Id.* at 25–26.

qualified voters, regardless of their political persuasion, to cast their votes effectively."[190]

Even if a candidate did not appear on the ballot, the Court acknowledged that individuals could associate for political purposes in the public sphere.[191] They could organize a political party, they could hold meetings, and they could assemble in public places or private homes.[192] But the Court did not limit the guarantee of association to these previously enumerated opportunities to engage in political speech. Alternative avenues of engagement existed, but they were insufficient. Instead, the Court extended the guarantee to include a right to associate in a particular forum: the ballot.[193] The Court explained, "[t]he right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."[194] This right of association is not effective enough unless it applies to the ballot, because alternative means of association are not enough.[195] The right to cast an effective or meaningful ballot, then, is also an element of the freedom of association.[196]

Like most other rights secured by the Constitution, the right of voters to associate with candidates on the ballot is not absolute. Circumstances may permit the state to regulate the ballot to burden individuals' right to associate. In *Rhodes*, the Court found that there were "unequal burdens on minority groups where rights of this kind are at stake," which meant that a burden-imposing state must proffer "a compelling state interest."[197] Ohio failed to justify the burden.[198] Its proffered interests in burdening minor parties—promoting the stability of the two-party system, ensuring that winners earn a majority of the vote, and the like—were legitimate interests, but

---

190. *Id.* at 30 (citing NAACP v. Alabama *ex rel*. Patterson, 357 U.S 449, 460 (1958)) ("We have repeatedly held that freedom of association is protected by the First Amendment."); *see* INAZU, *supra* note 184, at 82–96.

191. *Rhodes*, 393 U.S. at 30.

192. *See id.* at 60 (Stewart, J., dissenting). Many election law cases continue to refer to these as Equal Protection claims. *See, e.g.*, *infra* notes 205–207 and accompanying text.

193. *Rhodes*, 393 U.S. at 32.

194. *Id.* at 31.

195. *Accord* Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 192 (1999); Nader v. Blackwell, 545 F.3d 459, 472 (6th Cir. 2008); Moore v. Johnson, No. 14-11903, 2014 WL 4924409, at *4 (E.D. Mich. May 23, 2014); *cf.* Meyer v. Grant, 486 U.S. 414, 424 (1988) ("That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression.").

196. *See* Anderson v. Celebrezze, 460 U.S. 780, 787–88 (1983); *Rhodes*, 393 U.S. at 30–31; Rosen v. Brown, 970 F.2d 169, 176 (6th Cir. 1992).

197. *Rhodes*, 393 U.S. at 31 ("[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.").

198. *Id.*

they were not enough.[199] The State could not "justify the very severe restrictions on voting and associational rights," and its defense failed.[200]

The Court considered a ballot access law again, three years later, in *Jenness v. Fortson*.[201] There, a Georgia law permitted ballot access for an independent candidate if the candidate had a petition signed by at least five percent of registered voters.[202] Political parties whose candidates received at least twenty percent of the vote would automatically qualify for ballot access.[203]

> So far as the Georgia election laws [were] concerned, independent candidates and members of small or newly formed political organizations [were] wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish[ed]. They may [have chosen to] confine themselves to an appeal for write-in votes. Or they [might have sought], over a six months' period, the signatures of 5% of the eligible electorate . . . . If they [chose] the latter course, the [path to ballot access was open to them].[204]

The Court concluded that "nothing" in this system "abridges the rights of free speech and association secured by the First and Fourteenth Amendments."[205] Then it rejected a claim under the Equal Protection Clause.[206]

Since *Rhodes* and *Jenness*, the Court's opinions have emphasized the *voters'* rights to associate with candidates—voters' rights to associate for political ends or to choose among candidates.[207] The Court's examinations turn primarily on rights of

---

199. *Id.* at 31–34.
200. *Id.* at 32.
201. 403 U.S. 431 (1971).
202. *Id.* at 432.
203. *Id.* at 433.
204. *Id.* at 438.
205. *Id.* at 440.
206. *Id.* at 440–42.
207. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 786 (1983) ("Our primary concern is with the tendency of ballot access restrictions 'to limit the field of candidates from which voters might choose.' Therefore, '[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.'") (quoting Bullock v. Carter, 405 U.S 134, 143 (1972)); Communist Party of Ind. v. Whitcomb, 414 U.S. 441, 449 (1974) (rejecting loyalty oath for political party because it interfered with the party's candidates, and burdened voters' "access to the ballot, rights of association in the political party of one's choice, interests in casting an effective vote and in running for office"); Kusper v. Pontikes, 414 U.S. 51, 51 (1973) (finding that a twenty-three month prohibition on voting in a primary election of a political party if the voter previously voted in another party's primary "unconstitutionally infringes upon the right of free political association protected by the First and Fourteenth Amendments"); *see also Anderson*, 460 U.S. at 806 ("We began our inquiry by noting that our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused."). The Equal Protection line of cases, in which the Court examines whether the ballot access rules for similarly situated candidates are available on equal terms, does not put the same emphasis on the voters' rights. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351, 357–58 (1997).

voters to associate with these candidates and cast a ballot for the candidate of their choice.[208]

2. Balancing Tests

These early ballot access disputes ultimately led the Court to develop the balancing test that dominates election administration litigation today. A leading case in the area is *Anderson v. Celebrezze*.[209] There, the Court scrutinized an Ohio law that required independent candidates running for president to file a nomination petition and statement of candidacy the March before the November election.[210] The Court determined that the appropriate test required "weighing" a series of factors.[211] These included the "character and magnitude" of the injury to the constitutional rights at issue, the interests of the state in creating the burdens that impact those constitutional rights, and the extent to which the burdens are necessary to achieve the state's interests.[212] It then concluded that the March filing deadline did not further the state's proffered interests: educating voters, treating parties equally, and political stability.[213]

In *Burdick v. Takushi*, the Supreme Court examined a challenge to Hawaii's write-in candidate prohibition.[214] It articulated a fuller explanation of the *Anderson* balancing test as follows:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions,

---

208. *See, e.g.*, *Anderson*, 460 U.S. at 792 ("It is clear, then, that the March filing deadline places a particular burden on an identifiable segment of Ohio's independent-minded voters."); Clements v. Fashing, 457 U.S. 957, 965 (1982) ("The Court has recognized, however, that such requirements may burden First Amendment interests in ensuring freedom of association, as these requirements classify on the basis of a candidate's association with particular political parties. Consequently, the State may not act to maintain the 'status quo' by making it virtually impossible for any but the two major parties to achieve ballot positions for their candidates."); *see also* Rosen v. Brown, 970 F.2d 169, 175 (6th Cir. 1992) ("The primary concern in any ballot access case is not the interests of the candidate but of the voters who support the candidate and the views espoused by the candidate.").

209. 460 U.S. at 780.

210. *Id*. at 782–83.

211. *Id.* at 789.

212. *Id.*

213. *Id.* at 796–806.

214. 504 U.S. 428 (1992).

> the regulation must be "narrowly drawn to advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.[215]

Restated, a court must identify the "character and magnitude" of the injury based on the state's proffered "precise interests" and the "extent" of the "burden" on the plaintiff.[216] In practice, after an examination of the facts, the court tends to make a rather conclusory statement about the nature of the injury. A court's characterization of the character and magnitude of the law—as "severe" or "reasonable [and] nondiscriminatory"—triggers the level of appropriate scrutiny.[217] "Severe" burdens must be "narrowly drawn" to achieve a "compelling interest."[218] But a "reasonable [and] nondiscriminatory" burden "generally" survives judicial scrutiny pursuant to the state's "important regulatory interests."[219]

Burdick involved a challenge to Hawaii's ban on counting write-in votes.[220] The Court concluded that "any" burden imposed was a "very limited" one because candidates had ample opportunities to obtain ballot access.[221] That meant Hawaii's law easily passed constitutional scrutiny.[222]

But *Burdick* would offer a framework that could be applied to far more election law situations than ballot access disputes. It is, admittedly, an ad hoc and open-ended test.[223] And it would extend to election administration cases more generally. The ballot access disputes in *Anderson* and *Burdick* would offer a kind of safety valve for federal courts to scrutinize state election laws. And the introduction of the *Burdick* framework into "nuts and bolts" election administration cases has not proved as smooth.

In *Crawford v. Marion County Election Board*, the Supreme Court considered a challenge to Indiana's voter identification law and used the *Burdick* balancing test.[224]

---

215. *Id.* at 434 (citations omitted).

216. "'Character' references the type of burden the State places on voters . . . . 'Magnitude' references the severity of the State's burden on voters." Michael J. Gabrail, Misapplication: The Rush to Equal Protection and How the Lower Courts Have Misapplied the "Character and Magnitude" Analysis to Equal Protection Claims Against Election Law 6 (unpublished manuscript on file with the *Indiana Law Journal*).

217. *Burdick*, 504 U.S. at 434.

218. *Id.*

219. *See, e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 97 (2014).

220. *Burdick*, 504 U.S. at 428.

221. *Id.* at 435–37.

222. *Id.*

223. *See, e.g.*, Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI. LEGAL F. 279, 282–83, 297 (2015) (arguing that the *Anderson-Burdick* test is too subjective and ad hoc and recommending a more objective approach to identifying violations of the right to vote rooted in Section 2 of the Fourteenth Amendment).

224. Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) (plurality opinion).

The plurality characterized the law as "a limited burden on voters' rights"[225] and the concurrence described it as a "generally applicable, nondiscriminatory voting regulation."[226] Unsurprisingly, then, Indiana's law was justified by at least three "legitimate" interests: modernizing elections, preventing voter fraud, and safeguarding voter confidence.[227]

The "balancing" test often functions as a simple binary formula. If the burden is severe, it must pass strict scrutiny; if the burden is slight, it must pass something like rational basis scrutiny.[228] As a relatively binary formula, it often yields a binary result: if the legislative burden is severe, it is usually deemed a violation of the right to associate; if it is not severe, the regulation is typically upheld.[229]

Often, but not always. *Crawford* offered at least two major opportunities for increased judicial scrutiny of such laws. First, the *Crawford* three-Justice plurality suggested that the proper measure for evaluating the burden of election laws should be to examine the burden placed upon the affected group.[230] In *Crawford*, that meant examining the "small number of voters" who may experience a "special burden."[231] The record demonstrated no "'excessively burdensome requirements' on any class of voters."[232] Justice Scalia concurred in the judgment with two other Justices and argued that the Court precedent demanded that the Justices examine a "generally applicable, nondiscriminatory voting regulation" from the perspective of "voters generally," not a particularized group of voters.[233]

Second, the *Crawford* plurality offered not so much a binary formula, but a "flexible standard" that required some evaluation of the nature of the burden.[234] Justice Scalia concurred in the judgment to dispute this claim, arguing that a "two-track" approach was appropriate and more consistent with the Court's precedents.[235]

---

225. *Id.* at 202–03 (plurality opinion) (quoting *Burdick*, 504 U.S. at 439).

226. *Id.* at 205 (Scalia, J., concurring).

227. *Id.* at 191–97 (plurality opinion).

228. *See id.* at 204–06 (Scalia, J., concurring).

229. *See, e.g.*, Franita Tolson, *Protecting Political Participation Through the Voter Qualifications Clause of Article I*, 56 B.C. L. REV. 159, 207–10 (2015) (discussing courts' rulings on voter identification laws, and the severity of the states' burden). Occasionally, courts strike down a limited burden on voters' rights. *See, e.g.*, Cotham v. Garza, 905 F. Supp. 389, 391 (S.D. Tex. 1995) (striking down law that prevents voters from bringing personal notes into the voting booth). Additionally, courts may uphold a substantial burden. *See, e.g.*, Nat'l Right to Life Political Action Comm. v. Lamb, 202 F. Supp. 2d 995, 1017–20 (W.D. Mo. 2002), *aff'd sub. nom.* Nat'l Right to Life Political Action Comm. v. Connor, 323 F.3d 684 (8th Cir. 2003) (upholding Missouri law that requires political action committees to appoint a Missouri resident as treasurer if it intends to spend more than $1500 in a state election).

230. *Crawford*, 553 U.S. at 191.

231. *Id.* at 200.

232. *Id.* at 202 (citing Storer v. Brown, 415 U.S. 724, 738 (1974)).

233. *Id.* at 205–08 (Scalia, J., concurring).

234. *Id.* at 190 n.8 (plurality opinion); *see also* Justin Levitt, *Crawford—More Rhetorical Bark than Legal Bite?*, BRENNAN CTR. FOR JUST. (May 2, 2008), http://www.brennancenter.org/blog/crawford-more-rhetorical-bark-legal-bite [https://perma.cc/Y6R7-N34M].

235. *Crawford*, 553 U.S. at 205–06 (Scalia, J., concurring).

By permitting courts to focus exclusively on the group burdened, *Crawford* increased the likelihood that a generally applicable voting regulation would be found excessively burdensome. After all, if the law only directly impacts a subset of the voting population, the burdens placed upon that subset are likely to be greater when considered in isolation than when considered across all voters generally. This, of course, was of cold comfort to the plaintiffs in *Crawford*, who failed to garner sufficient evidence to demonstrate that they had been meaningfully burdened, and because the state's fairly generic interests were sufficient to sustain the voter identification law.[236]

3. The Democracy Ratchet and Balancing Tests

The *Burdick* balancing test, as applied in election administration cases in *Crawford*, may well have a component that resembles the Democracy Ratchet.[237] When considering the "burden" placed upon voters, courts do not evaluate claims in a vacuum. They are considering the evidence of the things prospective voters must do before they can vote.

Crawford presents some major opportunities for prospective litigants. First, like challenges under Section 2 of the Voting Rights Act, plaintiffs can demonstrate they are members of a disproportionately affected group, like the group who lacked proper voter identification established in *Crawford*. For a group that previously took advantage of an opportunity no longer available to it because of a change to the election law, that group can point to the language from *Crawford* that identifies the group as the appropriate place to begin an analysis of the *Burdick* balancing.[238]

---

236. *See id.*

237. I am grateful to several commenters who wondered whether the right to vote as a "fundamental right" meant that the Democracy Ratchet may have greater salience. I am reluctant to conclude so. The typical "fundamental" right to vote cases have had the greatest significance in vote denial or voter eligibility cases, see, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666–68 (1966); and in "one person, one vote" cases, see, e.g., *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964). But as *Burdick* balancing demonstrates, this language of "fundamental rights" does not appear to have as great a salience in other contexts like ballot access rules and election administration. And even in other classic "fundamental" right to vote cases, the Court has been inconsistent. *See generally* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143 (2008). For present purposes, I focus on the existing frameworks the Supreme Court has provided rather than addressing a "fundamental rights" context—at times, the right to vote may be sufficiently burdened, and laws so burdening it may be subject to heightened scrutiny. *Cf.* Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of* Bush v. Gore, 81 GEO. WASH. L. REV. 1865 (2013).

238. The plurality's decision in *Crawford* assuredly does not have binding precedential value. Six Justices agreed that the proper measure of a burden was on the affected group. *See Crawford*, 553 U.S. at 197, 200–03 (plurality opinion); *id.* at 211–14 (Souter, J., dissenting); *id.* at 238–39 (Breyer, J., dissenting). But this holding was not essential to the opinion. The essential element of the opinion was affirming that the voter identification law was not sufficiently burdensome, whether the burden was measured via a subset of voters, see *id.* at 203 (plurality opinion), or measured via voters generally, see *id.* at 205–07 (Scalia, J., concurring in the judgment). That is not to say that some courts have not quickly embraced

Second, plaintiffs have more opportunities to demonstrate the burdens placed upon them by the "flexible standard" theory of burden. Changes to election laws are often less onerous than a strict photo identification law like the one adopted in *Crawford*,[239] which would generally put claimants in a "less onerous" category of laws, if not the "slight" burden from the *Burdick* test. A flexible standard, however, provides a greater opportunity to persuade a court that the law impermissibly burdens a group of voters.

Third, with a comparative benchmark, courts can look to past practice to determine the substantiality of the burden. The more people affected by the law, the greater the impact. The record in a case like *Crawford* was fairly sparse because the law had not yet been implemented, and the Court was forced largely to speculate about the potential burden the identification law would place on voters. In contrast, a change to an existing law offers more ready evidence for plaintiffs to present about the burdens they face with the loss of a pre-existing voting practice or procedure.

These are all reasons why litigants might have certain advantages in raising claims under the Democracy Ratchet. But they do not necessarily mean that the *Burdick* balancing test itself embraces a Democracy Ratchet as a substantive element of the claim. Indeed, *Burdick*, as used in *Crawford*, and the practice of the Court in similar balancing cases, has not done so. And other federal courts in the voter identification context suggest that the change in the law is not the essential touchstone—or even something to consider. Voter identification laws, as the *Crawford* plurality noted, inevitably "inconvenience" a set of voters, and undoubtedly place a "burden" upon them. But courts considering voter identification laws seldom consider the burdens on voters before and after the identification law has been implemented. Instead, they simply evaluate the nature of the burden placed upon voters in the context of what they believe to be acceptable, based on the demonstrated record before them.[240]

Another complication is that the *Burdick* balancing test was originally developed as a kind of safety valve for ballot access laws that blocked minor party political candidates. It may not be as well-suited for the sprawling election law claims that they've been used for in the last few decades.[241] That said, the *Burdick* balancing test for ballot access cases has long resisted incorporating a ratchet. The series of cases discussed above—*Rhodes*, *Jenness*, *Anderson*, and *Burdick*—each focus exclusively on the impact of the new law, not a comparison of the new law against the old law.[242]

---

the plurality's practice. *See, e.g.*, *supra* Section II.D. But it is to say that it is not controlling precedent. For more on the best way to understand such a plurality opinion, see Ryan C. Williams, *Questioning* Marks*: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795 (2017).

239. *Crawford*, 553 U.S. at 185–86.

240. *See, e.g.*, *id.* at 200–02 (addressing facial challenge); *see also supra* Section II.A. (discussing pre-enforcement actions challenging new laws).

241. *See, e.g.*, Muller, *Ballot Speech*, *supra* note 180, at 721–28 (identifying weaknesses of extending *Burdick* balancing test outside the ballot access context).

242. *See, e.g.*, Tripp v. Scholz, 872 F.3d 857 (7th Cir. 2017), a routine examination of a new ballot access law that burdens candidates and political parties. The court's analysis closely tracks the Supreme Court's in measuring the burdens, not comparing the new burden to the old burden.

C. Other Causes of Action

The Voting Rights Act and the *Burdick* balancing test are the two most popular causes of action that invoke the Democracy Ratchet. But other causes of action, including a *Bush v. Gore*-style challenge, are possible sources of challenges.

Courts have occasionally invoked the equal protection claim in *Bush v. Gore*[243] when considering election law-related litigation. I hesitate even to raise *Bush v. Gore*. First, one must address the threshold inquiry of whether *Bush v. Gore* stands for any broader proposition beyond Florida's presidential election controversy in 2000.[244] Given that the Supreme Court has never cited it in any case in the ensuing eighteen years except once in a dissenting opinion for a proposition unrelated to its core holding,[245] one might wonder whether it has any applicability in election law cases going forward.[246]

But the per curiam opinion in *Bush v. Gore* did turn on an equal protection issue. The Court found that the Florida Supreme Court failed to adopt uniformity in a statewide recount, lacking "some assurance that the rudimentary requirement of equal treatment and fundamental fairness are satisfied."[247] A recount based on ad hoc, county-based recount standards yielded an "arbitrary and disparate treatment to voters in different counties."[248]

The Ohio early voting case expanded this proposition significantly. First, it applied *Bush v. Gore* in a case concerning a "burden[] on the fundamental right to vote" rather than disparate treatment of ballots in a recount.[249] Additionally, *Bush v. Gore* was concerned with disparate treatment after Election Day in the context of that very election—a new change to the recount procedures, adopted after Election Day and during a recount that had a disparate treatment of different ballots.[250]

The Sixth Circuit extended that holding in a somewhat dubious direction:

> Moreover, while *Bush v. Gore* did involve disparate treatment, rather than burdens on the fundamental right to vote, we nonetheless find its motivating principle instructive in the present case given that the Equal Protection Clause can be triggered by either disparate treatment or burdens. That is, "[h]aving once granted the right to vote on equal terms"—such as expanding early voting opportunities—"the State may not, by later arbitrary and disparate treatment, value one person's vote

243. 531 U.S. 98 (2000) (per curiam).

244. *See id.*

245. *See* Arizona v. InterTribal Council of Arizona, Inc., 570 U.S. 1, 35 n.2 (Thomas, J., dissenting) (quoting *Bush v. Gore* to emphasize the state's plenary power to choose the manner of appointing presidential electors, which cited *McPherson v. Blacker*, 146 U.S. 1 (1892)).

246. *See, e.g.*, Hasen, *supra* note 237.

247. *Bush*, 531 U.S. at 109 (per curiam).

248. *Id.* at 107.

249. Ohio State Conf. of NAACP v. Husted, 768 F.3d 524, 542 n.4 (6th Cir. 2014) *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

250. *Bush*, 531 U.S. at 100–04 (per curiam).

> over that of another"—for example, by making it substantially harder for certain groups to vote than others.[251]

But this cannot be the case. Not every subsequent change to any election law, particularly to laws that would prospectively apply in subsequent elections, runs afoul of the equal protection principle in *Bush v. Gore*. Extending the case from disparate treatment to voter burdens is one thing. But extending it from a change in treatment in a single election to a change in treatment across elections is far more attenuated. It may also be a reason few courts have followed suit to broaden the scope of application of *Bush v. Gore*.[252]

IV. AN EVIDENTIARY AND REMEDIAL DEMOCRACY RATCHET

Litigants, and courts, have begun to adopt the Democracy Ratchet. But, as this Article has demonstrated, there are good reasons to doubt that *any* of the major federal causes of action in election law disputes embrace the Democracy Ratchet.[253] That there are reasons to explain the use of the Democracy Ratchet, or to offer some basis for tying it to existing legal standards, hardly means that the Democracy Ratchet is the *right* tool for courts to use. Therefore, what role (if any) for the Democracy Ratchet?

This Article offers a modest role for the Democracy Ratchet as an evidentiary device and a readily available remedy. First, courts still face difficulties assessing the impact of changes to election laws. They also lack sufficient quantitative evidence to address the merits of these underlying disputes. And they lack judicially manageable benchmarks to examine these claims. These all point toward using the Democracy Ratchet as a useful evidentiary device, a judicially administrable benchmark, and a readily available remedy.

---

251. *Husted*, 768 F.3d at 542 n.4.

252. An alternative approach that might embrace a substantive Democracy Ratchet has been suggested by Professor Ned Foley. He has argued that the Due Process Clause might be a better place for these types of claims. He would invite judges to engage in a balancing test, "weighing the degree to which the change in voting rules upsets reasonably settled expectations concerning the operation of the voting process against the strength of the government's nonpartisan reasons for making the change." Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655, 741 (2017). Professor Foley's analysis is an intriguing proposal under the Due Process Clause and would incorporate a more substantive ratchet. *See id.* This Article focuses on how courts have used existing legal claims rather than proposing a new claim as Professor Foley recommends. But a discussion of whether, and how, to view "vested rights" under the Due Process Clause is an intriguing theory worthy of serious and ongoing discussion. Indeed, the expectations of voters may well be a part of a kind of "endowment effect," as voters may value opportunities they now have rather than opportunities they never had. *Cf.* Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991). The legal effect of such expectations, however, is another matter.

253. *See supra* Part III.

A. Difficulty Assessing the Likely Impact of a Law

Courts regularly grapple with how to measure the impact of a voting practice under these substantive legal standards. Courts must generally do their best to evaluate the prospective impact of a law, hardly a challenge unique to the election law context. But many judicial struggles likely arise from the fact that the right to vote, as a political right, never received the kind of judicial protection that today's contemporary causes of action provided.

Historically, if one were denied the right to vote, one could sue for damages.[254] The *writ quo warranto* permitted an election challenger to sue the certified winner and claim a right to the seat.[255] Another remedy might exist in legislatures, both in Congress and in the states, which have the power to judge the "Elections, Returns and Qualifications" of its members.[256]

But courts, beginning in the 1960s and particularly after *Baker v. Carr*,[257] increasingly found themselves fashioning remedies to protect the right to vote. Congress's mandate under the Voting Rights Act required courts to assess the burdens that changes to election laws might have on racial minorities.[258] The broad judicial development of the freedom of association continue to inject the federal courts into reviewing the mechanics of elections.[259] And *Bush v. Gore* invited courts to review even the "nuts and bolts" of election administration.[260] Courts, now tasked with these new legal responsibilities, began to fashion rules to help them adjudicate whether the facts surrounding an election law-related controversy would permit plaintiffs to succeed.

General evidentiary principles arose in these cases. In vote dilution claims under Section 2, the Supreme Court emphasized that results from several elections are more probative than a single election.[261] A single election might be an outlier—particularly a midterm election.[262] A change to an existing set of election laws, then, offers courts

---

254. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 283–89 (1962) (Frankfurter, J., dissenting) (describing precedent); Nixon v. Herndon, 273 U.S. 536, 539 (1927) (describing a damages action for five thousand dollars against state officer for refusing to permit a citizen to vote).

255. *See, e.g.*, Case Note, *Quo Warranto—Scope of Action—Not Available as Writ of Review*, 31 YALE L.J. 662 (1921).

256. *See, e.g.*, U.S. CONST. art. I, § 5, cl. 1; *see also* Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1 (2013); Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. 359 (2017); Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559 (2015); Paul E. Salamanca & James E. Keller, *The Legislative Privilege to Judge the Qualifications, Elections, and Returns of Members*, 95 KY. L.J. 241 (2006).

257. *Baker*, 369 U.S. 691; *see also* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (concluding that African American voters could raise a constitutional challenge in federal court to Alabama legislature's redrawing the city boundaries of Tuskegee to exclude those voters).

258. *See supra* Section III.A.

259. *See supra* Section III.B.

260. *See supra* Section III.C.

261. *See* Thornburg v. Gingles, 478 U.S. 30, 74–77 (1986).

262. N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 232 (4th Cir. 2016).

the benefit of looking back at past practice and evaluating the actual number of times voters took advantage of a previously available election law-related opportunity.

Accordingly, in voter identification litigation, courts have sometimes struggled to evaluate predictions of future voting behavior and the effect a law may have on turnout. In voter identification litigation before the Seventh Circuit, Judge Frank Easterbrook explained, "the parties and the district court have tried to make predictions about the effects of requiring photo ID, but the predictions cannot be compared with results."[263] Voter identification litigation, therefore, might typically explore the projected number of eligible or registered voters who lack the proper identification, which, in the view of courts evaluating such laws, has been the way to engage in prospective assessment.[264] Indeed, this is precisely the approach taken in *Crawford*.[265]

B. Insufficient Quantitative Evidence

There are challenges in evaluating changes to election laws. What, then, should courts do when confronting litigation with a lack of quantitative evidence? Courts cannot measure whether turnout has changed until *after* an election (and even then, isolating causes can still be a challenge). Nevertheless, they do their best to address the law with the evidentiary record before them, even if it involves some speculation. The Ninth Circuit identified this precise problem when assessing Arizona's ballot harvesting law.[266]

When invoking the Democracy Ratchet, proponents may be quick to note that quantitative evidence is not necessary to succeed on the substantive underlying legal claim. Consider the "totality of the circumstances" test for Section 2.[267] Professor Karlan notes that measuring the turnout effects of a law can be "extraordinarily

---

263. Frank v. Walker, 768 F.3d 744, 747 (7th Cir. 2014).

264. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008) (plurality opinion); Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016); Lee v. Va. State Bd. of Elections, 843 F.3d 592 (4th Cir. 2016); *McCrory*, 831 F.3d 204; *Frank*, 768 F.3d 744.

265. *See supra* Section III.B.2.

266. Feldman v. Ariz. Sec'y of State's Office, 843 F.3d 366, 401 (9th Cir. 2016) (dissent adopted en banc) ("One cannot statistically test the real world effect of a rule in the abstract; it can only be measured by actual voting data. In other words, imposition of the district court's proposed rule would mean that there could never be a successful pre-election challenge of the burdens placed on minority voting opportunity because no data will have been generated or collected.").

267. *See, e.g.*, Feldman v. Ariz. Sec'y of State's Office, 840 F.3d 1057, 1091 (9th Cir. 2016) ("Although quantitative or statistical measures of comparing minority and white voting patterns certainly may provide important analytic evidence, the district court erred in concluding that they were the exclusive means of proof."); *id.* at 1092 n.5 ("Likely plaintiffs could not rely on a vote denial case for the stated proposition because of the practical reality that in a vote denial case, quantitative evidence of the effect of a rule on voting behavior is only available after an election has occurred, at which point the remedial purpose of the Voting Rights Act is no longer served. Plaintiffs in vote dilution cases, in contrast, can often gather and analyze quantitative data before an election.").

complex," emphasizing that such quantitative evidence "are not a necessary precondition" under Section 2.[268]

Such mathematical demonstrations of proof have not been required in vote denial cases under Section 2 and, more specifically, under Democracy Ratchet cases. And this is an uncontroversial proposition in Section 2 claims. Professor Tokaji has emphasized that "context" matters when considering changes to election laws.[269] As he has argued, "Where a state goes from a more permissive voting rule to a stricter one, plaintiffs will naturally be in a better position to show that the disparate impact could be avoided by a different practice: namely, by introducing evidence on the effect of the practice in effect beforehand."[270] And Professor Karlan has emphasized that changes to election laws should carry some "evidentiary weight."[271] It is useful evidence, to be sure—and far from a quantitative evidentiary requirement.

C. Lack of Superior Alternative Judicially-Manageable Benchmarks

Even if there is little quantitative evidence, courts still must determine whether a state's law impermissibly burdens voters. Indeed, courts often lack quantitative evidence. Courts must turn to other measures to determine whether, and how much, a law burdens voters. And it may be the case that courts and litigants simply lack superior alternative benchmarks for measuring the burden placed on the right to vote, or that they are unwilling to posit alternative benchmarks. That is, it may be the case that the very best evidence at judges' disposal is to compare the new law against the old law and engage in an analysis about the relative change in burden.

Courts have been willing to inject themselves into disputes concerning the right to vote, and they have readily assessed burdens placed upon that right with a judicially developed standard, but one often readily easy to administer. Consider "one person, one vote," a judicial doctrine arising out of the redistricting litigation of the 1960s.[272] The Court's requirement in *Reynolds v. Sims* that districts include equal population did not include much guidance about what equal meant.[273] Over the last sixty years, the Court has ultimately settled that deviations of up to ten percent between the most populous and least populous districts in a state legislative system are usually permissible,[274] although larger deviations have been considered acceptable.[275] In congressional restricting, the Court has typically required something

---

268. Karlan, *Getting Results*, *supra* note 150, at 712–15.

269. *See supra* notes 145–149 and accompanying text.

270. Tokaji, *Applying Section 2*, *supra* note 145, at 478.

271. *See supra* notes 150–155 and accompanying text.

272. *See generally* Muller, *One Person, One Vote*, *supra* note 185.

273. 377 U.S. 533, 576 (1964).

274. *See, e.g.*, Harris v. Ariz. Indep. Redistricting Comm'n, 136 S. Ct. 1301, 1307 (2016) ("[T]hose attacking a state-approved plan must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors . . . .").

275. *See, e.g.*, Voinovich v. Quilter, 507 U.S. 146, 161 (1993); Mahan v. Howell, 410 U.S. 315, 328 (1973).

close to precise mathematical equality.[276] These have provided fairly administrable benchmarks for judicial review.

Or consider the judicial determination that a new majority-minority district ought to be drawn pursuant to Section 2 of the Voting Rights Act.[277] There have been mathematical rules—with some precision—required for a plaintiff to succeed on a vote dilution claim under Section 2. Consider *Thornburg v. Gingles*, which established the "necessary preconditions" for minority voters as a group to establish a single-member district.[278] Faced with the generic language of Section 2, the Court developed a test to determine whether a group has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[279] This Article addressed the contours of this test earlier.[280] The group must be "sufficiently large and geographically compact to constitute a majority,"[281] which has meant a voting population exceeding fifty percent,[282] and a geographic compactness that has precluded a district with a "300-mile gap" between racial minority communities.[283] The group must demonstrate that it is "politically cohesive,"[284] where, for instance, "anywhere from 49% to 67% of the members of a minority group preferred the same candidate."[285] And the group must demonstrate that the "white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, . . . usually to defeat the minority's preferred candidate."[286] The Court was comfortable requiring some history of support before moving ahead under a typical Section 2 vote dilution claim.

Or consider the whole line of ballot access cases, where a court makes a judgment that a particular signature requirement is or is not unduly burdensome.[287] Courts look to the objective burdens placed upon independent and minor-party candidates, not the relative change in burden.[288]

Just because courts are willing (or, in the case of the Voting Rights Act, mandated by Congress) to enter the political fray, does not necessarily mean remedies are so easily available. Having entered the thicket, courts have been more reluctant to fashion remedies that stray too far from a couple of hallmarks: readily available evidence that judges can evaluate, and remedial actions grounded in something

---

276. *See, e.g.*, Karcher v. Daggett, 462 U.S. 725, 727 (1983); White v. Weiser, 412 U.S. 783, 790–92 (1973); Kirkpatrick v. Preisler, 394 U.S. 526, 530–31 (1969).

277. *See supra* Section III.A.

278. 478 U.S. 30 (1986).

279. *Id.* at 36.

280. *See supra* Section III.A.2.

281. *Gingles*, 478 U.S. at 50.

282. Bartlett v. Strickland, 556 U.S. 1, 18–20 (2009).

283. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 432 (2006).

284. *Gingles*, 478 U.S. at 51.

285. Holder v. Hall, 512 U.S. 874, 904 n.12 (1994) (Thomas, J., concurring) (citing Citizens for a Better Gretna v. Gretna, 834 F.2d 496, 501–02 (5th Cir. 1987)).

286. *Gingles*, 478 U.S. at 51.

287. *See supra* Section III.B.

288. *See, e.g.*, Munro v. Socialist Workers Party, 479 U.S. 189, 198 (1986) (examining the burden placed on Socialist Workers Party candidate as a result of a new law, but not comparing the burden to the prior state of the burden); Breck v. Stapleton, 259 F. Supp. 3d 1126, 1131 (D. Mont. 2017); *see also supra* notes 240–242 and accompanying text.

tethered to that evidence. Past voting behavior and other readily discernible evidence are valuable to courts in election law cases.

Perhaps, too, there are worries about courts developing their own standards in areas where they lack guidance, either because the statute is open-ended or they are applying a test derived from a construction of the Constitution. And in this respect, the Democracy Ratchet has the emphatic virtue of the ease of administration.[289] It allows judges to perform a smaller task: they simply compare the old standard to the new standard, without referring to any other more abstract standard about what the "right to vote" looks like.

The legal standards from the Court are notoriously uncertain, anyway. For the *Burdick* balancing test, when is a burden on the right "slight," "substantial," or "severe"? Section 2's "totality of the circumstances" includes a laundry list of factors from a Senate report and a fairly substantial amount of judicial discretion. Professor Christopher Elmendorf has even gone so far as to call Section 2 a common law grant of power to federal courts.[290]

A comparison of the burdens between the old law and the new law provides an anchor for judges, litigants, and legislatures. And the change of law does seem to be *a* relevant factor—new laws should be examined in context. And while this factor may blend in with the absence of evidence,[291] it's really a factor closer to judicial administration.

D. A Remedial Ratchet

Finally, the Democracy Ratchet offers courts a benefit beyond its evidentiary function. It provides courts with a readily available remedy—the existing standard. If a new law is found to impermissibly lessen opportunities for voters or inappropriately burden voters, a court must fashion a remedy. And reverting to the preexisting law offers a readily available remedy.

This slightly diverges from the descriptive reason cited earlier in the preliminary injunction standard. There, courts used the preexisting standard as a justification for preserving the status quo in election law cases.[292] But when fashioning a remedy on the merits of the underlying claim, such as issuing a permanent injunction, courts can easily return to the preexisting state of the law.

Nevertheless, it is worth emphasizing how narrow the Democracy Ratchet looks here. In a dispute over an election law, the remedy would be to enjoin that statute generally or sever portions of the statute. That could be the case in voter identification law cases, when a court might enjoin application of the statute. But in other contexts, legislators might need to scramble for solutions to fill a void, or it might put the court in a position to determine what law *should* govern an election if it finds that an election law impermissibly burdens voters. And in the Arizona voting rights case, enjoining the statute would provide an identical solution to returning to the benchmark of the preexisting statute. But in some other cases, like determining how

289. Pitts, *supra* note 100, at 757.
290. Elmendorf, *Making Sense of Section* 2, *supra* note 112, at 384.
291. *See supra* Section IV.A.
292. *See supra* Section II.B.

Florida voters might be able to cure signatures on absentee ballots, there is no readily available solution if the statute is enjoined. Returning to the preexisting statute might be appropriate in such cases.

E. An Example: Pasadena, Texas Voting Districts, 2017

The Democracy Ratchet can serve these evidentiary and remedial functions with little effort. Indeed, in the Pasadena, Texas voting rights litigation, it worked quite well. But it was not included among the Democracy Ratchet examples above because the change was not a component of the substantive legal claim or very much of a consideration at all.

Voters in the city of Pasadena, Texas chose members of its city council from eight single-member districts.[293] In 2014, the city changed this plan to six single-member districts and two at-large districts.[294] Plaintiffs challenged the redistricting plan under Section 2 of the Voting Rights Act.[295]

The district court explained that Latinos had the opportunity to elect four of the eight seats under the old plan, but "[t]he change to Pasadena's voting map and plan drops Latinos' proportional opportunity" to three out of eight districts.[296] It concluded that "reversion" to the previous system "was necessary to cure the dilution of Latino votes."[297] The court also went on under a separate Equal Protection claim to find that the city had engaged in intentional discrimination in passing the law.[298]

But note that the court here barely needed the change as a component of its analysis. It simply evaluated Latino voting strength to indicate that four single-member districts should be drawn for Latino voters.[299] Whether the map was the result of a change or a long-standing practice, the result from the court would have been the same. But it helped, as an evidentiary matter, that the court could look to the past practice of Latino voters across eight single-member districts to evaluate Latino voting power. Additionally, the court did not need to fashion new maps for a remedy. It could easily revert to the old maps, which ensured that Latino voters would have the opportunity to elect members in four districts.[300]

Of course, past election results are necessary to succeed in a Section 2 vote dilution claim.[301] They can certainly be useful for *Burdick* claims.[302] But while past

---

293. Patino v. City of Pasadena, 230 F. Supp. 3d 667, 673 (S.D. Tex. 2017).
294. *Id.* at 674.
295. *Id.* at 675.
296. *Id.* at 712.
297. Patino v. City of Pasadena, 229 F. Supp. 3d 582, 588 (S.D. Tex. 2017).
298. *Patino*, 230 F. Supp. 3d at 724–28.
299. *Id.* at 725.
300. *Id.* at 729.
301. *See supra* note 279 and accompanying text (noting that past voting practices of racial groups are necessary to demonstrate success under Section 2); *see also* Thornburg v. Gingles, 478 U.S. 30, 57 (1986) ("Because loss of political power through vote dilution is distinct from the mere inability to win a particular election, a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." (citation omitted)).
302. *See supra* note 288.

election results may not be necessary under vote denial claims, they could certainly be useful for courts examining whether a voting law deprives voters of their equal opportunity to participate in the political process, or to substantially burden their right to vote.

V. REFINING THE DEMOCRACY RATCHET

The Democracy Ratchet is not a component of any of the existing legal causes of action for typical election law litigation. But it may be a valuable evidentiary device that can be persuasive to courts considering changes to election laws, and it can provide a judicially manageable benchmark for issuing a remedy.

That said, the Democracy Ratchet should be refined so that it can operate with greater precision. Courts in these cases have too quickly dismissed the substance of the causes of action they are tasked with enforcing when they invoke the Democracy Ratchet. They must ensure that the existing burdens of persuasion remain as substantive law has required, even in Democracy Ratchet cases. And they should recognize the costs to election laws and legislative experimentation that considers such costs, often imperfectly.

A. Considering Alternative Opportunities

There is a risk of overstating the severity of the burden placed on the right to vote when it comes to applying the Democracy Ratchet in the causes of action listed above. When a previously available voting practice or procedure is abolished, the relative burden on some voters has undoubtedly increased. But has it really added a burden that rises to the level of a legally cognizable injury?

Consider voter identification laws. Despite soaring rhetoric about the impact of voter identification requirements, political science literature has revealed that in most jurisdictions, these laws have little if any impact on voter turnout, at least as studied so far.[303] And when the Supreme Court considered the constitutionality of Indiana's

303. Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739, 749 (2015); Benjamin Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANN. REV. POL. SCI. 149, 164 (2017); M.V. Hood III & Charles S. Bullock III, *Much Ado About Nothing? An Empirical Assessment of the Georgia Voter Identification Statute*, 12 ST. POL. & POL'Y Q. 394, 409 (2012) (finding a decline in turnout by 0.4 percentage points in 2008 election but no empirical evidence that there was a racial or ethnic component to the suppression effect); Nicholas A. Valentino & Fabian G. Neuner, *Why the Sky Didn't Fall: Mobilizing Anger in Reaction to Voter ID Laws*, 38 POL. PSYCHOL. 331, 347 (2017) (concluding that empirical evidence for decline in voter turnout after implementation of voter identification laws has been lacking and arguing that any increase of disenfranchisement among Democratic voters has been offset by mobilization efforts). *See generally* Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L.J. 85, 98 (2009) ("We should be wary of claims—from all sides of the controversy—regarding turnout effects from voter ID laws."); Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 193–215 (2018) (describing empirical deficiencies among proponents and opponents of voter identification laws).

voter identification law in *Crawford*, it concluded that a mere "inconvenience" has not been considered a "substantial" burden according to the *Crawford* plurality.[304]

But the *Crawford* plurality's decision to measure the impact only on the group directly affected by the law looked at a subset of the total population—and increased the likelihood of finding a substantial burden.[305] A generally applicable law, like a new voter identification law, will ordinarily affect only a subset of the population, and often a small subset at that, meaning the overall burden is quite low.[306] That's the case for early voting opportunities in Ohio or ballot harvesting in Arizona. To demonstrate the burden, then, voters must not simply assert they would have used the previously available voting device, such as early voting or ballot delivery mechanisms. They must demonstrate that they were sufficiently burdened. But it is not enough for a litigant to insist that she took advantage of an opportunity that is no longer available; courts must look at alternative voting practices or procedures in determining the scope of the burden on the right to vote.

Alternative opportunities are not always sufficient for voters, but they are necessarily a part of the inquiry, regardless of the cause of action. Courts may conclude that alternative means are so materially different from a candidate appearing on the ballot that they are not treated as adequate alternative opportunities. In *Jenness*,[307] voters could engage in a variety of political activities, but the Court found the inability to associate by means of the ballot meant that alternative opportunities were insufficient.[308] The Supreme Court has found that write-in voting opportunities are not an adequate substitute for a candidate's name appearing in print on the ballot.[309] In contrast, in *Burdick*,[310] the lack of write-in access was not fatal to Hawaii's ballot access law.[311] Ample adequate alternative means existed for candidates and voters to associate with one another, even if the preferred means of a write-in candidacy was unavailable.[312]

For Section 2 claims, the burden is measured in terms of the opportunities available to a protected group. But even in striking down North Carolina's voter identification law, the Fourth Circuit emphasized that "it cannot be that states must forever tip-toe around certain voting provisions disproportionately used by minorities."[313] The burden, the Fourth Circuit reasoned, cannot arise just because a practice has been used by a particular group. Instead, it must be the case that the

---

304. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 198 (2008) (plurality opinion).

305. *But see supra* note 238 (describing judgment in this plurality opinion).

306. *See, e.g.*, Derek T. Muller, *What's Old Is New Again: The Nineteenth Century Voter Registration Debates and Lessons About Voter Identification Disputes*, 56 WASHBURN L.J. 109 (2017); Timothy Vercellotti & David Andersen, *Voter-Identification Requirements and the Learning Curve*, 42 PS: POL. SCI. & POL. 117 (2009).

307. Jenness v. Fortson, 403 U.S. 431 (1971).

308. *See supra* notes 201–206 and accompanying text.

309. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 799 n.26 (1983); Lubin v. Panish, 415 U.S. 709, 719 n.5 (1974).

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

311. *See supra* note 221 and accompanying text.

312. *See supra* note 221 and accompanying text.

313. N.C. State Conf. of NAACP v. McCrory, 831 F.3d 204, 241 (4th Cir. 2016); *see also* Lee v. Va. State Bd. of Elections, 843 F.3d 592, 601 (4th Cir. 2016).

group now has less opportunity than others, considering the "totality of the circumstances"—and that includes a demonstration of the burdens placed upon that group in pursuing *other existing* opportunities.[314]

To succeed under a Section 2 claim, litigants must demonstrate that they have "less opportunity."[315] The inquiry is not whether they have "fewer opportunities" —assuredly a tempting gloss on the text when the Democracy Ratchet is in play. After all, eliminating a previously available voting opportunity would certainly present one fewer opportunity, and a court might easily elide over the text of the statute when concluding that this alone means that the litigant has proved that the change rises to a Section 2 violation. But it is one unsupported by the text of the statute, and it is one that is not a substantive part of the statute, anyway.[316]

Here, perhaps, is simply a question of where the law ought to place the burden of persuasion. Typically, a challenger to a duly-enacted law would need to come forward with some quantum of evidence to demonstrate that the law ran afoul of the right to vote—the character and magnitude of the burden in *Burdick*, or that the voter had "less opportunity" to participate under Section 2. Under Section 2, if voters cannot avail themselves of alternative means of voting, such as voting on a different early voting day or finding a relative to collect their absentee ballot, then they might have "less opportunity." If the elimination of once-available opportunities materially burdened them, it might run afoul of *Burdick*. The Democracy Ratchet would simply be a useful tool to demonstrate voting opportunities and participation in the political process. The state altering those opportunities doesn't mean the plaintiffs win. It simply means plaintiffs can start at past practice in making their claims.

B. Retaining Burdens of Persuasion

The Democracy Ratchet is best understood as a limited tool of evidence and remedy, and its presence does not mean a challenger has presumptively demonstrated that the election law has impermissibly burdened their right to vote. The Democracy Ratchet does not alleviate responsibility of demonstrating that burden.

Proponents of a strong Democracy Ratchet might presume that litigants have demonstrated an impermissible burden because of the change. That would require a greater showing from the state to overcome that assumed burden. Plaintiffs need not present quantitative evidence to demonstrate a burden,[317] but this presumption might require substantial evidence, perhaps quantitative, to defend the law. Even assuming that one could collect the data, it becomes even more challenging for the state to establish that the burdened group would take advantage of (non-burden or low-burden) alternative avenues—wholly the stuff of projection. The state, therefore, would have a significant evidentiary burden to meet if there is thin evidence of a demonstrated quantifiable impact and a preexisting expectation that a once-available voting practice or procedure should continue to remain in place.

---

314. *McCrory*, 831 F.3d at 233.
315. Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301 (2012 & Supp. 2017).
316. *See supra* Section III.A.5.
317. *See supra* Section III.A.5.

Courts must carefully consider the Democracy Ratchet and avoid drifting into a strong version that alters the burdens of persuasion. The substantive law is not affected when the challenged voting practice or procedure stems from a recent change. It simply may be easier for plaintiffs to demonstrate that they have been impermissibly burdened.

To that end, the state legislature need not demonstrate some higher burden of proof justifying the change, nor does the burden shift to the state to justify the change. The evidentiary weight of the change—when properly understood in the context of all available voting opportunities[318]—is simply more persuasive when litigants can point to concrete instances of past exercise of those opportunities.

This is not unlike the Supreme Court's decision in *Federal Communications Commission v. Fox Television Stations, Inc.*[319] The FCC had long determined that isolated or fleeting broadcast expletives were not indecent and would not lead to enforcement against networks airing such incidents.[320] But the FCC changed its position over time, and by 2004 declared that a single fleeting expletive might rise to the level of indecent language subject to an enforcement action.[321] The Supreme Court affirmed the Agency's power to change its mind, and that such a change was not subject to "heightened" review under the Administrative Procedure Act.[322] The Agency still needed to provide a reasoned explanation for its decision, but it did not need to explain that its new position was better than the old one.[323] While only an analogous case under the Administrative Procedure Act, it is instructive when considering how changes to election laws should be evaluated. Unlike Section 5 claims, where the burden was expressly on the enacting jurisdiction to justify the change, these substantive claims require no such additional justification or heightened scrutiny. While the Democracy Ratchet may not require *greater* justifications from the state, it will inevitably require *some* countervailing evidence when litigation arises.

C. Ensuring Symmetrical Treatment of Election Laws

Of course, it may well be the case that there is simply an irreconcilable conflict of views over legislative power and voting laws, complicated by these open-ended legal standards. One view is a symmetrical approach: voting laws are like just about any other kind of law—as a matter of policy and acting within certain acceptable boundaries, the legislature can expand or contract voting opportunities as it deems appropriate, every time subject to external constraints on its power to burden the "right to vote." The other view is an asymmetrical approach: contraction of opportunities ought to be scrutinized with greater skepticism. That asymmetrical approach provides the initial framework for the Democracy Ratchet.

This asymmetry has drawn some concern in lower courts. Ninth Circuit Judge Jay Bybee wondered how Arizona's decision to limit ballot harvesting might comport

---

318. *See supra* Section V.A.
319. 556 U.S. 502 (2009).
320. *Id.* at 517–20.
321. *Id.* at 508–10.
322. *Id.* at 514.
323. *Id.* at 515.

with the fact that ballot harvesting is prohibited in a number of states.[324] The choice is a challenging one: identical provisions rise and fall together across the country; or identical provisions are treated differently in each jurisdiction.

It is worth pausing to reflect on two types of asymmetry. The first is asymmetry in how *courts scrutinize changes to election laws*. This Article has argued that courts cannot substantively incorporate a non-retrogression principle into existing legal doctrines. Judicial scrutiny of changes to election laws looks the same whether the law is longstanding or of recent vintage. But the evidence available to parties looks different in the context of the Democracy Ratchet.

The second is asymmetry in *voting rights across jurisdictions*. That arises in the opening hypothetical: one state has ample early voting, the other has none. Voting rights opportunities look different across jurisdictions.

There are good reasons to think that the Voting Rights Act and *Burdick* ought to differ across jurisdictions, and not simply for the pragmatic reasons listed above. To begin, the Constitution assumes that the right to vote will vary from jurisdiction to jurisdiction. The right to vote for members of the House turns on each state's qualifications to vote for the most numerous branch of the state legislature.[325] The same for voting for members of the Senate.[326] The times, places, and manner of elections will vary by state unless Congress standardizes it.[327] The opportunity to choose presidential electors depends on state law.[328] The American system of elections is built upon an expectation that the right to vote varies across jurisdictions.

The burdens places upon voters are context specific, dependent upon the evidence in each jurisdiction. Professor Tokaji has noted that context can, in fact, vary from state to state:

> In one state, for example, in-person early voting may be very important for racial minorities, while another state may not choose to offer it at all. A much higher percentage of racial minorities may have qualifying voter ID in one state than another. The same holds true of registration rules, provisional ballots, and virtually all other elements of a state's system. It follows that the effect of a change in election rules in one state may be very different from the effect of a similar-looking change in a different state.[329]

Courts are invited to examine the particular burdens in a jurisdiction, and the burdens may vary from state to state—no different from the fact that the right to vote itself may vary from state to state. Section 2 vote dilution claims may vary from jurisdiction to jurisdiction depending on evidence of voter behavior.[330]

---

324. Feldman v. Ariz. Sec'y of State's Office, 843 F.3d 366, 414 (9th Cir. 2016) (en banc) (Bybee, J., dissenting) ("Unless the Voting Rights Act means that identical provisions are permissible in some states and impermissible on other states, our decision would invalidate many of those provisions, including provisions in other states of the Ninth Circuit.").

325. U.S. CONST. art. I, § 2, cl. 1.

326. *Id.* amend. XVII.

327. *Id.* art. I, § 4, cl. 1.

328. *Id.* art. II, § 1, cl. 2.

329. Tokaji, *Applying Section 2*, *supra* note 145, at 483 (citations omitted).

330. There is an imperfect analogy to *Shelby County*. There, the Court emphasized that

It may well be the case that the absence of early voting opportunities is an impermissible burden; it could also be the case that eliminating a previously available opportunity is the same. Or, the long-absent opportunity and the recently-altered opportunity pose no impermissible burdens. The baselines simply differ across jurisdictions depending on the context of the right to vote in that jurisdiction. That may be cold comfort to those who desire greater uniformity in our election system, but asymmetry is inevitable when it comes to the right to vote as long as it is principally administered by the states.

D. Evaluating Costs in the Overall Electoral System

Courts uncritically accepting Democracy Ratchet may give short shrift to the costs that new and expanded voting opportunities offer—costs that may appear counterintuitive without careful examination. Conventional wisdom suggests that more opportunities to participate in the political process are invariably good. And the Democracy Ratchet in its present form tends to prefer the status quo of more opportunities over a change that reduces opportunities.[331] But political science data shows a decidedly mixed portrait of some of these expanded opportunities.

For instance, early voting opportunities spread out the election process over a series of weeks, and an early-voting electorate may not have all of the information that the electorate has on Election Day. Late information affects the political process, and legislatures might prefer for voters to vote when they have the most information.[332] Late-breaking information might affect voter behavior.[333] Candidates who drop out of a race, especially a presidential primary, might yield early "wasted" votes.[334] Perhaps there are better legislative solutions than limiting early voting opportunities. Instant runoff voting might be the preferable option.[335] Political

---

states were entitled to "equal sovereignty"; that is, the states are "equal in power, dignity and authority." Shelby County v. Holder, 570 U.S. 529, 544 (2013) (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)). The states each have the opportunity and ability to pass similar laws. But, of course, the application of a similar law can have a different impact in one jurisdiction over another, or a similar law may be motivated by improper animus in one jurisdiction but enacted legitimately in another.

331. *See supra* Part II.

332. Eugene Kontorovich & John McGinnis, *The Case Against Early Voting*, POLITICO MAG. (Jan. 28, 2014), http://www.politico.com/magazine/story/2014/01/early-voting-the-case-against-102748 [https://perma.cc/B3PE-HKAB].

333. *See, e.g.*, Politico Staff, *Full Text: FBI Letter Announcing New Clinton Review*, POLITICO (Oct. 28, 2016, 3:23 PM) http://www.politico.com/story/2016/10/full-text-fbi-letter-announcing-new-clinton-review-230463 [https://perma.cc/R8QM-BQXE]; *Transcript: Donald Trump's Taped Comments About Women*, N.Y. TIMES (Oct. 8, 2016), https://www.nytimes.com/2016/10/08/us/donald-trump-tape-transcript.html?_r=0 [https://perma.cc/HNU3-7KCV].

334. Randy Yeip, *The Impact of 'Wasted' Votes in the Presidential Race — Chart*, WALL ST. J.: WASH. WIRE (Mar. 29, 2016, 11:20 AM), http://blogs.wsj.com/washwire/2016/03/29/the-impact-of-wasted-votes-in-the-presidential-race-chart [https://perma.cc/EKJ3-U8GL].

335. *See, e.g.*, Dudum v. Arntz, 640 F.3d 1098, 1117 (9th Cir. 2011) (approving use of instant runoff voting in San Francisco); Edward B. Foley, *Third-Party and Independent Presidential Candidates: The Need for a Runoff Mechanism*, 85 FORDHAM L. REV. 993 (2016).

science literature tends to show that early voters are among the most partisan voters who are highly reliable in their preferred candidate and unlikely to change their vote based on late-breaking information, so perhaps such concerns are overstated.[336] Early voting may not even advantage groups of voters in ways that partisan legislatures anticipate.[337] Further, perhaps these concerns are most problematic with presidential primaries, the circumstance where candidates are unusually likely to drop out before an election.

There is mixed evidence about the benefits of other voting practices and procedures, too. There is some evidence supporting the argument that early voting actually *decreases* turnout,[338] or at least does not affect turnout as much as one might anticipate.[339] Basic financial cost issues, simplistic as they may be, would also drive marginal legislative decisions.[340]

The Democracy Ratchet best functions as a useful tool of evidence and a readily available remedy. But it cannot supplant broad examination of all the evidence, including critical—even generalized—evidence that may run counter to the court's intuitions.[341]

In the cases that have invoked the Democracy Ratchet, perhaps the plaintiffs simply amassed more evidence and were more persuasive,[342] particularly in situations where the courts addressed the evidence under a preliminary injunction standard.[343] This Article does not attempt to parse the evidentiary records developed in each of the cases identified in Part I. But in each case, it would provide more deference to legislative judgments in these areas, particularly in areas with limited empirical evidence. While the justifications for the change may be tenuous, they may be no more tenuous than the justifications for expanding the voting practices or procedures in the first place. Fairly generalized evidence might be enough for the state to meet its burden of justifying the law.[344] Indeed, state-specific evidence may

---

336. *See, e.g.*, Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *The Complicated Partisan Effects of State Election Laws*, 70 POL. RES. Q. 564, 565 (2017) ("[I]n practice most conveniences are better at 'retaining' likely voters than bringing out new voters.").

337. *See, e.g.*, *id.* at 566 ("[S]everal studies now cast doubt on the idea that early voting stimulates turnout.").

338. *See, e.g.*, Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform*, 58 AM. J. POL. SCI. 95 (2014).

339. *See, e.g.*, Craig Leonard Brians & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 SOC. SCI. Q. 170 (2001).

340. It's worth noting that these are not "cost" claims of the type that we need to make voting a little harder (to speak colloquially) so that only people with "skin in the game" participate in the political process. It simply means that routine finances of the states, including staffing, transportation, printing, and error correction, are inevitably a part of any election law calculus.

341. *See, e.g.*, *supra* notes 239–240 and accompanying text (discussing the Supreme Court's decision to accept state legislature's generalized evidence in *Crawford*).

342. *See supra* Part I.

343. *See supra* Section II.B.

344. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 194–96 (2008) (plurality opinion) (admitting that record had "no evidence of any such fraud actually

be a challenge to obtain—much less *any* evidence in short-fuse election litigation over a law whose impact is quite unknown.

Measurement of election participation may conceal the effects of the law. Consider the hypothetical voter identification law that bolsters turnout for those who have gained confidence under this new fraud-preventing law,[345] but that reduces turnout for others who lack the form of identification or are discouraged because they believe (rightly or wrongly) that they lack the proper form of identification.[346] The best ways to measure the impact of voter identification laws remains deeply unsettled.[347]

Litigants may rightly respond that if evidence has been introduced demonstrating that the law burdens minority voters and interacts with social and historical conditions, that should be good enough under Section 2; if it removes an opportunity some voters once used, that should be good enough to demonstrate a substantial burden under *Burdick* that requires more persuasive justification from the state. But as cold as it may sound, voters need not be guaranteed the right to exercise the *most convenient* voting practices and procedures. That is, neither Section 2 nor the *Burdick* balancing test requires that. Maximum voting convenience may be a desirable policy goal for some, but it is not the stuff of present election law claims.

E. Recognizing Legislative Experimentation

As a simple matter of incentives, a more modest Democracy Ratchet permits greater leeway for legislatures to experiment. State legislatures could experiment with expanding new voting opportunities, then contracting them later, with little justification for either the expansion or the contraction. After all, it is a fairly costless decision for the legislature to decide to experiment and create new and different voting opportunities. If a strong Democracy Ratchet prevents states from contracting opportunities later, however, state legislatures may choose not to expand in the first place. Limiting the Democracy Ratchet to an evidentiary and remedial function would prevent this disincentive.

---

occurring in Indiana at any time in its history," but citing evidence around the country and a legitimate "risk of voter fraud" as a legitimate state interest).

345. *See* Jack Citrin, Donald P. Green & Morris Levy, *The Effects of Voter ID Notification on Voter Turnout: Results from a Large-Scale Field Experiment*, 13 ELECTION L.J. 228 (2014). *But see* Charles Stewart III, Stephen Ansolabehere & Nathaniel Persily, *Revisiting Public Opinion on Voter Identification and Voter Fraud in an Era of Increasing Partisan Polarization*, 68 STAN. L. REV. 1455 (2016).

346. *See supra* note 303 and accompanying text.

347. *Compare* Justin Grimmer, Eitan Hersh, Marc Meredith, Jonathan Mummolo & Clayton Nall, *Obstacles to Estimating Voter ID Laws' Effect on Turnout*, 80 J. POL. 1045 (2018), https://www.journals.uchicago.edu/doi/pdfplus/10.1086/696618 [https://perma.cc/AKB5-B47A], *with* Zoltan Hajnal, John Kuk & Nazita Lajevardi, *We All Agree: Strict Voter ID Laws Disproportionately Burden Minorities*, 80 J. POL. 1052 (2018), https://www.journals.uchicago.edu/doi/pdfplus/10.1086/696617 [https://perma.cc/3ZES-Q6NE], *and* Barry C. Burden, *Disagreement Over ID Requirements and Minority Voter Turnout*, 80 J. POL. 1060 (2018), https://www.journals.uchicago.edu/doi/pdfplus/10.1086/696616 [https://perma.cc/MS2K-DEWM].

But one wonders how persuasive this justification may be. It remains deeply unsettled whether legislatures heed the judiciary very closely, if at all, when considering new legislation.[348] That said, preclearance under Section 5 emphatically did alter legislative behavior—legislatures knew that every election law would need preclearance, and legislatures tailored legislation as a result.[349] Additionally, a more robust Democracy Ratchet might simply demand that the legislature come forward with *reasons* for narrowing opportunities—even if the state needed no reasons to expand those opportunities. Without rehashing the earlier discussion,[350] existing laws in a post–*Shelby County* world anticipate symmetrical treatment of state election laws.

CONCLUSION

Challenges to laws that eliminate or alter voting procedures or practices will continue to fill judicial dockets. We are entering a time of greater single-party partisan control of state legislatures and governor's mansions than at any point in recent history;[351] an uptick in election law-related litigation;[352] and renewed concern of fraud (actual or perceived), from illegal voting to hacking election systems.[353] New legislation is always forthcoming.

---

348. *See, e.g.*, Kathy Canfield-Davis, Sachin Jain, Don Wattam, Jerry McMurtry & Mike Johnson, *Factors of Influence on Legislative Decision Making: A Descriptive Study – Updated August 2009*, 13 J. LEGAL ETHICAL & REG. ISSUES 55, 58–59 (2010) (identifying eighteen factors that appear to have any material influence on legislators in a single state case study, none of which concern the judiciary); *see also* Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Cannons: Part II*, 66 STAN. L. REV. 725, 773 (2014) ("[Congress] viewed courts, at best, as interpreters of 'last resort'—or worse, as interpreters whom Congress does not even think about or whose input was unwelcome.").

349. *See, e.g.*, South Carolina v. United States, 898 F. Supp. 2d 30, 53 (D.D.C. 2012) (Bates, J., concurring) (noting comments of state legislatures tailoring South Carolina's voter identification law to ensure that the law would be precleared under Section 5).

350. *See supra* Section V.C.

351. Haeyoun Park, Jeremy Ashkenas & Mike Bostock, *Taking the Battle to the States*, N.Y. TIMES (Jan. 11, 2014), https://www.nytimes.com/interactive/2014/01/11/us/politics/who-controls-the-states-and-where-they-stand.html [https://perma.cc/Q6SM-RTEM] ("Republicans or Democrats have single-party control of both the legislature and the governor's office in 36 states, the most in six decades.").

352. *See generally* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 131–57 (2012) (describing increased litigation in election law disputes).

353. *See* Derek T. Muller, *Three Divergent Election-Law Decisions in the Early Trump Administration*, U. ILL. L. REV. ONLINE (Apr. 29, 2017), https://illinoislawreview.org/symposium/first-100-days/three-divergent-election-law-decisions-in-the-early-trump-administration [https://perma.cc/8HJZ-76Y2] (describing efforts of the now-defunct Presidential Advisory Commission on Election Integrity); *see also Presidential Advisory Commission on Election Integrity*, WHITE HOUSE (July 13, 2017), https://www.whitehouse.gov/articles/presidential-advisory-commission-election-integrity/ [https://perma.cc/88QP-2D2S].

Courts and litigants have turned to the Democracy Ratchet under a variety of legal theories. It offers a fairly stable benchmark for courts to consider the impact of a new law, and it allows litigants to preserve existing voting practices or procedures that they prefer. But the theory, while descriptive in practice, has lacked a sufficient basis in the text of the Constitution, federal statutes, or judicial precedent. There is some support for a version of the Democracy Ratchet in Section 2 litigation—particularly when the legislature's justification is tenuous, the practice interacts with social and historical conditions, and minority voters demonstrate that they have less opportunity than other voters because of the change in the law. The same holds true in the *Burdick* balancing test—eliminating a previously available voting practice or procedure may result in a substantial burden being placed upon the voters.

But a strong Democracy Ratchet that incorporates a kind of non-retrogression analysis into Section 2, or one that elevates the *Burdick* balancing test into something of similar strength, lacks a legal basis—indeed, it may overstate the burdens on voters and unnecessarily limit legislatures. Instead, the Democracy Ratchet is best understood as providing two limited functions for courts. First, it enables them to more readily rely upon the evidence presented by litigants who can demonstrate actual past use of the procedure. Second, if the court finds that the practice does run afoul of a substantive claim, the court can readily revert to the past practice.

Perhaps[354] the Democracy Ratchet will put state legislatures on notice to develop a more robust record for any change to election laws. And maybe that's the necessary trade-off—voters can't afford the loss of opportunities because of the incalculable nature of them, and our instincts are that we simply conclude that more opportunities are better than fewer opportunities. But policy instincts are different than substantive legal claims, and the Democracy Ratchet ought to function, and can function effectively, in its limited role as an evidentiary device and a readily available remedy.

---

354. This Article has included the word "perhaps" more than a dozen times. That is far more uncertainty than the Author would prefer to include in an academic piece like this one. But it reflects the open questions surrounding how courts have gone about using the Democracy Ratchet, and the highly fact-specific context in individual cases that have led to superficial inconsistencies among jurisdictions. Without quantitative evidence, given frequent legislative innovation, and with deeply uncertain ability to isolate the precise impacts of any changes to election laws, some uncertainty is inevitable.