

A. Retrogressive effect

Under the benchmark procedure, Georgia voters may meet the state's voter identification requirement either by presenting one of 17 enumerated forms of identification before voting, or by signing an affidavit of identity under penalty of perjury. Thus, the retrogression analysis focuses not on whether Georgia may require voters to present identification, but whether the reduction in the number of acceptable forms of acceptable identification, combined with the elimination of the fail-safe procedure, is retrogressive for minority voters. In our standard Section 5 analysis, we consider whether the state could have achieved its stated purpose while avoiding retrogression. We would consider retrogression to be "unavoidable" in certain contexts such as redistricting or annexation when, for example, it results from either a numerical or constitutional impossibility, such as population growth. However, retrogression is not considered unavoidable when it results from the mere failure or an unwillingness to enact a method that is not retrogressive.

Moreover, in the redistricting context, if a jurisdiction submits a plan that is retrogressive, it will ordinarily occasion an objection if the jurisdiction could have drawn a reasonable alternative that could ameliorate or prevent that retrogression. See Procedures for the Administration of Section 5 of the Voting Rights Act, 28 C.F.R. 51.52. Accordingly, if we determine that Georgia could have fulfilled its stated purpose of preventing election fraud, while preventing or ameliorating the retrogression, an objection is appropriate.

Proponents of preclearance identify two cases in which federal district courts upheld voter identification requirements. See Colorado Common Cause v. Davidson, 2004 WL 2360485 (D. Col. Oct. 18, 2004); and Bay Co. Democratic Party v. Land, 347 F. Supp. 2d 404 (D. Mich. 2004). In both cases, plaintiffs challenged the constitutionality of voter identification requirements that were enacted after HAVA to conform state law to the federal law requirements, but such challenges were rejected by the courts. Both holdings are inapposite to the instant retrogression analysis, however, because neither state is subject to Section 5 review, so retrogression was not an issue. Moreover, both voter ID laws allowed numerous types of photo and non-photo ID, and both states retained fail-safe options for voters who lacked ID, so any discriminatory effect would have been lesser than the impact on black voters stemming from the restriction on acceptable ID under the Georgia law.

Here, we have not uncovered, nor has the state presented, any information or evidence to overcome the inferences drawn from the data discussed at length above that blacks are more likely than whites to lack acceptable photo identification. The most that can be concluded from the legislative history and discussions with proponents is that legislators failed to consider statistical evidence of whether blacks were more likely than whites to lack acceptable ID. Moreover, Section 59 of Act 53 also fails the retrogression analysis set forth in Georgia v. Ashcroft of whether minority representatives believe that the proposed change will decrease minority voters' effective exercise of the electoral franchise. See Georgia, 539 U.S. at 484. In this instance, all black members of the Georgia legislature save one opposed the photo ID

provisions of Act 53. Senator Jones emphasized that the Senate received no evidence addressing the racial effect of the photo identification provisions on Georgia citizens, and that the only data presented were general numbers regarding valid driver's license and ID card ownership, which were never broken down by race. Senator Brown stated that proponents never tried to prove that minorities have proportionate numbers of the proposed forms of ID nor did they substantially address allegations of retrogression. Rep. Watson concurred that there was no response to allegations of the potentially retrogressive effect of the photo identification provisions offered in the House.

Senator Harbison believes that a narrowing of the acceptable types of identification will harm black voters because many of his constituents have voter identification currently accepted by the state, but do not drive or have a non-driver's identification card, and as a result, will not have an acceptable photo ID for voting purposes if the change is implemented. Senator Reed, who has served two terms in the Georgia House and was recently re-elected to the Senate, stated that "this is the most aggressive bill and attack on the rights of minorities and African-Americans that I have seen in my tenure in the House and Senate." Sonji Jacobs, Carlos Campos, "Voter ID Bill Stirs Furor," *Atlanta Journal-Constitution*, March 30, 2005.

The sole black representative who supported these provisions, Willie Talton, understood that his opinion would be scrutinized more closely than that of other proponents because he was a minority. Rep. Talton stated that he "kept an eye on this legislation to make sure it did not disenfranchise voters of any race or class." He based his conclusion that the law was "color blind" on the fact that more Georgians of voting age had a driver's license or ID card than were registered to vote. However, even Rep. Talton did not seek an analysis of potential disparities among black and white ownership of acceptable ID.

In light of the overwhelming objections voiced by black legislators, including the 47 members of the Georgia Legislative Black Caucus as well as U.S. House of Representatives John Lewis who do not support the bill, compared to the one black representative who supports the bill, the weight of the minority legislators clearly falls on the side opposing the proposed voter ID restrictions.

Non-Retrogressive Alternative

The jurisdiction has failed to demonstrate that it could not satisfy its stated goal of combating voter fraud while avoiding retrogression. As we determined with the state's original adoption of a voter identification requirement, states have the authority to adopt measures to ensure the security of elections and such measures are not inherently retrogressive. However, in light of the apparent retrogressive effect of the proposed restriction on acceptable IDs, the availability of non-retrogressive alternatives raises substantial concerns regarding the manner in which the state amended its current voter identification requirements.

The state could have avoided retrogression by retaining various forms of currently

accepted voter ID for which no substantiated security concerns were raised. Supporters of the ID restriction suggested that the risk of mail being stolen compromised the security of bank statements and government checks as acceptable ID. Even though no evidence was raised to support these claims, if true, the state could have addressed this issue by removing these specific forms of ID but retained other forms of non-photo ID such as birth certificates, Social Security cards, and other government documents, which were not described as likely to be stolen from voters' mailboxes. Retention of these items as acceptable ID would have had a greater likelihood of accommodating the low income black population that is least likely to have a photo ID.

Moreover, there was no evidence presented to demonstrate that any of the existing forms of non-photo ID were unreliable or that their retention would not have reasonably allowed the state to prevent voter fraud. First-time voters who register to vote by mail without providing ID are still permitted to show any of the non-photo IDs set forth in HAVA, including government checks and bank statements, so the reliability of this type of ID for all other voters should not be in question.

Ms. Meyers and other proponents also expressed doubts about the controls over private sector ID, but presented no evidence to support these doubts. Photo identification issued by private colleges and universities are accepted for financial transactions by businesses not affiliated with the universities. Private sector employee IDs allow individuals access to highly restricted areas such as airports, factory floors, office buildings containing confidential information, and other restricted spaces, which suggests that businesses have an incentive to use reliable, non-duplicable ID cards. It is likely that the retention of these forms of identification would have, at minimum, lessened the impact of the restrictions for minority voters.

Although individuals may counterfeit non-photo identification, they usually do so for financial gain or to obtain permanent resident status. As the holder is desirous of not being caught, it is less plausible that the individual will attempt to use the counterfeit document for voting purposes. If anything, requiring a driver's license for voting does not preclude the possibility that a voter may present a counterfeit ID with his current photo. Rep. Talton, stated that in his capacity as Deputy Sheriff, he encounters numerous counterfeit driver's licenses weekly. Even the 9/11 hijackers obtained official driver's licenses at state DMV offices by bribing motor vehicle employees.

Another non retrogressive alternative would have been to retain the affidavit alternative so that no voters would be barred from voting at the polls if they lacked photo ID. Proponents of the bill presented no evidence that the penalty of law is an insufficient deterrent to falsely signing an affidavit of identity, and the affidavit document itself reflects that falsifying or making a fraudulent statement or representation in connection with signing is a felony. If legislators were concerned that an affidavit is not verified before the vote is cast electronically, they could have amended the current affidavit procedures to allow an affidavit voter to cast a provisional ballot, to be counted after the affidavit is verified by the registrar, similar to the current procedure for first-time registrants by mail who use an affidavit of identity. Under such a change, qualified

voters who lacked the requisite identification would still be allowed to vote and that vote would still be counted without requiring further action by the voter, thus obviating any retrogression concerns.

Other alternatives that the state could have explored would have been the addition of additional forms of photo identification allowed by other states with voter ID laws. These forms of ID could include store club cards, credit and debit cards, association cards, or any other identification card with the voter's name and photo, which would have broadened the available forms of acceptable ID. This is a practice allowed by many other states, as discussed below in Part IV.A.

The failure of the state to adopt any of these non- or less-retrogressive alternatives to satisfy its goal of preventing voter fraud weighs strongly in favor of interposing an objection.

No-Excuse Absentee Voting

Proponents of preclearance have suggested that the proposed changes are not retrogressive because the restriction of voter ID and the elimination of the affidavit procedure are balanced by the expansion of absentee voting to anyone who requests an absentee ballot. Under this analysis, anyone who is barred from voting at the polls is not disenfranchised because they may vote an absentee ballot.

Although the expansion to no-excuse absentee voting is a positive step, it does not obviate the retrogressive effect on black voters who lack the necessary identification, as data shows that blacks are only half as likely as whites to vote by absentee ballot. According to the 2000 U.S. Census, one in nine white voters nationally voted by absentee ballot, compared to only one in 21 black voters. This data is a national composite, so does not distinguish between states where absentee voting is restricted and those where it is available to all.

The Task Force Report, "To Assure Pride and Confidence in the Electoral Process," (Aug. 2001), part of the Carter-Baker National Commission on Election Reform, concurs with the Census data on absentee voting data, finding that blacks are half as likely as whites to vote absentee. See Chp. 5, p.3. The report accounts for this by noting that absentee ballots are used more by people with better educations, higher incomes, and more prestigious jobs; to wit, voters "who have the resources to know to arrange to vote in advance." Id. The highest rates of absentee voting are among holders of graduate and professional degrees and people in managerial and professional occupations. Id. Again, it appears that the lowest income voters, who are the least likely to have acceptable photo ID, are also the least likely to participate in absentee voting.

Even states that change their absentee voting rules to adopt no-excuse absentee voting generally do not experience an increase in voter turnout. According to a 50-state study by the Committee for the Study of the American Electorate (CSAE), those states that adopted early voting or no-fault absentee voting "performed worse in terms of either greater average turnout

declines” in years when turnout went down such as 1996 and 1998, and experienced “lesser average turnout increases” in years when turnout increased such as 1992 and 1994, compared to states that did not adopt either of these voting procedures. See Report released Feb. 8, 1999, by the Committee for the Study of the American Electorate. In a recent update analyzing the November 2004 election, CSAE found that in the 24 states with no-excuse absentee voting, turnout was at virtually the same levels as in states without that provision. See Report released Jan. 14, 2005, by the Committee for the Study of the American Electorate. The Carter-Baker Task Force report concurs that absentee voting rules appear to have very little effect on voter turnout. See id. at 6.

This disparity in absentee ballot usage between white and black voters is confirmed by those with experience in the voting patterns of minority citizens in Georgia. Senator Brown told us that many older black voters prefer to vote in person on election day to celebrate their civil rights victory. The significance of publically voting is heightened for these voters because of their personal struggle to obtain the electoral franchise. Importantly, the change to no-excuse absentee voting was not proposed nor supported by Black Caucus members as a mitigating factor to potential retrogression, according to Senator Jones.

The material presented by the Lawyers Committee for Civil Rights includes testimony from an African-American voter that others in his community fear that their votes may be excluded if submitted by absentee ballot, a concern that is alleviated by casting one’s vote at the polls. When they vote in person, no one handles the ballot but the voter, who places it personally into the ballot box. As voters over age 75 have always been permitted to vote absentee under Georgia law, there is little reason to believe that they would change their behavior under the state’s liberalized no-excuse absentee voting rules.

Finally, absentee voting requires the voter to obtain an application for an absentee ballot, receive the application through the mail, fill out and mail the request, receive the ballot through the mail, and finally mail the ballot back to the registrar before the close of polls. This requires four instances of mailing documents back and forth. Allowing two to three days per mailing, this can add up to twelve extra days, not including weekends, to the voting process. As a result, voters must begin the process at least two weeks before every election, and make their decision long before the campaigning ends. Complying with these requirements also requires knowledge of the deadlines and the application process, which may be harder for illiterate and less well-educated voters, who are disproportionately black.^{18/} In addition, many individuals are reluctant to rely on the mail to deliver ballots to and from absentee voters on time and without error. See, e.g., Associated Press, “Florida Republicans, Democrats Trade Accusations,” Oct. 29, 2004 (reporting 58,000 missing absentee ballots in Broward County, FL in 2004 general election).

^{18/} According to the 2000 Census, there were 109,729 illiterate people age 25 and over, defined as persons with no schooling or who had completed the 4th grade or less. Of those, 37,204 were white non-Hispanics and 42,274 were black non-Hispanics.

From both the statistical and anecdotal evidence we have obtained, it appears that the expanded availability of absentee voting, although a positive measure, is unlikely to change voters' behavior and will not ameliorate the retrogressive effect caused by the reduced number of acceptable forms of identification and the elimination of the affidavit of identity. The state has not provided any evidence to show that voters will behave any differently under the proposed "no-excuse" absentee ballot rules, and therefore has not met its burden of showing that the concomitant change to no-excuse absentee voting will remedy any potential retrogression caused by the restricted ID requirements.

GLOW Program

One positive effect of our numerous contacts with state officials appears to have been the development of the GLOW program. If this program goes into effect as described, it may well have beneficial effects in providing DDS cards in underserved areas to the most impoverished and isolated residents. However, the program has not yet gone into effect, and has designated only 36 counties on its tentative schedule to be visited through the end of November 2005. Most of these counties have black populations that are at least comparable to the statewide average or higher, which reflects targeting that may help to serve African-American voters. We cannot evaluate the effectiveness of the program's publicity measures, however, its responsiveness to citizen groups who call for its service to be directed to their counties and/or organizations, or quantify its actual output of photo ID cards compared to its projected maximum capacity of ID card distribution. Moreover, the GLOW program will not help those voters who do not have birth certificates or other documents necessary to obtain an ID card, nor the means to obtain them.

As a result, we conclude that the GLOW program may enhance the ability of some voters to access photo ID cards. Finally, even if we could measure the enhanced access that this program will provide, we cannot rely upon such measures to remedy the potential retrogression, as the program may be subject to Section 5 review, and without preclearance, may be subject to change or elimination at any time.

B. Retrogressive purpose

A voting change adopted with the intent to retrogress black voting strength, whether in the present or in the future, does not meet the standards of Section 5. Reno v. Bossier Parish School Board, 528 U.S. 320, 321 (2000). The Supreme Court has emphasized that the "purpose must be retrogressive" because "§ 5 prevents nothing but backsliding." Id. at 335, 340. The purpose inquiry under Section 5 should be guided by the Arlington Heights standard. See Reno v. Bossier Parish School Board, 520 U.S. 471, 488 (1997), quoting Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977) ("assessing a jurisdiction's motivation in enacting voting changes is a complex task requiring a "sensitive inquiry into such circumstantial and direct evidence as may be available"). The relevant factors in such a "purpose" inquiry are: the impact of the change on black voters; the historical

background of the decision; the specific sequence of events that led up to the challenged decision; procedural and substantive departures from normal considerations; and the legislative or administrative history -- especially where there are contemporary statements by members of the decision making body, minutes of its meetings or reports. Arlington Heights, 429 U.S. at 266.

Opponents of Act 53 have alleged that the state acted with retrogressive intent. The Lawyers' Committee letter in particular asserts that justification for the state's action is not found in the legislative history, points to the exclusion of absentee ballots from the revised identification requirements as evidence that fraud prevention is a pretextual justification, and notes that less retrogressive alternatives to the fraud problem were not debated. Opponents also note that there was no discussion in the legislative history regarding the reliability of IDs issued by private colleges and universities, or private employers. Proponents such as Representative Talton, who identified his specific motivation for tightening voter IDs to those with photographs, did not directly address the potential use of fake IDs themselves for voting purposes.

On the one hand, legislative proponents have been unable to provide examples of fraud in voting, with Representative Burnmeister stated that this information is unavailable because fraud is, by its nature, subversive. Secretary Cox stated that she is unaware of any cases of voter impersonation during her tenure as Secretary of State. The state's recitation of United States v. McCranie, 169 F.3d 723 (11th Cir. 1999), which upheld convictions for voter fraud in Dodge County, Georgia, does not support the stated purpose of Act 53 in that the fraud in McCranie was vote buying and selling, not impersonation or voting under a false identity. In fact, the vote buying and selling activities were performed openly, by county officials, and with the knowledge of the county clerk. Voters' identities were well known to county officials. As such, the case does not support the need for reducing the types of acceptable IDs or the elimination of the affidavit procedure as a means of reducing criminal activity.

However, there is no direct evidence that proponents intended to restrict the types of acceptable voter ID and eliminate the affidavit procedure for the specific purpose of retrogressing minority voting strength. It appears that proponents did not analyze the potential gaps in access to acceptable identification amongst blacks and whites, or seek out data regarding the racial distribution of persons who lack such identification. Several Georgia legislators stated that their intent was to combat voter fraud, and that their approach was considered and color-blind, relying on several sources for the approach it eventually adopted. Save for Rep. Burnmeister's inflammatory statement that blacks in her district vote only because they are paid, we have found no evidence to suggest that proponents had data pointing to the retrogressive effect of the legislation and nevertheless intentionally adopted the voter identification restrictions for the purpose of disenfranchising black voters.

IV. OTHER POLICY CONSIDERATIONS

A. Voter Identification Laws of Other States