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VOTING RIGHTS ACT: SECTION 5—PRECLEARANCE STANDARDS

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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VOTING RIGHTS ACT: SECTION 5—PRECLEARANCE STANDARDS

TUESDAY, NOVEMBER 1, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chairman of the Subcommittee) presiding.

Mr. CHABOT. Good afternoon. This is the Subcommittee on the Constitution, and it will come to order now. This is the fifth in a series of hearings on the Voting Rights Act that we have held thus far. More specifically, this is the third in examining section 5 and the preclearance requirements it imposes on covered States and counties. Section 5 is one of the several temporary provisions set to expire in 2007.

We have yet another distinguished panel with us here this afternoon. We are very fortunate to have such a distinguished panel. I appreciate the witnesses taking time out of their busy schedules and especially with the expertise that they have. And we are continuing to examine the impact and effectiveness and continued need for section 5.

Section 5 was enacted in 1965 as part of the Voting Rights Act, along with several other temporary and permanent provisions, to end almost a century of discrimination against minorities in the political process. It was designed to prevent certain States and political subdivisions from undermining Federal efforts to enforce the constitutional guarantees of the 14th and 15th amendments.

As we discussed in our earlier hearing, section 4 of the Voting Rights Act set forth a formula to cover jurisdictions with a history of discrimination. To protect minority voters and the progress made to date, Congress required these covered jurisdictions to preclear all voting and election changes with the U.S. District Court for the District of Columbia or the Attorney General before being able to give effect to such changes.

In submitting changes, covered States and counties are required to prove that such a change, "does not have the purpose or effect of denying a citizen's right to vote on account of race, color or language minority status."

The Department of Justice and the U.S. District Court for the District of Columbia enforced section 5 by requiring covered jurisdictions to prove that such a change was not made with a purpose to discriminate and will not have the effect of making minority vot-

ers worse off. Such was the standard until 2000 when the Supreme Court deviated from this standard in the case of *Reno v. Bossier Parish,* also known as *Bossier II.* In *Bossier II* the Supreme Court held that section 5 only required a covered jurisdiction to prove that a change was nonretrogressive in purpose and effect.

The holding of the Court therefore allowed changes that are enacted with a nonretrogressive but discriminatory purpose to be precleared under section 5. Some suggest that this standard is contrary to the broad purpose of the Voting Rights Act in section 5, which is to prohibit discrimination in all forms.

During this hearing, we will discuss Congress' intent in enacting section 5, the Department of Justice's and U.S. District Court for the District of Columbia's enforcement efforts prior to and after *Bossier,* and the potential solutions to remedy the impact if the decision is contrary to Congress' intent.

Again, we very much appreciate such a distinguished panel as we have before us this afternoon. And I will now yield, I believe, to the gentleman from North Carolina, Mr. Watt, for the purpose of making an opening statement.

Mr. WATT. I thank the Chairman for yielding. I am not sure how I got yielded to first, but I will take whatever order you want to take me in.

Mr. CHABOT. We would suggest 5 minutes, but——

Mr. WATT. All right, 5 minutes.

Mr. CHABOT. Or less.

Mr. WATT. Or less. Today is our fifth hearing on the reauthorization of the Voting Rights Act and the third in which we focus on section 5. Today we begin to consider whether the Supreme Court in a number of cases has strayed from the statutory intent of Congress in enacting section 5 through its interpretations of challenges under the act.

Section 5 requires covered jurisdictions to submit proposed voting changes to the Department of Justice or a three-judge court for preclearance. The jurisdiction bears the burden of proving that the proposed change, "does not have the purpose or effect of denying or abridging a citizen's right to vote on account of race, color, or language minority status."

For that case, the Supreme Court recognized that a voting change that was constructed with a discriminatory purpose violated section 5 and could not be precleared by the Justice Department or the three-judge court.

Proof of discriminatory purpose or intent has always been a formidable challenge, and as modes of discrimination become more sophisticated and less obvious, proof of discriminatory intent increasingly seem to be practically insurmountable. Yet, for years, minority voters and their advocates shouldered that overwhelming burden where necessary to prove intent where a voting change in a section 5 jurisdiction was motivated by a racial animus and intent to discriminate.

The *Reno v. Bossier Parish* school board, the so-called *Bossier II* case, on its facts was such a case. In *Bossier II* a Louisiana parish school board adopted a redistricting plan with the specific and successful intent to keep Blacks off the school board.

Because no Blacks had previously served on the school board, however, the Supreme Court held that there was no retrogression; that is, there was no backsliding and, hence, no violation of section 5 in that case. The decision of the Court in *Bossier II* was a radical departure from prior judicial interpretations of section 5, many of which are addressed in the written submissions from the witnesses today.

Under *Bossier II,* if blatant discrimination operates to keep a minority group, "in its place," there is no violation of section 5.

This cannot be what Congress intended in 1965 when it resolved to shift the advantage of time and inertia from the perpetrators of the evil to its victims as the Supreme Court noted in *South Carolina v. Katzenbach.* A rule of law that permits intentionally discriminatory policies that deliberately stagnate the progress of racial minority is counter to our democratic principles and invites racial hostility and polarization.

I hope that these hearings will form the basis for us to address and correct the Supreme Court's decision in *Bossier II* and the corrosive effect it is having on political participation for minorities.

Indeed, Mr. Chairman, as we prepare to say our final good-bye to Rosa Parks whose courageous defiance served as a catalyst to the civil rights movement, it seems only fitting that we reaffirm that our Nation does not sanction the racial subjugation of minorities either on the bus or at the polls.

Thank you, Mr. Chairman, and I look forward to hearing the testimony of the witnesses and thank the witnesses for being here to enlighten us here today.

Thank you so much. I yield back.

Mr. CHABOT. Thank you. The gentleman yields back his time.

The very distinguished Ranking Member of the full Committee, Mr. Conyers, is recognized for the purpose of making an opening statement. I would also note that a significant number of Members of the House, including myself and others, will be traveling to the gentleman's district, I believe tomorrow, for the purpose of attending the funeral of Ms. Parks.

The gentleman is recognized.

Mr. CONYERS. Thank you, Chairman Chabot. I am delighted that my friend from North Carolina would couch his opening statements in the backdrop of the incredible outpouring of grief and sentiment about the contributions of the mother of the civil rights movement, whose third tribute, memorial and home-going, will take place in Detroit tomorrow. We have had to enlarge to two planes, now leaving; and I am glad that the Chairman of this Subcommittee, as well as other Members of the Republican Party, are going as well.

The only thing I wanted to add to Mr. Watt's commentary is the fact that we are dealing with the most sensitive part, in my mind, of this reauthorization process, section 5. What we are going to be asked to do sooner or later is to look at a decision which has reversed over 3 decades of practice about how section 5 would be implemented.

There are a couple of considerations here. Number one is that we have had a restriction of the application of section 5 preclearance submissions that have been very, very noted under—as a result of *Bossier II* in particular. Also, the fact that in section 5 we intended

to prohibit the implementation of racially motivated changes, and it is almost undeniable that *Bossier,* by a 5–4 decision, was not adequately decided.

Now, this is not the first time that the Congress and this Committee have been called upon to rectify the problems in judicial interpretation of the Voting Rights Act of 1965. This has happened before, and it will probably be suggested that it happen again. It is extremely important that the way that we make sure that we don't slip back into the past is that the preclearance submission requirement be carefully gone over, and just to make sure that we all feel good about what we may be called upon to do, we just had to correct a court decision in the highest court of the land, in takings under eminent domain only last week in the *Kelo* case.

So, sometimes it is our job. As we look back at the effects of the Supreme Court decision we realize that it is very important that we make the correction and that we don't let a case stand like that. I think that this is essentially what we are confronted with today; and I am very happy that we have got such a distinguished panel of witnesses.

I look forward to a very stimulating discussion, and I thank the Chairman for the time and return what is remaining.

Mr. CHABOT. Thank you very much. The gentleman yields back.

Are there any other Members that would like to make any opening statement?

The gentlemen from Virginia, Mr. Scott is recognized.

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman, and I thank you for convening the hearing.

The purpose of these hearings is to establish a record to justify the reauthorization of section 5 of the Voting Rights Act. Jurisdiction covered by section 5 must receive prior approval from the U.S. Attorney General or prior judicial approval from the three-judge panel in the Federal District Court in Washington, D.C., for all proposed voting changes.

The importance of this provision has been recognized by several civil rights organizations in previous hearings. A bipartisan congressional report in 1982 warned that without the section, discrimination would appear—would reappear overnight. Frankly, Mr. Chairman, I don't think it would take that long.

Without prior approval, preclearance jurisdictions could proceed to elect to make changes in elections and have elections on what would later be determined by courts pursuant to a section 2 challenge to be illegal changes.

Bringing a section 2 action is very expensive, more than what most voters or small groups may be willing to afford to vindicate their rights. And even if they were able to make a case and be successful, this would be years down the road by the time you take into account the time frame for litigation, including appeals. By then, the winner of the illegal election is an incumbent, and we all know from our experiences as well as from observing other races in which there is an incumbent and from testimony before this Subcommittee, that incumbency is a huge and, more often than not, dispositive advantage in an election.

So it is clear that if we do not renew this section, we would essentially create a perverse incentive to pass illegal plans with no

immediate recourse. Unfortunately, due to the 2000 Supreme Court case, *Bossier Parish,* we do need to consider more than a simple renewal of section 5. We have to also renew and strengthen its traditional intent and purpose of disallowing voting changes with a discriminatory purpose as well as just effects. The Department of Justice, the courts and all proponents of section 5 have long understood and interpreted it to prohibit jurisdictions from implementing both purposeful discrimination and those that changes with retrogressive effect. However, the majority in *Bossier Parish II* effectively eliminated the purpose prong of the preclearance requirement.

The Court held that section 5 was intended only to prevent specific instances in which changes would make minority voters worse off than they were prior to the change. The majority in that case incorrectly interpreted congressional intent in crafting section 5 by limiting its impact to those cases where there was the retrogression; and this leaves, of course, the absurd result that when a clear section 2 violation is offered in a change for preclearance,if the illegal plan is no worse than the existing illegal plan, the Justice Department would have to preclear it. That eviscerates the very purpose of section 5 preclearance.

So Congress must not only reauthorize section 5, but we must also clarify its intent that section 5 preclearance would disallow and prevent all voting practices that have a discriminatory purpose.

Thank you, Mr. Chairman. I look forward to the testimony of our witnesses.

Mr. CHABOT. Thank you, and the gentlemen yields back. I would note the attendance today, as well, of the gentleman from Georgia, Mr. Scott, who is not a Member of this Committee, but has been very studious, I would say, in attending many of the hearings we have had thus far, and we appreciate your attendance as well.

At this time, I would like to introduce our very distinguished panel. Before I do that, I would note that, without objection, all Members will have 5 legislative days to submit additional materials for the hearing record.

Our first witness this afternoon will be Mr. Mark Posner. Mr. Posner is currently an Adjunct Professor of Law at the University of Maryland's School of Law and at American University's Washington College of Law, as well as an independent consultant in the area of civil rights.

Prior to teaching and consulting, Mr. Posner served as an attorney in the U.S. Department of Justice Civil Rights Division from 1980 until 2003. Between the mid-1980's through 1995 he was one of two attorneys responsible for reviewing section 5 preclearance submissions and served as special section 5 counsel from 1992 until 1995.

Prior to joining the Department of Justice, Mr. Posner was a law clerk to U.S. District Court Judge Harry Pregerson.

We very much welcome you here this afternoon, Mr. Posner.

Our second witness will be Ms. Brenda Wright. Ms. Wright currently serves as the Managing Attorney for the National Voting Rights Institute in Boston, Massachusetts. As Managing Attorney, Ms. Wright directs the NVRI's nationwide litigation program and

has served as lead counsel for the Institute in landmark cases in Vermont and New Mexico, defending the constitutionality of campaign spending limits.

Prior to joining the NVRI, Ms. Wright served as the Director of the Voting Rights Project at the Lawyers' Committee for Civil Rights Under Law, where she successfully argued the first Supreme Court case, *Young v. Fordice,* involving the voter law. In addition to authoring many publications on voting rights and campaign finance reform, Ms. Wright has testified before Congress and State legislatures on several occasions.

We welcome you back, Ms. Wright.

Our third witness will be Mr. Roger Clegg. Mr. Clegg is Vice President and General Counsel for the Center for Equal Opportunity, where he specializes in civil rights, immigration and bilingual education issues.

Prior to his work at the Center, Mr. Clegg held a number of positions at the U.S. Department of Justice between the years 1982 and 1993 including that of Assistant to the Solicitor General. From 1993 to 1997, Mr. Clegg was Vice President and General Counsel of the National Legal Center for the Public Interest, where he wrote and edited a variety of publications on legal issues of interest to business.

Mr. Clegg is the author of numerous publications, writes frequently for USA Today, the Legal Times, and The Weekly Standard and serves as a contributing editor for the National Review online.

We welcome you here, as well, Mr. Clegg.

Our fourth and final witness this afternoon will be Mr. Jerome A. Gray. Mr. Gray currently serves as the State Field Director for the Alabama Democratic Conference, a position he has held for 25 years.

During the 1980's, Mr. Gray played an instrumental role in organizing and mobilizing Black citizens at the county and municipal levels to successfully challenge the administration of discriminatory election systems. In addition, for more than 20 years, Mr. Gray served as a member of the Alabama Advisory Committee to the U.S. Commission on Civil Rights, investigating civil rights injustices throughout the State.

Mr. Gray is the coauthor of the Alabama chapter in the highly acclaimed publication edited by Chandler Davidson and Bernard Grofman, *Quiet Revolution in the South:* "The Impact of the 1965 Voting Rights Act, 1965–1990," and has served on numerous panels discussing race, politics and voting.

Mr. Gray is a life member of the Conecuh—am I pronouncing that correctly—County branch of the NAACP, and is the Political Action Chairman of the NAACP State Conference.

We welcome the entire panel. As we said, we have a very distinguished panel here this afternoon.

For those of you who may not have testified before the Committee, we have what is called a 5-minute rule where you are allowed to testify for 5 minutes. We have a lighting system; there are two separate lights there, the green light will stay on for 4 minutes, the yellow light will let you know you have 1 minute to go and the red light will indicate you that your 5 minutes are up. I

won't gavel you down immediately, but we ask you to stay within the confines of the 5-minute rule.

We will have 5 minutes to ask questions as well, so we will stick by that same rule.

It is the practice of the Committee to swear in all witnesses appearing before it, so if you would all please rise and raise your right hand.

[Witnesses sworn.]

Mr. CHABOT. All witnesses have indicated in the affirmative. We thank you very much, and we now begin with you, Mr. Posner, and you're recognized for 5 minutes.

TESTIMONY OF MARK A. POSNER, ADJUNCT PROFESSOR, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW

Mr. POSNER. Thank you, Mr. Chairman, and good afternoon to you and to the distinguished Members of this Committee.

It is an honor to testify before you today regarding the reauthorization of section 5 of the Voting Rights Act, one of our Nation's most important civil rights laws.

It is my firm belief that Congress, as part of a section 5 reauthorization, should legislatively reverse the Supreme Court's January 2000 decision in *Reno v. Bossier Parish School Board.* There are three reasons for this.

First, the five-Justice majority in *Bossier Parish* badly misconstrued the meaning of the discriminatory purpose test contained in section 5. For over 34 years prior to this decision, section 5 prohibited the implementation of voting changes adopted with a racially discriminatory purpose. Now, according to the Court, racially motivated voting changes are almost always completely legal under section 5.

Specifically, the section 5 purpose test now only applies if, per chance, a jurisdiction were to intend to cause a retrogression in minorities' electoral opportunity, but somehow messes up and adopts a change that, in fact, is not retrogressive. This is highly unlikely to occur, and in fact, in the nearly 5 years since *Bossier Parish* was decided, the Justice Department has reviewed approximately 76,000 voting changes and no such incompetent retrogressor has appeared.

Adopting such a specialized and esoteric definition of discriminatory purpose is not what Congress intended when it enacted the Voting Rights Act in 1965. The plain meaning of the word "purpose" in section 5 encompasses any and all discriminatory purposes, not merely a purpose to cause retrogression.

As the Supreme Court explained when it upheld the constitutionality of section 5 in 1966, Congress adopted the statute to respond to exceptional conditions by acting in a decisive manner through an uncommon exercise of congressional power. Clearly, Congress knew that this historic effort necessitated a prohibition on all purposeful discrimination in voting.

Second, as a matter of actual practice, the *Bossier Parish* decision has substantially undercut the ability of the Justice Department and the District Court for the District of Columbia to employ section 5 to block the implementation of discriminatory changes.

At the time that *Bossier Parish* was decided, a majority of the Justice Department's section 5 objections were based on discriminatory purpose, and the clear trend line from the 1970's to the 1980's to the 1990's was that discriminatory purpose increasingly was the basis on which the Department was interposing objections. About four-fifths of the Department's objections to post-1990 redistricting plans were based on discriminatory purpose and about a third of the objections to the post-1980 plans were interposed on this basis.

Not surprisingly, therefore, after *Bossier Parish,* the Justice Department has interposed many fewer objections to redistricting plans and to voting changes in general.

Third, the section 5 discriminatory purpose test is fully capable of administration by the Justice Department and the District Court for the District of Columbia and does not raise any constitutional concerns. It may be that the Supreme Court's central problem with the section 5 purpose test is that it does not trust the Justice Department to apply this test in an appropriate manner.

In 1995, a five-Justice majority of the Court averred that the Department was using the purpose test as a cover for implementing a near-unconstitutional policy of maximization. Then, in *Bossier Parish,* the same five Justices suggested that the purpose test itself might render section 5 unconstitutional.

Since purposeful discrimination is the core conduct prohibited by the 15th amendment, this statement seems explainable only if the five Justices were referring to the false purpose test they believe the Justice Department was enforcing. It is my conclusion, however, that the Justice Department, in fact, did not apply the section 5 purpose test in an unlawful or inappropriate manner.

The Department utilized the well-established framework for conducting discriminatory purpose analyses set forth by the Supreme Court in the Arlington Heights case and also relied on the analytic factors described in the Department's procedures for the administration of section 5.

The Department first began to rely extensively on the purpose test in the 1980's during the Reagan administration when William Bradford Reynolds was Assistant Attorney General for Civil Rights, and the purpose objections interposed thereafter reflected a continuation of the modes of analysis begun at that time. Still, in light of the concern expressed by the Supreme Court, Congress should consider what actions it may take to provide further assurance that the Justice Department and the District of Columbia court will employ the purpose test in an appropriate manner if *Bossier Parish* is legislatively reversed. Specifically, Congress should consider including statutory language and/or legislative history that would provide clear guidance to the Department and the District Court with regard to the manner in which the section 5 purpose test should be utilized.

For these reasons, I believe that Congress should act to reverse the Supreme Court's decision in *Bossier Parish* to restore the section 5 purpose test to the meaning Congress intended when it enacted section 5 in 1965. Discriminatory purpose under section 5 should again mean discriminatory purpose.

Thank you.

Mr. CHABOT. Thank you.
[The prepared statement of Mr. Posner follows:]

PREPARED STATEMENT OF MARK A. POSNER

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION

OVERSIGHT HEARING ON
"THE VOTING RIGHTS ACT: SECTION 5 - PRECLEARANCE STANDARDS."

NOVEMBER 1, 2005

STATEMENT OF MARK A. POSNER
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1

Good afternoon Mr. Chairman and distinguished Committee members. My name is Mark Posner and I am an Adjunct Professor of Law at American University's Washington College of Law. From 1980 to 2003, I served as an attorney in the Civil Rights Division of the United States Department of Justice. From the mid-1980s to 1995, I was one of two attorneys principally responsible for supervising the Department's reviews of Section 5 preclearance submissions, and served with the title of Special Section 5 Counsel from 1992 to 1995. It is an honor to testify before you today regarding the reauthorization of Section 5 of the Voting Rights Act, one of the most important civil rights remedies enacted by Congress in our Nation's history.

The specific issue I will address in my testimony is whether Congress, as part of a reauthorization of Section 5 of the Voting Rights Act,[1] should legislatively reverse the Supreme Court's January 2000 decision in *Reno v. Bossier Parish School Board* (known as the "*Bossier Parish II*" decision).[2] In that case, the Supreme Court construed the scope of the Section 5 nondiscrimination standard, and by a vote of five-to-four held that Section 5 generally does not prohibit the implementation of voting changes enacted with a racially discriminatory purpose. This reversed over 34 years of law and practice, dating back to the 1965 enactment of the Voting Rights Act, under which voting changes with a racially discriminatory purpose had "no legitimacy at all . . . under the statute."[3]

It is my firm belief that Congress now should act to restore Section 5 to the nondiscrimination standard that existed prior to the *Bossier Parish II* decision. There are three reasons why Congress should do this. First, as a matter of actual practice, *Bossier Parish II* has had an enormous impact on Section 5. Before January 2000, the Section 5 nondiscrimination standard, as enforced by the Justice Department and the United States District Court for the District of Columbia, provided minority voters with broad and powerful protection against the enactment of discriminatory voting changes. After *Bossier Parish II*, the ability of the Justice Department and the district court to bar the implementation of discriminatory voting changes is highly circumscribed. Second, the intent of Congress, when it enacted Section 5 in 1965, was that Section 5 should prohibit the implementation of all racially motivated changes. Thus, as a matter of law, *Bossier Parish II* was incorrectly decided. Third, the pre-*Bossier Parish II* "purpose" test is fully capable of administration by the Justice Department and the district court, and does not raise any constitutional concerns.

Before expanding on these three points, I would like to place the legislative issue raised by *Bossier Parish II* in historical context, and also describe the legal context in which the decision was rendered and provide a more specific statement of the Court's holding.

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[1] 42 U.S.C. § 1973c.

[2] 528 U.S. 320 (2000).

[3] City of Richmond v. United States, 422 U.S. 358, 378 (1975).

Historically speaking, as Congress now embarks on its review of Section 5 of the Voting Rights Act, it finds itself in much the same situation presented in 1982, when Section 5 and the other time-limited provisions of the Voting Rights Act were last before Congress for reauthorization. Then, as is the case now, Congress was confronted with a recent Supreme Court decision that upended prior judicial rulings and severely limited the scope of the Act's nondiscrimination standards. In 1982, the Court decision was *Mobile v. Bolden*,[4] and the issue was whether the Court plurality in *Bolden* correctly interpreted the nondiscrimination standard contained in Section 2 of the Act,[5] as well as the constitutional vote dilution standard. Congress concluded that the Court got it wrong, and therefore amended Section 2 to restore the old standard.[6] Today, the Court decision is *Bossier Parish II*, and the issue is whether the five-Justice majority in *Bossier Parish II* correctly interpreted the nondiscrimination standard contained in Section 5.

Section 5 requires covered jurisdictions to satisfy a two-pronged test in order to obtain preclearance. Jurisdictions must demonstrate that their voting changes do not have a discriminatory purpose and that their changes will not have a discriminatory effect. In applying this test of discriminatory purpose and discriminatory effect, it is well established that the world of Section 5 voting changes is divided in two. In one sphere are those voting changes that are "retrogressive," i.e., changes that would worsen the opportunity of minority voters to effectively participate in the electoral process. In the other sphere are those voting changes that either are ameliorative or do not affect minority electoral opportunity one way or the other, i.e., non-retrogressive voting changes.

In 1976, the Supreme Court held in *Beer v. United States*[7] that discriminatory effect under Section 5 means retrogression. Because Section 5 prohibits the implementation of any and all changes that have a discriminatory effect, all retrogressive changes are per se unlawful under Section 5.

With regard to non-retrogressive changes, the Supreme Court, the District Court for the District of Columbia, and the Justice Department, prior to *Bossier Parish II*, all uniformly construed Section 5 as barring the implementation of such changes if and when they are adopted with a discriminatory purpose.[8] Under this approach, most non-

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[4] 446 U.S. 55 (1980).

[5] 42 U.S.C. § 1973.

[6] S. Rep. No. 97-227, at 15-27 (1982).

[7] 425 U.S. 130 (1976).

[8] Bossier Parish II, 528 U.S. at 368 (Souter, J., dissenting) & 373 (Stevens, J., dissenting); City of Pleasant Grove v. United States, 479 U.S. 462 (1987); City of Richmond v. United States, *supra*; Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983).

retrogressive changes were lawful under Section 5, but covered jurisdictions also were required to comply with the core teaching of the Fourteenth and Fifteenth Amendments, that government actions must be free of discriminatory purpose. Thus, discriminatory purpose under Section 5 simply meant any intent to abridge the right to vote of minority citizens.[9]

In *Bossier Parish II*, the Supreme Court held that discriminatory purpose under Section 5 no longer is co-extensive with the ordinary meaning of discriminatory purpose or with the meaning of discriminatory purpose under the Fourteenth and Fifteenth Amendments. Instead, Section 5 "purpose" now has been given a highly specialized and esoteric meaning, the intent to cause retrogression. As a result, the purpose test has effectively been read almost entirely out of Section 5. This is because the purpose standard now can almost never make a difference in whether or not a change is precleared. The only situation in which it can make a difference is where a jurisdiction intends to cause retrogression but then, somehow, messes up and enacts a voting change that will not actually cause retrogression to occur (the so-called "incompetent retrogresser"). In the nearly five years since *Bossier Parish II* was decided, the Justice Department has reviewed approximately 76,000 voting changes, and no such incompetent retrogresser has appeared.[10]

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[9] The Justice Department also implemented Section 5 so as to bar the implementation of non-retrogressive changes that violated some other provision of the Act, such as the Section 2 results test, the language minority requirements of Section 4(f)(4), 42 U.S.C. § 1973b(f)(4), and 203, 42 U.S.C. § 1973aa-1a, and the voter assistance requirement of Section 208, 42 U.S.C. § 1973aa-6. In 1997, in the *Bossier Parish I* decision, 520 U.S. 471, the Supreme Court held that preclearance may not be denied on this basis. This decision was important, but also had only a modest impact on Section 5 since the Justice Department had based relatively few preclearance denials solely on another Voting Rights Act provision prior to the decision in *Bossier Parish I*.

[10] Subsequent to *Bossier Parish II*, the Justice Department has denied preclearance on two occasions (to redistricting plans) where the Department, in its letters of explanation, seemingly advised that the denials were based solely on retrogressive intent. Letter from J. Michael Wiggins, Acting Assistant Attorney General, to Al Grieshaber Jr., City Attorney, September 23, 2002; Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to C. Havird Jones, Jr., Senior Assistant Attorney General, September 3, 2002. However, based on the information provided in the Department's letters, it appears that both plans actually were retrogressive in effect as well as being intentionally retrogressive (in one plan, the offending single-member district was reduced from fifty-one to thirty percent black in population, and in the other plan, the two offending districts dropped seven percentage points and four percentage points in black voting-age population).

The Department also advised in a third preclearance letter that its decision was based on discriminatory intent, although the Department did not contend that it was a retrogressive intent. Letter from R. Alexander Acosta, Assistant Attorney General, to Mayor H. Bruce Buckheister, September 16, 2003. That denial involved annexations that

1. *Bossier Parish II*'s Significant Impact on Section 5.

The Supreme Court's decision in *Bossier Parish II* has had an enormous impact on the ability of the Justice Department and the District Court for the District of Columbia to employ Section 5 to block the implementation of discriminatory changes. This impact is best demonstrated by examining the record of Justice Department preclearance denials (known as "objections") before and after the decision. Almost all Section 5 changes are reviewed by the Department and not by the district court.[11]

At the time that *Bossier Parish II* was decided, a majority of the Justice Department's objections were based on discriminatory, non-retrogressive purpose. Furthermore, the clear trend line, from the 1970s to the 1980s to the 1990s, was that discriminatory purpose increasingly was the basis on which Section 5 objections were being interposed.[12]

The purpose test was particularly important in the Justice Department's objections to redistricting plans. A substantial majority (about four-fifths) of the Department's objections to post-1990 redistricting plans were based on discriminatory purpose with no finding of retrogression, and about a third of the objections to the post-1980 plans were interposed on this basis.[13]

Not surprisingly, therefore, the Justice Department has interposed many fewer objections after the *Bossier Parish II* decision than in the corresponding time period in the 1990s. Again, the effect of the decision can best be seen by looking at the

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added two white persons of voting age to a town, and was based on the Department's finding that the town was implementing a racially selective annexation policy. Accordingly, it appears to be correct that this post-*Bossier Parish II* preclearance denial was based on discriminatory purpose, but it is difficult to see how the town's intent was to cause a retrogression in the electoral opportunity of the town's black citizens.

[11] Through October 4, 2005, jurisdictions covered by Section 5 have submitted approximately 435,000 voting changes to the Justice Department for Section 5 review, while filing only 68 preclearance lawsuits in the District Court for the District of Columbia.

[12] According to an analysis recently undertaken by voting rights researchers, fifty-five percent of the 1990s objections, twenty-seven percent of the 1980s objections, but just three percent of the pre-1980 objections were interposed to non-retrogressive, intentionally discriminatory voting changes. Peyton McCrary, Christopher Seaman, & Richard Valelly, The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act (Sept. 2005) (forthcoming).

[13] For purposes of this analysis, post-1990 plans are those that the Justice Department reviewed between April 1991 and June 1995, and post-1980 plans are those that were reviewed between April 1981 and June 1985.

preclearance statistics for redistrictings. Whereas the Department objected to about seven percent of the redistricting plans adopted following the 1980 Census and about eight percent of the post-1990 plans, the Department has objected to just one percent of the post-2000 redistricting plans. Interestingly, the number of redistricting plans submitted to the Department for preclearance was almost exactly the same after both the 1990 and 2000 Censuses, and the number of retrogression objections to post-1990 and post-2000 plans also remained the same. Accordingly, the sharp drop in the post-2000 objection percentage, and the corresponding sharp shop in the actual number of redistricting objections, occurred entirely because the purpose-based objections disappeared. While one cannot know for certain how many purpose-based objections to redistrictings would have been interposed if *Bossier Parish II* had not intervened (and it is possible that fewer purposefully discriminatory plans were adopted by covered jurisdictions after the 2000 Census), it seems clear that the change in the purpose standard occasioned by *Bossier Parish II* had a major impact. [14]

In considering the practical impact of *Bossier Parish II* on the enforcement of Section 5, it also is helpful to examine the specific types of circumstances in which non-retrogressive changes may have a discriminatory purpose and to briefly recount the history of the Justice Department's development, in the 1980s and 1990s, of the purpose basis for interposing objections.

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[14] Because the number of post-2000 redistricting objections has decreased substantially, the overall number of objections, involving all types of voting changes, also is much lower in recent years. However, it should be noted that the *Bossier Parish II* decision apparently is not the only reason for the overall decrease.

Since the mid-1990s, there have been many fewer retrogression objections to dilutive annexations, and to the use of a majority-vote requirement and/or anti-single-shot voting provisions in the context of at-large elections. This likely is due in large part to the fact that, by the mid-1990s, a great many covered jurisdictions had switched from at-large to district-based election systems, spurred by Congress' adoption of the Section 2 results test in 1982 (annexations that reduce a municipality's minority population percentage typically are not retrogressive when the municipality is employing a district-based election system; likewise, the adoption of a majority-vote requirement typically is not retrogressive in the context of a district-based system; and anti-single-shot voting provisions are inapplicable when elections are held using single-member districts since single-shot voting only can occur in the context of at-large or multi-member district elections).

In addition, there have been many fewer purpose objections since the mid-1990s to changes from at-large to mixed systems of districts and at-large seats. Initially, this decrease, at least in part, appears to have occurred because the wave of changes from at-large to district-based systems slowed in the mid-1990s. The *Bossier Parish II* decision in 2000 then eliminated the purpose basis for interposing these objections.

In the 1980s and 1990s, most purpose objections were interposed to redistrictings and election method changes. A purpose objection to a non-retrogressive redistricting could occur where, in the context of racially polarized voting, a jurisdiction adopted a new plan that fragmented or packed minority voters so as to purposefully avoid drawing additional majority-minority districts, or so as to minimize the opportunity of minority voters to elect a candidate of their choice in a majority-minority district included in the new plan. For example, in 1982, the State of Georgia enacted a congressional redistricting plan that increased the black population percentage in the Fifth Congressional District in Atlanta from fifty to fifty-seven percent, but the District Court for the District of Columbia denied preclearance because it found that the State had fragmented the black population in Atlanta to purposefully minimize black electoral opportunity.[15]

Election method objections were interposed on a number of occasions based on discriminatory purpose where a jurisdiction changed from an at-large to a mixed system of districts and at-large seats. Though this change was ameliorative in the context of racially polarized voting, purpose objections were interposed where the new election system included one or more features intentionally designed to significantly limit the extent of the new electoral opportunity provided to minority voters. For example, objections were interposed where the districting plan that was adopted with the new election system fragmented or packed minority voters to minimize their electoral opportunity. Objections also were interposed where the at-large seats in the new plan were to be elected with a majority-vote requirement or with a provision that prevented single-shot voting by minority voters.

The 1980s increase in the number of purpose objections to non-retrogressive changes began in the Reagan Administration under the leadership of then Assistant Attorney General William Bradford Reynolds. These objections first took full flower in the Department's reviews of post-1980 redistrictings by Mississippi counties. During Mr. Reynolds' tenure, the Department interposed about twenty-five objections to non-retrogressive Mississippi plans based on discriminatory purpose. Thereafter, Mr. Reynolds expanded the application of the purpose test to the review of covered jurisdictions' changes from an at-large method of election to a mixed system of districts and at-large seats. In the 1980s, many covered jurisdictions were abandoning their at-large systems in response to Congress' 1982 adoption of the Section 2 results test. While most of these jurisdictions adopted new election systems that provided minority voters with an equal opportunity to elect candidates of their choice, some jurisdictions inserted provisions in their new election systems so as to purposefully limit or minimize the increase in minority electoral power.

The modes of analysis forged under Mr. Reynolds then were applied by the Justice Department to the post-1990 redistrictings and to the continuing submission of election method changes. For example, about a fifth of the total number of 1990s purpose redistricting objections were again to plans enacted by Mississippi counties. The

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[15] Busbee v. Smith, *supra*.

other states in which a large number of purpose redistricting objections were interposed were Louisiana and Texas. The Texas objections were particularly notable as the Section 5 concern often was that jurisdictions were seeking to limit the growing political power of Hispanic voters.

In *Bossier Parish II*, the Supreme Court suggested that interposing purpose objections to non-retrogressive changes makes little or no practical sense. The Court correctly observed that a Section 5 preclearance denial, in and of itself, only means that the offending jurisdiction may return to the old voting practice or procedure and does not require the jurisdiction to adopt a substitute change that is both non-retrogressive and free of discriminatory purpose. The Court reasoned, therefore, that a refusal to preclear a non-retrogressive change "would risk leaving in effect a status quo that is even worse."[16] The flaw in the Court's reasoning, however, is that Justice Department often interposed purpose objections to non-retrogressive changes where the jurisdiction, for a non-Section 5 reason, could not return to the status quo. In the case of purpose objections to redistrictings, the status quo typically could not remain in effect because the existing plan violated the one-person, one-vote requirement. In the case of purpose objections to election method changes, the existing at-large system often could not remain in effect (for legal and/or practical reasons) because it was the subject of a Section 2 challenge, or because a Section 2 challenge was threatened and/or the local minority community was applying significant political pressure in favor of a change.

In sum, the Supreme Court's decision in *Bossier Parish II*, in very real terms, significantly shrank the remedial power of Section 5 by eliminating the most common basis on which the Justice Department was interposing objections.

2. *Bossier Parish II* Wrongly Interpreted Section 5.

The second issue is whether the Supreme Court in *Bossier Parish II* correctly construed congressional intent regarding the meaning of discriminatory purpose under Section 5. The answer, I believe, is emphatically "no." The separate dissenting opinions of Justices Stevens, Breyer, and Souter in *Bossier Parish II* provide excellent statements of the many reasons why the Court got it wrong, and I refer the Committee to those opinions (Justice Ginsburg dissented without writing an opinion).

What I would like to emphasize here are the two most basic flaws in the Court's analysis. First, the plain meaning of the word "purpose" in Section 5 encompasses any and all discriminatory purposes, not merely a purpose to cause retrogression. Second, it is implausible, if not unbelievable, that Congress in 1965 meant to adopt such a small bore definition of purpose when, as the Supreme Court noted in 1966, Congress had adopted Section 5 to respond to "exceptional conditions" by acting in a "decisive manner" through an "uncommon exercise of congressional power."[17]

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[16] 528 U.S. at 336.

[17] South Carolina v. Katzenbach, 383 U.S. 301, 334-335 (1966).

3. The Discriminatory Purpose Test is Administrable and Well-Established.

The third and final issue is whether the pre-*Bossier Parish II* purpose standard is administrable by the Justice Department and the District Court for the District of Columbia, and whether it raises any special concerns. This issue arises because of Supreme Court pronouncements indicating that the up-until-recent five-Justice majority of the Court did not trust the Justice Department to properly apply the pre-*Bossier Parish II* purpose standard. In 1995, this five-Justice majority severely criticized the manner in which the Justice Department purportedly was applying the Section 5 purpose test to redistrictings. The Court held that the Department was using the purpose test as a cover for the implementation of a near-unconstitutional policy of maximization (i.e., requiring that redistricting plans include the maximum number of possible majority-minority districts).[18] Then, in *Bossier Parish II*, the same five-Justice majority observed that use of the pre-existing purpose standard would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts [citation omitted], perhaps to the extent of raising concerns about § 5's constitutionality."[19] Since purposeful discrimination is the core prohibition of the Fifteenth Amendment, this statement is perplexing. However, one explanation may be that the five Justices again were expressing their concern about the Justice Department's ability to properly enforce a purpose test. In short, the Supreme Court may well be asking, and Congress also then should consider, whether it is appropriate to give the purpose authority back to the Justice Department if the Department badly handled that authority in the past.

It is my conclusion that the Justice Department, in fact, did not apply the purpose standard in an unlawful or inappropriate manner to redistrictings (or any other type of voting change). Instead, the Department applied the Section 5 purpose test using the well-established framework for conducting discriminatory purpose analyses, a framework that continues to provide a fully workable basis on which to apply a restored purpose test in the future.

I previously have published a comprehensive and detailed analysis of the Justice Department's post-1990 redistricting objections.[20] As described in that essay, the Justice Department interposed its purpose objections to post-1990 plans by utilizing the analytic framework set out by the Supreme Court in its *Arlington Heights* decision.[21] The

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[18] Miller v. Johnson, 515 U.S. 900, 926 (1995).

[19] 528 U.S. at 336.

[20] "Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act," in *Race and Redistricting in the 1990s* (Bernard Grofman, ed., 1998).

[21] Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

Department also relied on the analytic factors set forth in the Department's Procedures for the Administration of Section 5.[22]

As specified in *Arlington Heights*, the Justice Department began each purpose analysis of a submitted redistricting plan by examining the impact of the plan on minority voters. That is, the Department considered whether the plan diluted or fairly reflected minority voting strength, in the context of the prevailing voting patterns in the jurisdiction and the location of the jurisdiction's minority population concentrations.[23] Had the Department's analyses also ended there, there might be reason for concern that the Department was implementing a maximization policy or perhaps an abbreviated version of the Section 2 results test. However, the Department's analyses did not end there. Instead, when the Department found that a plan diluted minority voting strength, it then proceeded to conduct a thorough review of the justifications proffered by the submitting jurisdiction for the plan. To determine whether these justifications were in fact the concerns that motivated the jurisdiction's selection of the new district lines, the Department analyzed whether the asserted redistricting criteria were applied consistently by the jurisdiction, whether the district lines in fact reflected the criteria, and the extent to which the criteria actually were discussed and used during the redistricting process. The Department also considered the extent to which efforts to protect white incumbents, elected by white voters in racially polarized elections, were indicative of a discriminatory purpose.[24]

Turning to the Supreme Court's interpretation of the Justice Department's purpose analyses, it appears that the evidence offered by the Court to support its "Justice Department as illegitimate maximizer" holding was extraordinarily weak. At the outset, the Court made no claim that the Justice Department had set forth its purported policy in any written document (in Section 5 objection letters or otherwise). No documentation was produced in support of the existence of any such policy and, as the Court acknowledged, the Solicitor General had advised the Court that no such policy existed.

Lacking direct evidence, the Court nonetheless concluded that it could infer the existence of a maximization policy. This was problematic on its face, since the Court was considering just two of the Department's post-1990 redistricting objections (to congressional redistricting plans enacted by the State of Georgia), which was a poor foundation on which to infer a general policy. Moreover, even with regard to these two objections, the Court's evidence consisted of a small assortment of less-than probative or unpersuasive facts. The most damning admission, according to the Court, was a

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[22] 28 C.F.R. § 51.59.

[23] *See* Johnson v. De Grandy, 512 U.S. 997 (1994); Thornburg v. Gingles, 478 U.S. 30 (1986); City of Richmond v. United States, *supra*.

[24] Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1992); Ketchum v. Byrne, 740 F.2d 1398, 1408-1409 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

Mr. CHABOT. Ms. Wright, you're recognized for 5 minutes.

TESTIMONY OF BRENDA WRIGHT, MANAGING ATTORNEY, NATIONAL VOTING RIGHTS INSTITUTE

Ms. WRIGHT. Good afternoon, Mr. Chairman, and Members of the Subcommittee. I very much appreciate the opportunity to testify here in favor of reauthorization of the Voting Rights Act of 1965.

I am here today to discuss in particular the need to fully restore section 5's protections against purposeful racial discrimination in voting. As you have indicated, Mr. Chairman, those protections were fundamentally weakened by the Supreme Court's January 2000 decision in the *Bossier Parish* case. In that decision, a narrow majority said that the Justice Department must approve certain racially discriminatory voting changes under section 5 even if the Justice Department determines that the discrimination was intentional.

I believe the *Bossier Parish* decision was contrary to Congress' intent in enacting section 5 and contrary to well-settled precedent. By its terms, section 5 bars any voting change that is racially discriminatory either in its purpose or its effect.

Prior to the *Bossier Parish* decision, it was clear that the purpose and effect test of section 5 were independent, so that failure to satisfy either one meant that the voting change should not be precleared.

A series of Supreme Court decisions in the 1970's and 1980's established that a showing of retrogression was necessary to support an objection under the effects test, but also made it clear that any voting change that was the product of intentional racial discrimination was barred under section 5 whether or not it was retrogressive. A good example of this was a 1975 case, *City of Richmond v. United States,* in which the Court explained in a very vivid way why a change with no unlawful effect should still be denied preclearance if adopted for a discriminatory purpose. In the Court's words, an official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute.

For many years, the Justice Department relied on this understanding of the purpose test to deny preclearance to any changes that reflected intentional racial discrimination. But the *Bossier Parish* decision changed all this by ruling that the intent prong of section 5 covers only so-called "retrogressive intent," that is, an intent to make things worse for minority citizens as compared to the status quo. Under that interpretation, a jurisdiction that never had minority representation on its elected body could continue to adopt new redistricting plans, intentionally designed to freeze out minority voting strength; and section 5 would provide no protection.

The facts in the *Bossier Parish* case, as Representative Watt indicated, provide a good illustration of that. In 1990, African-Americans constituted approximately 20 percent of the population in the parish, yet no African-American had ever been elected to the 12-member school board. The school board refused to include any majority Black districts in the new plan even though the school board

later stipulated that it was, "obvious that a reasonably compact Black majority district could be drawn within Bossier City."

There was even testimony that two school board members acknowledged that the redistricting plan reflected opposition to Black representation or a Black majority district. The Supreme Court nevertheless ruled that the Justice Department was powerless to block the school board's plan under section 5 because the plan did not have a retrogressive purpose. That decision greatly weakens protections of the Voting Rights Act.

If this interpretation had been applied during the first 35 years of section 5's history, Congressman John Lewis of Georgia probably would not have won election to the U.S. Congress in 1986. In the early 1980's, Georgia enacted a discriminatory congressional redistricting plan that fragmented the Black population in the Atlanta area. The Georgia legislator who headed the redistricting committee openly declared his opposition to drawing so-called Negro districts, except that he did not use the word "Negro;" he used the racial epithet.

Because of the clear evidence of racism behind the plan, the Justice Department objected even though the plan was not retrogressive. Georgia then redrew the district and the result was that Congressman Lewis was able to win election. But under the *Bossier Parish* decision, the Department of Justice would have been obliged to approve Georgia's original discriminatory plan.

The decision has also had a serious detrimental impact on actual section 5 enforcement since it was issued. In 1980's and 1990's, before the *Bossier Parish* decision, over 200 section 5 objections were based solely on racially discriminatory intent. By contrast, in the first 4½ years after the *Bossier Parish* decision, only two objections were based solely on intent.

All of this underscores the importance of restoring the original intent of section 5 when Congress reauthorizes it. When a jurisdiction deliberately acts to lock minorities out of electoral power, that jurisdiction should not be entitled to preclearance simply because minorities have always been discriminated against in the jurisdiction.

Intentional racial discrimination should not be tolerated under section 5. Such a result is fundamentally inconsistent with our Nation's values.

Thank you.

Mr. CHABOT. Thank you very much.

[The prepared statement of Ms. Wright follows:]

PREPARED STATEMENT OF BRENDA WRIGHT

Testimony of Brenda Wright
Before the Judiciary Committee's Subcommittee on the Constitution
United States House of Representatives
November 1, 2005

Good afternoon, Mr. Chairman and members of the Subcommittee. My name is Brenda Wright. I am the Managing Attorney at the National Voting Rights Institute in Boston, Massachusetts. Prior to that I served as the Director of the Voting Rights Project of the Lawyers' Committee for Civil Rights Under Law here in Washington, where I helped to litigate the *Bossier Parish School Board* case that I am going to discuss today.[1] It is a privilege to appear before this distinguished Subcommittee as it addresses the reauthorization of several provisions of the Voting Rights Act of 1965, an Act whose protections have been critically important in securing full voting rights for all Americans.

I am here today to discuss Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, and in particular the need for congressional action to restore Section 5's protections against purposeful racial discrimination in jurisdictions that are subject to the Section 5 preclearance requirement. Those protections were fundamentally weakened by the Supreme Court's January 2000 decision in *Reno v. Bossier Parish School Board.*[2] In that decision, a narrow Supreme Court majority said that the Justice Department must approve certain racially discriminatory voting changes under Section 5, even if the Justice Department determines that the discrimination was intentional. As I will explain, the *Bossier Parish* decision was at odds with Congress' intent in enacting Section 5 and with well-settled precedent.

As you know, Section 5 of the Voting Rights Act requires certain states and political subdivisions with a history of racial discrimination in voting practices to seek approval from the United States Department of Justice or the United States District Court for the District of Columbia before making any changes in their voting laws or practices – a process known as Section 5 preclearance. To obtain preclearance, covered jurisdictions must prove that the proposed change does not have the purpose

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[1] *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000).
[2] *Id.*

and will not have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority.[3]

Prior to the *Bossier Parish* decision, it was clear that the "purpose" and "effect" tests of Section 5 were independent; failure to satisfy either one meant that the voting change should not be precleared.[4] The Court's 1976 decision in *Beer v. United States* held that the Section 5 "effects" test required a showing of retrogression, but also made clear that an absence of retrogression would not prevent an objection based on intentional discrimination that would violate the constitution.[5] In *Beer*, the Court examined a proposed legislative redistricting plan for the New Orleans City Council, and held that because the new plan would increase the number of black-majority districts compared to the previous plan, it was not "retrogressive" and could not be found to violate the "effects" test of Section 5. In the same decision, however, the Court made it clear that the "purpose" prong of Section 5 is broader, and that a change reflecting intentional racial discrimination that would violate the Constitution should be denied preclearance even if it is not retrogressive. As the Court said, "[A]n ameliorative new legislative apportionment cannot violate § 5 *unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.*"[6]

The Court's decision in *City of Richmond v. United States* also made it clear that the test for purposeful discrimination under Section 5 is as broad as the constitutional prohibition against intentional racial discrimination.[7] In *City of Richmond* the Court ruled that a proposed annexation had no unlawful effect under Section 5, but nevertheless remanded the case to the district court to determine if the change had been adopted for a discriminatory purpose. As the Court explained:

> [I]t may be asked how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result

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[3] 42 U.S.C. § 1973c.

[4] *See, e.g.*, *City of Rome v. United States*, 446 U.S. 156, 172 (1980) ("By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent.") (emphasis in original); *City of Pleasant Grove v. United States*, 479 U.S. 462, 469 (1987) (same).

[5] 425 U.S. 130 (1976).

[6] *Id.* at 141 (emphasis added). *See also id.* at 142 n.14 ("It is possible that a legislative reapportionment could be a substantial improvement over its predecessor . . . and yet nonetheless continue to so discriminate on the basis or race or color as to be unconstitutional.")

[7] 422 U.S. 358 (1975).

> under that section and why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute.[8]

A case decided 11 years after *Beer* further confirmed that nonretrogressive voting changes must nevertheless be examined to determine if they reflect purposeful racial discrimination. In *City of Pleasant Grove v. United States*,[9] a city whose population was all white sought preclearance for annexations of several white neighborhoods, although the city had refused to annex nearby black neighborhoods. Although the change clearly would not have been retrogressive of the minority's voting rights – since there were no minorities in the city – the Court upheld the Section 5 objection because of clear evidence of racially discriminatory purpose.[10] "To hold otherwise[,]" the Court said, "would make [the city's] extraordinary success in resisting integration thus far a shield for further resistance. Nothing could be further from the purposes of the Voting Rights Act."[11]

For many years, the Justice Department relied on this understanding of the purpose test to deny preclearance to non-retrogressive changes that reflected intentional racial discrimination by a covered jurisdiction. For example, during the 1980s, under Assistant Attorney General William Bradford Reynolds (an appointee of President Ronald Reagan), the Department interposed Section 5 objections to redistricting plans in about 25 counties in Mississippi where there was no retrogression in minority voting strength, but where the evidence showed that the plans were infected by a

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[8] *Id.* at 378.
[9] 479 U.S. 462 (1987).
[10] The language of Section 5, which prohibits changes that "deny[] or abridge[e] the right to vote on account of race or color," tracks the language of the Fifteenth Amendment, which guarantees that "[t]he right of citizens ... to vote shall not be denied or abridged ... on account of race [or] color ....". U.S. Const. Amend. XV sec. 1. This choice of language further evidences Congress' intent that a change that would violate the Fifteenth Amendment also would violate Section 5. The Fifteenth Amendment, of course, clearly reaches more than retrogression; indeed, given the almost complete lack of voting rights enjoyed by blacks in the South when the Fifteenth Amendment was adopted, an anti-retrogression standard would have been virtually meaningless. As the *Bossier Parish* dissenters noted, "[t]he [Fifteenth] Amendment contains no textual limitation on abridgment, and when it was adopted, the newly emancipated citizens would have obtained practically nothing from a mere guarantee that their electoral power would not be further reduced." 528 U.S. at 361 (Souter, J. dissenting).
[11] 479 U.S. at 472.

discriminatory purpose.[12] According to an account by Mark A. Posner, "[t]he concern was that counties were intentionally minimizing minority voting strength by fragmenting minority populations or by packing minority voters into a limited number of majority-minority districts."[13] The Department continued to rely on the purpose prong of Section 5 as an important protection during the 1990s.[14]

The *Bossier Parish* decision changed all this by adopting a new interpretation of the statutory language. In the *Bossier Parish* case, a narrow majority ruled that the intent prong of Section 5 does not outlaw all intentional racial discrimination, but instead covers only "retrogressive intent"[15] -- that is, an intent to make things worse for minority citizens as compared to the *status quo*. Under that narrowed interpretation of the intent prong, a jurisdiction that never had minority representation on its elected body could continue to adopt new redistricting plans intentionally designed to minimize minority voting strength, and Section 5 would provide no protection.

The facts in the *Bossier Parish* case provide a good illustration of that scenario. Bossier Parish is located in the northwest corner of Louisiana, near the border of Texas and Arkansas. In 1990, African Americans constituted approximately 20 percent of the parish's 86,000 residents, yet no African American had ever been elected to the 12-member school board.

The evidence in the case showed that the Bossier Parish school board deliberately sought to keep things that way when it adopted a redistricting plan after the 1990 Census. The school board refused to include any majority black districts in the new plan, even though the school board later stipulated and admitted in court that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City."[16] There was even testimony that two school board members specifically acknowledged, in private conversations, that the school board's plan

[12] Testimony of Mark A. Posner before the National Commission on the Voting Rights Act, Mid-Atlantic Regional Hearing, October 14, 2005, at 2 (written testimony).
[13] *Id.* Mr. Posner had substantial responsibility for Section 5 matters during his tenure with the Voting Section of the Civil Rights Division, and served as Special Section 5 Counsel from 1992-1995.
[14] *Id.* at 2-3.
[15] *Reno v. Bossier Parish School Board*, 528 U.S. at 326.
[16] *Id.* at 350 (Souter, J., dissenting).

reflected opposition to "black representation" or to a "black-majority district."[17]

The Bossier Parish School Board also had a long history of discrimination against African American citizens in other areas. For example, the parish actively resisted school desegregation long after the historic *Brown* decision. In fact, the School Board stipulated that it had sought for decades to "limit or evade" its obligation to desegregate the parish's schools.[18] As Justice Souter put it in his dissent in the *Bossier Parish* case, "The record illustrates exactly the sort of relentless bad faith on the part of majority-white voters in covered jurisdictions that led to the enactment of § 5."[19]

The Justice Department, in keeping with long-standing precedent, used its authority under Section 5 of the VRA to object to the plan because of the evidence of purposeful racial discrimination. The Parish took the Justice Department to court. The case actually went up to the Supreme Court twice,[20] and in its final opinion the Supreme Court ruled that the Justice Department was powerless to block the school board's plan under Section 5's intent prong, because the plan did not have the "retrogressive purpose" of making things worse than they already were for minority voters.[21] In other words, because the school board had no majority black districts before 1990, its enactment of a plan preserving the all-white school board could not violate Section 5, no matter how blatant the evidence that the plan was motivated by racial discrimination.

The *Bossier Parish* decision greatly weakens the anti-discrimination protections of the Voting Rights Act. To give one important example, if this interpretation had been applied during the first 35 years of Section 5's history, Congressman John Lewis of Georgia probably would not have won election to the U.S. Congress in 1986. After the 1980 Census, Georgia

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[17] *Bossier Parish School Board v. Reno*, 907 F. Supp. 434, 438 n.4 (D.D.C. 1995), *aff'd in part, vacated & remanded in part sub nom. Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).
[18] *Reno v. Bossier Parish School Board*, 528 U.S. at 349 (Souter, J., dissenting).
[19] *Id.* at 342 (Souter, J., dissenting).
[20] In its first *Bossier Parish* decision, the Supreme Court ruled that the school board's redistricting plan could not be denied preclearance solely on the ground that it would violate the effects test of Section 2. *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) ("*Bossier Parish I*"). Relying on *Beer*, the *Bossier Parish I* Court held that a dilutive but non-retrogressive effect alone could not give rise to a Section 5 objection, but left open the question whether a showing of retrogression was required when intentional discrimination was present (the question later answered in the second *Bossier Parish* decision).
[21] 528 U.S. at 328-341.

enacted a racially discriminatory congressional redistricting plan that fragmented the black population in the Atlanta area. The Georgia legislator who headed the redistricting committee, Representative Joe Mack Wilson, openly declared his opposition to drawing "n--ger districts."[22]

Because of the clear evidence of racism in the 1980 congressional redistricting process in Georgia, the Justice Department objected to the plan under Section 5, even though the redistricting plan was not retrogressive and did not decrease the minority population in the district. Georgia filed suit, but the District Court for the District of Columbia also refused to grant preclearance, finding that "[t]he Fifth District was drawn to suppress black voting strength."[23] The Supreme Court summarily affirmed that decision. Georgia subsequently redrew its districts to provide a better opportunity for black representation, with the result that Congressman John Lewis was able to win election from a majority-black congressional district in 1986. Under the *Bossier Parish* decision, however, the Department of Justice would have been obliged to approve Georgia's original, discriminatory plan.

The *Bossier Parish* Court's interpretation of Section 5 drains the "purpose" test of any practical meaning in the preclearance process. If a change is retrogressive, there is no need to examine the intent behind the change, because a retrogressive result is sufficient by itself to bar Section 5 preclearance of a proposed change under the "effects" prong. Thus, the only circumstance in which intent can still play an independent role is when a jurisdiction somehow intends to cause retrogression in minority voting strength, but fails to actually bring about a retrogressive result – the case of the so-called "incompetent retrogressor." Such a trivial scope for the "purpose" prong of Section 5 could not have been intended by Congress, which acted with the "firm intention to rid the country of racial discrimination in voting."[24]

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[22] *Busbee v. Smith*, 549 F. Supp. 494, 498 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983). The district court decision reported that Representative Wilson routinely used that racial epithet in referring to blacks. 549 F. Supp. at 500. The court made the somewhat remarkable finding of fact: "Joe Mack Wilson is a racist." *Id.*

[23] *Id.* at 515.

[24] *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966) (footnote omitted).

The *Bossier Parish* decision does not merely conflict with the antidiscrimination principles long followed by our laws. It also has had a serious detrimental impact on Section 5 enforcement.

Before the Bossier Parish decision, Section 5 objections based on racially discriminatory intent were very common. According to a forthcoming study by Peyton McCrary, Christopher Seaman, and Richard Vallely, during the 1980s, 25% of the Department's Section 5 objections were based solely on racially discriminatory intent (83 total objections), and in the 1990s, discriminatory intent accounted for 43% of the objections (151 total objections).[25] These objections were made because minority voting strength was being deliberately minimized to perpetuate past underrepresentation. All together, during those two decades, 234 objections to voting changes were based solely on intent.[26] By contrast, between January 2000 and June 2004, the study found only two objections based solely on intent, showing how little scope remains for the concept of "retrogressive intent" after *Bossier Parish*.[27] In fact, I have examined the objection letters in both those two instances, and I find it difficult to explain either one solely in terms of retrogressive intent.[28]

The sheer reduction in the overall number of Section 5 objections since the *Bossier Parish* decision also suggests that the loss of a meaningful intent standard has substantially reduced the effectiveness of Section 5. In the first four and a half years after the *Bossier Parish* decision, the Department of Justice lodged only 41 total objections under Section 5.[29] In a similar period in the early 1990s, the Department made 250 objections to voting changes.[30] While no one can say for certain how many Section 5

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[25] Peyton McCrary, Christopher Seaman, & Richard Vallely, *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act,* Table 2 (forthcoming in Michigan Journal of Race & Law) (Appendix 1 to testimony).
[26] *Id.*
[27] *Id.*, Table 4.
[28] In one case, the plan appeared retrogressive in effect. The jurisdiction had reduced the black population percentages in two majority black districts, one by four percentage points and the other by seven, which the Department's objection letter appeared to treat as significant reductions in black voting strength. Letter from Ralph F. Boyd, Jr., Assistant Attorney General, to C. Havird Jones, Jr., Senior Assistant Attorney General, September 3, 2002 (File Number 2002-2379). In the other, the Department denied preclearance to a proposed annexation that would have added two white residents to the town, citing evidence that the town had refused to annex black neighborhoods. While the intent does appear discriminatory, it is hard to see the intent as retrogressive of existing black voting strength. Letter from R. Alexander Acosta, Assistant Attorney General, to Hon. H. Bruce Buckheister, September 16, 2003 (File Nos. 2002-07-12 and 2002-08-09).
[29] *Id.*
[30] *Id.* at 68.

objections would have been lodged without the *Bossier Parish* decision, that huge disparity certainly suggests that the decision has had a major impact.

All of this underscores the importance of going back to the original intent of Section 5 when Congress reauthorizes it. When a jurisdiction deliberately tries to lock minorities out of electoral power, that jurisdiction should not be entitled to Section 5 preclearance simply because minorities always have been discriminated against in the jurisdiction.[31] Such a result is fundamentally inconsistent with our nation's values.

Therefore, when Congress reauthorizes Section 5, Congress should act to restore the original scope of Section 5's prohibition on intentional discrimination. Congress should make it clear that preclearance should be denied if a change has a racially discriminatory purpose, whether or not the purpose is retrogressive.

Thank you for the opportunity to testify here today.

[31] As Justice Souter said in dissent in *Bossier*, "the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles." 528 U.S. at 366.

Mr. CHABOT. Mr. Clegg, you're recognized for 5 minutes.

TESTIMONY OF ROGER CLEGG, VICE PRESIDENT AND GENERAL COUNSEL, CENTER FOR EQUAL OPPORTUNITY

Mr. CLEGG. Thank you very much, Mr. Chairman. I am delighted to have the opportunity to testify before the Subcommittee today.

I am going to focus, as my co-panelists have focused, on the *Bossier Parish* decisions. But I also want to make clear that I have problems with the whole notion of reauthorizing section 5, and in my written testimony I go into more detail about why I don't think that section 5 should be reauthorized.

And beyond that, I have other problems with the Voting Rights Act, including the bilingual ballot provisions and the results test in section 2. But I am not going to get into all that; I will just leave that to my written testimony. And today I will focus on the *Bossier Parish decisions.*

By way of background, let me make clear that the Voting Rights Act really has two key provisions. The two most prominent provisions are section 2 and section 5. Section 2 applies nationwide and bans any racially discriminatory voting qualification or prerequisite to voting standard practice or procedure.

Section 5, on the other hand, is not nationwide in scope. Rather, it applies only to certain jurisdictions called "covered jurisdictions," and it requires them to preclear changes to voting qualifications and prerequisites to voting with either the Justice Department or the U.S. District Court for the District of Columbia.

As a practical matter, that means that most of these changes are submitted to the Justice Department, and this includes anything from a relatively minor change like moving a voting booth across the street from the elementary school to a high school, to undoubtedly major changes like redrawing a State's congressional districts.

What the Supreme Court said in the two *Reno v. Bossier Parish School Board* decisions was that these two statutes had very different purposes and that, because section 5 is aimed at changes in voting practices, it is violated only if the changes are retrogressive. That is, the whole purpose of section 5 was to enable the Justice Department to go after jurisdictions, particularly in the covered jurisdictions in the Deep South, that for years had stayed one step ahead of the people trying to enforce the 15th amendment by making a series of changes—you know, tiny changes to keep one step ahead of the law enforcement officials.

What the Supreme Court said was that, well, since that was the purpose of section 5, if a jurisdiction is not making a change that is retrogressive, section 5 was not intended to apply to it.

Now, I think that the Supreme Court was correct in its interpretation of the language and intent of section 5, but of course, that is not really the issue today. The issue today—because you all can change section 5, obviously, to make it clear if you think that the Supreme Court made a mistake. So the question today is, should you want to change section 5 so that, for instance, a potential violation of section 2 justifies a preclearance denial under section 5?

I think that would be a mistake. What my co-panelists are assuming is that if the Justice Department thinks that a jurisdiction acted with discriminatory purpose, that is proof that it acted with

discriminatory purpose. But that is not the way, as a general matter, that our legal system works. Usually, before we have a decision like that, both sides ought to be able to argue their side of the case.

But when you have a section 5 denial, you just have one side's opinion about that, without a trial or a formal hearing or anything of that sort. And, as the Supreme Court recognized in *Bossier Parish II,* section 5 contains, "extraordinary burden-shifting procedures."

And while section 5 is normally aimed at a simple determination of whether or not there was backsliding—the kind of relatively technical and relatively straightforward factual determination that can be left to a bureaucrat, rather than a court of law—determining, for instance, whether there is a section 2 violation is much more complicated than that. You have to make a difficult legal appraisal, and you have to weigh the "totality of the circumstances." And that is something that ought to be decided in congressional litigation rather than by a low-level bureaucrat.

You know, it is one thing to give such an individual the authority to hold up a change; it is something else to give a person, an unelected official like that, the effective authority to order changes where no changes had been made.

It can no longer be charged that all the Justice Department is doing in that case is the kind of thing that section 5 was intended to allow the Justice Department to do. If you all insist on overturning *Bossier Parish II,* you run a substantial risk of having—excuse me—of overturning *Bossier Parish II,* you run a significant risk of having the new legislation, the reauthorized section 5, struck down as unconstitutional.

In his opinion for the Court, in *Bossier Parish II,* Justice Scalia wrote, "Such a reading would also exacerbate the substantial federalism concerns that the preclearance procedure already exacts, perhaps to the extent of raising concerns about section 5's constitutionality."

Mr. CHABOT. Mr. Clegg, are you about ready to wrap up?

Mr. CLEGG. Yes, I am.

Mr. CHABOT. Thank you.

Mr. CLEGG. As a consequence, I think it would be a mistake——

Mr. CHABOT. The gentleman from New York would like you to elaborate on that point.

Mr. NADLER. Why would that raise a constitutionality issue on section 5, in your opinion?

Mr. CLEGG. Because what the statute would then be doing would be to give the Justice Department authority not just to make a relatively technical determination of whether or not a change in the voting procedure was retrogressive, but to make it a determination, depending on whether you were overruling *Bossier I* or *Bossier II,* if that was—there was a section 2 violation, or that a change, while not retrogressive, wasn't, didn't go far enough to satisfy the Justice Department.

Let me give you an example.

Mr. CHABOT. We can get into this in questioning. But if you would like to wrap up your testimony because we want to keep on track here.

Mr. CLEGG. The only other point I was going to make, Mr. Chairman, was to give one example of an unhappy side effect of overturning the *Bossier Parish* decisions.

If the Justice Department refused to preclear a change that actually diminished discrimination, but—and this I think responds in part to what Mr. Nadler was getting at—but it didn't go far enough, as far as the Justice Department was concerned, and the reason it didn't go further, according to the Justice Department, was because of some kind of discriminatory animus, the denial would freeze in place a procedure that was actually worse than what the jurisdiction was proposing to change to.

It would be much better to allow the change to go into place and make matters better, and then if the Justice Department wanted to bring an additional section 2 lawsuit to try to make things even better than that, they would have that authority. That, I submit, is the better approach.

Thank you.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Clegg follows:]

PREPARED STATEMENT OF ROGER CLEGG

TESTIMONY OF

ROGER CLEGG,

VICE PRESIDENT AND GENERAL COUNSEL,

CENTER FOR EQUAL OPPORTUNITY

BEFORE THE

HOUSE JUDICIARY COMMITTEE'S

SUBCOMMITTEE ON THE CONSTITUTION

REGARDING THE

SUPREME COURT'S *BOSSIER PARISH* DECISIONS AND THE

REAUTHORIZATION OF SECTION 5 OF

THE VOTING RIGHTS ACT

November 1, 2005

Thank you, Mr. Chairman, for the opportunity to testify before you today, regarding the reauthorization of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, and, in particular, whether the Supreme Court's decisions in the *Bossier Parish* cases ought to be overturned by Congress, should it choose to reauthorize Section 5.

My name is Roger Clegg, and I am vice president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Sterling, Virginia. Our president is Linda Chavez, and our focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should also note that I was a deputy in the U.S. Department of Justice's Civil Rights Division for four years, from 1987 to 1991.

The Bossier Parish *Decisions*

The Voting Rights Act's two most prominent provisions are Section 2, 42 U.S.C. 1973, and Section 5, 42 U.S.C. 1973c. Section 2 applies nationwide, and bans any racially discriminatory "voting qualification or prerequisite to voting or standard, practice, or procedure." Discrimination is defined in terms of a controversial "results" test. It is controversial because it defines discrimination differently than it is defined in the Constitution itself, and because it inevitably drives jurisdictions to do exactly what the Constitution itself proscribes, namely act with an eye on race and ethnicity.

Section 5, on the other hand, is not nationwide in scope. Rather, it requires certain jurisdictions--called "covered jurisdictions"--to "preclear" changes in, to quote the statute itself, "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" with the U.S. Department of Justice or the U.S. District

Court for the District of Columbia. This includes anything from a relatively minor change (like moving a voting booth from an elementary school to the high school across the street) to an undoubtedly major change (like redrawing a state's congressional districts). The change cannot be precleared unless it is determined that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The "effect" language is problematic for the same reason that the "results" language in problematic in Section 2: It proscribes what the Constitution does not proscribe, and indeed it pushes jurisdictions to weigh race and ethnicity in their voting-related decisions.

In *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) (*Bossier Parish I*), and *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier Parish II*), the Supreme Court held that, because Section 5 is aimed at changes in voting practices undertaken in order to evade the Fifteenth Amendment, it is violated only if the changes at issue are retrogressive in "purpose" or "effect." Thus, it is not permissible to refuse to preclear a changed practice or procedure simply because it may contain a violation of Section 2 (*Bossier Parish I*) or may reflect a discriminatory purpose (*Bossier Parish II*); the change must also be retrogressive.

The *Bossier Parish* decisions were rightly decided. As Justice O'Connor wrote for the Court in *Bossier Parish I*, "we have consistently understood these sections [i.e., Sections 2 and 5] to combat different evils and, accordingly, to impose very different duties upon the States." The question now is whether the statute should be rewritten so that, say, a potential violation of Section 2 is alone sufficient to deny preclearance under Section 5, even though there has been no retrogressive change.

In my view, this would be a mistake. I'm sure that some will argue, for instance, What's wrong with the Justice Department holding up a change if it contains a potential Section 2 violation? But the problem is that, in truth, we don't know whether there is a Section 2 violation or not. Generally, we would have just one side's opinion about that, without a trial or a formal hearing or anything of the sort. As the Supreme Court recognized in *Bossier Parish II*, Section 5 contains "extraordinary burden-shifting procedures." And, while Section 5 is normally aimed a simple determination of backsliding vel non, determining a Section 2 violation requires a difficult legal appraisal and, factually, weighing the "totality of the circumstances"--something much better left to conventional litigation. See generally Abigail M. Thernstrom, *Whose Votes Count?: Affirmative Action and Minority Voting Rights* (1987).

Indeed, as a practical matter, the government's opinion is likely to be that of a low-level bureaucrat. And it is one thing to give that person, whoever he or she is, the authority to hold up a change; it is something else to give that person the effective authority to order changes where none were being made. It can no longer be claimed that all the Department is trying to do is thwart changes designed to keep one step ahead of the enforcement of the law.

Indeed, this shift would call into question the statute's constitutionality. In his opinion for the Court in *Bossier Parish II*, Justice Scalia wrote: "Such a reading would also exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999), perhaps to the extent of raising concerns about Section 5's constitutionality, see *Miller* [*v. Johnson*, 515 U.S. 900,] 926-927 [(1995)]."

These problems are further exacerbated by the fact that, because Section 2 uses a constitutionally problematic "results" test, the Justice Department would be able to refuse to preclear, for instance, a redistricting plan that it felt had not been redrawn to contain "enough" minority-majority districts, or "influence" districts, or whatever it liked--even though the submitted plan contained no fewer such districts than it had in the past. The Department could likewise claim that the failure to "improve" voting procedures demonstrates discriminatory "purpose"--and, once again, gerrymandered districts would be ordered even though there had been no retrogression. This fear is hardly an unfounded one, since the Court itself has noted the Department's record in the past of coercing this sort of gerrymandering. *Miller v. Johnson*, 515 U.S. 900 (1995).

Finally, let me note also an unhappy side-effect of overturning the *Bossier Parish* decisions. If the Justice Department refused to preclear a change that actually diminished discrimination but not by enough to make the Department happy--because it didn't diminish it *enough*--the result would be to leave in place the *more* discriminatory status quo. It would be better and fairer to everyone to approve the change (improving matters) and then also bring a separate lawsuit under Section 2 (which, if successful, might improve matters still further). See *Bossier Parish II*, 528 U.S. at 335-336.

I would like to devote the remainder of my testimony to the broader question before this subcommittee, namely whether Section 5 ought to be reauthorized at all. Let me note here, however, that there are other important legal and policy issues regarding the reauthorization of the VRA, such as those involving Section 2 and the bilingual ballot provisions. (I would refer the subcommittee to a column I wrote for *National Review Online*, "Revise before Reauthorizing," on August 8, 2005. Link:

http://www.nationalreview.com/clegg/clegg200508040826.asp.) To a degree, those provisions also involve the constitutional issues that I will be discussing today.

The Two Basic Issues Raised by Section 5

As I noted before, Section 5 requires certain jurisdictions--called "covered jurisdictions"--to "preclear" changes in, to quote the statute itself, "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" with the U.S. Department of Justice or the U.S. District Court for the District of Columbia. Again, this includes anything from a relatively minor change (like moving a voting booth from an elementary school to the high school across the street) to an undoubtedly major change (like redrawing a state's congressional districts). The change cannot be precleared unless it is determined that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

Section 5 raises constitutional issues for two reasons, and I think that these two reasons together are likely to create judicial concerns greater than their sum alone. First, there are federalism concerns insofar as it requires states (and state instrumentalities, like cities and counties) to get advance federal approval in areas traditionally--and, often, textually, by the language of the Constitution itself--committed to state discretion. These federalism concerns are arguably heightened by the fact that some states are covered and others are not. Second, since the federal government can bar a proposed change that has a racially disproportionate "effect" but not a racially discriminatory "purpose," Congress arguably exceeds its enforcement authority under Section 5 of the Fourteenth

Amendment and Section 2 of the Fifteenth Amendment, since those two amendments ban state disparate *treatment* on the basis of race but not mere disparate *impact* on that basis.

Now, one may ask why Congress should be interested in this now, when the statute has been on the books since 1965. The reason of course is that Section 5 will expire in 2007, so that Congress will need to reauthorize it if it is to stay on the books. And the fact is that both the law and the facts have changed over the past 40 years, so that a reevaluation of Section 5 is appropriate.

The Shifting Factual and Legal Landscapes

As to the facts, few would dispute that a great deal of progress has been made over the last 40 years in eliminating the scourge of state-sponsored racial discrimination, particularly in the South (which is where most of the covered jurisdictions are). No one would deny that there is still additional progress to be made, but clearly the gap between the South and the rest of the country has narrowed considerably in this arena. I will not dwell on this point for two reasons. First, I think it is obvious. Second, it is precisely this point that Congress *should* dwell on: It should carefully use hearings to explore the extent to which racial discrimination in voting remains, and remains a regional problem. You have already heard testimony from my colleague Edward Blum on this point, concluding that Section 5 ought not to be reauthorized. [Available at http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=19969.]

As to the law, during the time since the Voting Rights Act was first enacted in 1965, the Supreme Court has made clear that the Fourteenth Amendment bans only disparate treatment, not state actions that have only a disparate impact and were

undertaken without regard to race. *See, e.g., Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977) ("Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976), made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact."). A plurality of the Court has drawn the same distinction for the Fifteenth Amendment. *City of Mobile v. Bolden*, 446 U.S. 55, 62-65 (1980) (plurality opinion) ("[The Fifteenth] Amendment prohibits only purposefully discriminatory denial or abridgment by government of freedom to vote 'on account of race, color, or previous condition of servitude.'") (quoting the Fifteenth Amendment).

The Supreme Court has also ruled even more recently that Congress can use its enforcement authority under the Fourteenth Amendment to ban actions with only a disparate impact only if those bans have a "congruence and proportionality" to the end of ensuring no disparate treatment. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). It follows that this limitation applies also to the Fifteenth Amendment; there is no reason to think that Congress's enforcement authority would be different under the Fourteenth Amendment than under the Fifteenth, when the two were ratified with 19 months of each other, have nearly identical enforcement clauses, were both prompted by a desire to protect the rights of just-freed slaves, and indeed have both been used to ensure our citizens' voting rights.

Finally, the Supreme Court has, in any number of recent decisions, stressed its commitment to principles of federalism and to ensuring the division of powers between the federal government and state governments. *See, e.g., Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). It has also stressed what is

obvious from the text of the Constitution: "The Constitution creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995).

Constitutional Problems

Putting all this together, it is very likely that the courts will look hard at a law that requires states and state instrumentalities to ask permission of the federal government before taking action in areas that are traditionally, even textually, committed to state discretion under the Constitution, and to meet a much more difficult standard for legality than is found in the Constitution itself.

It is true that in the leading case *City of Boerne v. Flores*--striking down a federal statute that did not involve voting--the Court explicitly distinguished the actions Congress had taken under the Voting Rights Act. On the other hand, however, in doing so it stressed Congress's careful findings and rifle-shot provisions. 521 U.S. at 532-33. If Congress were to reauthorize Section 5 without ensuring its congruence and proportionality to the end of banning disparate treatment on the basis of race in voting, the language in *Flores* could as easily be cited against the new statute's constitutionality as in its favor. Likewise, the Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)--upholding Congress's abrogation of state immunity under the federal Family and Medical Leave Act--also stressed Congress's factual findings and the challenged statute's limited scope.

One frequently noted byproduct of the use of the effects test--under both Section 5 and Section 2--has been racial gerrymandering. It is ironic that the Voting Rights Act should be used to encourage the segregation of voting, but it has. In the his opinion for

the Court in *Miller v. Johnson*, 515 U.S. 900 (1995), Justice Kennedy noted the constitutional problems raised for the statute if it is interpreted to require such gerrymandering. (The Supreme Court has likewise, in the employment context, noted the danger of effects tests leading to more, rather than less, disparate treatment. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 992-94 & n.2 (1988) (plurality opinion); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J. concurring in judgment).) This byproduct of racial gerrymandering obviously raises a policy problem of the Voting Rights Act, in additional to the constitutional one.

In this regard, let me note that it has been suggested that, in the course of its reauthorization of the Voting Rights Act, Congress should draft a provision that would overturn the Supreme Court's ruling in *Georgia v. Ashcroft*, 123 S. Ct. 2498 (2003), on the grounds that it insufficiently guarantees the creation of majority-minority districts. While it is difficult to comment on such a provision in the abstract and without seeing the actual statutory language, it is also difficult to see how this could be accomplished without using and intending the sort of racial classifications the Supreme Court has ruled will always trigger strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993). (While we're on the subject of dubious amendments to the VRA, let me also note that it has been suggested that the Act should be amended to force states to allow felons to vote; such a provision would clearly be neither proportional nor congruent to the core constitutional provisions at issue, especially when the Fourteenth Amendment itself expressly contemplates felon disenfranchisement. *See* Roger Clegg, "Who Should Vote?," 6 Tex. Rev. L. & Pol. 159

(2001); Roger Clegg, George T. Conway III, & Kenneth K. Lee, "The Bullet *and* the Ballot? The Case for Felon Disenfranchisement Statutes," Am. U. J. Gender, Soc. Pol'y & L. (forthcoming).)

Conclusion: What Congress Should Do

Let me conclude by noting that the best course is for Congress to hold thorough, full-committee hearings on the question of how best to ensure compliance with the Fifteenth Amendment, and to go into them with an open mind. If one is skeptical about the continued need for Section 5 in its present form, as I am, then naturally such probing makes sense. But it also makes sense even if one is inclined to think that Section 5 in some form ought to be reauthorized, since--to ensure that such a reauthorization is upheld when it is challenged (as will likely happen)--it will be prudent for Congress to have made the case through its hearings and subsequent findings that the reauthorized law is indeed congruent and proportional to ensuring the guarantees of the Fifteenth Amendment.

Congress must find specifically that the preclearance approach and the "effects" test are necessary to ensure that the right to vote is not "denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," to quote the Fifteenth Amendment. Without these updated findings, a reauthorized Section 5 will not pass the tests of constitutionality the Supreme Court has set out.

And, legal requirements aside, these hearings make perfect policy sense as well. After all, how likely is it that, 40 years after the initial passage of Section 5, there is no

need for making some alterations to that statute? The facts have changed, and the law has changed.

If the problems that remain are national in scope, then to focus on only particular jurisdictions makes no policy sense and may aggravate federalism concerns. If the problems remain regional but the problematic regions are now different, then applying the statute's preclearance provisions where they are no longer justified will also aggravate federalism concerns. The government has only limited resources, and it makes little sense to focus those resources on one part of the country if there is no longer much difference from region to region in discrimination, or to focus on parts of the country that are no longer more problematic than others, rather than on those parts of the country that now are.

Nor may it make much sense to require that all voting changes be precleared if the federal government's objections are concentrated in only a few subject-matter areas. Indeed, it may not make sense to use the preclearance mechanism any more at all.

In sum, surely Congress would want to take this opportunity to ensure that the Voting Rights Act is still fashioned to do the best job it can to guarantee the right to vote, and to do so in a way that also honors the principle of federalism--which, after all, is also a bulwark against government abridgment of our rights as citizens.

Thank you again, Mr. Chairman, for the opportunity to present this testimony today.

Mr. CHABOT. The gentleman, Mr. Gray, you're recognized for 5 minutes. Thank you.

TESTIMONY OF JEROME A. GRAY, STATE FIELD DIRECTOR, ALABAMA DEMOCRATIC CONFERENCE

Mr. GRAY. Thank you, Mr. Chairman.

Chairman Chabot and distinguished Committee Members, it is a pleasure to have the opportunity to deliver this testimony before you today on the topic of the ongoing need for section 5 of the 1965 Voting Rights Act.

Prior to my 67th birthday on July 20th, I had a senior moment that moved me to consider drafting a resolution for our organization the Alabama Democratic Conference, celebrating the 40th anniversary of the Voting Rights Act of 1965. And in looking at that draft resolution, I was concerned about and looking at the fact that the original act, passed with broad-based bipartisan support and biracial support of the Members of Congress and people of goodwill across America, who lobbied for that to happen, it recognized the fact that the Voting Rights Act contributed greatly to a new spirit of race relations and cooperation and political and civic affairs in this country and in our State.

And also, what I did, I drafted an op-ed piece that several State newspapers picked up, and we challenged governments around the State of Alabama to celebrate the 40th anniversary of the Voting Rights Act, asking also to call for key provisions of the Voting Rights Act to be renewed in 2007.

Today, I just brought for review one from Selma that I picked up, where it all began, the resolution from the Selma City Council, signed by the mayor and the members of the Selma City Council, and also one from the Jefferson County Commission, which is a biracial group, three Whites, two Blacks, three Republicans, two Democrats.

I will see that this Committee receives copies of resolutions that local governments around the State of Alabama are passing in support of reauthorizing the Voting Rights Act in 2007, so that you will see the record of evidence around the State of Alabama of jurisdictions who are in favor of the Voting Rights Act being renewed, particularly section 5.

Recently, our organization held a convention celebrating the 40th anniversary of the Voting Rights Act, and we called—one of the themes we had was a Marching Miracle Empowering a Powerless People. Indeed, the Voting Rights Act has allowed the State of Alabama to climb off the bottom in terms of racial representation and fairness.

Forty years ago, Alabama had less than 12 Black elected officials. Today, we have more than 850, and we rank along with Mississippi, usually first and second, in terms of the number of Black elected officials in the Nation. So it is really important, you might say, to borrow a phrase from his novel, *Light in August,* it has been 40 years of "peaceful astonishment."

But we should not confuse the success with obsolescence. I have personally witnessed one of the most astonishing things about section 5 preclearance in terms of its ability to nudge public officials to act in a positive way and to be more than inclusive as they go

about reaching a consensus in that decision-making process. Let me cite an example or two to make my point.

Two months ago the Barbour County Commission was in the process of adopting a new redistricting plan. In the preclearance process, the Department of Justice discovered that the Barbour County Commission had never submitted some polling place changes, dating back to the early 1990's. This delay in submitting these changes in a timely fashion calls the Barbour County Commission to seek out help in getting these late submissions precleared.

One commissioner, who called me recently, is a car salesman. I like his style. He said "Jerome, buddy, can you help us?" When I told him I would, he replied, "Buddy, come see us." Without reservation, I can say that the Voting Rights Act, section 5, in particular, has made unlikely buddies of people who are ready, willing and able to communicate in a civil, democratic way as we engage in the process of representative government and full civic participation.

As we work through this issue of redistricting in Barbour County, the Commission had originally drawn a seven-member plan with three majority Black districts, one of which had a White incumbent. In that district, the Commission's first instinct was to draw a plan that reduced the Black voting age population percentage by 8 percent. However, when I heard about their plan, I called the Barbour County Commission and told them I would fully support almost any plan they developed so long as it did not retrogress or dilute the Black vote in these majority Black districts.

At first they hemmed; then I hawed a little, using section 5 of the Voting Rights Act as my rabbit's foot. Soon thereafter they invited me to help them in developing a fair plan. But I had my role, and they had theirs from a distance; and I said to them, You all can do it; just send me a copy of your plan when you're done.

Well, you know what? They did better than I expected. And true to my word, I wrote a strong letter of support to the Department of Justice asking to grant expedited consideration to the Barbour County redistricting plan in the preclearance process.

For the record, I want to mention two more instances of how the threat of section 5—what I call the rabbit's foot—being used for good, has worked to get local governments to do the right thing.

In the city of Lanette, Alabama, in Chambers County in 2004, I received a telephone call from a voter stating that the city clerk had been denying citizens the opportunity to pick up absentee ballot applications at city hall. Instead, the clerk was usurping her authority and taking the application forms to the voters' residences.

I called the clerk and read her a section from the Alabama election law handbook. And I also indicated to her that she had no authority to deny giving absentee ballot forms to a citizen. I also told her that what she was doing amounted to a change in voting procedure that would have to be precleared by the Justice Department.

In my own way, I persuaded her that we did not need anyone from the Department of Justice calling down to Alabama to tell us what was right to do. She obliged, and the election ran smoothly, and Lanette elected its first Black mayor in August of 2004.

In my hometown of Evergreen, Alabama, in Conecuh County, I received a similar call from a voter who complained about a clerk's failure to produce a complete and fair voters list. At first, many names were omitted including my 94-year-old mother, a retired educator.

I called the clerk, and I got the former mayor on the phone, and I reminded him of the election fiasco we had in 1980 when the clerk at the time had prepared a sloppy voters list that omitted scores of Black voters from the official list. A Black candidate that we supported that year lost by four votes, and our organization, Democratic organization, NAACP, complained to the Department of Justice, and the Justice Department reviewed those complaints, found them to be legitimate, and for the next election sent down some Federal observers to monitor the election.

In that case, with section 5's help, we found out that the Conecuh County Commission had changed its election system from single-member districts to at-large elections after 1965 and had not gotten them precleared. And we also learned that the county Democratic Executive Committee had changed its election procedure after the 1965 Voting Rights Act without submitting those changes for preclearance.

At any rate, by reminding the clerk and the mayor about what had happened in 1980, they acquiesced and allowed for a fair voters list to be developed. The election went on without incident, and the city of Evergreen had the highest turnout in history, over 95 percent in 2004, and we elected our first Black mayor without a runoff. It was indeed "peaceful astonishment."

Although the issue of monitoring bad proposals such as changes in registration, voting or election procedures has decreased dramatically since 1982, there have been State laws harmful to minority participation that have received our attention. The worst one that I recall came about after a law was passed in 1998, where voters could not receive an absentee ballot at a post office box. That had not been precleared. We went into Federal court with a three-judge panel, and they struck that down as unconstitutional.

Earlier in my remarks I compared section 5 to a rabbit's foot. I like that reference because it takes a little rabbit to make folks do right. Then I urge you to keep some rabbit provisions on the books. As a son of the South, I know that a little rabbit ain't going to hurt nobody. We are used to it by now.

Section 5 is edible and digestible. We have made tremendous progress. But we still must work to protect Black voters, and section 5 makes that possible.

Thank you.

Mr. CHABOT. Thank you very much, Mr. Gray.

[The prepared statement of Mr. Gray follows:]

PREPARED STATEMENT OF JEROME A. GRAY

Testimony of Jerome A. Gray
State Field Director
Alabama Democratic Conference

Given Before The
House Judiciary Committee
Washington, DC

November 1, 2005

Chairman Chabot and distinguished Committee members, it is a pleasure to have the opportunity to deliver this testimony before you on the topic of the ongoing need for Section 5 of the Voting Rights Act.

Prior to my 67th birthday on July 20th, I had a senior moment that moved me to draft a resolution for the Alabama Democratic Conference ("ADC") celebrating the 40th Anniversary of the Voting Rights Act of 1965. The resolution noted that the Voting Rights Act of 1965 could not have passed without broad-based bipartisan, biracial support from the members of Congress and people of goodwill across America, who lobbied for that to happen. It recognizes that the Voting Rights Act has contributed greatly to a new spirit of race relations and cooperation in political and community affairs throughout Alabama; and that the Voting Rights Act has been largely responsible for the state having the highest percentage of black elected officials in the nation, based on the black percentage in the general population. The Voting Rights Act has helped to elect many white candidates in Alabama and throughout America since 1965. In fact, the Act has been responsible for helping to elect significantly more white candidates than black candidates in Alabama. Too often, this isn't said.

What began as part of my effort on behalf of ADC prior to the 40th anniversary of the August 6th date on which President Lyndon Johnson signed the 1965 Act has expanded quickly and local governmental bodies across the state from Selma to Montgomery; from Birmingham to Huntsville; from the Jefferson County Commission to the Conecuh County Commission — my home town — are moving to adopt a 40th Anniversary Voting Rights Act resolution to recognize the role the Act plays in helping Alabama to strive toward political equality. Perhaps one of my greatest joys came when Larry Fluker, the mayor in my hometown of Evergreen, Alabama, got a resolution adopted in July. Consider this: In 1978,

Governor George Wallace appointed Larry Fluker's mother chairman of the Conecuh County Board of Registrars. She became the first black voter registrar in Alabama since Reconstruction. Then, some 26 years later, her son, who served as president of the local NAACP Branch for 35 years and who testified before a House Judiciary Committee Field Hearing in Montgomery back in June of 1981, is elected Mayor of Evergreen in August 2004. Yes, as we say in the church, nobody but God and the Voting Rights Act could have wrought that miracle.

I will see to it that the Committee receives copies of all of the resolutions as evidence of support from rank-and-file leaders in Alabama who directly experience the ongoing power and necessity of the expiring provisions of the Act.

Recently, when the ADC and the Alabama Voter Education and Registration Alliance celebrated the 40th Anniversary of the Voting Rights Act during a statewide convention in Birmingham on October 14th & 15th, we chose as our theme, "The Voting Rights Act . . . A March Miracle: Empowering a Powerless People."

One theme that was consistent throughout the gathering was the Act's uncanny ability to bring people together from different backgrounds to do good things for communities. Indeed, the Voting Rights Act has allowed a state like Alabama to climb off the bottom in terms of racial representation and fairness. Forty years ago Alabama had less than 12 black elected officials. Today, we have more than 850. In its last statistical report, the Joint Center for Black Political and Economic Studies ranked Mississippi and Alabama first and second in the nation in the number and percentage of black elected officials. Even Nina Simone might be pleased today to know that.

To illustrate the reach of the Voting Rights Act and its impact on society today, consider this line-up of participants that we had during our 40th Anniversary VRA Celebration: Rev. F. D. Reese, a Selma native, who was head of the Dallas County Voters League that invited Dr. Martin Luther King Jr. to come to Selma in 1965; Bishop Will Willimon, former dean of the chapel at Duke University, and the new presiding bishop of the North Alabama Conference of the United Methodist Church; four top white executives—Dr. Paul Hubbert, executive secretary of the Alabama Education Association; D. S. Burkhalter, President, Alabama AFL-CIO;

Steve Prince, Communications Director of the Alabama Trial Lawyers Association; and Joe Turnham, chairman of the Alabama Democratic Party, all talking about the impact that the Voting Rights Act has had on Alabama's major institutions and organizations since 1965. Before the conference ended, we had a session that was videotaped, called "A Time to Testify." During this session approximately 30 people stepped before the camera and said why they felt that the Voting Rights Act should be renewed. In that group were mayors, legislators, county commissioners, school board members, judges, and the lieutenant governor.

If I may borrow an expression from William Faulkner's novel "Light in August," he might describe the outstanding outcome of the Voting Rights Act this way: It's been 40 years of "peaceful astonishment."

But we should not confuse the success with obsolescence. I have personally witnessed that one of the most astonishing things about the Section 5 Preclearance provision is its ability to nudge public officials to act in a positive way and be more inclusive as they go about reaching a consensus in their decision-making process. Let me cite an example or two to make my point.

Just two months ago the Barbour County Commission was in the process of adopting a new redistricting plan. In the preclearance process the Justice Department discovered that the Barbour county Commission had never submitted some polling place changes dating back to the early 1990s. This delay or neglect in submitting these changes in a timely fashion caused the Barbour County Commission to seek our help in getting these late submissions precleared. One commissioner who called me recently is a car salesman. I like his style. He said: "Jerome, buddy, can you help us?" When I told him I would, he replied: "Buddy, come see us."

Without reservation, I can say that the Voting Rights Act, and Section 5 in particular, have made unlikely buddies of people who are ready, willing, and able to communicate in a civil, democratic way as we engage in the process of representative government and full civic participation. As we worked through this we also sought to address the redistricting issues. The county had a seven-member plan with three majority black districts, one of which had a white incumbent. In that district the Commission's first instinct was to draw a plan that reduced the black voting age population percentage by 8%. However, when I heard about their plan I called the Barbour County

Commission and told them that I would fully support almost any plan they developed so long as it did not retrogress or dilute the black vote in these majority black districts. At first they hemmed. Then I hawed a little, using Section 5 of the Voting Rights Act as my rabbit's foot. Soon thereafter, they invited me to help them in developing a fair plan. But I have my role and they have theirs so from a distance I said to them, "Y'all can do it. Just send me a copy of your plan when you're done." Well, you know what, they did better than I expected. And true to my word, I wrote a strong letter of support to the Justice Department, asking them to grant expedited consideration to the Barbour County redistricting plan in the preclearance process.

In another example, city officials in the town of Warrior, Alabama in Jefferson County, sought our input and the consensus of local citizens in determining what kind of election system they should have in order that they might keep two incumbents, both of whom are black, on their city council, and gain preclearance with a new plan. Again, the attractiveness of black community support in the Section 5 preclearance process for a new plan gave the community leverage to negotiate for good result.

For the record, I want to mention two more instances of how I used the threat of the Section 5 rabbit's foot for good in 2004, without involving a submission or preclearance. In the city of Lanett, Alabama in Chambers County, I received a telephone call from a voter, stating that the city clerk had been denying citizens the opportunity to pick up absentee ballot applications at city hall. Instead, the clerk was usurping her authority and taking the application forms to the voters' residences. I called the clerk and read a section from the Alabama Election Law Handbook to her, indicating that she had no authority to deny giving an absentee ballot application form to a citizen. I also told her that what she was doing amounted to a change in voting procedure that would have to be precleared by the Justice Department. In my own way I persuaded her that we did not need anyone from the Justice Department calling down here to tell us what was right to do. She obliged. The election ran smoothly. And Lanett elected its first black mayor in August 2004.

In my hometown of Evergreen, Alabama in Conecuh County, I received a similar call from a voter who complained about the city clerk's failure to produce a complete and fair voters' list. At first, many names were omitted, including that of my mother, who is a 94-year-old retired

educator. I called the city clerk and I got the former mayor on the phone, and I reminded them of the election fiasco that we had in 1980, when the city clerk at the time prepared a sloppy voters' list that omitted scores of black voters from the official list. A black candidate that we supported that year lost by four votes. Our Democratic organization and the NAACP documented the irregularities thoroughly. And we sent up a "carload" of affidavits and complaints to the Justice Department for review. Their botched list in 1980, along with our documentation, brought the "feds" in 1980. And things haven't been the same since.

In that case, with Section 5's help, we found out that the Conecuh County Commission had changed its election system from single-member districts to at-large after 1965, and had not gotten the change precleared. We also learned that the County Democratic Executive Committee had changed their election procedure after 1965 without submitting those changes for preclearance.

At any rate, my reminding the clerk and mayor about how all this happened because of a defective voters' list brought about a pledge of cooperation and mutual respect to prepare a fair list for the benefit of all. Election day went well. The City of Evergreen had its highest turnout in history at over 95%. We elected our first black mayor without a runoff. It was indeed "peaceful astonishment" in August of 2004.

Although the issue of monitoring bad proposals, such as changes in registration, voting or election procedures has decreased dramatically since 1982, there have been state laws harmful to minority political participation that have received our attention. The worst one was a law that sought to prevent any eligible voter from receiving an absentee ballot at a post office box or general delivery address. This provision was a part of an absentee ballot bill in 1997-1998. Fortunately, the Alabama Democratic Conference successfully challenged this absentee ballot post office ban in federal court. The three-judge panel struck down the provision as unconstitutional. Alas, if the law had been implemented thousands of eligible Alabamians would have been denied the right to vote because no mail is delivered to their residential addresses.

Earlier in my remarks I compared Section 5 to a rabbit's foot. I like that reference because if it takes a little rabbit to make folk do right, then I urge you to keep some rabbit provisions on the books. As a son of the

South, I know that a little more rabbit is not gon' hurt us. We're used to it by now. Section 5 is edible and digestible. We have made tremendous progress but we still must work to protect black voters and Section 5 makes that possible.

Mr. CHABOT. Before we get to the questioning round, let me just mention a couple of housekeeping things. We were scheduled to have another Voting Rights Act hearing tomorrow. Because of the going to Detroit for Rosa Park's services, we will not have that hearing; it will be next week. We have—at this point, we have two on Tuesday and one on Wednesday.

I would also note that we have another hearing in this room at 4 o'clock, as well, so if we can keep it to one round of questions, in light of the number of hearings we will be having, perhaps that might be a reasonable thing to do. I appreciate that, because we will we have to clear the room and get set up for the next hearing as well.

Mr. CHABOT. At this time, the gentleman from New York.

Mr. NADLER. I would just point out that next Tuesday is Election Day. Although there are no Congressional elections, there are a number of elections in a number of States and cities, and some Members may have to participate in those or even go vote.

Mr. CHABOT. If the gentleman would yield, I voted. I just went to the Board of Elections before I caught my flight here from Cincinnati and voted. I won't tell you how I voted, but I did vote.

Mr. NADLER. You voted absentee ballot is how you voted.

Mr. CHABOT. Yes, that is right. Okay.

I now recognize myself for 5 minutes for the purpose of asking questions. I will just direct this to the whole panel here. It is a couple of questions. You all to one degree or another already dealt with this issue, but one of the main things we are doing here is creating a record, because this may ultimately—there could be a lawsuit that could end up with the U.S. Supreme Court, and so we are trying to establish that record here.

What does a weaker section 5 mean for minority voters, and what does it mean for covered jurisdictions? Is the purpose standard after *Bossier II* consistent with Congress' intent that the Voting Rights Act end, this country end racial discrimination in voting? I have 5 minutes, so about 1 minute apiece would about take up my time. Mr. Posner, we will begin with you and down the line.

Mr. POSNER. Thank you, I think that a particular focus is appropriate on redistrictings. Of course, as you well know, redistricting is a key part of the election process, and certainly a very significant change that is reviewed under the Voting Rights Act.

In the 1990's, as I referred to in my testimony, as well as the 1980's, a very large number of objections were interposed by the Justice Department to redistrictings. About 7 percent of the redistrictings were objected to, 8 percent in the 1980's and 1990's. After 2000 about 1 percent, about 30 redistrictings were objected to. So many fewer plans were objected to.

Section 5 had much less power and authority to prevent discriminatory plans from going forward. That, of course, has a very, very real impact on the opportunity of minority voters to participate in the political process.

Mr. CHABOT. Thank you. Ms. Wright.

Ms. WRIGHT. The precedent that we had under section 5 for 35 years, prior to the *Bossier Parish* decision was really unbroken. In each case when the Court had an opportunity to consider it, the Court made it clear that regardless of retrogression, any racially

discriminatory purpose that would violate the Constitution would also violate section 5.

I think that standard has been very important. The Department has been applying it, was applying it for 35 years prior to the *Bossier Parish* decision. It was a critical part of the section 5 preclearance process, and as the numbers indicate, in looking at the changes in the numbers and kinds of objections since the *Bossier Parish* decision, has certainly had a dramatic impact. All of that, I think, really argues for the need to restore the intent test when Congress reauthorizes section 5.

Mr. CHABOT. Thank you.

Mr. Clegg.

Mr. CLEGG. First of all, Mr. Chairman, I think you are exactly right that these hearings are very important, because there is likely to be a constitutional challenge on down the road. In fact, one of the things that I would encourage the Subcommittee to recommend to the full Committee is that there be full Committee hearings as well, not only on the issue that we are talking about today, but more generally on whether section 5 ought to be reauthorized and the other issues that I raised before.

You know, in terms of whether the *Bossier Parish II* decision was consistent with Congressional intent, as I said, I think that is really not the issue today. I mean, there's no point in the Subcommittee trying to figure out what this Subcommittee might have intended 40 years ago. What you all need to decide is whether—when the section 5 is reauthorized, if it is reauthorized—what the language should provide for then.

In terms of what this means for, you know, minority voters, I think if you decide to overturn *Bossier Parish II,* the answer will depend on the whim of whoever is making the decision at the Justice Department. If you have somebody that thinks that there ought to be a maximization of influence districts, there will be one set of results. If you have somebody that thinks there ought to be a maximization of majority Black districts, you will get another set of results. I don't know that either one is—can be said beforehand to be—pro- or anti-minority.

Mr. CHABOT. Thank you. Mr. Gray.

Mr. GRAY. I would like to discuss it in terms of a case we had, *Dillard v. Crenshaw,* where we sued a number of jurisdictions throughout Alabama, school boards, city councils and county commissions. We got the consent decrees in many of those cases, in that case, to go to, in those instances, single member districts. As a result, Blacks were elected to governing bodies as a result of that lawsuit.

Unfortunately, in some of those localities, I would say probably three dozen or more, they did not get the consent decree codified. And the Federal judge in some of those instances, in order to correct the violation, he recommended that the number of districts be increased so that we would have a majority Black district. Since then, though, there has been a Supreme Court court case that says the judge can't do that.

So now we are stuck with the possibility of if we don't get legislation, State legislation to codify those, the content decrees that created those districts by increasing the number of seats, all of those

places will be in jeopardy. But because before the lawsuit, the *Dillard v. Crenshaw* lawsuit, none of those places had Black representation. So if you use the *Bossier II* standard, all of those places where we did not have Black representation where the number of seats, members on the commission or county school board or city council were increased, we would stand to lose representation, all of those governing bodies, if the *Bossier II* standard is applied.

Mr. CHABOT. Thank you very much, Mr. Gray. My time has expired.

The gentleman from New York is recognized for 5 minutes.

Mr. NADLER. Thank you. Let me ask Mr. Posner and Ms. Wright, with respect to redistricting, which is what we are talking about, to a large extent in this *Bossier II,* if Congress were to modify section 5 in response to *Bossier II,* what issues, if any, arising from *Shaw v. Reno* and its prodigy should we keep in mind? How does this affect it at all because *Shaw v. Reno* was a constitutionalized statutory decision?

Mr. POSNER. Well, *Shaw v. Reno,* as well as the subsequent case of *Miller,* posed certain limitations on a jurisdiction's ability to be race conscious in conducting the redistrictings. However, the Court has also held that a justification for such race consciousness is to avoid either a section 2 or a section 5 violation. So if section 5 prohibits—well, section 5 does prohibit retrogression, and if section 5 again prohibits discriminatory purpose, that is completely consistent with the *Shaw* ruling.

Mr. NADLER. So it would change how a court would look at a case in light of *Shaw*?

Mr. POSNER. It may change how the Court considers the justifications of the jurisdiction, but the jurisdiction even now, under the Constitution, can't act with a discriminatory purpose. So I think it would really just bring section 5 in conformance with the Constitution, in terms of prohibiting a discriminatory purpose as well as an effect.

Mr. NADLER. Thank you.

Ms. Wright.

Ms. WRIGHT. I think that's right. The *Shaw v. Reno* certainly did nothing to say that the traditional constitutional protections against intentional racial discrimination against minorities was somehow written out of the Constitution. So I don't see anything inconsistent at all between the idea of having an intent test, a meaningful intent test under section 5, and the proper observance of the limits that the court, that the Court indicated were required in *Shaw v. Reno.*

I mean, I do understand that the Justice Department, after the 2000 census, developed some guidelines for jurisdictions on how the Department would take *Shaw v. Reno* into account and reconcile the concerns about race conscious redistricting that were there in *Shaw v. Reno* with the mandates of the Voting Rights Act. So this is not something that I think poses any apparent——

Mr. NADLER. You don't think this would change those guidelines or would, in effect, have to take another look at those guidelines?

Ms. WRIGHT. No, I don't think so. I don't think so at all. I think they were written with the idea that the intent test is still part of section 5 probably.

Mr. NADLER. Mr. Clegg and Mr. Gray, the same question.

Mr. CLEGG. I think that there are other constitutional problems with overturning *Bossier Parish II.* You know, what I——

Mr. NADLER. Well, can you address the question?

Mr. CLEGG. Right. But I don't think that an inconsistency with *Shaw v. Reno* is one of the problems that I was talking with respect to overturning *Bossier Parish II.*

I also think that where *Shaw v. Reno* does put limitations on what Congress can do and what the Justice Department can do, is if either section 2 or section 5 is being used to accomplish racial gerrymandering of the sort that the Supreme Court said was illegal in *Shaw v. Reno.*

Mr. NADLER. That will be ineffective. That would be ineffective.

Mr. CLEGG. That will remain unconstitutional. And as long as section 5 and section 2 were not being interpreted or written in a way——

Mr. NADLER. Okay. Thank you. Mr. Gray.

Mr. GRAY. I don't think those two things are inconsistent. You can change *Bossier* without that happening.

Mr. NADLER. Thank you. Mr. Posner, I have time for just one more question, and Mr. Clegg.

Mr. Clegg asserts that objections under section 5 are decided by low-level bureaucrats, I heard him say that in the Justice Department. I thought the Assistant Attorney General for Civil Rights, which is—it is a position requiring confirmation by the Senate, has final authority over these issues. Do you think it's fair—well, is that a fair description, and court staff to review that?

Mr. POSNER. Yes. The Department regulations require—the Attorney General has delegated his authority under section 5 to make decisions to the assistant attorney general, which, of course, is a presidential appointment confirmed by the Senate. Now the assistant attorney general, of course, can't investigate the 13,000 to 17,000 voting changes that are reviewed each year, the assistant attorney general has other responsibilities as well.

So, naturally, just as in any other part of Government, these voting changes are reviewed by career officials, which I would say is actually beneficial, because these are career officials who are non-political, and I think that helps to ensure that the section 5 process is conducted in a non-political fashion. But ultimately, any decision to object has to be made by the assistant attorney general.

Mr. CHABOT. The gentleman's time has expired.

Mr. Clegg, you can respond as well since Mr. Nadler asked for a response.

Mr. CLEGG. Well, I don't disagree with what Mr. Posner said, in so far as, I think he admits that, with thousands and thousands of these issues to review, as a practical matter the decisions frequently are made by low-level bureaucrats. I don't agree with Mr. Posner that just because somebody is not a political appointee doesn't mean that they don't have political views and prejudices.

Mr. CHABOT. Thank you. The gentleman's time has expired. The gentleman from Florida, the former Speaker of the House, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman, Mr. Posner, while I ask a question of Mr. Clegg, I would like you to look at article I, section

4, clause 1, which I have outlined for you. I would ask you a question about that next.

Mr. Clegg, one of the arguments that you make is an unhappy side effect of overturning the *Bossier* decision, is that we are likely to leave, in effect, an equally or more discriminatory procedure or process. But isn't it true, with respect to redistricting, at least since *Baker v. Carr,* after every census, jurisdictions are pretty much required, if they have single-member districts to redistrict.

So, in fact, there is always a fall-back position that would require compliance with section 5, and you would not go back to a system that was equally or more discriminatory in redistricting situations.

Mr. CLEGG. You know, I am not sure I agree with that even in the narrow context of redistricting right after a census. You know, suppose that you had a——

Mr. FEENEY. Well, Congress for example, the Supreme Court often requires the equivalent of zero deviation unless you have a darn good justification. You can't very well get away with keeping a plan for 20 years after a census comes out.

Mr. CLEGG. I understand. But suppose that a jurisdiction decided to redistrict in a way that increased the number of majority-minority districts, but not enough to satisfy the Justice Department. The point I was making was that it was the Justice Department who would be better off—it would make more sense for the system to be that, in that circumstance, the improved system would be allowed to go forward—and if the Justice Department thought that the reason an even better system wasn't adopted was because of discriminatory intent they could bring a section 2 lawsuit.

Mr. FEENEY. I am going to interrupt, because I have limited time. But the effect is virtually every jurisdiction has a fallback position so they would come into compliance every 10 years with section 5 if they are precleared, they have a commission or they have a court order. It gets bumped up to Federal Court, because eventually you have to have lines consistent with *Baker v. Carr* and consistent with the most recent redistricting.

Mr. Posner, one of Mr. Clegg's, I think, important arguments because Scalia does raise it in his decision, is the federalism argument, that at least with respect to congressional redistricting, under article 1, section 4, clause 1, which I just asked you to look at, basically State legislators have been given by the Constitution directly, the ability to prescribe the times, place and matter for congressional redistricting. But the second clause says that Congress may, at any time, by law, make or alter such regulations. So hasn't the Constitution, in fact, expressly, given Congress the ultimate ability to determine the times, places and matters of Congressional redistricting?

Mr. POSNER. Yes, but I guess the concern with regard to section 5 is that typically, of course, State and local jurisdictions can adopt a voting change or any other law, and it's presumed legal, unless someone goes to court and obtains an injunction. Section 5 reverses that situation because voting changes are presumed unlawful until preclearance.

Mr. FEENEY. I understand that Congress created section 5. The Constitution says any time we want we can take back the times, place and matter process for Congressional redistricting. So at least

with respect to Congress, my view is that the federalism arguments actually are undermined by the express language of the Constitution.

Mr. Posner, there is a law of statutory construction, which basically preassumes that Congress isn't frivolous. Now often in reality we are frivolous, but in certain language, there is a reason for it. To the extent that the *Bossier II* decision essentially makes the words or purpose superfluous, haven't the—didn't the decision sort of violate that fundamental rule of construction?

In all likelihood, shouldn't the Court have assumed that Congress meant something by adding the words "purpose" in section 5?

Mr. POSNER. Absolutely. Certainly the thrust of my testimony is that after the *Bossier II* decision, the purpose test essentially has been read out of the statute.

Mr. FEENEY. Along those lines, Mr. Chairman, if I could have unanimous consent, your footnote 12, Mr. Posner, on page 4 of your testimony, cites a study by Peyton McCrary, Christopher Seaman & Richard Valley, "The End of Preclearance as We Knew It."

I think that would be important to submit for the record because what that study demonstrates is that the Court's decision has really neutered section 5, especially as it relates to redistricting preclearance. So I would ask unanimous consent that study be submitted as part of the record.

Mr. CHABOT. Without objection, so ordered. The gentleman's time has expired.

[The information referred to can be found in the Appendix.]

Mr. CHABOT. The gentleman from Detroit—excuse me, the gentleman from Michigan, the distinguished Ranking Member of the Committee, Mr. Conyers, is recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman. I appreciated the testimony of the witnesses. This is, to me, getting to one of the very most important decisions that we will be making in reauthorizing the Voting Rights Act of 1965. I just wanted to thank Mr. Clegg, counsel, for your candor, because you have come out—and we don't have time for it. But you really feel that the Voting Rights Act might be better off being reconsidered entirely, whether we should go forward with it.

That being the case, you are the first witness that has taken a position that extreme. I wasn't prepared for that. Your testimony was pretty limited on the subject that brought us here. But since you mentioned it, I wanted to let you know that I had listened to your testimony carefully.

Now, the problem that we are wrestling with here is whether there is a constitutional basis for turning *Bossier II* back, which said that the Justice Department was essentially powerless to block intentionally discriminatory voting changes, unless it found the jurisdiction acted with the retrogressive purpose of making things worse than they already were for minority voters. Is that essentially the issue, Mr. Posner, that brings us here today?

Mr. POSNER. Well, that is certainly one of the issues, or at least an issue that Justice Scalia raised in *Bossier*. It was a very perplexing statement by him in the *Bossier Parish II* decision since discriminatory purpose is always considered the core prohibition of the 14th and 15th amendments. So to just then turn around and

say that having section 5 prohibit discriminatory purpose, that would somehow threaten or question the constitutionality of section 5, is just very hard to figure out.

Mr. CONYERS. Well, what constitutional considerations do we need to take in—as we go about making this consideration—I mean, this whole hearing really is, are we going to leave *Bossier II* like it is and continue this construction of preclearance, or are we going to turn it back the way it was for several decades prior? Is that a simplification, but correct interpretation of what we are doing here today in our discussions and hearings.

Mr. POSNER. Yes. I think there's a question of whether section 5 or not, whether the section 5 nondiscrimination standard is going to have some real authority and power to it, and what it did, what existed prior to the *Bossier II* decision.

Mr. CONYERS. Wouldn't we, Attorney Wright, be—well, I don't know how we could come out of a 2005 hearing going through section 5, again, and leaving *Bossier* untouched.

Ms. WRIGHT. I agree. I would like to speak to the question of Congressional power and authority that has been raised. I think that it, if anything, is clear, it's that Congressional power is at its zenith when Congress is addressing the problem of intentional racial discrimination. That is at the core of the 14th amendment, it's at the core of the 15th amendment, and it's really difficult to imagine any other area where Congress would have more plenary authority to take important prophylactic measures such as section 5 has proven to be, to assure that kind of discrimination does not affect the electoral process.

Mr. CONYERS. Are there any concerns, finally, that we might want to take into consideration that we want to be careful about? Because this is restorative. We are not adding anything when we look at *Bossier.* We are just turning it back to the way it had been.

Mr. POSNER. Well, I think the one concern that I mentioned in my testimony, is that the Supreme Court, or at least the then five-Justice majority of the Court, expressed real concern about the manner in which the purpose test was being implemented by the Justice Department. I mean, I disagree with their appraisal, but nonetheless, I think that this offers Congress the opportunity as part of reversing *Bossier II* then—to provide some advice and guidance to the Justice Department and the District Court for the District of Columbia as to the proper manner in which the purpose test should be applied.

In doing that, Congress would really be following the path that it followed back in 1982 when *Mobile v. Bolden* was then the case which Congress was seeking to legislatively reverse, and Congress decided that not only should the statute specifically go back to the standard that existed prior to *Mobile,* but that it was necessary to, in the legislative history, as well as in the statute, to provide guidance as to how this test should be implemented.

Mr. CHABOT. The gentleman's time has expired.

Mr. CONYERS. Thank you, Mr. Posner.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you. The gentleman from Virginia, Mr. Scott is recognized for 5 minutes.

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman.

Mr. Chairman, I want to follow up on what the gentleman from Florida said in terms of redistricting plans. If you have an illegal plan that is being rejected, you could end up with a plan. You have to change because of one man, one vote and an injunction could easily be obtained very cheaply if a State tried to proceed on, within a 10-year cycle without a redistricting plan.

So if you are caught with an illegal plan and try to get something precleared, that may be better, but still illegal. It just seems to me that section 5 is the most convenient place to do it. Now, Mr. Clegg, you have suggested that changing it that way would subject section 5 to constitutional challenge.

Mr. Clegg, could you give us a few Supreme Court cases that we could review that would help us understand your decision—position. You don't have to do it now.

Mr. CLEGG. I am happy to address that. I think there may be two different issues here though that we are talking about. The fallback question with respect to a redistricting after census, is whether the—what I am assuming is, that there is a situation where the fallback may be worse than what the jurisdiction has proposed going forward with, but that is not as good as what the Justice Department would imply.

Mr. SCOTT OF VIRGINIA. You can't fall back. Once you have submitted something, you have to have something. If the fallback is going to be worse, that is not going to be precleared either. So you cannot go forward with any plan. The court is going to come in and draw the plan for you for the next election. You are not going to be able to go backwards. But in terms of the Constitutional challenge, could you provide us with cases that would help us understand your position?

Mr. CLEGG. Well, I think if I understood your question correctly, Representative Scott, what I am raising as a constitutional problem, and what I think Justice Scalia was talking about in *Bossier Parish II,* was giving the Justice Department unilateral authority to block a voting practice or procedure that was not retrogressive.

Mr. SCOTT OF VIRGINIA. Could you give us cases to help us on that? Names of cases. If you could submit those, I would appreciate it.

Mr. CLEGG. Sure. I am happy to do that. What I am going to do is take the cases and the passage from *Bossier Parish II.*

Mr. SCOTT OF VIRGINIA. Okay. If that is your answer, that is fine. Mr. Gray, you had been involved in campaigns for a long time?

Mr. GRAY. Yes.

Mr. SCOTT OF VIRGINIA. And helping people get elected?

Mr. GRAY. Yes.

Mr. SCOTT OF VIRGINIA. Is there value in incumbency. Does an incumbent have a better shot at getting elected?

Mr. GRAY. Very much so.

Mr. SCOTT OF VIRGINIA. Okay. You have been involved in section 5 cases?

Mr. GRAY. Yes.

Mr. SCOTT OF VIRGINIA. Have you ever been involved in a section 2 case?

Mr. GRAY. Yes.

Mr. SCOTT OF VIRGINIA. What is the relative expense in a—is a section 5 more or—cheaper or more expensive than in a section 2.

Mr. GRAY. Less costly, and you can fix the problem much quicker.

Mr. SCOTT OF VIRGINIA. If you had to wait for section 2, what kinds of costs are you talking about?

Mr. GRAY. Many times, thousands of dollars. You are talking about small jurisdictions and many times poor plaintiffs may be impacted negatively. Many of them wouldn't be able to launch the lawsuit any way.

Mr. SCOTT OF VIRGINIA. But they would be protected if they tried—if someone tried to impose an illegal plan on a section 5.

Mr. GRAY. Absolutely.

Mr. SCOTT OF VIRGINIA. They could fight it.

Mr. GRAY. That's correct.

Mr. SCOTT OF VIRGINIA. But are unable to fight it if they are relegated to section 2?

Mr. GRAY. Absolutely, that's correct.

Mr. SCOTT OF VIRGINIA. And we don't go to—the fact that if you don't fix *Bossier II,* the fact that there's an underlying section 2 violation to begin with shows you that the community didn't have the resources to fix it under section 2. They have an opportunity under section 5, and they ought to fix it. Now you have negotiated, obviously, redistricting plans?

Mr. GRAY. Many.

Mr. SCOTT OF VIRGINIA. If you don't fix it, and you have an area that never had any representation at all, and a fair analysis suggests that it ought to be three, majority-minority seats, if you have section 5, you can negotiate for 3.

Mr. GRAY. Yes.

Mr. SCOTT OF VIRGINIA. If you don't have section 5 the way we would like it to be, with *Bossier II,* you might get stuck with 1 or 2 as the best you could do under negotiations, is that true?

Mr. GRAY. Right, or sometimes nothing.

Mr. SCOTT OF VIRGINIA. Because nothing is no worse than you started off with.

Mr. GRAY. That's correct.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Watt, is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman.

Mr. Clegg, I have heard everything you said, and I understand, I am just trying to figure out how we get past this. One of the concerns you raised, I think, was that you have a Justice Department, which is a bureaucracy, making a factual determination or a determination, which theoretically could be a concern.

The problem is that it's the jurisdiction that is submitting the plan for preclearance that selects the venue to which it submits it. It can either submit it to the Justice Department for preclearance or it can submit it to a three-judge court in the District of Columbia.

Would it help address your concern if it were a three-judge—I mean, does that part of your concern go away with a plan that is

submitted to a three-judge court that has the authority to make a factual determination, or you are still equally troubled by that?

I mean, I can understand how you might be troubled by having a bureaucracy make a decision. Does that help your concern at all, or does it not?

Mr. CLEGG. It does help. I think it is certainly less problematic.

Mr. WATT. It is the jurisdiction that is seeking to implement the new plan that has that choice. They can have a factual determination by a court if they want to, right?

Mr. CLEGG. That is true, although, you know, I think that for the same reasons that my co-panelist was talking about, it's probably a lot more expensive and slower and more difficult to go the District Court route than the Justice Department route.

Mr. WATT. You would rather that additional cost and position be on the individual citizen as opposed to the State or jurisdiction?

Mr. CLEGG. I am not saying that the additional costs should not necessarily be on either one.

Mr. WATT. You would rather leave things as they are?

Mr. CLEGG. No. But I think what the—that the focus should be on whether or not there is, in fact, a purposeful discrimination. If you——

Mr. WATT. But that is—I am sitting here reading the 15th amendment, section 1 says "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

Section 2 says that Congress shall have power to enforce this article by appropriate legislation. Now, I can't imagine that you could be submitting to us that a local jurisdiction makes an intentional decision to discriminate on the basis of race, and that decision should go forward in the face of the clear language of the 15th amendment.

Mr. CLEGG. No, I——

Mr. WATT. So how would you—let's just put aside the more difficult cases where you are making judgments about the extent of the discrimination, but let's just assume the basic case, as it was in *Bossier,* where the evidence was we intended not to have minority representation, we intended to abridge the vote of Black people. How would you address that without just allowing it to go forward, the system gets put in place, you got to have a vote before you can have a trial under section 2. Tell me how you had address that in your world. I guess that's the question I am asking. I am just perplexed.

I understand the concern you are raising, but I don't understand how you would address that in a United States of America where Black people and White people both are trying to vote. I just don't understand how you would address it. Tell us how to address it. I mean, that is what these purposes, these hearings are about, to try to come up with some constructive means of making our democracy work. Tell us how you would address that.

Mr. CHABOT. The gentleman's time has expired, but the gentleman can respond to the question.

Mr. CLEGG. All right. Well, I think there are a number of questions in there. Let me go through them as best I can.

First of all, Congressman Watt, before I forget the thought, the other problem that I have with your suggestion that there's really no—there shouldn't be any objection to the jurisdiction simply aside from going to court—is that under section 5, even if it goes to court, there is still this—the burden of proof in a quite extraordinary way, is shifted to the jurisdiction. In other words, they have to go into court and prove——

Mr. WATT. The burden of proof in *Bossier Parish* was they came in and said we intended to do this. Are you saying that they ought to be allowed to do that?

Mr. CLEGG. No. So the first point I would make is that although I have fewer problems if the decisionmaker is a court, the Supreme Court itself has said that the burden shifting provisions in section 5, and those apply to court hearings, as well as to, you know, going through the Justice Department, are part of what raises these federalism concerns that I was alluding to.

Mr. WATT. Federalism concerns are more dramatic than the express provisions of the 15th amendment?

Mr. CLEGG. Well, again, Congressman, your assumption is that because the Justice Department thinks——

Mr. WATT. Oh no, I am talking about the three-judge court. I gave you that out.

Mr. CLEGG. Look. I think if you had a—and are you also giving me the out that there is also no longer any burden shifting?

Mr. WATT. No.

Mr. CLEGG. Because if you do that, then it is starting to look a lot like a section 2 lawsuit.

Mr. WATT. So they got it pretty clear, I mean, if you got to have the—but you got to have a disposition quickly. I guess that is why I kept asking what is your solution to this. You need a quick disposition so the election can go forward. You don't want people to intentionally discriminate. You want a decision quick. You want to not have the extra expense. You know, it seems to me that what Congress did was set up a system to accommodate all of those things, and you seem to be advocating for a different system, and I keep wondering what that system is.

Mr. CLEGG. Believe me, I will look into that, and I appreciate the opportunity. Let me also say though, particularly with respect to *Bossier Parish*—you know, I did not litigate the case. But it says here that the court, the lower court in that case, concluded that there was no evidence of discriminatory but nonretrogressive purpose.

So I questioned, you know, the factual premise there. But there could be situations where there was such a finding. I don't dispute that.

All right, now, your $64,000 question, what would I do? I would continue to have a Voting Rights Act. I am not that radical. Many of the provisions about having examiners and poll watchers and that sort of thing make perfect sense and ought to be continued—you know, no literacy tests and a lot of those things in section 4.

I think that we ought to have a second section 2, but I would change section 2, so that it tracks the language that you so eloquently read from the 15th amendment, so that it is prohibiting the kinds of racial discrimination that are prohibited by the 15th

amendment, but not pushing jurisdictions to racially gerrymander, which is unfortunately what I think what the results test does.

Then, in terms of section 5, I think that there should be full hearings before the full Committee. You all should ask a couple of questions. Number 1, should the way that covered jurisdictions are defined——

Mr. WATT. But before you go there, you finally worked your way into the same position, I think, that Mr. Posner was.

Mr. CHABOT. The gentleman's time has long since expired. But could he be brief?

Mr. WATT. All right. I just wanted him to know that he was surprisingly close to Mr. Posner by the time he got through with that part of his presentation. I didn't mean to interrupt him.

Mr. CHABOT. Mr. Clegg, have you had an opportunity to finish your thought?

Mr. CLEGG. It think the only other thing I would say, Mr. Chairman, is I would make sure that the covered jurisdictions are accurately described, because I think that what—the jurisdictions that it made sense to cover 40 years ago may not be if same jurisdictions that ought to be covered now. I would use a purpose test rather than an effects test for section 5 as well.

Mr. CHABOT. The gentleman's time has expired. I would ask unanimous consent that the gentleman from Georgia be extended 5 minutes to ask questions. Hearing no objection, the gentleman has 5 minutes.

Mr. SCOTT OF GEORGIA. Thank you very much.

Mr. Chairman, again I appreciate your kindness and generosity in allowing me to ask questions and participate on the question.

I think, Mr. Clegg, you have laid bare, I think, the seriousness of the challenge to this Voting Rights Act. Prior to your testimony, I did not really realize how in jeopardy the Voting Rights Act is. I think that it's very important for us to use this hearing to set as much of a record as we can to your basic argument on the constitutionality of this. I think that *Bossier* is indeed like a cancer, eating away at the Voting Rights Act.

Would you not agree that the best argument for us going forward is to go directly to the 15th amendment and to illustrate point by point just how *Bossier* has acted to deny and abridge an individual's right to vote based upon race, based upon background, servitude, as so eloquently stated by my colleague, Mr. Watt from North Carolina?

Mr. CLEGG. That is absolutely right.

Mr. SCOTT OF GEORGIA. With that in mind, could I not go to you, Ms. Wright, and to you, Mr. Posner and to you,

Mr. Gray, and take the remaining moments that I have, of trying to get on record directly examples of how this does, in fact, abridge an act against the 15th amendment?

One point, if I may add to that, just to start us off is, is this not true that prior to *Bossier,* the Justice Department objected to about 8 to 9 percent of the cases that came before them? Since *Bossier,* they have objected to only 1 percent. I think that is some damaging evidence in itself.

But if I could just allow the rest of my time,

Mr. Chairman, if Ms. Wright and Mr. Posner and Mr. Gray could give us some specific examples of how this, indeed, could violate the 15th amendment.

Ms. WRIGHT. Well, I think that probably the most vivid example was the one that I gave during my testimony of the impact this decision would have had if it had been in effect in the 1980 on the creation of Congressman Lewis' district.

Mr. SCOTT OF GEORGIA. Of Georgia?

Ms. WRIGHT. Yes. Where there was outright evidence that the head of the redistricting committee was routinely describing African-Americans in his State using racial epithets and declaring that he would never create such a district.

Mr. SCOTT OF GEORGIA. I might add that I was there as a member of the Georgia legislature when that happened. You are absolutely correct.

Ms. WRIGHT. You have insight to this. I would also add is very important, the misconception that has been put forward here if you have an intent that is being administered by the Justice Department, that is somehow a standardless test, nothing could be further from the truth.

The standards for examining whether a change is intentionally discriminatory are very well established. You follow the set of factors that is listed in the case of Arlington Heights in 1977, the Supreme Court decision, which has a set of factors that you look at, including the impact of the decision on racial minorities, the sequence of events leading up to the decision to enact the change, the degree to which the jurisdiction departed from normal procedures in the course of its decisionmaking and a variety of other factors that are very well established and which the Justice Department used very successfully for 35 years routinely to examine these kinds of changes, and only objected in a very small percentage of the overall number of submissions that came to the Justice Department.

But in those cases where the Justice Department did object, the preclearance requirement and the intents standard played an absolutely crucial role in bringing us to where we are today, which is a lot of progress compared to where we were 40 years ago.

Mr. SCOTT OF GEORGIA. Mr. Posner.

Mr. POSNER. As I indicated in my written testimony, the purpose test first began to be enforced under section 5 with real vigor when Assistant Attorney General Reynolds was in charge of the Civil Rights Division. It first began with objections to about 25 redistrictings based upon discriminatory purpose, 25 redistrictings by county governing boards in Mississippi.

Often the situation that existed with regard to the redistrictings that were objected to was that the Black population was concentrated in one city located more or less in the center of the county. And the plan that was submitted by the county board of supervisors, what it did was draw each district into that city, so that you had five districts weaving their way into the Black population located in that city, fragmenting that Black population among the four, five districts, thereby significantly minimizing the opportunity of Black voters to elect candidates by choice, in fact, preventing Black voters in counties with significant Black populations from

electing any member of the county board of supervisor, county board of supervisors.

As a result of these objections, these purpose objections by the Justice Department, the county, of course, couldn't then go back to the old plan as was indicated. The county had to adopt a new redistricting plan, and that was mandated by one person, one vote. The county adopted new plans that did not fragment Black population in this manner, and thereby giving Black voters significant opportunities to elect candidates of their choice onto the boards of supervisors.

Mr. CHABOT. The gentleman's time has expired. Mr. Gray, I think you were asked to respond. Would you like to respond?

Mr. GRAY. Yes. I do not see making sense for discriminatory intent to be allowed in any instance, but in one county in Alabama that was part of that redistricting loss, Chilton County, where they had agreed to a cumulative vote system that with seven seats on the council, and on the county commission and on the county school board, on the county commission they have had add least three or four voting cycles using cumulative voting. That system was challenged by some plaintiffs in the county.

Now what they are asking to do is to go back to what they had prior to the lawsuit, where we were able to get a Black member elected to the Chilton County Commission using cumulative voting. If we apply the *Bossier* standard, if you go back to what they had prior to the lawsuit, there would be no opportunity for Blacks to have representation because the Black percentage in the county is not high enough to create districts with, say, four or five seats, which they had four or five members, which they had prior to the lawsuit.

So Blacks will be shut out. If you said the standard that they would be allowed to use, would be what they had prior to the lawsuit, then Blacks in Chilton County would never have representation on the county commission.

Mr. CHABOT. The gentleman's time has expired.

Mr. FEENEY. Mr. Chairman, I wonder if I might request unanimous consent for 1 minute to ask a question.

Mr. CHABOT. Without objection.

Mr. FEENEY. Thank you. This really goes to anybody. I argued earlier that Congress, at least intentionally, shouldn't act with frivolity, but I am going to go ahead and just do that. I have been trying to build a record, I think, with most of my colleagues here—and by the way, Mr. Chairman, it doesn't feel that bad being outnumbered on a partisan basis. We have for most of these hearings, at least on this issue.

But to be frivolous for a few seconds, if you have a few minutes, Mr. Posner, you served with Chief Justice Roberts in the Justice Department. He probably has at least a passing familiarity with the enforcement of the Voting Rights Act.

I just wanted to know whether Mr. Posner or anybody else, something beyond superstition or a hunch, had any guesses as to where Chief Justice Roberts or potential Justice Alito comes down on the constitutional issues. We have got three Justices that believe in equal protection or federalism are implicated, that being Thomas, Scalia and the now-deceased Rehnquist. We have had

Kennedy sort of align, for the most part, with those Justices, and O'Connor has always been a court of one for the last 10, 15 years on these issues.

Does anybody have any guess for us that they want to make based on some sort of evidence. Mr. Posner, I would love to here what, if anything, you are willing to tell us.

Mr. POSNER. Well, the Chief Justice was serving in a different part of the Department than I was. So I didn't have any personal contact with him when he was a member of the Department.

It is very difficult to guess. He has indicated that he has great respect for *stare decisis,* that he believes in that principle and the importance of that principle. The Supreme Court has, on at least two occasions, upheld the constitutionality of section 5. The Court was well aware of the federalism issue, but thought that the 15th amendment issue, the 15th amendment concerns in terms of the right to vote, as well as the record that Congress established in terms of justifying section 5, meant that that section 5 should be upheld as being constitutional.

So I think we go back to the record that Congress is trying to establish. I think that is critical in showing that there is a continuing need for section 5. But predicting a vote is, of course, a very difficult thing to do.

Mr. CHABOT. The gentleman's time has expired. Anyone else want to weigh in on that?

Ms. WRIGHT. I also would be reluctant to speculate about the vote of an individual Justice, but would emphasize but no matter who is on the Court, it certainly is of the most critical importance of this Committee to do as thorough a job as possible in examining what the Voting Rights Act has accomplished in the covered jurisdictions, what the continuing problems are, what the likely effect would be, if its protections were removed.

I think we have already gone a long way toward doing that in some of the testimony that I have seen so far in some of these hearings. But there is certainly a lot more that can and should be done to document the record of discrimination and voting rights enforcement in the covered jurisdictions. That is critically important no matter who is on the Court.

Mr. CHABOT. Thank you. Anybody else? Mr. Clegg.

Mr. CLEGG. I agree that there are going to be at least five Justices who are going to be very sensitive to these federalism concerns and to wanting to make sure that the Congress is acting pursuant to its enumerated powers. So however you think you are going to come down, you need to be careful and have the full hearings. I think also, you know, come into them with, you know, an open mind, not with a verdict first, trial afterwards-type mind set, this is a matter of policy, doesn't make sense to keep the statute in exactly the same defining—covered jurisdictions in exactly the same day.

Mr. CHABOT. Mr. Gray, do you want to gaze into the crystal ball here?

Mr. GRAY. No. I am not going to venture on that one.

Mr. CHABOT. At least you won't be wrong. Okay.

Thank you very much. I want to thank the whole panel for their very excellent testimony here this afternoon.

I want to, once again, mention that we need to clear this room as expeditiously as possible, because we do have a hearing starting in 6 minutes on an entirely different issue here.

If there's no further business to come before the Committee, we are adjourned.

[Whereupon, at 3:50 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Testimony of Brenda Wright, National Voting Rights Institute
before the National Commission on the Voting Rights Act
Jackson, Mississippi
October 29, 2005

Thank you for the opportunity of presenting this testimony today in support of reauthorization of critical provisions of the Voting Rights Act of 1965.

The Voting Rights Act of 1965 is inextricably tied to the history of the state of Mississippi. Mississippi's history of discrimination in voting was a primary impetus for Congress' enactment of the Voting Rights Act.[1] Mississippi's continued resistance to the Act's guarantees also has been an important consideration in Congress' several extensions of the Act since 1965.[2] Virtually every conceivable device for disfranchising people has been used here at one time or another, and some of those devices were invented here.[3]

Since these hearings are primarily focused on the post-1982 record of voting rights violations, I would like to focus my testimony here today on a battle that started in the 1980s, and continued into the late 1990s, over the requirement of dual registration in Mississippi. "Dual registration" refers to the practice of requiring citizens to register more than once in order to be eligible to vote in different categories of elections. Although the battle over dual registration concerns just one of the racially discriminatory barriers to voting that black Mississippians have encountered over the years, I think it will be illustrative of several themes that are important in understanding the need for reauthorization of the expiring provisions of the Voting Rights Act.

First, the battle over dual registration illustrates how registration requirements that are facially neutral have been used, time and again, disproportionately to disfranchise black citizens in Mississippi. Second, it illustrates the critical importance of Section 5 in preventing states like

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[1] *See South Carolina v. Katzenbach*, 383 U.S. 301, 310-13, 315 (1966).

[2] Frank R. Parker, Black Votes Count: Political Empowerment in Mississippi After 1965, at 180-181 (1990).

[3] Mississippi has used poll taxes, literacy tests, lengthy residency requirements, tests of "good moral character," white primaries, publication of registrants names to facilitate retaliation, prohibitions on registration outside of a county clerk's office, re-registration programs, and dual registration requirements. *See Mississippi Chapter, Operation PUSH v. Allain*, 674 F. Supp. 1245, 12560-52 (N.D. Miss. 1987), *aff'd*, 932 F.2d 400 (5rh Cir. 1991); Parker, *supra* n. 2, at 26-29, 185, 205-06 (1990).

Mississippi from backsliding on voting rights. We had to get rid of dual registration through a court battle not just once, but twice, and the most recent battle did not end until 1998. The second time, however, was somewhat quicker than the first, because the first time we had to file suit under Section 2 of the Voting Rights Act, while the second time we were able to rely on the Section 5 preclearance requirement (although even that took some doing). Third, the dual registration battle shows how Mississippi, even in its more recent history, has continued to defy even the basic requirement of submitting voting changes for preclearance, requiring federal court intervention even to get the preclearance review mandated by Congress under Section 5.

The original form of dual registration in Mississippi was the requirement that, in order to vote in local elections, voters had to register twice – once with the county registrar (to vote in county, state and federal elections) and once with the municipal clerk (to vote in municipal elections).[4] This requirement was part of the package of voter registration barriers adopted by the Mississippi Legislature in 1892 to implement the provisions of the 1890 Constitutional Convention, whose overall purpose was to disfranchise black citizens of Mississippi to the greatest extent possible.[5] By 1984 Mississippi was the only state still to require dual registration.[6]

In 1984, a group of African American citizens and two voter registration organizations, represented by the Lawyers' Committee, the NAACP Legal Defense & Educational Fund, and Greenville attorney Johnnie Walls, filed suit challenging the dual registration requirement as a violation of the 14th and 15th Amendments and Section 2 of the Voting Rights Act.[7] The lawsuit also challenged Mississippi laws that effectively prohibited any voter registration from being conducted outside the county registrar's office.

In a decision issued in 1987, the district court found that both of these limitations on voter registration had been adopted for a racially discriminatory purpose.[8] It also found that these barriers continued to have a

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[4] *PUSH*, 674 F. Supp. at 1247-1250.
[5] *Id.* at 1251 (noting that dual registration requirement "was enacted as part of the 'Mississippi plan' to deny blacks the right to vote following the Constitutional Convention of 1890").
[6] *Id.* at 1252.
[7] *PUSH*, 674 F. Supp. 1245.
[8] *Id.* at 1252.

racially discriminatory effect. Black voter registration rates lagged far below those of whites; 79 percent of voting age whites were registered compared to only 54 percent of voting age blacks, a difference of 25 percentage points.[9] With respect to the dual registration requirement, the court found that "[m]ore black citizens than white have been denied the right to vote in municipal elections, because their names could not be found on municipal voter registration rolls, and this has probably resulted in the defeat of black candidates."[10] In one example cited by the court:

> In the March 10, 1987 municipal Democratic primary election in the City of Marks, Mississippi, 56 voters who had registered to vote with the Quitman County Circuit Clerk prior to August 3, 1984, but who had not registered with the Marks Municipal Clerk, were required to cast affidavit ballots by election officials. These affidavit ballots were later rejected and not counted by the Marks Municipal Democratic Committee. All 56 of these voters were black. In that election, two black candidates for the board of aldermen lost by voter margins less than the number of affidavit ballots that were rejected.[11]

The district court noted that, because of past discrimination, blacks had lower income and educational levels than whites, making it more difficult for blacks to overcome "administrative barriers" such as dual registration requirements.[12] Many communities, particularly small communities in the Delta, were located far from the nearest registrar's office. Blacks were far less likely than whites to have access to an automobile, and far more likely to work for hourly wages in blue collar and service positions that afforded less opportunity to take time off to register during the limited hours the registration offices were open.[13] The court also noted that "the widespread variations among counties in voter registration practices, as attested to by the various circuit clerks, may result in the unequal treatment of similarly situated persons."[14]

The court further found that "the evidence in this case" supported findings made by other courts:

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[9] *Id.* at 1255.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 1255-56.
[13] *Id.* at 1256-57.
[14] *Id.* at 1267.

> (1) that there is an extensive past history of purposeful official discrimination in Mississippi that has touched on the right of black citizens to register, to vote, and otherwise to participate in the democratic process; (2) that racially polarized voting has prevailed in Mississippi elections, resulting in the defeat of black preferred candidates by white bloc voting and in black voters being unable to elect candidates of their choice; (3) that there continue to exist socio-economic disparities between whites and blacks in Mississippi that impair equal access to the political process in Mississippi; (4) that there is evidence of racial campaign tactics still being used in Mississippi; and (5) that the percentage of elected officials who are black remains disproportionately low.[15]

As a result of the *PUSH* litigation, Mississippi eliminated the dual registration requirement and implemented a fully unitary system.[16] Registering once was finally sufficient to make a voter eligible to vote in all elections, federal, state, and local. This state of affairs, unfortunately, did not last. In 1994, Mississippi began preparations to implement the requirements of the newly enacted NVRA. The NVRA requires states to provide voter registration at agencies serving the public, such as drivers' license and public assistance offices, and limits the circumstances under which a registered voter's name may be removed from the voter rolls.[17] Although the requirements of the NVRA apply only to registration for federal elections, virtually every state implemented the NVRA so that NVRA registrations would be valid for all elections, recognizing that maintaining separate systems of registration for federal and state elections would be confusing to voters and wasteful of state resources.

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[15] *Id.* at 1252.

[16] *Mississippi State Chapter, Operation PUSH v. Mabus*, 717 F. Supp. 1189 (N.D. Miss. 1989), *aff'd*, 932 F.2d 400 (5th Cir. 1991).

[17] The NVRA created nationwide standards requiring states to end "discriminatory and unfair registration laws and procedures" that Congress found "have a direct and damaging effect on voter participation," including disproportionate harm to racial minorities. 42 U.S.C. § 1973gg(a)(3). The primary requirements of the NVRA are: (1) states must permit voter registration simultaneously with applications for, or renewal of, drivers' licenses at motor vehicle offices, *see* 42 U.S.C. § 1973gg-3; (2) states must accept mail-in voter registration forms and make such forms widely available, *see* 42 U.S.C. § 1973gg-4; (3) states must designate and provide voter registration opportunities in public assistance offices, offices primarily engaged in providing state-funded programs for persons with disabilities, armed forces recruitment offices, and in other governmental or non-governmental offices designated by the state, *see* 42 U.S.C. § 1973gg-5; and (4) states must maintain an accurate and current voter registration roll through uniform and non-discriminatory procedures, with limits on purges of voter rolls, *see* 42 U.S.C. § 1973gg-6. The requirements of the NVRA do not apply to a handful of states that, on and after March 11, 1993, permitted election-day registration at the polls, or did not require registration as a precondition to voting. 42 U.S.C. § 1973gg-2.

Mississippi also started out with the intention of creating a unitary NVRA-compliant registration system, publishing an NVRA implementation manual for county clerks that clearly contemplated a unified system. The state then began conducting voter registration under this unified plan as of January 1, 1995, as required by the NVRA. Several thousand voters were registered under this system in the first few weeks of 1995, all of them on the assumption that they were registering to vote for all elections, not just federal elections. Although the Mississippi Legislature had not yet enacted the implementing legislation for the NVRA-compliant system as of January 1, it was expected to do so in the 1995 legislative session. On February 1, 1995, the Department of Justice granted preclearance to the unitary system described in the 1994 NVRA implementation manual.[18]

The Mississippi Legislature, however, never passed the implementing legislation. State Senator Kay Cobb, the chair of the Mississippi Senate Elections Committee, unexpectedly tabled the bill. She later explained her position in part by focusing upon the registration opportunities offered to welfare recipients under the NVRA, saying that people who "care enough to go get their welfare and their food stamps, but not walk across the street to the circuit clerk," should not be accommodated.[19] Then-Governor Kirk Fordice later sounded the same theme in opposing full NVRA implementation, saying the legislation "should be called 'Welfare Voter'" rather than "Motor Voter" because it provides access to voter registration for public assistance recipients.[20] Of course, when white politicians in Mississippi resort to criticism of allegedly lazy welfare recipients, everyone understands that it is an appeal to racial prejudice. Editorial writers around the state condemned this as "racist rhetoric."[21]

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[18] For details on Mississippi's implementation of the NVRA, its re-institution of a dual registration requirement, and the ensuing litigation, *see* Brenda Wright, *Young v. Fordice*, Challenging Dual Registration Under Section 5 of the Voting Rights Act, 18 Miss. Coll. L. Rev. 67 (1997).

[19] Grace Simmons, *"'Motor Voter' No Good in State Races*, Jackson Clarion Ledger, March 6, 1995, at A5.

[20] *See* "Fordice stoops to picking on poor," Greenwood *Commonwealth*, May 6, 1997.

[21] "It's hard for Fordice to go forward with foot in mouth," *Sun-Herald*, Biloxi-Gulfport, *reprinted in Daily Leader*, Brookhaven, May 7, 1997 (noting similarities between "racist rhetoric" of invoking "welfare queens" and Fordice's use of "a similar slur to maintain a dual system of registration that keeps voters segregated at the polls in Mississippi"). As noted by another Mississippi columnist, "since the 1960's and the evolution of Lyndon Johnson's "Great Society," Mississippi and the South have become fertile ground for the myth of the "Welfare Queen" and the popular notion that the word "welfare" is interchangeable with the word "black" in political discourse . . . . No one on the political scene in Mississippi makes more frequent use of speed-dialing those fears and misconceptions than the current occupant of the Governor's Mansion." "Fordice shouldn't throw rocks at the poor," DeSoto *Times*, May 15, 1997. *See also* "Fordice

The result of this legislative impasse was that Mississippi implemented NVRA procedures for federal elections only – since that was required by federal law – but not for state elections. This belated decision to implement the NVRA only for federal elections changed the entire nature of the state's NVRA implementation plan. No one had anticipated that NVRA registration would be valid for federal elections only, and the State certainly had never sought section 5 preclearance for a dual registration system. And the NVRA forms were very confusing; nowhere on the form was the voter notified that the form was only good for federal elections. Persons using the form would naturally assume that they were applying to register for all elections.[22]

Nevertheless, to initiate this federal-election-only NVRA plan, state officials issued a memorandum with a new set of instructions to the Mississippi circuit clerks and the chairpersons of the Mississippi County Election Commissions. The February 10, 1995 memorandum announced that "Mississippians who have registered to vote under NVRA will also need to register under Mississippi election law to be eligible to vote in all elections."[23] To prevent NVRA registrants from voting in state elections, the memorandum directed circuit clerks to prepare two separate sets of poll books for NVRA and non-NVRA registrants, or to adopt other procedures for distinguishing NVRA registrants from other registrants on their voting rolls.[24] The memorandum also acknowledged that "[a]nyone who has thus far registered under NVRA, or will do so in the future, may well assume that they are eligible to vote in all elections."[25] The memorandum therefore asked circuit clerks to notify NVRA registrants of their limited eligibility to vote, and to provide "the opportunity to register for state elections."[26]

In other words, Mississippi once again had a dual registration system, and the electorate was divided into two classes of voters. One group of registrants, those who took advantage of the opportunity to register at

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stoops to picking on poor," Greenwood *Commonwealth*, May 6, 1997 (criticizing Fordice for "trying to feed on prejudice to make his case" against unified registration).

[22] *See Young v. Fordice*, 520 U.S. 273, 283 (1997); *see also* Wright, Challenging Dual Registration, *supra* n. 18, at 72-74.

[23] Juris. Statement at 22a, Young v. Fordice (No. 95-2031) (Memorandum dated February 10, 1995, from Phil Carter, Assistant Attorney General, and Reese Partridge, Staff Attorney, Secretary of State's Office, to Mississippi Circuit Clerks and Chairman, Mississippi County Elections Commission).

[24] *Id.*

[25] *Id.*

[26] *Id.*

drivers' license offices and other offices designated by the NVRA, were eligible to vote only in federal elections; the other group, who registered with the circuit clerk under pre-existing Mississippi procedures, were eligible to vote in all elections. There was no difference between these two groups of voters in terms of meeting the voter qualification requirements of Mississippi law. NVRA registrants differed from other Mississippi voters only in what forms they filled out and at what site they obtained a registration form.

What should have happened next was for Mississippi to submit its new, dual registration plan for Section 5 preclearance, so that it could be examined to determine if these procedures would have a racially discriminatory effect or were adopted for a racially discriminatory purpose. But the State refused to do so, even after the Department of Justice wrote to the State and advised it that the voting practices described in the new memorandum were subject to the Section 5 preclearance requirement and had to be submitted.

Accordingly, the only way to force Mississippi to comply with Section 5 was, once again, to go to federal court, this time with a Section 5 enforcement action.[27] The fact that we had to do this, 30 years after the Voting Rights Act was adopted, speaks volumes about Mississippi's determined resistance to the clear requirements of the Act. It must have been obvious to the State that a dual registration system, particularly with the confusing and inconsistent procedures the state adopted, would never be precleared, so the State elected to ignore the law. We had to litigate the Section 5 enforcement action all the way to the Supreme Court, which unanimously held that Mississippi had violated Section 5 by refusing to submit its federal-election-only NVRA plan for preclearance review.[28] And when, after almost two years of litigation, Mississippi finally was forced to submit its dual registration procedures for Section 5 preclearance, the Department of Justice objected. Not surprisingly, the Department found that the state's method of implementing this confusing registration system was racially discriminatory both in its effect and in its purpose.[29]

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[27] The plaintiffs in the case were Thomas Young, Reverend Rims Barber, and Richard L. Gardner, who all were active in conducting voter registration activities on behalf of the NAACP or minority voters generally, and Eleanor Faye Smith, an unregistered public assistance recipient. Their efforts helped to protect the voting rights of thousands of Mississippians.

[28] *Young v. Fordice*, 520 U.S. 273.

[29] Letter from Isabella Katz Pinzler, Acting Assistant Attorney General, Civil Rights Division, to Sandra M. Shelson, Special Assistant Attorney General, State of Mississippi, September 22, 1997.

As the Justice Department's objection letter indicated, much of the discrimination stemmed from the fact that Mississippi was conducting voter registration very differently in drivers' license offices than in the public assistance agencies covered by the NVRA. The predominantly white clientele registering at the drivers' license offices was not disadvantaged by the confusing NVRA registration forms used by the State, because those citizens were simultaneously being offered the opportunity to fill out a state mail-in form that was effective to register voters for all election. By contrast, the predominantly black clientele registering at public assistance agencies was not being offered a state mail-in form at the time of registration, but instead was being offered only the NVRA registration form that resulted only in registration for federal elections.[30] The Justice Department's objection letter also found that the State's notification efforts had been ineffective in bringing about re-registration of NVRA registrants; some 30,000 citizens remained registered only for federal elections as of 1997. In addition, notification efforts in the poorest and predominantly black areas of the state had lagged in comparison with the rest of the state.[31] Finally, the Justice Department noted that the State's re-institution of a dual registration system "is particularly noteworthy because it occurred only a few years after a federal court had found that a similar requirement had led to pronounced discriminatory effects on black voters[,]" bolstering the conclusion that it was "tainted by improper racial considerations."[32]

The Department's Section 5 objection meant that Mississippi had been conducting voter registration under patently unlawful procedures for over two years. But even after the Department issued this objection, the State failed to correct the problem. Governor Fordice vetoed legislation in 1998 that would have created a unified system in order to cure the Section 5 violation.[33]

Therefore, in the summer of 1998, we went back to court once again. The three-judge district court, noting "the failure of the State of Mississippi to enact remedial legislation after full and fair opportunity to do so," entered an order enjoining the State from "denying the right to vote in any state,

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[30] *Id.* at 3-4.
[31] *Id.* at 4-5.
[32] *Id.* at 5.
[33] *Young v. Fordice*, Civil Action No. 3:95CV197 (L)(N), Memorandum and Order at 6 (S.D. Miss. October 5, 1998).

county or municipal election to any voter who is registered and qualified to vote in federal elections under the NVRA."[34] As a result, thousands of voters in Mississippi were restored to the voting rolls for full eligibility in all Mississippi elections.

As mentioned at the outset, this battle over dual registration requirements in Mississippi is just one small chapter in the struggle for voting rights in Mississippi. It is a good illustration, but just one illustration, of Mississippi's entrenched resistance to full voting rights, the persistence of state officials in finding new excuses to create barriers to the right to vote, the critical role of Section 5 in protecting the right to vote, and the continued need for reauthorization of Section 5 to protect the hard-won gains that have been made.

Thank you for this opportunity to testify.

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[34] *Id.* at 9.

APPENDIX TO THE STATEMENT OF BRENDA WRIGHT: LETTER FROM ISABELLE PINZLER, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE, TO SANDRA SHELSON, ESQ., SPECIAL ASSISTANT ATTORNEY GENERAL, STATE OF MISSISSIPPI

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

September 22, 1997

Sandra M. Shelson, Esq.
Special Assistant Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Ms. Shelson:

This refers to the administrative plan for implementation of the National Voter Registration Act of 1993, 42 U.S.C. 1973gg to 1973gg-10 ("NVRA") for the State of Mississippi, which designates agencies for purposes of voter registration, includes voter registration forms for federal elections only, establishes procedures for conducting voter registration, and transmitting and processing voter registration forms in state agencies, and authorizes circuit clerks to develop procedures for notifying NVRA registrants of their federal-elections-only status and for registering NVRA registrants for state and local elections, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on July 23, 1997; supplemental information was received on September 4, 5, 11, 12, 16, 18, and 19, 1997.

We have given careful consideration to the information the State has provided, as well as data from the U.S. Census and other federal agencies, information and comments from other interested persons, and information available from the Section 5 enforcement action that led to this submission. In addition, we have reviewed the State's submission in accordance with the Supreme Court's opinion in Young v. Fordice, 117 S.Ct. 1228 (1997). Our review has led to the conclusion that the submitted changes do not meet the standards for preclearance under Section 5 of the Voting Rights Act.

In Young, the Court held that Mississippi's administrative NVRA plan "contains 'practices and procedures' that are significantly 'different from' ... the system that was in effect in 1994" and that "the State has not precleared those differences." 117 S.Ct. at 1235. The Court stated that:

> It is the discretionary elements of the new federal system that the State must preclear. The problem for Mississippi is that preclearance typically requires examination of discretionary changes in context--a context that includes history, purpose, and practical effect. See City of Lockhart v. United States, 460 U.S., at 131, 103 S.Ct., at 1002 ("The possible discriminatory purpose or effect of the [changes], admittedly subject to § 5, cannot be determined in isolation from the 'preexisting' elements of the council").

Young, 117 S.Ct. at 1239.

An important part of the context in which we must review the submitted changes is the state's prior experience with a requirement that its citizens register to vote twice to be eligible for all elections. For nearly a century, up until 1988, Mississippi had a dual registration requirement under which voters had to register separately for state and municipal elections. Ten years ago, a federal district court found that the original version of this dual registration requirement, adopted in 1890, had been "adopted for a racially discriminatory purpose" and that a revised version of the dual registration requirement, adopted in 1984, violated Section 2 of the Voting Rights Act because it had "result[ed] in a denial or abridgement of the right of black citizens in Mississippi to vote and participate in the electoral process." Operation PUSH v. Allain, 674 F. Supp. 1245, 1252 (N.D. Miss. 1987), aff'd sub nom. Operation PUSH v. Mabus, 932 F.2d 400, 413 (5th Cir. 1991).

The PUSH court found that in Mississippi "[b]lacks ... continue to face disproportionate economic and educational levels resulting from past discrimination which inhibits their political participation," id. at 1266, that "administrative barriers" such as dual registration were "harder to overcome for persons of lower socio-economic status and persons of lower educational attainment, a group that is disproportionately black," id. at 1255-56, and that the registration rate among black citizens lagged some 25 percentage points behind the registration rate of white citizens (54 percent for blacks in comparison to 79 percent for whites). Id. at 1253-55. The PUSH court also found that in Mississippi "the widespread variations among counties in voter registration practices ... may result in the unequal treatment of similarly situated persons" and that "[u]nfettered discretion in

voting registration procedures unnecessarily restricts access to the political process." 674 F.Supp. at 1267; see also id. at 1257-58.

In 1994, just prior to the time Mississippi began its implementation of the NVRA, the State had a unitary voter registration system, which included voter registration by mail, the availability of state voter registration forms at drivers' license offices, and fairly uniform local voter registration procedures. Under this unitary system, irrespective of the office at which voters registered, or the manner in which they registered, filling out one form would register them for all elections. At that point, the State's voter registration system had been fully unitary for just over six years, as a result of state legislation adopted to remedy the Voting Rights Act violation found in PUSH.

Pursuant to the State's submitted NVRA procedures, which the State began implementing without preclearance in early 1995, persons who register to vote in Mississippi solely under the NVRA are allowed to vote only in federal elections. To be eligible to vote in state and local elections, NVRA registrants in Mississippi must register a second time through pre-NVRA state voter registration procedures. This has led to a new dual registration system in Mississippi for voters who have registered only for federal elections under the NVRA, and for voters who have registered for all elections under state procedures, with separate registration procedures, separate registration lists, and separate ballots and voting booths.

In Mississippi, according to 1990 Census data, black persons comprise 35.6 percent of the total population and 31.6 percent of the voting age population. The 1990 Census also shows that black residents of the State continue to labor under severe socio-economic disparities as compared to white residents in areas such as education, poverty, and access to transportation.

Statistics provided by the State indicate that a majority of the applications for voter registration in Mississippi under the NVRA have come from public assistance offices, and in particular, from the Mississippi Department of Human Services. Statistics reported by the U.S. Department of Health and Human Services and the U.S. Department of Agriculture indicate that participants in Mississippi's public assistance programs which offer voter registration are predominantly black. Therefore, it appears likely that a majority of the applicants for voter registration under the NVRA in Mississippi are black.

It appears that the Mississippi Department of Human Services provides its public assistance clients the opportunity to register to vote solely through the NVRA forms, which only register voters for federal elections; and, as noted above, the

majority of these clients are black. By contrast, although it appears that the drivers' license offices of the Mississippi Department of Public Safety early in 1995 abandoned using the state's mail-in voter registration forms in favor of only offering NVRA forms, it also appears that after voters registered under the NVRA were not allowed to vote in state elections, the drivers' license offices resumed distributing state forms. As a result, it appears that clients at drivers' license offices now are offered a choice between state forms (which will register voters for all elections) and NVRA forms (which will register voters only for federal elections), and that many voters choose the state forms. Based on statistics reported by the State, it appears that overall, persons who obtain drivers' licenses and picture identification cards at drivers' license offices in Mississippi are predominantly white.

For more than two and a half years after the State began implementing the NVRA only for federal elections, the State has continued to use NVRA voter registration forms which bear titles such as "Mississippi Voter Registration Application" and instructions about how to "register to vote in Mississippi." The Supreme Court in Young found that these forms "probably would have led [NVRA registrants] ... to believe that NVRA registration permitted them to vote in all elections" and thus "might well mislead if they cannot in fact be used to register for state elections." Young, 117 S.Ct. at 1237. Although the State has submitted certain steps that it indicates have been taken in state agencies to advise NVRA applicants that they are registering only for federal elections, it appears that these steps have varied from agency to agency, and in any event, have not been sufficient to advise NVRA voters of their federal-only status. There appears to be widespread agreement among election officials in Mississippi that NVRA voters remain significantly confused about their inability to vote in state and local elections. Although the State has now proposed to begin stamping these forms "registration for federal elections only" this would not appear to significantly reduce the potential for confusion.

At this time, more than 30,000 persons, that is, more than half of the persons who have registered to vote in Mississippi under the NVRA, have not registered to vote a second time under state procedures, and thus are not eligible to vote in state and local elections. This is true despite the authority granted circuit clerks under the proposed NVRA implementation plan to notify NVRA registrants that they are registered for federal elections only and to register them for state elections using the state voter registration form. There appears to be significant variation in the efforts undertaken across the state by circuit clerks to notify NVRA registrants of their federal-elections-only status and to register NVRA voters for state and local elections through state procedures. Several of the State's poorest counties with significant black populations appear to be among

those which have had the least success in registering NVRA voters for state elections.

Thus, the State's federal-election-only implementation of the NVRA has a disproportionate impact on black citizens, preventing them, to a greater extent than white citizens, from voting in state and local elections. This has the overall impact of hampering the ability of black persons to participate in the political process. This result is hardly surprising in light of the recent findings in PUSH, the long history of discrimination against black citizens in Mississippi, and the persistence of severe socio-economic disadvantages among black citizens in Mississippi. Moreover, as set forth above, a number of aspects of the federal-election-only manner in which the State is implementing the NVRA virtually ensure that it will have a discriminatory effect on black citizens. The fact that the State has implemented these voting changes without preclearance for more than two and a half years has led to the full realization of the discriminatory potential of these changes. Under these circumstances, it appears that the voting changes involved in the State's administrative federal-elections-only NVRA implementation plan and the manner in which the state proposes to implement those changes "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," Beer v. United States, 425 U.S. 130, 141 (1976), particularly with regard to registration and voting in state and local elections.

Mississippi's proposal to implement the requirements of the NVRA in a manner that would cause the State to revert to a form of dual registration requirement is particularly noteworthy because it occurred only a few years after a federal court had found that a similar requirement had led to pronounced discriminatory effects on black voters. The State has also administered this new dual registration requirement in such a way that discriminatory effects on black voters were not just foreseeable but almost certain to follow. Moreover, several proposals aimed at mitigating or eliminating the discriminatory effects of the federal-elections-only manner in which Mississippi is implementing the NVRA have been made over the last three years. At least some of these proposals appear to have had widespread support, particularly among state and local election officials who bear the extra burden and expense of implementing the dual registration system, yet these proposals have several times been rejected under somewhat unusual circumstances. The reasons offered by some state officials for opposing such measures appear to have been insubstantial, and in some cases have been couched in racially charged terms indicating antipathy towards "welfare voters." In light of these circumstances, we cannot find that the State has met its burden of showing that the State's submitted NVRA procedures are not tainted by improper racial considerations. See Village of Arlington Heights v.

Metropolitan Housing Corp., 429 U.S. 252 (1977).

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to Mississippi's administrative plan for implementation of the NVRA.

We note that under Section 5 the State has the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, the State may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the objected-to changes continue to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

This also refers to your July 22, 1997, letter concerning the procedures for removing from the voter registration list the names of NVRA registrants who have moved and the amended procedures for removing from the registration list the names of registrants who have moved for state and local elections.

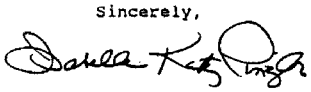
While your letter purports to be a submission under Section 5, the information provided does not meet the requirements for a proper submission under Section 5 for changes affecting voting. In particular, your letter does not satisfy 28 C.F.R. 51.27(c). Under Section 5, a jurisdiction has the responsibility for clearly identifying the voting changes for which preclearance is being requested. Clark v. Roemer, 500 U.S. 646 (1991); McCain v. Lybrand, 465 U.S. 236 (1984); Allen v. State Board of Elections, 393 U.S. 544 (1969). Therefore, we are unable to accept your letter concerning the above-referenced voter removal procedures as a request for review under Section 5. See 28 C.F.R. 51.26(d) and 51.35.

We further note that the voter removal procedures referenced in your July 22, 1997, letter appear directly related to the administrative procedures for implementation of the NVRA objected to in this letter. Consequently, review of the voter removal procedures under Section 5 must await preclearance of the related NVRA implementation plan.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that the State of Mississippi plans to take concerning this matter. If you have any questions, you should call Chris Herren (202-514-1416), an attorney in the Voting Section.

Since the Section 5 status of Mississippi's NVRA implementation procedures is pending before the Court in Young v. Fordice (S.D. Miss.), we are providing a copy of this letter to the Court and counsel in that case.

Sincerely,



Isabelle Katz Pinzler
Acting Assistant Attorney General
Civil Rights Division

cc: The Honorable E. Grady Jolly
United States Circuit Judge

The Honorable Tom S. Lee
United States District Judge

The Honorable William H. Barbour, Jr.
United States District Judge

Robert E. Sanders, Esq.
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Todd Cox, Esq.
Margaret Carey, Esq.
Laughlin McDonald, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
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THOMAS YOUNG, et al.

vs. Civil Action No. 3:95CV197(L)(N)

KIRK FORDICE, et al. DEFENDANTS

consolidated with:

UNITED STATES OF AMERICA PLAINTIFF

vs. Civil Action No. 3:95CV198(L)(N)

STATE OF MISSISSIPPI, et al. DEFENDANTS

MEMORANDUM AND ORDER

This matter was first before this three-judge district court on April 20, 1995, when private citizens brought suit pursuant to Section 5 of The Voting Rights Act, 42 U.S.C. § 1973c. The plaintiffs alleged that on and after February 10, 1995, the State of Mississippi, when implementing the National Voter Registration Act of 1993, 42 U.S.C. § 1973 gg et seq. ("NVRA"), effected changes in Mississippi's voting registration system in violation of the Voting Rights Act. Plaintiffs' core argument was that Mississippi failed to seek § 5 preclearance prior to implementing the changes in its voting practices and procedures. The United States brought

a similar suit against the state of Mississippi and the two cases were consolidated.

Mississippi moved for summary judgment and on July 24, 1995, we granted the State's motion. We reasoned that the changes implemented to Mississippi's voting registration system resulted from Mississippi's attempt to correct a misapplication of state law and therefore were not changes subject to § 5 preclearance. The plaintiffs appealed the decision to the United States Supreme Court.

The Supreme Court reversed our grant of summary judgment and held that because the modifications made to Mississippi's voting registration system were discretionary and nonministerial in nature, Mississippi needed to preclear certain changes under § 5. Young v. Fordice, 117 S.Ct. 1228, 1235 (1997)[1] The Supreme Court then remanded the case to the district court with instructions for the district court to enter the appropriate order enjoining Mississippi from using the unpracleared changes. Id. at 1239. The Supreme Court concluded that any further questions about the remedy

[1]The Supreme Court elaborated that the changes in Mississippi's voting system requiring preclearance included: "(1) newly revised written materials containing significant, and significantly different registration instructions; (2) new reporting requirements for local elections officials; (3) new and detailed instructions about what kind of assistance state agency personnel should offer potential NVRA registrants, (4) a list of which state agencies would be NVRA registration agencies, and (5) how and in what form registration materials would be forwarded to those who maintain voting rolls and other similar matters." Id. at 1236.

for Mississippi's use of an unprecleared plan would be for the district court to address. Id.

The parties then entered into negotiations and ultimately agreed upon an interim voting registration plan that Mississippi could use to comply with the NVRA until the State obtained § 5 preclearance or until the Mississippi Legislature took further action on the issue. The parties submitted their plan in the form of a proposed joint consent decree to the district court for approval on May 2, 1997. Four days later, on May 6, 1997, municipal primary elections were to be held in Mississippi. Consequently, in the event that this three-judge district court rejected the proposed consent decree, the plaintiffs, along with the Justice Department, pursuant to Fed.R.Civ.P. 65, also filed an emergency motion for a preliminary injunction to enjoin the upcoming elections.

On the eve of election day, May 5, 1997, we rejected the proposed consent decree. We also refused to enjoin the elections on the basis that the specific registration and election laws pursuant to which the elections actually would be conducted all had been previously precleared. We further reasoned that enjoining the election in such a late hour would be tantamount to depriving thousands of properly registered voters their basic right of franchise. Regarding the consent decree, we noted that it constituted "a sweeping reform of Mississippi's state election

laws--apparently contrary to state legislative and executive expressions."

The next development in the case occurred on September 22, 1997, when the Justice Department issued its letter ruling on Mississippi's request for § 5 preclearance.[2] In a letter addressed to the State, the Justice Department unequivocally denied § 5 preclearance of the February 10, 1995 administrative plan that Mississippi had been using to implement the NVRA. First, the Justice Department stated that Mississippi's implementation of the NVRA essentially created a new dual registration system--one system for voters who had registered only for federal elections under the NVRA and a second system for voters who had registered for all Mississippi elections under state procedures.[3] The Justice Department further observed that there existed widespread agreement among Mississippi election officials that the NVRA voters remained significantly confused about their inability to vote in state and local elections. Relying on statistics provided by the State, the

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[2]Earlier, following the Fordice decision, Mississippi elected to submit its administrative plan for implementing the NVRA to the United States Justice Department for § 5 preclearance. The Justice Department received Mississippi's submission on July 23, 1997. Supplemental information was received from the State on September 4, 5, 11, 12, 16, 18, and 19, 1997.

[3]Immediately prior to implementation of the February 10, 1995 plan, Mississippi had maintained a unitary voter registration system that was the product of state legislation adopted to remedy the Voting Rights Act violation found in Operation PUSH v. Allain, 674 F. Supp. 1245, 1252 (N.D. Miss. 1987) aff'd sub nom. Operation PUSH v. Mabus, 932 F.2d 400, 413 (5th Cir. 1991).

Justice Department found that the majority of the NVRA voter registrants in Mississippi were black, and that, because of the dual registration system, more than 30,000 of the NVRA registrants were not eligible to vote in Mississippi's state and local elections. Considering this evidence, the Justice Department concluded that Mississippi's "Federal-Elections-Only" NVRA implementation plan had a disproportionate impact on blacks in that the plan prevented black citizens from voting in Mississippi state and local elections to a greater extent than it hindered white citizens. The Justice Department further asserted that Mississippi's plan hampered the ability of black voters to participate in the political process and stated that the manner in which Mississippi implemented the NVRA virtually insured that the plan would have a discriminatory effect on blacks. Citing Beer v. United States, 425 U.S. 130, 141 (1976) and speaking specifically to registration and voting in Mississippi state and local elections, the Justice Department surmised that Mississippi's NVRA plan and the manner in which the State proposed to implement those changes "would lead to a retrogression in the rights of racial minorities with respect to their effective exercise of the electoral franchise." In the light of these circumstances, the Justice Department denied preclearance and concluded that Mississippi had not sustained its burden of proof under the Voting Rights Act to show that the NVRA plan had neither a discriminatory purpose nor discriminatory effect.

Addressing a collateral issue, the Justice Department concluded that Mississippi's procedures for purging NVRA registrants from NVRA voter registration lists who had moved were directly related to the voting procedures previously rejected and therefore § 5 review of these procedures had to await preclearance of the related NVRA implementation plan.

Approximately one month after the Justice Department issued its objection letter, this court, pursuant to the joint motion of all the parties, ordered that the case be held in abeyance. The purpose of the October 22, 1997 abeyance order was to provide the Mississippi State Legislature an opportunity during its 1998 legislative session to remedy Mississippi's preclearance problems. We instructed the State of Mississippi to seek § 5 preclearance for any remedial legislation that resulted from the 1998 session. We concluded the order with the provision that if Mississippi failed to enact and obtain § 5 preclearance for its remedial voting rights legislation in a timely manner, the parties could reapply to the court for entry of a remedy.

Taking its cue, the legislature took positive steps to remedy the State's voting registration system. Both the House and Senate approved Senate Bill 2115, which would have eliminated the dual registration system and permitted all NVRA registrants to vote in Mississippi's local, state, and federal elections. The goal was not achieved, however, because Bill 2115 was vetoed by Governor Fordice.

Soon after the Governor's veto, the plaintiffs moved for leave of court on July 1, 1998, to file a supplemental complaint reflecting new developments in the case that had occurred, particularly the Justice Department's denial of § 5 preclearance to Mississippi's implementation plan for the NVRA. Next, the plaintiffs and the Mississippi State Conference of the NAACP moved to join the NAACP as an additional party plaintiff to the suit. The district court granted both motions. Next, on August 28, 1998, the Young plaintiffs moved for declaratory and injunctive relief under Fed.R.Civ.P. 57 and 58. The plaintiffs requested a declaration--as set forth in the Supreme Court opinion Young v. Fordice, 117 S.Ct. 1228 (1997)--that the State of Mississippi violated preclearance requirements of § 5 of the Voting Rights Act when it administered unprecleared voting practices and procedures on and after February 10, 1995. Second, the plaintiffs sought an injunction to postpone Mississippi's November 3, 1998 state and local elections and all subsequent elections in the state until such time that Mississippi secured § 5 preclearance of its NVRA implementation plan and the voter purging provisions related to administration of the plan. In alternative to its request for injunctive relief, the plaintiffs requested an interim order that until such time that Mississippi gained § 5 preclearance of its NVRA implementation plan, all Mississippi state and local elections would be permitted to proceed only on the condition that NVRA registrants be permitted to vote in all elections.

* * * *

So it is in this end that we come to our beginning. Given that the United States Supreme Court ruled that the State of Mississippi was required to preclear its February 10, 1995 administrative plan for implementing the NVRA, and given that the Justice Department expressly denied § 5 preclearance of said plan on September 22, 1998, and given the failure of the State of Mississippi to enact remedial legislation after full and fair opportunity to do so, we find it necessary and appropriate to enter the following remedy:

IT IS ORDERED, ADJUDGED AND DECREED that:

1. As established by the Supreme Court in Young v. Fordice, 117 S.Ct. 1228, 1239 (1997), the State Of Mississippi's administrative plan to implement the NVRA, utilized on and after February 10, 1995, constitutes a change in Mississippi's voting practices and procedures that requires preclearance under § 5 of the Voting Rights Act.

2. The State of Mississippi has violated the preclearance requirements of § 5 of the Voting Rights Act by administering unpreclearred voting practices and procedures on and after February 10, 1995.

3. Because the State of Mississippi's February 10, 1995 administrative plan to implement the NVRA effected nonministerial and discretionary changes in the State's voting registration system

and because Mississippi has not been able to obtain § 5 preclearance for those changes, all such modification and/or implementation of Mississippi's election laws subject of this Memorandum and Order, on and after February 10, 1995, constitute a direct violation of the Voting Rights Act of 1964.

4. The State of Mississippi, its officers, agencies, and all those who act in concert with, or on its behalf, are hereby enjoined from denying the right to vote in any state, county, or municipal election to any voter who is registered and qualified to vote in federal elections under the NVRA.

5. This order shall remain in effect until such time that the State of Mississippi obtains § 5 preclearance of its administrative plan for implementing the NVRA, all as spelled out in the opinion of the United States Supreme Court.

SO ORDERED this the 5th day of October, 1998.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

APPENDIX TO THE STATEMENT OF ROGER CLEGG: LETTER FROM ROGER CLEGG TO THE HONORABLE ROBERT C. SCOTT, NOVEMBER 2, 2005

November 2, 2005

The Honorable Robert C. Scott
1201 Longworth House Office Building
Washington, D.C. 20515

Dear Representative Scott:

At the Constitution Subcommittee hearings yesterday, you asked me to send you any relevant Supreme Court cases for the proposition that overturning the Court's decision in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000) (*Bossier Parish II*), might be unconstitutional. The best authority is this passage from the Court's own opinion in *Bossier Parish II* (and the two Supreme Court cases cited therein): "Such a reading would also exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts, *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999), perhaps to the extent of raising concerns about Section 5's constitutionality, see *Miller* [*v. Johnson*, 515 U.S. 900,] 926-927 [(1995)]."

Permit me to elaborate on what I believe the Court is saying here. Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, raises a number of federalism red flags in its current form: (1) It shifts the usual burden of proof from the plaintiff to the defendant (thus, *Bossier Parish II* also refers to Section 5's "extraordinary burden-shifting procedures"); (2) as a practical matter in most cases, it makes the prosecutor (i.e., the U.S. Department of Justice) rather than a court the decisionmaker; (3) it does this in an area traditionally--and sometimes by the text of the Constitution itself--committed to state and local authorities; (4) by using the "effects" test, it imposes a disparate-impact standard (see *City of Boerne v. Flores*, 521 U.S. 507 (1997)) much stricter than the Fourteenth or Fifteenth Amendment's disparate-treatment standard (see *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1976); *City of Mobile v. Bolden*, 446 U.S. 55 (1980)); and, finally, (5) the way the Justice Department has used this authority to coerce racial gerrymandering has troubled the Court (see *Miller v. Johnson*, 515 U.S. 900 (1995)).

So far, the Court has nonetheless upheld Section 5, since Congress's power is at its zenith in enforcing the guarantee against racial discrimination by the states in voting. But the Court in *Bossier Parish II* was, I believe, warning that, if Section 5 were to be applied not just to determining whether a change was retrogressive but to the legality of practices and procedures already in place, this would be adding the straw that might break the camel's back.

I very much enjoyed the hearings, and appreciate the opportunity the Subcommittee afforded me to present my views. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

Roger Clegg
Vice President and General Counsel

cc: The Honorable Steve Chabot

THE END OF PRECLEARANCE AS WE KNEW IT: HOW THE SUPREME COURT TRANSFORMED SECTION 5 OF THE VOTING RIGHTS ACT

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1 Historian, Civil Rights Division, United States Department of Justice; B.A., M.A. 1965, 1966, University of Virginia; Ph.D. 1972, Princeton University. The views expressed in this article may not necessarily reflect those of the Department of Justice. The research for this article was begun in 1999 while Dr. McCrary was on leave from the government, serving as the Eugene Lang Professor, Department of Political Science, Swarthmore College. We acknowledge with appreciation the financial assistance provided by the Lang professorship.

2 B.A. 1999, Swarthmore College; J.D., 2004, University of Pennsylvania. Part of the research for this article was supported financially by a grant to Mr. Seaman from the Public Policy Committee of Swarthmore College. Mr. Seaman is now an attorney with Sidley Austin LLP in Chicago.

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**THE END OF PRECLEARANCE AS WE KNEW IT:
HOW THE SUPREME COURT TRANSFORMED SECTION 5
OF THE VOTING RIGHTS ACT**

Abstract

Section 5 of the Voting Rights Act of 1965 requires certain jurisdictions with a history of racial discrimination to obtain "preclearance" of proposed electoral changes from the United States Department of Justice or a three-judge panel in the United States District Court for the District of Columbia. This provision, which is set to expire in August 2007, has successfully reduced racial and ethnic discrimination in voting.

The United States Supreme Court determined in a 5-4 decision, Reno v. Bossier Parish School Board, 528 U.S. 230 (2000), that Section 5's prohibition on the enforcement of electoral changes which have a discriminatory purpose does not apply to electoral changes that were not intended to "retrogress," or make worse, the position of minority voters. This interpretation upset a long-standing consensus among executive, legislative, and judicial actors that Section 5 prohibited all changes enacted with an unconstitutional discriminatory purpose, not just those which made minority voters worse off. This article explains how the Bossier majority dramatically transformed Section 5 and demonstrates, through an empirical analysis of the Justice Department's Section 5 objection letters, how it significantly weakened the statute's ability to protect minority voting rights. It concludes by arguing that Congress should amend Section 5 in 2007 to supercede the Bossier decision.

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Introduction

In August, 2007, several special provisions of the Voting Rights Act of 1965[4]--the "preclearance" requirement in Section 5 of the Act, the authority of the Department of Justice to use federal examiners and observers, and protections for the voting rights of language minorities--will expire, unless extended by congressional action. Of the provisions due to expire in 2007, the most important for the protection of minority voting rights is the preclearance requirement set forth in Section 5.[5] Jurisdictions covered by the preclearance process, for the most part states of the former Confederacy, must obtain federal approval of voting changes, either through a declaratory judgement action before a three-judge panel in the District of Columbia or from the Department of Justice, before these changes become legally enforceable.[6] In order to secure preclearance of desired changes, covered jurisdictions have over the years agreed

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[4] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)). The Voting Rights Act is often regarded as the most successful civil rights act in our history. *See, e.g., Extension of the Voting Rights Act of 1965: Hearing Before the Senate Subcomm. on Constitutional Rights of the Comm. on the Judiciary*, 94th Cong. 121 (1975)(statement of Nicholas deB. Katzenbach, former Attorney General, United States) ("The Voting Rights Act of 1965 is the most successful piece of civil rights legislation ever enacted.").

[5] 42 U.S.C. § 1973c (2000).

[6] *Id.* § 1973b-c; *see also* 28 C.F.R. pt. 51 app. (2003) (listing jurisdictions covered under Sections 4 and 5 of the Act).

to remove barriers to registration and voting, as well as to eliminate election structures that dilute minority voting strength.[7] Approval requires proof by the jurisdiction that the change, in the language of the statute, "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[8]

Prior to January, 2000, the definition of discriminatory "purpose" under Section 5 had been understood as synonymous with the term's meaning in constitutional cases: a practice designed by a covered jurisdiction to restrict access to registration or voting, or to dilute minority voting strength, in violation of the Fourteenth or Fifteenth Amendments, was thought to be prohibited by the purpose requirement of Section 5.[9] For a

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[7] Drew S. Days III, *Section 5 and the Role of the Justice Department," in* Controversies in Minority Voting: The Voting Rights Act in Perspective 52, 52-53 (Bernard Grofman & Chandler Davidson eds., 1992). The implementation and impact of Section 5 is assessed by the case studies in Quiet Revolution in the South: The Impact of the Voting Rights Act, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994).

[8] 42 U.S.C. § 1973c.

[9] City of Richmond v. United States, 422 U.S. 358, 378 (1975) ("An official action . . . taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute."); *see also* Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act,"* in Race and Redistricting in the 1990s, at 80, 100 (Bernard Grofman ed., 1998) ("Both the Attorney General and the federal courts consistently have construed the Section 5 purpose test as being co-extensive with the constitutional prohibition on enacting redistricting plans (or other voting practices or procedures) that minimize minority electoral opportunity for a discriminatory reason . . . .").

decade federal courts had treated the assessment of discriminatory effect under Section 5 as equivalent to the measurement of discriminatory effect in a constitutional challenge.[10] However, in a key 1976 decision, *Beer v. United States,*[11] the Supreme Court bifurcated the statutory and constitutional effect standards by announcing that in the Section 5 context a voting change likely to produce a racially discriminatory effect prohibited by either the Fourteenth or Fifteenth Amendments was entitled to preclearance unless it *would make matters worse* for minority voters than the existing plan, an effect the Court referred to as "retrogression."[12]

On January 24, 2000, the United States Supreme Court, by a narrow 5-4 majority, fundamentally redefined - and weakened - the concept of discriminatory intent under Section 5 in *Reno v. Bossier Parish School Board* (*Bossier II*).[13] Under the new

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10 Perkins v. Matthews, 400 U.S. 379, 390 (1971) ("Congress intended to adopt the concept of voting articulated in Reynolds v. Sims . . . [to] protect Negroes against a dilution of their voting power.").

11 425 U.S. 130 (1976).

12 *Beer*, 425 U.S. at 141. Even so, the Court in *Beer* recognized that the concept of purpose was to be defined the same way under both Section 5 of the Act and the Constitution ("[A]n ameliorative new legislative apportionment cannot violate § 5 *unless* the new apportionment itself so discriminates on the basis of race or color *as to violate the Constitution.*"), emphasis added. Id., at 141.

13 528 U.S. 320 (2000). The Court's initial opinion, *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) (*Bossier I*), decided a related issue, discussed below, but remanded to the lower court certain questions regarding the purpose prong of Section 5, which were ultimately resolved in *Bossier II*.

standard a voting change with an unconstitutional racial purpose, no matter how strong the evidence of discriminatory intent, would have to be precleared unless the evidence also showed that the change was intended to make matters worse for minority voters than under the *status quo* - which the Court termed "retrogressive intent."[14] In the guise of making the definition of purpose under Section 5 congruent with the definition of retrogressive effect, the decision effectively minimized use of Section 5 as a weapon for protecting minority voters from discrimination.[15]

Determining the impact of this doctrinal change on Section 5 enforcement by the Department of Justice is the central thrust of this article. The key evidence on which we rely is found in the 996 letters from 1968 through 1999 - and the 41 letters after the *Bossier II* decision - in which the Assistant Attorney General for Civil Rights explained the basis for objecting to voting changes.

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14 *Bossier II*, 528 U.S. at 326; *see also id.* at 341 ("In light of the language of Sec. 5 and our prior holding in *Beer*, we hold that Sec. 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.")

15 Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 Vill. L. Rev. 1179 (2001), provides a brief but careful analysis of the Court's *Bossier II* decision. *See also* Alaina C. Beverly, Case Note, *Lowering the Preclearance Hurdle:* Reno v. Bossier Parish School Board, 5 Mich. J. Race & L. 695 (2000). Less illuminating are Charlotte Marx Harper, *A Promise for Litigation:* Reno v. Bossier Parish School Board, 52 Baylor L. Rev. 647 (2000); Lindsay Ryan Erickson, Note, *Threading the Needle: Resolving the Impasse Between Equal Protection and Section 5 of the Voting Rights Act,* 54 Vand. L. Rev. 2057 (2001); and David Harvey, Note, *Section 5 of the Voting Rights Act Does Not Bar Preclearance of a Redistricting Plan Enacted With a Discriminatory But Nonretrogressive Purpose:* Reno v. Bossier Parish Sch. Bd., 39 Duq. L. Rev. 477 (2001).

These objection letters, unlike court opinions regarding preclearance, do not set forth the full body of evidence on which the Department relies in making each decision, and thus do not provide a basis for evaluating the accuracy of the Department's fact-finding.[16] The letters are, however, the official record of the legal bases asserted for each objection and thus constitute the essential starting point for an analysis of the Department's preclearance policy.[17]

Our analysis reveals that by the 1990s the intent, or purpose, prong of Section 5 had become the dominant basis for objections to discriminatory voting changes. During that decade an astonishing 43 percent of all objections were, according to our assessment, based on discriminatory purpose alone (see *infra* Table 2).[18] Thus a key issue for Congress in determining how to

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16 Our analysis was concluded in June, 2004; only one objection has been interposed since then. Memoranda which present the factual evidence and legal basis underlying each objection, the more appropriate analogue to formal court opinions, are restricted internal documents. In the course of his official responsibilities, the senior author has examined many memoranda recommending objections. Because these documents are unavailable to researchers, and because it is important for any social science analysis to be replicable, we have not relied on these documents in our analysis.

17 Two resourceful studies of Section 5 objection policy have previously utilized these letters as a major resource. Neither, however, has undertaken a comprehensive quantitative analysis of the legal basis asserted by the Department for its decisions. *See* Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. Rev. 189 (1983), and Posner, *supra* note 9.

18 Another 19 percent of the Department's objections were based on a combination of discriminatory purpose and retrogressive effect. Arguably this 19 percent would have been

deal with the preclearance requirement of the Act due to expire in 2007 - assuming it seeks to restore the protection of minority voting rights that existed before January, 2000 - is whether to revise the language of Section 5 so as to restore the long-accepted definition of purpose thrown out by *Bossier II*. We believe that the analysis in the following pages provides critical evidence for the debate over reauthorization and revision of the Voting Rights Act.[19]

We begin in Part I with an overview of Section 5 case law before *Bossier II*, focusing on the ways in which the purpose and effect standards were interpreted by the federal courts. In Part II, we present our analysis of the implementation of Section 5 by the Department of Justice prior to *Bossier II*, relying on evidence found in objection letters. In Part III, we probe the Bossier Parish litigation in an effort to explain the ways in which the majority opinion in *Bossier II* recasts the holding of past Court decisions regarding preclearance. We also examine the critique of the majority's view propounded by dissenting justices, which largely agrees with our own assessment. Part IV looks at the impact of *Bossier II* on the Department's subsequent objection decisions and sums up our analysis.

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interposed even under the new definition of intent imposed by the Supreme Court in *Bossier II*.

[19] The Department of Justice has at the time of this writing taken no position regarding revision of the Act.

I. Evolving Definitions of Purpose and Effect

A. Administrative Review Under Section 5

During the first three years after adoption of the Act in 1965, the preclearance requirement set forth in Section 5 was rarely invoked.[20] During that time, however, Southern legislatures,faced with the prospect that black voters might cast a majority of the ballots in some single-member districts, often shifted to at-large election systems, numbered place or runoff requirements, or gerrymandered district lines to minimize the number of black-majority districts.[21] Active enforcement of Section 5 to deal with such changes awaited the 1969 ruling in *Allen v. State Board of Elections*.[22] In that decision, the Supreme Court determined that all changes affecting voting, including measures with the potential to dilute minority voting strength as well as procedures for registering or casting votes, required preclearance by three-judge trial courts in the District of Columbia or through administrative review by the Department of

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20 Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523, 578 n.244 (1973).

21 See, e.g., Derfner, *supra* note 20, at 553-55, 572-74; David J. Garrow, Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965, 203-06, 310-13 (1978); Frank R. Parker, Black Votes Count: Political Empowerment in Mississippi After 1965, 34-77 (1990); Peyton McCrary, et. al., "Alabama," in Davidson and Grofman (eds.), *supra* note 7, at 39-41; Laughlin McDonald, A Voting Rights Odyssey: Black Enfranchisement in Georgia (2003), 131-36.

22 393 U.S. 544 (1969).

Justice.[23] When the changes at issue were submitted for preclearance, the Department objected to those that appeared likely to have a discriminatory effect.[24]

Preclearance review by the Department provides a quicker and less expensive alternative to litigation and the Department seeks to function as a "surrogate" for the District of Columbia trial courts.[25] The Attorney General has from the start delegated responsibility for preclearance decisions to the Assistant Attorney General ("AAG") who heads the Civil Rights Division. Administrative reorganization in 1969 produced a separate section within the Civil Rights Division specializing in voting rights.

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23 *Id.* at 569. The Court based its decision in *Allen* on its reasoning in the Alabama reapportionment case *Reynolds v. Sims*, 377 U.S. 533, 555 (1964): "[T]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." 393 U.S. at 566. Abigail Thernstrom, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987), observed that the Mississippi laws at issue in *Allen* were racially discriminatory in both intent and effect. "Clearly the Court could not stand by while southern whites in covered states - states with dirty hands on questions of race - altered electoral rules to buttress white hegemony." *Id.* at 4.

24 Objection letter (State of Mississippi), May 21, 1969, disallowing laws requiring appointment of county superintendents of education, new qualification requirements for independent candidates, and optional use of at-large elections for county boards of supervisors. Subsequently the state adopted a revised version of the at-large provision for county boards: Miss. Code Ann. § 37-5-15 (1972). When the Department discovered this change five years later, it objected once again. U.S. Dep't of Justice, Objection Letter to State of Mississippi (July 18, 1977).

25 The responsibility to act as a surrogate for the D.C. court, 28 C.F.R. § 51.52(a) (2004), was set forth in the Department's original Section 5 guidelines. 28 C.F.R. § 51.19 (1971).

The new Voting Section then provided the factual investigation for preclearance reviews and made detailed recommendations to the AAG for Civil Rights. Prodded by liberal critics in Congress, the Department developed detailed guidelines for enforcing Section 5 that were, in turn, endorsed by the Supreme Court.[26] Other Supreme Court decisions over the next decade expanded the scope of Section 5 and strengthened the Department's enforcement powers.[27]

The Supreme Court, however, agreed to hear arguments and issue opinions in only a few cases. As a result, the District of Columbia trial courts who hear preclearance lawsuits by the jurisdictions played a major role in shaping Section 5 case law. Often the Supreme Court declined to hear oral argument and summarily affirmed the trial court's decision. Although summary affirmances simply endorse the lower court's decision and not necessarily its reasoning, they are binding precedents for the

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26 Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 Fed. Reg. 18,186 (Sept. 10, 1971). The guidelines, which have been revised several times over the years, are found at 28 C.F.R. pt. 51 (2004). The Supreme Court found the regulations "wholly reasonable and consistent with the Act." Georgia v. United States, 411 U.S. 526, 541 (1973). On the development of the procedures for enforcing Section 5, see Howard Ball et al., Compromised Compliance: Implementation of the 1965 Voting Rights Act, at 66-73, 91-93 (1982); Steven F. Lawson, In Pursuit of Power: Southern Blacks and Electoral Politics, 1965-1982, at 162-78 (1985).

27 *See* Drew S. Days III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, *in* Minority Vote Dilution 164, 167-80 (Chandler Davidson ed., 1984); John P. MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 Cath. U. L. Rev. 107 (1979).

lower courts and the Department of Justice until contradicted by a future Supreme Court decision.[28]

Section 5, like the Fourteenth and Fifteenth Amendments, has both a purpose and an effect prong.[29] The Supreme Court first addressed the legal standard to be applied in assessing the purpose requirement in the context of a municipal annexation case, *City of Richmond v. United States*.[30] The Court emphasized

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[28] Hicks v. Miranda, 422 U.S. 332, 344 (1975) ("[L]ower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'"); *see also Picou v. Gillum*, 813 F.2d 1121 (11th Cir. 1987) ("A summary affirmance by the Supreme Court has binding precedential effect."). On the other hand, the precedential value of a summary affirmance has distinct limits. *See* Anderson v. Celebrezze, 460 U.S. 780, 786 n.5 (1983) ("We have often recognized that the precedential value of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions."); Mandel v. Bradley, 432 U.S. 173, 176 (1977) ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below [but does] prevent lower courts from coming to conclusions on the precise issues presented and necessarily decided by those actions."); *see also* Robert L. Stern et al., Supreme Court Practice 277, 279-85, 333-35 (8th ed. 1993); 16B Charles Alan Wright et al., Federal Practice and Procedure §4003 (2d ed. 1996).

[29] 42 U.S.C. § 1973c (2000). We use the terms "purpose" and "intent" - and the terms "result" and "effect" - interchangeably here.

[30] City of Richmond v. United States, 422 U.S. 358, 378 (1975. Justice Lewis F. Powell, Jr., who subsequently originated the "retrogressive intent" theory in City of Pleasant Grove v. United States, 479 U.S. 462 (1987, abstained from the decision in the Richmond case, no doubt because he had, before joining the Court, sought to persuade the Attorney General to preclear the annexation. Letter from Lewis F. Powell. Jr., Esq., to John N. Mitchell, Attorney General, United States (Aug. 9, 1971) (public document, Voting Section, Civil Rights Division, Department of Justice).

that preclearance should be denied if a voting change were racially motivated so as to violate the Constitution: "An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute."[31] For this reason the Court remanded the case for an analysis of the purpose issue.[32]

In the Richmond case, however, the Court gave an unusual twist to the effect standard where dilutive annexations were concerned. Municipalities facing potential objections to such

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31 *City of Richmond*, 422 U.S. at 378. The Court had previously held that municipal annexations that significantly decrease the percentage of a city's residents who belong to a racial minority group can dilute minority voting strength and are thus covered by Section 5. *Perkins v. Matthews*, 400 U.S. 379, 382-83 (1971) (reversing the decision of a three-judge court in Mississippi that ignored *Allen v. State Board of Elections*, 393 U.S. 544 (1969), to hold that annexations were beyond the scope of Section 5).

32 Id. The change at issue in the purpose analysis on remand was a settlement plan to which the city and the Justice Department had recently agreed. Dissenting Justices Brennan, Marshall, and Douglas would have denied preclearance of the annexation based on the evidence of discriminatory intent as to the original annexation decision, in which the city retained at-large elections. "[T]he record is replete with statements by Richmond officials that prove beyond question that the predominant (if not the sole) motive and desire of the negotiators of the 1969 settlement was to acquire 44,000 additional white citizens for Richmond, in order to avert a transfer of political control to what was fast becoming a black population majority." 422 U.S. at 382 (Brennan, J., dissenting). For additional evidence of racial purpose, see John V. Moeser and Rutledge M. Dennis, The Politics of Annexation: Oligarchic Power in a Southern City 88-93, 98-102, 107-09 (1982); *see also* Thernstrom, *supra* note 20, at 146 (agreeing that "in Richmond fear of black political control had been the motivating force" behind the annexation).

annexations could obtain preclearance by adopting an election plan that fairly reflected minority voting strength for the enlarged city, normally a single member district system, by its decision.[33] Otherwise, such cities would likely be condemned to declining tax revenues, as well-off whites moved to nearby suburbs to escape racial integration.[34] As a result of this decision, departmental objections to annexations often persuaded Southern municipalities to give up at-large elections and switch to single-member district plans.[35]

B. Purpose and Effect in *Beer v. United States*

The Court's first major restriction on the scope of the Act was announced in its 1976 decision *Beer v. United States*.[36] The city of New Orleans sought a declaratory judgement preclearing its redistricting plan following the 1970 census. The trial court refused to preclear the plan, on the grounds that it had the effect of diluting minority voting strength as defined by the Supreme Court in the landmark Fourteenth Amendment case *White v.*

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33 422 U.S. 358, 370-71 (1975).

34 Id., at 371.

35 During the years 1975-1980, for example, annexations accounted for the largest single type of voting change to which the Department of Justice objected, and most were withdrawn only when the municipality switched from at-large to single-member district elections. U.S. Comm'n on Civil Rights, The Voting Rights Act: Unfulfilled Goals 65, 69 tbl. 6.4 (1981).

36 425 U.S. 130 (1976).

Regester.[37] The Supreme Court reversed the lower court, however, ruling that the term "effect" has a different meaning under Section 5 than under the Constitution. It determined that, in the preclearance context, discriminatory "effect" was to be defined as "retrogression," a newly-minted term that described changes which place minority voters in a *worse* position than under the status quo.[38] As a result of *Beer*, changes that do not make matters worse for minority voters are entitled to preclearance under the effect prong of Section 5, even where the new method of election appears likely to dilute minority voting strength or otherwise discriminate, as in voting changes affecting registration or casting a ballot.[39]

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37 412 U.S. 755 (1973). *See* the trial court decision in *Beer*, 374 F. Supp. at 384, 387-90, 393-99, 401-02. At that time the constitutional standard was not understood as requiring proof of discriminatory intent. *See* James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1, 22-26 (1982); Katherine Inglis Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 La. L. Rev. 851, 883-88 (1982); Timothy G. O'Rourke, *Constitutional and Statutory Challenges to Local At-Large Elections*, 17 U. Rich. L. Rev. 39, 51-55 (1982); Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715, 722-26 (1983).

38 *Beer*, 425 U.S. at 141.

39 *See, e.g.*, Motomura, *supra* note 17, at 204 (regarding the application of the retrogression test to individual ballot access).

Whether or not the *purpose* of the change was racially discriminatory was not before the Court in *Beer,*[40] but it referred to the purpose prong of Section 5 in terms similar to *City of Richmond*: "We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 *unless* the new apportionment itself so discriminates on the basis of race or color *as to violate the Constitution*."[41] The Court's reference to a constitutional violation appears understandable only as a reference to the purpose test in Fourteenth or Fifteenth Amendment cases,[42] and that is the interpretation placed upon this wording by the Supreme Court itself in subsequent preclearance cases.[43]

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40 Because the trial court decided the case on the grounds that the redistricting plan had a dilutive effect, it did not reach the issue of whether the change had a discriminatory purpose and thus the intent of the plan was not among the questions presented on appeal. *Beer,* 374 F. Supp. at 387.

41 *Beer,* 425 U.S. at 141 (emphasis added).

42 Steve Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980's*, 34 Sw. L.J. 607, 669 (1980) ("The *Beer* Court dealt only with whether the reapportionment plan in question has the effect of denying the right to vote on account of race. A state carries the additional burden of showing that the plan does not have such a purpose."); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 661-63 (1983) ("[E]ven without retrogression, a covered jurisdiction will violate Section 5 if an impermissible racial purpose is behind an electoral change."). See infra, Part III (B)(2).

43 City of Port Arthur v. United States, 459 U.S. 159, 168 (1982) (holding that even a non-retrogressive plan "would nevertheless be invalid if adopted for racially discriminatory purposes"). *See also* City of Pleasant Grove v. United States,

C. The Purpose Standard After *Beer*

How the purpose standard was applied after *Beer* is exemplified by the decision, summarily affirmed by the Supreme Court, in a Georgia case, *Wilkes County v. United States*.[44] The case involved a change from single member districts to at-large elections in the early 1970s for both county commission and school board. Voting patterns were racially polarized and no black candidates had been elected to either governing body countywide, despite the fact that African-Americans made up 43 percent of the population.[45] In *Wilkes County*, the trial court applied the constitutional purpose standard as set forth by the Supreme Court in its recent *Arlington Heights* decision.[46]

The starting point for the trial court was the fact that the change to at-large elections followed a substantial increase in minority voter registration after the Voting Rights Act, thus putting continued white control at risk under the single-member district plan.[47] No African-Americans had been elected to

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479 U.S. 462, 469, 471 n. 11, 472 (1987). Even justices who opposed a strong Voting Rights Act seemed to agree. *See e.g.*, the observation that "it is clear that if the proposed changes would violate the Constitution, Congress could certainly prohibit their implementation." City of Rome v. United States, 446 U.S. 156, 210 (1980)(Rehnquist, J., dissenting).

44 450 F. Supp. 1171 (D.D.C.), *aff'd mem.*, 439 U.S. 999 (1978).

45 *Wilkes County*, 450 F. Supp. at 1175-77.

46 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977).

47 450 F. Supp. at 1176 & tbl.6.

office, served as Democratic party officials in the one-party county, or been appointed to fill vacancies for elected offices.[48] Nor had any black citizens been consulted about the decision to adopt an at-large plan. The county claimed that the purpose of the change was solely to satisfy the one person, one vote requirement, but the court found that argument a mere pretext; districts could simply have been equalized in population after the 1970 census instead of shifting to countywide elections.[49] Under *Arlington Heights* the county failed the purpose test, as well as failing to meet *Beer's* retrogression test, and thus its at-large plan was not entitled to preclearance.[50]

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48 *Id.* at 1174-75.

49 *Id.* at 1175, 1177-78.

50 Id. at 1174-76. In a similar case, the State of Mississippi sought preclearance for its state legislature's redistricting plan. Mississippi v. United States, 490 F. Supp. 569, 582-83 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980). As the trial court saw it, the state's redistricting plan "constitute[d] a clear enhancement of the position of racial minorities with respect to their effective exercise of the electoral franchise"). Id. at 582 n.6. This finding, however, did not end the court's inquiry into whether the plan violated Section 5: "[l]egislative reapportionment plans must be scrutinized to determine if they were enacted with the prohibited 'purpose' of denying or abridging black voting strength." Id. at 583. Section 5's purpose prong was equivalent, in the court's view, to the constitutional standard for discriminatory purpose: "The prohibited 'purpose' of section 5 may be described as the sort of invidious discriminatory purpose that would support a challenge to official action as an unconstitutional denial of equal protection." Id. at 583. The trial court found that the state met this standard and precleared the redistricting plan at issue.

How the purpose standard should be applied where the election plan is *not* retrogressive was exemplified by another influential trial court decision summarily affirmed by the Supreme Court, the Georgia congressional redistricting case *Busbee v. Smith*.[51] The case turned on the facts surrounding the fifth congressional district, centered in the capital city of Atlanta. Black civil rights leader Andrew Young had represented the district during the mid-1970s, when whites were a majority of its voting-age population, but when Young left to head the United Nations delegation in 1977 the district elected a moderate white Democrat, Wyche Fowler. After the 1980 census the legislature increased the black population percentage in the fifth district to 57 percent but whites were still 54 percent of the registered voters.[52] Because voting patterns had become more racially polarized in recent years, most observers believed that the black concentration in the newly configured district was not great enough to provide African American voters an equal opportunity to elect a candidate of their choice.[53]

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51 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983).

52 *Id.* at 498. The district to which Young was elected in 1972, thanks in part to an unusual 25 percent white crossover vote, was adopted following a Department of Justice objection to an earlier plan, drawn in 1971 with the goal of preventing the election of an African American to Congress. McDonald, *supra* note 18, at 149-50.

53 549 F. Supp. at 499.

Applying *Arlington Heights*, the trial court found abundant evidence, both direct and circumstantial, that "[t]he Fifth District was drawn to suppress black voting strength."[54] For example, a key player in the legislative decision-making process, Joe Mack Wilson, who chaired the House Reapportionment Committee, complained to fellow legislators that "the Justice Department is trying to make us draw nigger districts and I don't want to draw nigger districts."[55] The trial court also found that Speaker Tom Murphy "purposefully discriminated on the basis of race in selecting the House members of the conference committee where the final redistricting plan was determined," in that he selected white legislators "he knew would adamantly oppose the creation of a congressional district in which black voters would be able to elect a candidate of their choice," and refused to appoint any black members to the conference committee.[56]

Because the redistricting plan had a racially discriminatory purpose, it was not entitled to preclearance, even though it was ameliorative rather than retrogressive in effect. As the three-

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54 *Id.* at 515; *see also* McDonald, *supra* note 21, at 168-72 (providing additional evidence of racial purpose).

55 549 F. Supp. at 501. Wilson was also quoted as saying "I'm not for drawing a nigger district and I'm not for drawing a Republican district." *Id.* at 512. According to the trial court, "Wilson uses the term 'nigger' [routinely] to refer to black persons." *Id.* at 500.

56 *Id.* at 510. Murphy explained at trial that "I was concerned that . . . we were gerrymandering a district to create a black district where a black would certainly be elected." *Id.* at 509-10.

judge court stated, "[s]imply demonstrating that a plan increases black voting strength does not entitle the State to the declaratory relief it seeks; the State must also demonstrate the absence of discriminatory purpose."[57] The court found the plan objectionable "because State officials successfully implemented a scheme designed to minimize black voting strength," and as a result the plan was "not free of racially discriminatory purpose."[58]

D. The Issue of Retrogressive Intent

Among the questions presented on appeal by the state in *Busbee* was the very question subsequently at issue in *Bossier II*:

> Whether a Congressional reapportionment plan that does not have the purpose of diminishing the existing level of black voting strength [that is, an *intent to retrogress*] can be deemed to have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act.[59]

By refusing to hear oral argument in *Busbee* and by affirming the opinion of the trial court, the Supreme Court gave observers every reason to believe that the purpose prong of Section 5 was not, as Georgia argued, limited to an intent to make things worse

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57 *Id.* at 516.

58 *Id.* at 518.

59 Jurisdictional Statement at 1, Busbee v. Smith, 459 U.S. 1166 (1983) (No. 82-857). Private appellees went so far as to characterize this argument as "frivolous" and "without merit." Intervenor-Appellees Motion to Affirm at 31, 33, *Busbee* (No. 82-857) ("It ignores the plain language of the statute, the legislative history of the provision, [and] the decisions of this Court.")

for minority voters, but was instead as broad as the constitutional purpose standard.[60] After all, the Supreme Court had made clear that summary affirmances "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions."[61] Thus, *Busbee* bound the Section 5 trial courts and the Department of Justice when dealing with comparable voting changes to reject the theory of retrogressive intent.

In 1987, the Supreme Court agreed to hear a case where a jurisdiction presented an "intent to retrogress" theory in *City of Pleasant Grove v. United States*.[62] The factual context in

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60 The purpose prong of Section 5 was also key in the Supreme Court's decision in the Port Arthur, Texas, annexation case. City of Port Arthur v. United States, 459 U.S. 159 (1982), *aff'g* 517 F. Supp. 987 (D.D.C. 1981). The City of Port Arthur, Texas had unsuccessfully sought preclearance of a series of annexations and consolidations, agreeing to switch from its at-large system to a series of mixed plans that nevertheless still diluted African American voting strength. 517 F. Supp. at 992-1008. The trial court found that the city's choices of election methods at each stage were made with discriminatory intent. *Id.* at 991, 1011. By the time the city's appeal reached the Supreme Court, the key remaining issue was whether Port Arthur could retain a majority vote requirement for three at-large seats in a mixed election plan adopted in an effort to settle the case. 459 U.S. at 164-65. Because the runoff requirement had initially been adopted with a discriminatory purpose and retained a dilutive effect, the Court decided that the discriminatory impact of the annexations and consolidations had been insufficiently neutralized and was not entitled to preclearance. *Id.* at 161-62; *see also* Blumstein, *supra* note 40, at 688; Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 J.L. & Pol. 751, 767-70 (1988).

61 Mandel v. Bradley, 432 U.S. 173, 176 (1977).

62 479 U.S. 462 (1987).

this case was unusual. Pleasant Grove, Alabama, a virtually all-white city near Birmingham in industrial Jefferson County, sought preclearance of a series of annexations. Its refusal to annex nearby black population concentrations was part of what the trial court called "an astounding pattern of racial exclusion and discrimination in all phases of Pleasant Grove life," and as a result, the city had remained an "all-white enclave in an otherwise racially mixed area of Alabama."[63] The annexations at issue provided further evidence of racial discrimination in the city's annexation policy.[64]

The city claimed that there could be no retrogressive effect to its annexation policies because there were no black people in the city, and thus no one whose voting strength could be worsened.[65] The *Pleasant Grove* majority rejected this view, pointing out that "Section 5 looks not only to the present

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[63] City of Pleasant Grove v. United States, 568 F. Supp. 1455, 1456 (D.D.C. 1983) (denying plaintiff's motion for summary judgment); *see also* City of Pleasant Grove v. United States, 623 F. Supp. 782, 784, 787-88 (D.D.C. 1985) (denying preclearance of the annexations), *aff'd* 479 U.S. 462 (1987).

[64] The evidence of intentional discrimination was so strong, noted the Supreme Court, that "even if the burden of proving discrimination was on the United States, the [trial] court 'would have had no difficulty in finding that the annexation policy of Pleasant Grove is, by design, racially discriminatory in violation of the Voting Rights Act.'" *City of Pleasant Grove*, 479 U.S. at 467 (quoting 623 F. Supp. at 788 n. 30).

[65] *Id.* at 470-71. The dissenters also adopted this view. *Id.* at 475-76 (Powell, J., dissenting); *see also* Thernstrom, *supra* note 23, at 156 ("It is difficult to see how black voting rights had been abridged by the boundary change, since Pleasant Grove had no black voters to begin with.").

effects of changes, but to their future effects as well," adding that the purpose requirement also applied to "anticipated as well as present circumstances."[66] The city also argued that proof of discriminatory intent without proof of discriminatory effect was insufficient to deny preclearance. The trial court gave short shrift to that argument.[67] The Supreme Court agreed: "Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent."[68]

Pleasant Grove also argued that the purpose requirement of Section 5 was limited to retrogressive intent. In dissenting, Justice Lewis Powell, joined by Chief Justice William Rehnquist and Justice Sandra Day O'Connor, agreed: "[F]or a city to have a discriminatory purpose within the meaning of the Voting Rights Act, it must intend its action to have a retrogressive effect on the voting rights of blacks."[69] The majority of the Court,

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66 479 U.S. at 471. The dissent by Justice Powell rejected this interpretation as "purely speculative." *Id.* at 472 (Powell, J., dissenting).

67 *See City of Pleasant Grove*, 623 F. Supp. 782, 788 (D.D.C. 1985) ("[T]he city has wholly failed to carry its burden of establishing that its annexation policy does not have the purpose of denying or abridging the right to vote on account of color"); *City of Pleasant Grove*, 568 F. Supp. at 1460 (holding that annexations are not entitled to preclearance "if there is a discriminatory purpose irrespective of whether or not there is also a discriminatory effect").

68 479 U.S. at 469 (quoting *City of Rome v. United States*, 446 U.S. 156, 172 (1980)).

69 *Id.* at 474 (Powell, J., dissenting). For this proposition, Justice Powell relied on his majority opinion in *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983) (discussing *Beer*, 425 U.S. at 141), although discriminatory

however, observed that it had rejected such reasoning since the *City of Richmond* case. A change motivated by a racially discriminatory purpose "has no legitimacy under our Constitution or under the statute," the Court had ruled then, "*whatever its actual effect may have been or may be*."[70] In light of the outcome in *Bossier II* a dozen years later, it is ironic that Justice Scalia joined the majority opinion in *Pleasant Grove*, and thus rejected the retrogressive intent theory in favor of the constitutional purpose standard used in previous Section 5 cases.[71]

E. The "Clear Violation of Section 2" Rule

In 1980, the Supreme Court ruled in *City of Mobile v. Bolden*,[72] a Fourteenth Amendment challenge to that city's use of at-large elections, that plaintiffs must prove not only that the at-large system has a discriminatory effect due to racially

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purpose was not even an issue at the Supreme Court in either *Beer* or *Lockhart*.

70 *Id.* at 471 n. 11 (quoting *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975)) (emphasis added).

71 Justice Scalia appeared to treat the Section 5 and constitutional purpose standards as synonymous at least as late as 1991. In his dissenting opinion in a Louisiana judicial election case, *Chisom v. Roemer*, 501 U.S. 380, 416 (1991), he observed that Section 5 "is a means of assuring in advance the absence of all illegality, not only that which violates the Voting Rights Act but that which violates the Constitution as well." He added that "intentional discrimination . . . whatever its form, is constitutionally prohibited, and the preclearance provision of § 5 gives the Government a method by which to prevent that." 501 U.S. at 416-17 (Scalia, J., dissenting).

72 446 U.S. 55 (1980).

polarized voting, but also that it was adopted or maintained for the purpose of diluting minority voting strength.[73] The Court remanded the case, and a companion suit challenging at-large school board elections in Mobile County, for a new trial on the intent question. The plaintiffs prevailed under the intent standard after demonstrating that a racial purpose lay behind shifts to at-large elections in 1876 and 1911.[74]

In the view of many observers, the *Mobile* decision was inconsistent with the intent of Congress when it adopted and expanded the Voting Rights Act in 1965, 1970, and 1975. A substantial majority in both houses revised Section 2 of the Voting Rights Act in 1982 to outlaw election methods that result in diluting minority voting strength without requiring a judicial finding of discriminatory intent.[75] In creating a new statutory

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[73] *Id.* at 66-70. Although supported by only a plurality, Justice Potter Stewart's opinion was the prevailing view on the Court. Not only did the opinion require proof of intent, but it appeared to require a more difficult standard for inferring racial purpose through circumstantial evidence. The Fifth Circuit Court of Appeals had anticipated the intent requirement in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978); *Bolden v. City of Mobile*, 571 F.2d 238 (5th Cir. 1978); *Blacks United for Lasting Leadership v. City of Shreveport*, 571 F.2d 248 (5th Cir. 1978); and *Thomasville Branch of NAACP v. Thomas County*, 571 F.2d 257 (5th Cir. 1978). *See* O'Rourke, *supra* note 37, at 56-57.

[74] Bolden v. City of Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982); Brown v. Bd. of Sch. Comm'rs, 542 F. Supp. 1078 (S.D. Ala. 1982); *see also* Peyton McCrary, *History in the Courts: The Significance of* City of Mobile v. Bolden, *in* Minority Vote Dilution, *supra* note 27, at 47-63 (summarizing the testimony in both cases).

[75] *See, e.g.*, Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in Minority Vote Dilution, *supra* note 27, at 145, 148-49, 151-63 (describing the 1982 revisions to

means of attacking minority vote dilution, Congress cited the "totality of circumstances" test of *White* and *Zimmer* as the evidentiary standard to be used in applying the Section 2 results test. Vote-dilution cases previously decided under the Fourteenth Amendment would henceforth be tried under the new statutory standard.[76]

Congress did not at the same time revise the language of Section 5.[77] The legislative history provides some evidence that Congress believed an objection would be required where the voting change would violate the new Section 2 results standard. According to the 1982 Senate report:

> In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.[78]

Section 2); Parker, *supra* note 35, at 746-64. Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347 (1983), provides the most detailed account of the legislative actions and that led to the passage of the 1982 amendments.

76 Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 Vand. L. Rev. 1249, 1265 (1989); Blacksher & Menefee, *supra* note 35, at 31-32.

77 In *Bossier I*, Justice O'Connor, writing for the majority, treats this fact as dispositive evidence that Congress did not intend that preclearance be denied when a voting change would violate Section 2: "Congress, among other things, renewed § 5 but did so without changing its applicable standard." 520 U.S. at 484.

78 S. Rep. No. 417, 97th Cong. 12 n.31 (1982). *But see Bossier I*, 520 U.S. at 484 (dismissing the significance of this expression of intent from the Senate Report: "We doubt that Congress would depart from the settled interpretation of § 5 and impose a demonstrably greater burden on the jurisdictions covered

Democratic Senator Edward Kennedy and Republican Representative James Sensenbrenner, two key sponsors of the revised statute, each pointed to this language in the Senate Report during floor debates, interpreting it to mean that changes which violated Section 2 would now be objectionable under Section 5 as well.[79] Democratic Representative Don Edwards, who chaired the subcommittee charged with drafting the House bill and sponsored the final version of the revised Act, concurred in this view.[80] Nor did congressional opponents of the 1982 amendments dispute this view.[81]

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by § 5 . . . by dropping a footnote in a Senate Report instead of amending the statute itself.")

[79] 128 Cong. Rec. S7095 (daily ed. June 18, 1982) (remarks of Sen. Kennedy); *id.* H3841 (June 23, 1982) (remarks of Rep. Sensenbrenner). The majority in *Bossier I* ignores all evidence on this issue in the *Congressional Record*. 520 U.S. 471, 484 (1997).

[80] 128 Cong. Rec. H3840-41 (June 23, 1982) (remarks of Rep. Edwards).

[81] Mark Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 99 Yale L.J. 139, 150 (1984). However, two Georgia congressmen from metropolitan Atlanta, Wyche Fowler and Elliott Levitas, asked Chairman Edwards during floor debate--without referring in any way to the revised Section 2--whether Section 5 had been revised in any way in the new bill, and he replied that it had not. 128 Cong. Rec. H3845-45 (June 23, 1982) (remarks of Rep. Edwards). The most plausible reading of this colloquy is that Rep. Edwards believed he was responding to a question about the language of Section 5 itself, which had not changed, rather than to the standard by which Section 5 was to be implemented under the revised Act. Moreover, it is hard to disagree with the observation of Laughlin McDonald, *Racial Fairness--Why Shouldn't It Apply to Section 5 of the Voting Rights Act?*, 21 Stet. L. Rev. 847, 863 (1992), that "to the extent that there is a conflict between the Senate Report and the statements of key sponsors of the bill (Senator Kennedy and Representative Sensenbrenner) on the one hand, and the colloquies

In 1985, the Department of Justice proposed the first revision of its Section 5 guidelines following the 1982 amendments.[82] As finally adopted, a new provision required that preclearance be withheld where "a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2."[83] This new test was relatively short-lived, however; a decade later, the Supreme Court determined in *Bossier I* that preclearance could not be denied simply because the proposed change would clearly violate Section 2.[84] Nor was the new Section 2 test often the sole basis of an objection; the two

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by Representatives Fowler and Levitas on the other, the former clearly takes precedence over the latter."

82 A proposed revision was published for comments on May 6, 1985. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 50 Fed. Reg. 19,122 (proposed May 6, 1985). Oversight hearings were then held on the proposed guidelines. *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong. (1985) [hereinafter *Oversight Hearings*]. Comments were received from 120 persons or organizations, and the final version was published at 52 Fed. Reg. 490 (Jan. 6, 1987).

83 Criticism in the oversight hearings focused on the Department's policy that, in applying the new basis for objecting to voting changes, the burden of proof for determining whether the new voting procedure would "clearly" violate Section 2 lay with the Department, not the submitting jurisdiction. *Oversight Hearings*, *supra* note 80, at 49, 149-53, 167-71. On the other hand, two academic critics, Professors Timothy O'Rourke and Katherine Butler, contended that the legislative history of the 1982 Act provided an insufficient basis for incorporating Section 2 in a Section 5 analysis at all, even with the Department bearing the burden of proof. *Id.* at 35-38, 63, 69-75.

84 *Bossier I*, 520 U.S. at 474, 485.

principal reasons for objecting to voting changes continued to be retrogressive effect and unconstitutional purpose.[85]

II. Changing Patterns of Purpose and Effect

A. The Research Design

The central focus of the empirical research reported in Part II is to assess the legal basis asserted for objections by the Department of Justice between 1965 and the end of 1999.[86] The data we examine are 996 letters interposing objections to voting changes in jurisdictions covered by the preclearance requirements of the Act.[87] Where a single letter included

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[85] We base this observation on our own quantitative findings, presented below, but see also Posner, *supra* note 9, at 84 (contending, for example, that in the 1990s, "only one [redistricting] objection relied exclusively on Section 2").

[86] For the discussion of legal standards in the current guidelines, see 28 C.F.R. pt. 51, especially 28 C.F.R. §§ 51.52, 28 C.F.R. §§ .54-61. These legal standards were first set forth in the Department's guidelines for administering the Act. Revision of Procedures for Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486 (Jan. 6, 1987).

[87] As we noted at the outset, these objection letters, unlike court opinions regarding preclearance, do not set forth the full body of evidence on which the Department relies in making each decision, and thus do not provide a basis for evaluating the accuracy of the Department's fact-finding. We are not attempting to assess the *accuracy* of the Department's decision-making; we merely seek to identify the legal theory on which each objection was based. The objection letters, which typically reflect the involvement of numerous analysts, reviewers, and decision makers, are not always models of clarity in explanation, especially in the early 1970s. Our analysis of the legal basis asserted in each letter is guided by the Department's Section 5 guidelines, the briefs filed by the parties in Section 5 declaratory judgment actions, and by the Section 5 case law discussed in Part I. The coding scheme was

objections to changes affecting more than one governing body (e.g., both school board and county commission in the same jurisdiction, or both state house and state senate redistricting plans), we have treated this as two objections. On the other hand, if a letter itemized objections to several different features of a proposed change (e.g., objections to the use of at-large elections, a numbered post requirement, staggered terms, and a majority vote requirement for a city council), we treated this as a single objection where only a single governing body was involved.[88]

We divided voting changes into five basic groups: 1) ballot access; 2) at-large elections and multi-member districts; 3) enhancing devices; 4) redistrictings; 5) annexations and consolidations (see Table 1).[89] Often a letter included

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initially devised by Dr. McCrary. It was first implemented by Mr. Seaman; Dr. McCrary then reviewed Mr. Seaman's coding decisions; the final decision on each assessment was the responsibility of Dr. McCrary. Our coding decisions were, inevitably, based on textual interpretation. We believe that although knowledgeable observers might disagree occasionally with our coding of individual objections, the patterns we identify are beyond reasonable dispute.

88 We are guided in this process by the "Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965," now available on the Voting Section's website. The observations in this document are objection letters, which sometimes include two or even three governing bodies.

89 We began with a larger number of initial categories, in order to determine whether specific change types displayed unusual patetrns over time. Because that proved not to be the case, we aggregated the data for clarity of presentation. For example, requirements for numbered places, runoffs, and staggered terms, as well as changes in the size of the governing body and changes from appointive to elective procedures (or vice versa) were all tallied separately, but were eventually collapsed into

objections to more than one type of change, such as a decision to deny preclearance to both at-large elections and the use of numbered posts.[90] When delineating the types of change that most frequently brought objections, the Department focuses on change types rather than decisions to object.[91] Because we are trying to assess the legal basis for objections, on the other hand, the observations in our tables are the number of times the Department interposed an objection, except that where more than one

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the category "enhancing devices." The category "annexations" includes deannexations and consolidations between local jurisdictions. We put into the "ballot access" category all changes related to registration or voting, candidate qualification requirements, or the timing of referenda, primaries, or other elections. The "at-large election" category includes multimember districts, as well as the use of at-large seats, in mixed plans.

90 For the period since January 1, 1980, these changes are identified in the Department's Submission Tracking and Processing System (STAPS). STAPS is a database used to track the thousands of submissions (containing tens of thousands of changes) that the Department receives annually, and provides, among other things, data on each voting change submitted and the type of determination made. We have utilized STAPS only for help in locating files.

91 *See, e.g.*, Attachments to the Statement of William Bradford Reynolds, Assistant Attorney General, Civil Rights Division (Attachment E-2: Number of Changes to Which Objections Have Been Interposed by Type and Year from 1965 - December 31, 1981), *reprinted in Hearings on the Voting Rights Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary*, 97th Cong. 1784 (1982) (listing objections to 695 changes resulting from 414 objections, according to Attachments D-1 and D-2, *id.* at 1746-82). Attachment C-2 (Number of Changes Submitted and Reviewed . . . by Type and Year from 1965 - December 31, 1981), lists 39,837 changes submitted for the same period. *Id.* at 1744-45. Thus, during this period, objections were interposed to only 1.7 percent of all changes submitted for preclearance.

governing body is affected by the denial of preclearance, we count each governing body as a separate observation.[92]

We did not code an objection as one based on purpose unless the letter cited at least some specific evidence of the sort set forth by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Corporation*.[93] Where the letter referred to the exclusion of minority group members from the decision-making process, the refusal to accommodate requests from the minority community, the awareness by decision-makers that the adopted change would have a racially discriminatory effect, the departure from standard decision-making procedures or criteria, or the use of pretextual arguments to justify the change, we took that as evidence that the objection was based on purpose.[94] This was

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92 Our count is 1,074 objections to specific governing bodies from 1965 through 1999.

93 429 U.S. 252, 265-66 (1977). In our view, *Arlington Heights* codified the standards employed in previous equal protection cases involving voting, beginning with *Smith v. Paris*, 257 F. Supp. 901 (M.D. Ala. 1966), *modified and aff'd*, 386 F.2d 979 (5th Cir. 1967).

94 This is consistent with the Department's approach. See 28 C.F.R. § 51.57 (2004); *see also* Posner, *supra* note 9, at 100-01. There is in most objection letters "boilerplate" language setting forth the legal burden of the jurisdiction to show that a change has neither the purpose nor the effect of discriminating on the basis of race. Because such language was included in the vast majority of letters, regardless of the actual basis for the objection, we do not view such language as substantively significant.

especially clear where the letter indicated reliance on court decisions based in part on intent.[95]

The "effect" prong of Section 5 was also understood as synonymous with the constitutional effect requirement before 1976, when the Supreme Court distinguished between the constitutional definition of effect and discriminatory effect under Section 5 - defined as retrogressive effect - in *Beer v. United States*.[96] We coded objections as based on a retrogression standard when the *Beer* definition was satisfied, both before and after the Supreme Court decision in that case.[97] Where the letter made clear that the objection was based on the change's discriminatory effect--before *Beer*--but the effect did not appear retrogressive, we coded it as simply an effect objection.[98]

95 Key purpose-based decisions in Section 5 declaratory judgment actions included *Wilkes County v. United States*, 450 F. Supp. 1171 (D.D.C. 1978), *aff'd mem.*, 439 U.S. 999 (1978), and *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1982); also key were a Fourteenth Amendment redistricting case, *Rybicki v. State Board of Elections*, 574 F. Supp. 1082 (1982), and a Section 2 decision based in part on the purpose standard, *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal., 1990), *aff'd*, 918 F.2d 763 (9th Cir. 1990).

96 425 U.S. 130, 140-42 (1976); *see also* 28 C.F.R. § 51.54(a) (2004).

97 We recognize that this approach may seem ahistorical, by classifying pre-*Beer* objections on a basis that the Department could not have had in mind (because the retrogression standard did not yet exist), but applying consistent definitions for the entire period from 1968 through 1999 required this practice.

98 A special problem arises where there is no clear benchmark for comparing the new plan. *See* 28 C.F.R. § 51.54(b)(4) (2004) ("Where at the time of submission . . . there exists no other lawful practice or procedure for use as a benchmark (e.g., where a newly incorporated college district

Some changes we viewed as *per se* retrogressive for purposes of this analysis. For example, all changes from single member districts to at-large elections would necessarily be retrogressive, assuming there was evidence of racially polarized voting.[99] Changes from straight at-large elections to a numbered place or residency district requirement, from a plurality rule to a majority vote requirement, and from concurrent to staggered terms were also treated as retrogressive. Annexations, deannexations, or consolidations were necessarily retrogressive as well, if objectionable, but could be precleared where accompanied by a fairly drawn district election plan.[100]

In the 1980s, after Congress amended Section 2 of the Act to create a statutory results test, the Department revised its guidelines to require objections where the new practice at issue would clearly violate the new results test.[101] Where objection

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selects a method of election) the Attorney General's preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.").

[99] Recall that we are not assessing the *accuracy* of the Department's fact-finding, but rather the legal basis for the objection.

[100] 28 C.F.R. § 51.61(c) (2004) (following *City of Richmond v. United States*, 422 U.S. 358 (1975)).

[101] Revision of Procedures for Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486 (Jan. 6, 1987) (codified at 28 C.F.R. § 51.55(b)(2) (2004)) (barring implementation of any voting change that would constitute "a clear violation of amended Section 2"); *see also supra* Part I.G. Even before the 1987 revision of the Guidelines, some objections to redistricting plans were based on this reasoning. *See, e.g.*, U.S. Dep't of Justice, Objection Letter to Oktibbeha County, Mississippi (June 17, 1983); U.S. Dep't of Justice, Objection

letters specifically used language referring to a "clear violation of Section 2," we identified this as a third type of Section 5 effects test.[102] The Department's letter often provided evidence of racial purpose as well as retrogressive effect or a clear violation of Section 2; where that was true, we coded the objection as having two legal bases (both purpose and effect).

On occasion, voting changes were found objectionable because they would violate the minority language protections of the Act.[103] Finally, some objections were based on the failure of the submitting authority to provide the information necessary to determine whether the change was entitled to preclearance. These were considered technical objections, and the change was often

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Letter to Amite County, Mississippi (June 6, 1983); U.S. Dep't of Justice, Objection Letter to Copiah County, Mississippi (April 11, 1983).

102 In *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997), the Supreme Court ruled that this was an improper basis for objections. *See supra* text accompanying notes 77-83. In some cases, language in the objection letters referencing Section 2 this language appeared to be no more than "boilerplate," restating the requirements of 28 C.F.R. § 51.55(b)(2). Initially we were inclined to view this language as substantively insignificant, as we did with similar boilerplate references to the Section 5 purpose requirement. *See supra* note 94. Discussions with present and former Voting Section attorneys persuaded us, however, that this boilerplate language was used only when the fact that the proposed plan would clearly violate Section 2 played at least some role in the decision to object. Consequently, we coded all letters that referred to Section 2 of the Act as falling under this category.

103 28 C.F.R. § 51.55(a) (2004).

precleared once the jurisdiction supplied the necessary evidence.[104]

B. The Changing Legal Basis of Objections

To grasp the larger patterns at work in the Department's objection decisions, a few simple quantitative observations are necessary. Table 1 (see Appendix) summarizes the types of voting changes to which objections have been interposed, by decade. The percentage of objections for each category was relatively stable over time, except that at-large elections and enhancing devices accounted for a much higher proportion of objectionable changes in the first decade (1968-1979) than subsequently, and objections to districting plans were proportionally lower in the first decade and higher thereafter.[105]

During the 1970s, at-large elections and enhancing devices together were denied preclearance 292 times, 59 percent of all objectionable changes, but only 86 redistricting plans (17 percent) were the subject of objections (see Table 1). By the 1980s, the picture presented by Table 1 is more mixed: the Department interposed objections to 150 at-large election plans and enhancing devices (35 percent of objectionable changes) and denied preclearance to 165 redistricting plans (38 percent). In the 1990s, at-large elections and enhancing devices were the

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104 *Id.* §§ 51.40, 51.52(c).

105 Note that the data presented in Table 1 are the number of change types to which objections were interposed, and are somewhat more numerous than objection decisions (the data presented in Table 2).

subject of objections only 104 times, 26 percent of objectionable changes, but the Department denied preclearance to a striking 209 redistricting plans (52 percent)--over half of all changes to which objections were interposed (see Table 1). The increasing proportion of objections due to redistricting plans was, to some extent, a direct consequence of the decline in the number of at-large systems resulting from earlier Departmental objections.

The most striking characteristic of our findings regarding the legal basis of the Department's decisions to object (see Table 2) is the consistent increase over time of objections based on the purpose prong of Section 5, and the consistent decline of objections based on retrogression. During the 1970s the Department rarely cited intent in its objection letters. We identified only 9 objections (just two percent) as based entirely on purpose, and only 22 more (six percent) were based on a combination of intent and retrogressive effect. The vast majority of the objections (297, or 77 percent) were based on retrogression.[106]

The high percentage of objections attributed to the retrogression standard in the 1970s is, to some extent, an artifact of our need to apply a consistent coding scheme for all

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[106] A small number fell into the category of a technical objection, where the jurisdiction failed to supply the information required by the Department's guidelines, making a proper assessment of the change impossible. Although always small in number, technical objections were more common in the 1970s and in the 1980s (four percent), but virtually disappeared by the 1990s.

letters between 1968 and 1999.[107] Based on the need for consistency, we treated all changes as retrogressive if they satisfied the standard set forth in *Beer v. United States*.[108] Where the letter referred to the dilutive effect of a change that did not, however, make matters worse for minority voters, we classified the change as dilutive.[109] There were only 34 such non-retrogressive but dilutive plans, 9 percent of the redistricting objections in the 1970s.

By the 1980s, 83 objections (25 percent) were based entirely on the intent requirement, and another 73 (22 percent) were seen as both retrogressive and purposefully discriminatory. Only 146 objections (44 percent) relied on the retrogression standard alone. A new basis for objecting was available in the 1980s, when it was possible to object because the proposed change presented a clear violation of the new Section 2 results test. In our judgment, however, the Department only interposed two

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107 *See supra* note 97.

108 425 U.S. 130 (1976). Based on our reading of the letters, we think that before *Beer* the Department understood the effect prong of Section 5 to be identical to the constitutional effect standard.

109 The classic example would be the New Orleans redistricting plan at issue in *Beer*, to which the Department had objected under the effect standard. All non-retrogressive changes seen by the Department as having an objectionable effect were seen as dilutive; all objections in the ballot access category were retrogressive.

objections (one percent) on this basis alone in the 1980s, and only 73 letters (22 percent) cited both purpose and Section 2.[110]

In the 1990s, fully 151 objections (43 percent) were based on purpose alone. In contrast, retrogression alone was the basis for only 73 objections (21 percent), and only six objections relied entirely on Section 2. Another 67 objections (19 percent) relied on a combination of purpose and retrogression, and 41 (12 percent) on both purpose and the need to comply with Section 2. Thus, the intent prong was involved in a remarkable 74 percent of all objections in that decade. In contrast, a determination of retrogressive effect was involved in only 40 percent of objections in the 1990s and Section 2 in only 14 percent.

Looking just at objections to redistricting plans, we observe similar patterns (see Table 3). Objections based on purpose alone increased from 7 (11 percent) in the 1970s to 75 (46 percent) during the next decade, and 122 (58 percent) in the 1990s. The intent prong, in combination with retrogression, was involved in only 5 redistricting objections in the 1970s, but increased to 40 objections (24 percent) in the 1980s, sagging a bit to 33 redistricting objections (16 percent) in the 1990s. Although inconsequential in the 1980s, the combination of intent and Section 2 concerns provided the basis for 30 objections (14 percent) of redistricting objections in the 1990s. The principal difference between redistricting objections and objections as a

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110 In both the 1980s and 1990s, the content of those letters citing both purpose and Section 2 concerns suggested that the purpose issue was usually the more important concern.

whole was that a substantially lower proportion of redistricting objections were based on retrogression than was case for objections as a whole. In the 1970s, only 37 redistricting plans (40 percent) were retrogressive (see Table 3), as compared with 297 (77 percent) for all objections (see Table 2). In the 1980s, 35 redistricting plans were rejected on retrogression grounds (21 percent), but retrogression was the basis for 146 objections (44 percent) for all change types (see Tables 2 and 3). In the 1990s, retrogression provided the basis for 20 redistricting objections (only 10 percent), but 73 (21 percent) for all change types (see Tables 2 and 3).

These results make clear that the likely effect of striking down the Department's authority to object to voting changes when they present a clear violation of Section 2 was inconsequential (see *Bossier I)*.[111] On the other hand, the effect of redefining purpose under Section 5 as extending only so far as an "intent to retrogress"(see *Bossier II)* was potentially to reduce the number of objections substantially from the level found in the 1990s.[112]

III. How the Supreme Court Transformed Section 5

A. The Bossier Parish Litigation: Procedural History

The litigation used by the Supreme Court to reinterpret Section 5 case law arose from the Department's objection to a

111 *Bossier I*, 520 U.S. at 485.

112 *Bossier II*, 528 U.S. at 328.

school board redistricting plan in Bossier Parish, Louisiana. Louisiana parishes elect their governing bodies, called police juries, and their parish school boards as well, by districts rather than at large.[113] In the 1980s Bossier Parish used different election plans for police jury and school board; neither had a single black-majority district. [114] Although blacks made up 20 percent of the parish population and 18 percent of its voting age population, the school board had never elected an African American.[115] After the 1990 census, both bodies displayed wide population disparities among their twelve single-member districts and thus required redistricting.[116] The police jury quickly redistricted and secured preclearance of its plan. Although the new plan had no black-majority districts, this

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113 A police jury is a unit of local Louisiana government similar to a county board of supervisors. *See* O'Quinn v. Manuel, 773 F.2d 605, 606 n.1 (5th Cir. 1985) (discussing La. Rev. Stat. Ann. § 33:1236). In 1968, the Louisiana legislature authorized police juries and school boards to use at-large elections for the first time. Following *Allen v. State Board of Elections*, the Department of Justice objected to both enactments and to numerous efforts by particular parishes to adopt at-large elections. David Hunter, The Shameful Blight: The Survival of Racial Discrimination in Voting in the South 148-49, 208-09 (1972). McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990*, 5 U. Pa. J. Const. L. 665, 671-73 (2003), provides direct evidence that in the 1960s, Louisiana legislators saw at-large elections as a key device for diluting African American voting strength.

114 Bossier Parish Sch. Bd. v. Reno, 907 F. Supp. 434, 437 (D.D.C. 1995).

115 Id.

116 *Bossier I*, 520 U.S. at 474.

characteristic had also been true of the police jury plan in the 1980s and the change was thus not retrogressive. When the Department precleared the police jury plan, it was not aware of evidence potentially showing an intent to dilute minority voting strength.[117] However, it was aware that, unlike the school board, the police jury had elected - and reelected - a black candidate under the existing plan.[118]

The school board refused initially to adopt this plan, in part because it did not appear to serve the interests of the school board. The plan was drawn to protect incumbent members of the police jury and would pit two sets of school board incumbents against one another; the police jury plan also reflected that body's functional concerns such as road maintenance and drainage, and would create several open districts.[119] It had an unusually high deviation from population equality, and, as the dissenting justices later pointed out, four districts "failed the standard

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117 The parties in *Bossier* stipulated that the police jury failed to provide the Department with information then available to the parish, showing that two reasonably compact black-majority districts could be drawn, and failed to inform the Department that local black citizens had protested their exclusion from the redistricting process. J.S. at 68a-69a, 76a, 82a-83a, 87a, *Bossier Parish I* (Nos. 95-1455 and 95-1508).

118 907 F. Supp. 434, 437 (D.D.C. 1995). The district included an air force base, whose largely white residents rarely voted in local elections, so that blacks approached parity with whites in voter turnout. Id.

119 *Bossier II*, 528 U.S. at 346-47 (Souter, J., concurring in part and dissenting in part); *see also Bossier Parish Sch. Bd.*, 907 F. Supp. 434, 458 (D.D.C. 1995) (Kessler, J., concurring in part and dissenting in part); J.S. at 72a-73a, 102a, 112a, *Bossier I* (Nos. 95-1455 and 95-1508).

measure of compactness used by the Board's own cartographer."[120] The school board engaged the same consultant to draw a separate plan, anticipating the likely need to realign precinct boundaries. In the meantime, local black leaders proposed an alternative plan with two black-majority districts.[121] At that point the school board put aside its reservations and adopted the police jury plan, which it submitted for preclearance.[122] On August 30, 1993, the Department of Justice objected to the plan because the plan was adopted with a discriminatory purpose and posed a clear violation of Section 2.[123]

The school board then filed a Section 5 declaratory judgment action in the District of Columbia.[124] The three-judge panel

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120 *Bossier II*, 528 U.S. at 347.

121 *Id.* at 347-48.

122 *Id.* at 349.

123 U.S. Dep't of Justice, Objection to Bossier Parish School Board, Louisiana (Aug. 30, 1993); *see also* U.S. Dep't of Justice, Letter to Bossier Parish School Board (Dec. 20, 1993) (declining to withdraw the objection). Justice Sandra Day O'Connor, writing for the majority in *Bossier I*, 520 U.S. at 475-76, observed that the Department's objection letter "asserted that the Board's plan violated § 2 of the Act," relying on 28 C.F.R. 51.55(b)(2). This seems an incomplete characterization. We read the objection letter as asserting that the school board failed to demonstrate that its redistricting plan was adopted without a racially discriminatory purpose, largely because the letter summarized at some length the background of the board's decision in a manner suggesting an *Arlington Heights* analysis of intent, and merely noted in a single sentence--a sentence that could be characterized as "boilerplate" language in the Department's objection letters--that the new plan also presented a clear violation of Section 2.

124 Black leaders from Bossier Parish, represented by the Lawyers' Committee for Civil Rights Under Law, intervened in the

precleared the plan by a 2-1 majority, with Judge Laurence Silberman writing the opinion of the court.[125] The majority opinion focused on the claim that a plan that clearly violates Section 2 is not entitled to preclearance. The Court forcefully rejected this interpretation of Section 5, treating the Department's view of the Section 2 issue as evidence to support the allegation--by now endorsed by the Supreme Court in *Miller v. Johnson*[126]--that it sought to use Section 5 to maximize black voting strength.[127] Judge Gladys Kessler dissented, however, asserting that under *Arlington Heights* the evidence in the case "demonstrates convincingly that the Bossier School Board acted with discriminatory purpose."[128] This judgment was later echoed by the dissenters on the Supreme Court.[129]

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lawsuit as defendants. *Bossier Parish Sch. Bd.*, 907 F. Supp. at 436.

125 *Id.* at 450.

126 515 U.S. 900 (1995).

127 *Bossier Parish Sch. Bd.*, 907 F. Supp. at 440-41, 444-45 449-50. Judge Silberman associated the Department's alleged "maximization" policy with its application of Section 2, not the purpose prong of Section 5.

128 *Id.* at 454 (Kessler, J., concurring in part and dissenting in part) (pointing out that the majority never even cited *Arlington Heights*). The majority viewed the intent evidence quite differently, in part because it treated much of the factual evidence presented by the defendants as part of its purpose case as relevant only to the Section 2 analysis. *Id.* at 445, 447-49.

129 In his dissenting opinion, Justice Souter observed that, under the traditional Section 5 purpose analysis, the evidence regarding the redistricting plan for the Bossier Parish School Board "disqualifies it from § 5 preclearance." *Bossier II*, 528

Although on appeal the Supreme Court vacated the lower court decision and remanded for reconsideration, it agreed with the lower court's view of the effects prong.[130] Writing for a 5-4 majority, Justice Sandra Day O'Connor announced that preclearance could not be denied to a voting change on the ground that the new system would violate Section 2.[131] In considering the purpose prong of Section 5, however, Justice O'Connor introduced a theory not previously advanced by the school board and not considered by the trial court--the assertion by the dissenters rejected by the majority in *City of Pleasant Grove v. United States,*[132] that under Section 5 a purpose inquiry is restricted to the question of retrogressive intent--that is, whether the change was designed not merely to discriminate against minority voters but to make matters worse for them.[133]

On this issue Bossier Parish took the same view of the purpose prong as the United States and private intervenors.[134]

U.S. at 356-57 (Souter, J., dissenting). "There is no reasonable doubt on this record that the Board chose the Police Jury plan for no other reason than to squelch requests to adopt the NAACP plan or any other plan reflecting minority voting strength." *Id.*

130 *Bossier I*, 520 U.S. at 474.

131 *Id.* at 485.

132 479 U.S. 462 (1987).

133 *Bossier I*, 520 U.S. at 479.

134 *See* Brief of Appellee Bossier Parish at 10, *Bossier I* (Nos. 95-1455 & 95-1508) ("[T]his Court, in just the past two Terms, has already squarely rejected the notion that a Section 5 objection can be premised on any grounds other than an invidious purpose or retrogressive effect."), *available at* 1996 WL 531765;

In fact, at oral argument the school board's veteran attorney, Michael Carvin, explicitly rejected the suggestion that, as one justice put it, "the only purpose that is relevant under Section 5 is purpose to cause retrogression, as distinct from purpose to discriminate by effecting a purposeful dilution."[135] Carvin's response was: "Oh, no. No, not at all. I think that decision, the Court's decision in Richmond and Pleasant Grove has already decided that issue."[136]

Despite the fact that no previous court had ever restricted the Section 5 purpose requirement in this way, the conservative

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see also id. (noting that the Court has "squarely held that a Section 5 objection was warranted *only if* a redistricting change is retrogressive *or has a discriminatory purpose sufficient to violate the Constitution*" (emphases added)); Brief of Federal Appellant at 35, *Bossier I* (Nos. 98-405 and 98-406) ("Preclearance should be denied to a voting change when it is known that the change will result in the unlawful dilution of minority voting strength, regardless of whether the change was instituted for a discriminatory purpose or had a retrogressive effect."), *available at* 1996 WL 439256. In fact, the "retrogressive intent" argument that the five-justice majority found so persuasive in *Bossier II* was advanced only in a petition to file a late amicus curiae brief on behalf of several covered counties in Texas in *Bossier I*. *See* Motion for Counties to File Brief Amicus Curiae at 3, *Bossier I* (Nos. 98-405 and 98-406) (arguing that Section 5 is limited "to only those circumstances in which the purpose or effect of the change is to cause a retrogression in the electoral position of minority voters"), *available at* 1997 WL 143493.

135 See Oral Argument at 30, *Bossier I* (Nos. 95-1455, 95-1508), *available* at 1996 WL 718469.

136 Id. at 30-31. As Carvin pointed out, since the parties stipulated that the plan was not retrogressive, "you can obviously assume that they didn't have the purpose to retrogress," and had the purpose issue been restricted to intent to retrogress, the district court's decision "would have been a one-paragraph opinion." Id. at 31.

majority in *Bossier I* remanded the case in order for the trial court to consider whether the evidence it had previously excluded was relevant to determining whether the Bossier Parish school board acted with an "intent to retrogress" in adopting its redistricting plan.[137] As Justice O'Connor put it ominously, "we leave open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent."[138]

B. The Legal Gymnastics[139] *of* Bossier II

When the case returned to the Supreme Court on appeal, Justice Antonin Scalia, writing for the same five-justice majority, answered Justice O'Connor's question with an emphatic "No."

> In light of the language of § 5 and our prior holding in *Beer*, we hold that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.[140]

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137 *Bossier I*, 520 U.S. at 486.

138 *Id.* Justice O'Connor added that the lower court was to determine as well whether the school board acted with a "nonretrogressive, but nevertheless discriminatory, 'purpose,'" and whether such evidence was "relevant" to a Section 5 analysis.

139 *See Bossier II*, 528 U.S. at 371 (Souter, J., dissenting) (using the term "gymnastic" to characterize the majority's effort to reconcile its opinion in *Bossier II* with the majority opinion in *City of Pleasant Grove*, 479 U.S. 462).

140 *Id.* at 341.

Explaining how the conservative majority reached this remarkable conclusion, which appears to us at odds with all previous court interpretations of Section 5 since the inception of the Voting Rights Act, requires careful attention to Justice Scalia's language, the language of Section 5 of the Act, the language of the *Beer* decision, and the context within which each of the above was penned.

1. Misapplying Legislative History

Justice Scalia began with the key language in Section 5: a covered jurisdiction has the burden of proving that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[141] Much of his analysis hinged on the definitions given to the words "purpose" and "effect" in this sentence, as well as to the meaning of the phrase "denying or abridging the right to vote." The starting point for Justice Scalia's analysis of the text was, however, the definition attached to the word "effect" in *Beer*.

> Reasoning that § 5 must be read in light of its purpose of "insur[ing] that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," we held [in *Beer*] that "a legislative reapportionment that enhances the position of racial minorities . . . can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of Section 5."[142]

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141 *Id.* at 328 (quoting 42 U.S.C. § 1973c).

142 *Id.* at 329 (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

If the term "effect" means retrogression, as the *Beer* majority had determined in 1976, then in Justice Scalia's view the definition of "purpose" under Section 5 must also be tied to the concept of retrogression because "we refuse to adopt a construction that would attribute different meanings to the same phrase ["denying or abridging"] in the same sentence, depending on which object it is modifying."[143] Under this reading the burden of the covered jurisdiction is to prove that: 1) the change will not have a retrogressive effect; and 2) the change was not adopted with the intent of achieving a retrogressive effect.

Justice Scalia's interpretation of the text of Section 5 hinges upon a word--retrogression--that does not appear in the text of the statute at all, but was coined by the *Beer* majority based on its reading of a congressional committee report.[144] This is an odd approach for a Justice who professes to disdain legislative history, who "object[s] to [its] use . . . on

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143 *Id.* (relying on *Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983), which declined to give different meanings to the phrase "other than" when it modified "banks" and "common carriers" in the same clause). "Justice Scalia determines what statutory text means by presuming authorship by an ideal drafter who meets proper standards of style and grammar," points out legal scholar William D. Popkin, and "his resort to internal context in statutory interpretation has very little to do with how people ordinarily use the language." Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretion,* 76 Minn. L. Rev. 1133, 1143 (1992).

144 H. Rep. No. 94-106, at 60 (1975).

principle,"[145] and who believes that the Court should generally ignore legislative history, except in the rare situation where the statutory text is absurd on its face.[146] Justice Scalia has strenuously dissented from the use of legislative committee reports as valid evidence in interpreting statutes,[147] and has even gone so far as to write separate concurring opinions with the sole purpose of disavowing or disparaging legislative history relied upon by the majority.[148]

The *Beer* majority's use of legislative history--on which Justice Scalia relies in *Bossier II*--illustrates the sort of

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145 Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpretation: Federal Courts and the Law 3, 31 (Amy Gutmann ed., 1997).

146 *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 651 & n.116 (1990) (collecting cases where Justice Scalia has objected to the use of legislative history).

147 *See, e.g.*, Bank One Chi. N.A., v. Midwest Bank & Trust, 516 U.S. 264, 279-80 (Scalia, J., concurring in part and dissenting in part); Conroy v. Aniskoff, 113 S. Ct. 1562, 1567 (1993) (Scalia, J., concurring) (stating that Court should not have consulted legislative history once it concluded that statute was unambiguous and unequivocal because "that is not merely a waste of research time and ink; it is a false and disruptive lesson in the law"); Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."). Scalia's disdain for committee reports even predates his appointment to the Supreme Court. *See* Hirschey v. FERC, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J. concurring in the judgment).

148 *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 Wash. U. L. Q. 351, 365 (1994) (noting "Justice Scalia's practice of refusing to join any part of another Justice's opinion that relies on legislative history").

behavior that ordinarily triggers Justice Scalia's disdain. The Court relied for its assessment of congressional intent on a passage from the 1975 House Report,[149] a characterization of the purpose of Section 5 reprinted verbatim from a little-known 1972 oversight committee report evaluating the preclearance review of Mississippi's voter reregistration program.[150] In the introduction to the 1972 oversight report we are cautioned that "[t]he subcommittee has given detailed consideration to the administration and enforcement of the Voting Rights Act in Mississippi during 1971 when 26 counties in Mississippi undertook to reregister voters," and as a result "[t]he observations and conclusions contained within this report are based upon *and limited to* that study."[151] To us, this appears a slim basis for an assessment of legislative intent in 1965, or later, as neither this 1972 subcommittee nor any congressional committee in 1975 ever made a systematic investigation of the legislative history of Section 5 as originally adopted or revised.

The idea that the 1965 Congress saw the preclearance requirement as limited to retrogression strikes critics as thoroughly counterintuitive. As Justice Breyer pointed out in dissenting from Justice Scalia's *Bossier II* analysis, there were some jurisdictions in 1965 where "historical discrimination had

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149 H. Rep. No. 94-106, at 60 (1975).

150 *Enforcement of the Voting Rights Act of 1965 in Mississippi: Hearing Before the Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary*, 92nd Cong. 14 (1972).

151 *Id.* at iii (emphasis added).

left the number of black voters at close to zero," and as a result "retrogression would have proved virtually impossible where § 5 was needed most."[152] As an example he pointed to Forrest County, Mississippi, where as of 1962 only one percent of the black voting-age population was registered to vote, due to the discriminatory application of the state's registration requirements.[153] When the Fifth Circuit Court of Appeals enjoined the registrar from discriminatory processing of registration applications, Justice Breyer observed,[154] the state legislature enacted a "good moral character requirement," which the Supreme Court characterized as "an open invitation to abuse at the hands of voting officials."[155] As Justice Breyer wryly noted, this change "would result in *maintaining*--though *not*, in light of the absence of blacks from the Forrest County voting rolls, in *increasing*--white political supremacy,"[156] and thus,

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152 *Bossier II*, 528 U.S. at 374 (Breyer, J., dissenting).

153 *Id.* at 374-75 (relying on *United States v. Mississippi*, 229 F. Supp. 925, 994, n. 86 (S.D. Miss. 1964) (dissenting opinion), *rev'd*, 380 U.S. 128 (1965), and *United States v. Lynd*, 301 F.2d 818, 821 (5th Cir. 1972)).

154 *Id.* at 375 (citing *Lynd*, 301 F.2d at 821).

155 *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966). To Justice Breyer, "[i]t seems obvious, then, that if Mississippi had enacted its 'moral character' requirement in 1966 (after enactment of the Voting Rights Act), a court applying § 5 would have found 'the purpose . . . of denying or abridging the right to vote on account of race,' even if Mississippi had intended to permit, say, 0.4%, rather than 0.3%, of the black voting age population of Forrest County to register." *Id.* at 376.

156 *Id.* at 375.

under the majority's reading of the Section 5 purpose requirement, an intentionally discriminatory change would have been entitled to preclearance.

Both Justice Stevens and Justice Breyer emphasized that it was not necessary to overrule *Beer* to retain the meaning attached to the Section 5 purpose requirement for the past quarter century.[157] Justice Stevens would have deferred to the reading placed upon the language of the statute by the Department of Justice, in which the term "purpose" refers, quite simply, to the constitutional standard:

> The reading above makes clear that there is no necessary tension between the *Beer* majority's interpretation of the word "effect" in § 5 and the Department's consistent interpretation of the word "purpose." For even if retrogression is an acceptable standard for identifying prohibited effects, that assumption does not justify an interpretation of the word "purpose" that is at war with both controlling precedent and the plain meaning of the statutory text.[158]

On the other hand, if *Beer* were wrongly decided, and thus the novelty of defining discriminatory effect as limited to retrogression were not an issue, then the conflicted syntax that troubled Justice Scalia in *Bossier II*[159] would not arise. Justice Souter, a staunch advocate of *stare decisis* in interpreting statutory language--"when statutory language is

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157 *Id.* at 373-74.

158 *Id.* (Stevens, J., dissenting).

159 *Id.* at 329.

construed it should stay construed"--flatly declared that "*Beer* was wrongly decided."[160]

> The Court was mistaken in *Beer* when it restricted the effect prong of § 5 to retrogression, and the Court is even more wrong today when it limits the clear text of § 5 to the corresponding retrogressive purpose.[161]

2. Misinterpreting the Purpose Prong

In our view, another major problem with Justice Scalia's interpretation of the Section 5 purpose requirement is the language from *Beer* that could only be referring to a second prong of Section 5-the "purpose" prong plainly stated in the text of the statute. An ameliorative change, according to *Beer*, "cannot violate § 5 *unless* the new apportionment itself so discriminates on the basis of race or color *as to violate the Constitution*."[162]

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160 *See id.* at 362-63 (Souter, J., dissenting) ("Although I adhere to the strong policy of respecting precedent in statutory interpretation and so would not reexamine *Beer*, that policy does not demand that recognized error be compounded indefinitely, and the Court's prior mistake about the meaning of the effects requirement of § 5 should not be expanded by an even more erroneous interpretation of the scope of the section's purpose prong.")

161 *Id.* at 342; *see also id.* at 363 (Souter, J., dissenting) ("But it is another thing entirely to ignore error in extending discredited reasoning to previously unspoiled statutory provisions . . . [as] the Court does in extending *Beer* from § 5 effects to § 5 purpose.")

162 425 U.S. 130, 141 (1976) (emphasis added). Substantially the same wording is used at *id.* at 141 n.14: "It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional."

The United States argued in *Bossier II* that the phrasing of this "unless" clause clearly meant that the purpose requirement under Section 5 was the same as the intent standard under the Fourteenth Amendment.[163] Justice Scalia rejected this view as "a most implausible interpretation" on the grounds that "at the time *Beer* was decided, it had not been established that discriminatory purpose as well as discriminatory effect was necessary for a constitutional violation."[164] He pointed out that the Court had not yet decided *Washington v. Davis*,[165] where the Court ruled that evidence of discriminatory effect, without proof of discriminatory intent, is insufficient to prove a constitutional violation.[166] *Beer*, Justice Scalia contended, cannot be interpreted as "anticipating (without argument) that later holding."[167]

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163 *See, e.g.*, Brief for the Federal Appellant at 28-32, *Bossier II* (Nos. 98-405 and 98-406); Reply Brief of the Federal Appellant at 6-8, *Bossier II* (Nos. 98-405 and 98-406).

164 *Bossier II*, 528 U.S. at 337 ("If the statement in *Beer* had meant what appellants suggest,"--that is, referring to a Section 5 purpose requirement identical to the purpose standard under the Equal Protection clause--it would "have been gutting *Beer*'s holding," because under the appellants' interpretation "a showing of discriminatory but nonretrogressive effect *would* have been a constitutional violation and *would*, despite the holding of *Beer*, have sufficed to deny preclearance." *Id.* Contrary to Justice Scalia's characterization, the appellants actually argued that the "unless" clause in *Beer* referred to discriminatory but nonretrogressive *purpose*, not *dilutive effect*.)

165 426 U.S. 229 (1976).

166 *Id.* *Davis* was decided less than three months later, however, at the end of the term.

167 *Id.*

In short, Justice Scalia contended that the *Beer* majority had understood the constitutional standard for evaluating vote dilution to be the standard set forth in *White v. Regester,*[168] which he characterized as a simple effects test not requiring proof of discriminatory intent.[169] That interpretation seems to us to contradict the Court's view of this issue three years earlier in *Bossier I.*[170] As Justice O'Connor put it in 1997, even if one assumes that the standard for proving a constitutional violation at the time *Beer* was decided was a simple dilutive effect test, "it is no longer valid today because the applicable statutory and constitutional standards have changed."[171]

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168 412 U.S. 755 (1973).

169 *Bossier II*, 528 U.S. at 337. The Court could hardly have intended its reference to a constitutional violation to mean that a voting change that was dilutive in effect under *White v. Regester*-but not retrogressive--would be objectionable under Section 5, because in announcing the retrogression test, the *Beer* majority made clear that the dilutive effect standard was inapplicable in the Section 5 context.

170 *Bossier I*, 520 U.S at 481 (rejecting argument in Brief for Federal Appellant at 36, *Bossier I* (Nos. 98-405 and 98-406), that the constitutional standard at the time Beer was decided was the effect standard set forth in *White v. Regester*).

171 *Id.* at 481.

> Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose.[172]

Under this view, even if the "unless" clause in *Beer* did *not* refer to discriminatory purpose in 1976, it had to be construed as requiring evidence of discriminatory intent by 1980, when the Supreme Court decided *City of Mobile v. Bolden*.[173]

3. Misinterpreting *City of Richmond*

Justice Scalia conceded that the Supreme Court in the *City of Richmond* case "did give the purpose prong of § 5 a broader meaning than the effect prong,"[174] but dismissed the significance of this fact on the grounds that annexations are different from other voting changes.[175] Effect was defined in such a way in the annexation context, he argued, that the reduction of black voting strength in the city from 52 percent to 42 percent was not to be interpreted as violating Section 5: "[t]o hold otherwise would be either to forbid all such annexations" or to permanently *over-represent* African Americans in the enlarged city.[176] "We

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172 *Id.* at 481-82 (citing *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)).

173 446 U.S. 55 (1980).

174 *Bossier II*, 528 U.S. at 330.

175 *Id.*

176 *Id.*, quoting *City of Richmond v. United States*, 422 U.S. 358, 371 (1975). Nowhere does Justice Scalia mention that preclearance of this reduction in black voting strength was *contingent* on adoption of an election plan in the enlarged city

refused, however, to impose a similar limitation on § 5's purpose prong," he added.

> Preclearance could be denied when the jurisdiction was acting with the purpose of effecting a percentage reduction in the black population, even though it could not be denied when the jurisdiction's action merely had that effect.[177]

Here Justice Scalia characterized the purpose at issue in *City of Richmond* as *retrogressive intent.*[178] In factual terms Richmond's purpose could be described - accurately - as seeking to reduce the black voting age population in the city under the existing at-large system, but the Court did not characterize the purpose issue under Section 5 as retrogressive intent when deciding the case in 1975.[179] It was another dozen years before the concept of retrogressive intent was first articulated by the Supreme Court--in a dissenting opinion that was soundly rejected by a six

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that fairly reflected black voting strength within the new city borders. 422 U.S. at 371-72. We view this contingency as a critical aspect of the Court's reasoning in annexation cases.

177 *Id.* (citing *City of Richmond*, 422 U.S. at 378-79).

178 Id. at 331 ("The approved *effect* of the redistricting [sic!] in *Richmond*, and the hypothetically disapproved *purpose, were both retrogressive.* We found it necessary to make an exception to normal retrogressive-*effect* principles, but not to normal retrogressive-*purpose* principles, in order to permit routine annexation.")

179 Even the concept of retrogressive effect did not exist until a year later when *Beer* was decided. Recall Justice Scalia's observation in another context that one cannot assume that the Supreme Court in *City of Richmond* was "anticipating (without argument) that later holding" in *Beer*. See *Bossier II*`, 528 U.S. at 337

to three vote, including that of Justice Scalia himself --in *City of Pleasant Grove*.[180]

Instead, the majority in *City of Richmond* quite explicitly characterized the Section 5 purpose standard as a constitutional purpose standard, and the Court emphasized that this standard extended *beyond annexations* to include other voting changes:

> An official action, whether an annexation *or otherwise*, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute.[181]

In light of the Court's explicit statement that its holding was not limited to annexations, we cannot agree with Justice Scalia's dismissal of the *Richmond* Court's characterization of the Section 5 purpose standard as reflecting "nothing more than an *ex necessitate* limitation upon the effect prong in the particular context of annexation."[182]

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180 479 U.S. 462 (1987). In his dissenting opinion in *Pleasant Grove*, Justice Powell contended that for a jurisdiction to have a discriminatory purpose under Section 5 "it must intend its action to have a retrogressive effect on the voting rights of blacks." *Id.* at 474. This view had the support of only two other justices, however; the majority, including Justice Scalia, denied preclearance under the purpose prong of Section 5.

181 422 U.S. 358, 378-79 (1975) (emphasis added). The Court cited *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), as sufficient justification for the authority of Congress to impose such a purpose prong under Section 5.

182 *Bossier II*, 528 U.S. at 330-31.

4. Misconstruing Vote Denial

Even more problematic is the handling of vote denial in *Bossier II*. After dismissing the Court's long-standing view that the "unless" clause in *Beer* referred to discriminatory purpose,[183] Justice Scalia offered a novel explanation of its meaning:

> A much more plausible explanation of the statement is that it referred to a constitutional violation *other than* vote dilution - and, more specifically, a violation consisting of a "denial" of the right to vote rather than an "abridgement."[184]

It is difficult to see how a clause that specifically deals with "an ameliorative new legislative apportionment"[185] could possibly be viewed as referring to vote denial, which was not even an issue in the litigation, rather than vote dilution, which was the case's central focus.

The retrogressive effect standard has consistently been understood, since its creation in *Beer*, to apply to vote denial as well as abridgement.[186] For this reason it would be logical to assume that--if the purpose prong of Section 5 is restricted to retrogressive intent when assessing changes with a dilutive

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183 See *supra* notes 41-42.

184 *Id.* at 337-38.

185 425 U.S. 130, 141 (1976) ("We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 *unless* the new apportionment itself so discriminates on the basis of race or color *as to violate the Constitution*.").

186 *See, e.g.*, Motomura, *supra* note 17, at 204-05.

potential, as the Court said in *Bossier II*--then it would have the same definition when assessing changes with a potential for vote denial.[187] Justice Scalia conceded that "in the context of denial claims, no less than in the context of abridgement claims, the antibacksliding rationale for § 5 (and its effect of avoiding preservation of an even worse status quo) suggests that retrogression should again be the criterion."[188] He asserted nevertheless that "arguably in that context the word 'deny' (unlike the word 'abridge') does not import a comparison with the status quo,"[189] as in the concept of retrogression under Section 5. As a result, he observes, implausibly we think: "our holding today does not extend to violations consisting of an outright 'denial' of an individual's right to vote, as opposed to an 'abridgement' as in dilution cases." [190] This implies, although the Court did not expressly hold, that purpose means one thing under Section 5 when reviewing ballot access changes and quite another when reviewing changes in election methods or redistricting plans.[191]

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187 *Bossier II*, 528 U.S. at 338.

188 *Id.*

189 *Id.*

190 *Id.* at 338 n.6.

191 Of course, such a reading would be at odds with Justice Scalia's goal of promoting textual clarity by assigning the same meaning to the words "purpose" and "effect" in Section 5.

5. Minimizing the Purpose Requirement

The boldest stroke in Justice Scalia's interpretation of the disputed wording in *Beer* is his dismissal of its significance, despite its quarter century of application, on the ground that it is dictum, and thus not binding precedent.[192]

> In any event, it is entirely clear that the statement in *Beer* was pure dictum. The Government had made no contention that the proposed reapportionment at issue was unconstitutional. And though we have quoted the dictum in subsequent cases, we have never actually applied it to deny preclearance.[193]

Appellants in *Bossier II* had argued that defining the Section 5 purpose standard as retrogressive intent would restrict its application to rare instances in which covered jurisdictions adopted a change with the intention of making minority voters

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192 In fact, Justice Scalia has often explained away language from prior decisions that he disagrees with by labeling it as dictum. *See, e.g.*, Sattazahn v. Pennsylvania, 537 U.S. 101, 113-14 (2002) (The statement [in *Scott v. United States*, 437 U.S. 82 (1978)] upon which the dissent relies . . . was nothing more than dictum."); Mickens v. Taylor, 535 U.S. 162, 172 n.3 (2002) ("To the extent the '*mandates* a reversal' statement [in *Wood v. Georgia*, 450 U.S. 261 (1981)] goes beyond the assertion of mere jurisdiction to reverse, it is dictum."); Kyllo v. United States, 533 U.S. 27, 38 n.5 (2001) (describing a footnote in *California v. Ciraolo*, 476 U.S. 207 (1996), as "second-hand dictum").

193 *Bossier II*, 528 U.S. at 338 (citations omitted). We find this claim difficult to square with the application of the purpose standard after *Beer* by the Court itself (*supra* note 43), and by the lower courts. For example, in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983), the Supreme Court summarily affirmed a lower court judgment that relied entirely on the *Beer* "dictum" to find a discriminatory (though nonretrogressive) purpose in the adoption of a Georgia congressional redistricting plan.

worse off than under the status quo, but were unsuccessful in accomplishing that goal.[194]

> Nothing in the text, legislative history, or decisions of this Court construing Section 5 suggests that the purpose prong has such a trivial reach, limited to the case of the incompetent retrogressor.[195]

Justice Scalia admitted that such instances of "malevolent incompetence" would be rare, but "it [the "incompetent retrogressor" exception] is enough to justify the separate existence of the purpose prong in the statute."[196]

Justice Scalia readily admitted that, as appellants had contended, "our reading of § 5 would require the District Court or Attorney General to preclear proposed voting changes with a discriminatory effect or purpose, or even with both."[197]

> That strikes appellants as an inconceivable prospect only because they refuse to accept the limited meaning that we have said preclearance has in the vote-dilution context. It does *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore . . . must be attacked through the normal means of a § 2 action.[198]

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194 Reply Brief for the Federal Appellant at 9, *Bossier I* (Nos. 98-405 and 98-406);.

195 *Id.*

196 *Bossier II*, 528 U.S. at 331-32. Justice Scalia also asserted that there would be additional instances in which the retrogressive intent standard would present a harder threshold for jurisdictions to meet than the retrogressive effect standard - a view we find improbable.

197 *Id.* at 335.

198 *Id.* "As we have repeatedly noted," writes Justice Scalia, "in vote-dilution cases § 5 prevents nothing but

To give the purpose prong the expansive reading advocated by the United States, warned Justice Scalia, would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts,"[199] and could well raise "concerns about § 5's constitutionality."[200]

We have always understood the "federalism costs" of Section 5 to be the requirement that *all* voting changes must secure federal approval before being enforced, together with the fact that in a preclearance review the burden of proof shifts to the submitting jurisdiction. The Supreme Court determined in 1966 that these federalism costs were justified by the substantial record of racial discrimination placed before the Congress when it adopted the Voting Rights Act.[201] We doubt that defining the statutory meaning of purpose as identical to its meaning under the Fourteenth or Fifteenth Amendments would increase the federalism costs of Section 5 beyond the level approved by the Supreme Court four decades ago, or lead a fair-minded Court to find Section 5 unconstitutional.[202]

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backsliding, and preclearance under § 5 affirms nothing but the absence of backsliding." *Id.*

199 *Id.* at 336 (quoting *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999)).

200 *Id.* (citing *Miller v. Johnson*, 515 U.S. 900, 926-27 (1995)).

201 *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

202 Of course, the record developed by the Congress when considering reauthorization or revision of Section 5 will

IV. In the Wake of *Bossier II*

A. The Pattern of Objections

The impact of the Supreme Court's decision in *Bossier II* was dramatic, as measured by the number of objections interposed by the Department in its wake. Since the Court's decision, January 24, 2000, the Department interposed only 41 objections, as compared with 250 objections during a comparable period a decade earlier.[203] Moreover, virtually all of these objections were based on a finding of retrogressive effect; only two of the 41 objections were based entirely on the elusive concept of retrogressive intent.

One of the two objections based on retrogressive intent involved an annexation in the town of North, South Carolina, that

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necessarily be a much different record that in 1965. Whether the record of more recent voting changes continues to justify the preclearance requirement will be an issue in likely court challenges after 2007. See, e.g., Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy? 81 Denver U.L.Rev. 225 (2003).*

203 The comparable period would be from Jan. 26, 1990 to June 25, 1994. We are not arguing that there would likely have been approximately 250 objections after January, 2000, had *Bossier II* not eliminated the long-standing Section 5 purpose standard. Doubtless the number of potentially objectionable changes would have been somewhat lower than in the 1990s due to changed political circumstances. For example, where the Democratic Party controlled the legislature the increased role of minority officeholders in the decision-making process in covered jurisdictions, due to earlier successes in enforcing the Voting Rights Act, might have occasioned fewer objectionable changes. On the other hand, black elected officials would likely have had little influence in Republican-controlled legislatures. That said, the gap between 40 and 250 is substantial, and likely cannot be explained by these other changes alone.

would have added only two white people to the town's voting age population. There was evidence, however, that "a large number of black persons" living just outside the town's borders had unsuccessfully sought annexation.[204] Granting the requested annexation would have swung the town from a white to a black population majority. Town officials had routinely assisted whites in complying with annexation requirements but made no effort to disseminate information about annexation procedures to nearby black applicants. "The test for determining whether or not a jurisdiction made racially selective annexations," wrote the Department, "is whether the annexation policies and standards applied to white areas are different than those applied to minority areas."[205]

The other objection based only on retrogressive intent involved a redistricting plan for Cumberland County, Virginia. There was a small reduction in the black percentage of the voting age population in the county's one black-majority district, but the change was only from 55.7 to 55.2 percent, leaving the district still arguably viable for minority-preferred candidates. However, the county apparently went to great lengths to reduce the black proportion in the district because, as the Department put it, "given the demographics in the area, it was virtually

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204 U.S. Dep't of Justice, Objection Letter to City of North, Orangeburg County, South Carolina (Sept. 16, 2003).

205 *Id.* The Department relied on both *Bossier II*, 528 U.S. at 339-41, and *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), in interposing the objection, and noted that town officials had frequently failed to supply requested information.

impossible to devise an illustrative plan which did not increase the district's black population percentage."[206] The areas moved out of the old district were, moreover, those black neighborhoods "from which the black-preferred candidate in District 3 drew substantial support in the 1995 and 1999 elections," leading the Department to conclude that the plan reflected a retrogressive intent.[207]

One objection was based on the concept of future retrogression. The city of Charleston, South Carolina, reduced the number of black-majority districts from six to five (out of 12 in the benchmark plan), but the Department recognized that as a result of demographic changes in the city this was necessary to meet one-person, one-vote requirements, and was thus preclearable. One of the city's black-majority districts, however, had been combined with a new, up-scale residential development on Daniel Island, part of a neighboring county annexed to the city some years earlier. The city conceded that the development "will have mostly white residents in the future," so that in a few years the district would no longer afford African-American voters an opportunity to elect candidates of their choice.[208]

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206 U.S. Dep't of Justice, Objection Letter to Cumberland County, Virginia (July 9, 2002).

207 *Id.*

208 U.S. Dep't of Justice, Objection Letter to City of Charleston, Charleston County, South Carolina (Oct. 12, 2001). Once again, the Department relied on *Bossier II* and *Pleasant Grove* in its decision. *Id.*

Most objections involved straightforward cases of retrogression. In roughly a third of the 41 objections in Table 4 the Department also concluded, following an *Arlington Heights* analysis, that the submitting jurisdiction intended to make matters worse for minority voters. Of course, in those instances the change would not have been legally enforceable even without the purpose finding.

B. Erosion of the Retrogression Standard: Georgia v. Ashcroft

On June 26, 2003, the Supreme Court announced yet another significant change in the standard for preclearing voting changes in the redistricting case *Georgia v. Ashcroft*.[209] Before this decision, written by Justice O'Connor for a five-person majority, analysis of redistricting plans under the retrogressive effect standard focused on a change's impact on the opportunity of minority voters to elect their preferred candidates.[210] In the *Georgia* case, however, the Court parted company with that precedent, emphasizing that "the power to influence the political

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209 539 U.S. 461 (2003). Professor Pamela Karlan writes that the decision presents "a profound transformation in what 'effective exercise of the electoral franchise' means." Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 Election L.J. 21, 30 (2004). We largely agree with Professor Karlan's incisive analysis of the decision's ambiguities, but are less confident about predicting its transformative impact.

210 This focus stemmed from the command in *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969), to protect minority voters from changes with the potential to "nullify their ability to elect the candidate of their choice."

process is not limited to winning elections,"[211] and that "a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice."[212] In this new scheme of things, states are now permitted to choose varying combinations of: 1) the traditional "safe" majority-minority districts; 2) what Justice O'Connor called "coalitional" districts; or 3) somewhat nebulously defined "influence" districts.[213]

As in the past, the first option, maintaining the same proportion of safe majority-minority districts in which "it is highly likely that minority voters will be able to elect the candidate of their choice" would entitle a jurisdiction to preclearance.[214] Under the second option, a state could now "choose to create a greater number of districts in which it is likely--although perhaps not as likely as under the benchmark plan--that minority voters will be able to elect candidates of their choice."[215] In such coalitional districts minority voters

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211 *Georgia*, 539 U.S. at 480 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 99 (1986) (O'Connor, J., concurring)).

212 *Id.* at 480.

213 *Id.*

214 *Id.*

215 *Id.* Here Justice O'Connor cited a law review article by Richard H. Pildes, who referred to this sort of district as "coalitional." Richard H. Pildes, *Is Voting-Rights Law Now At War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1517, 1522 (2002) (distinguishing between "safe" districts, in which "a majority of the voting-age population is made up of minority voters," and coalitional districts in which

combine to form a functional majority with "white voters who are willing to form interracial political coalitions in support of minority candidates."[216] One recent court designated this sort of district a "crossover" district.[217]

Coalitional or crossover districts, like the traditional majority-minority districts, permit minority voters to elect candidates of their choice. By spreading minority voters across a larger number of districts, coalition districts offer the possibility of greater substantive representation--the election of a larger number of representatives who are responsive to the views of minority voters--but by increasing the need for

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minority voters combine to form a functional majority with "white voters who are willing to form interracial political coalitions in support of minority candidates").

216 *Id.* For more than a decade some voting rights experts have treated such coalitional districts as a viable alternative to majority-minority districts where the empirical evidence demonstrates a realistic opportunity for the election of candidates preferred by minority voters. *See, e.g.*, Allan J. Lichtman & J. Gerald Hebert, " A General Theory of Vote Dilution," 6 La Raza L. J., 1, 4, 10-18 (1993) ("The test is not achievement of an arbitrary level of minority population, but the realistic potential of minority voters to elect candidates of their choice."); *see also id.* at 14 (referring to "functional-majority" districts where "coalition voting provides minorities a realistic potential to elect candidates of their choice, despite the lack of a numerical population majority"); and J. Morgan Kousser, "Beyond *Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law," 27 U.S.F. L. Rev. 551, 563-69 (1993).

217 Meza v. Galvin, 322 F. Supp. 2d 52, 63 (D. Mass. 2004) (defining a crossover district as one "in which minority groups constitute under 50% of the relevant population in the proposed district but with the help of non-minority crossover votes have the ability to elect preferred officials").

crossover votes that approach also, Justice O'Connor recognized, carries an increased "risk that the minority group's preferred candidate might lose."[218] Despite that risk, all nine justices agreed that coalition districts provided an acceptable alternative to safe districts, where justified by the observed level of crossover voting.[219]

The third choice, the use of "influence" districts, presents minority voters only with the opportunity to play some indeterminate role in the election. Justice O'Connor's characterization of influence districts was extremely vague: "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."[220] The Seventh Circuit Court of Appeals put it somewhat more clearly: influence districts are those "in which a minority group has enough political heft to exert significant influence on the choice of the candidate though not enough to determine that choice."[221] It is not clear, on the other hand, how coalition and influence districts should be "weighted"--in comparison either to each other or to safe districts--when

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218 *Georgia*, 539 U.S. at 481.

219 *Id.* at 480-81, 492.

220 *Id.* at 482; *see also* Rodriguez v. Pataki, 308 F. Supp. 2d 346, 375-76 (S.D.N.Y.) (distinguishing between "coalition or "crossover" districts and influence districts), *aff'd mem.*, 73 U.S.L.W. 3315 (2004); Hall v. Virginia, 276 F. Supp. 2d 528, 533-34 (E.D. Va. 2003) (same), *aff'd*, 385 F.3d 421 (4th Cir. 2004).

221 Barnett v. City of Chicago, 141 F.3d 699, 703 (7th Cir. 1998) (reserving question of influence districts).

measuring retrogression. "Being part of a winning coalition in which a sufficient number of white voters support a candidate sponsored by the black community may be quite different from having some less direct effect on election outcomes."[222]

Unlike a coalitional district, neither courts nor political scientists have developed clear measures of what constitutes an influence district.[223] Professor Pamela Karlan quite properly emphasizes that "the concentration of black voters necessary to create safe, coalitional, or influence districts will depend on the degree of racial bloc voting."[224] Only where white crossover voting is sufficient to provide minority voters opportunity to elect candidates of choice, for example, are coalitional districts feasible. For this reason, "the validity of the Court's entire analysis depends on the relative absence of racial bloc voting within a covered jurisdiction."[225]

In the past, the Supreme Court had left open the question of whether the right of minority voters to coalition or crossover districts--but *not* mere influence districts--is protected as a

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222 Karlan, *supra* note 209, at 32 ("The Court seemed to treat coalitional and influence districts as fungible . . . but they are decidedly not the same.")

223 Pildes, supra note 215, at 1539 ("The concept of influence is nebulous and difficult to quantify.")

224 Karlan, *supra* note 209 at 34.

225 *Id.* Notably, Justice O'Connor's opinion never discussed the levels of polarized voting in particular Georgia senate districts; thus, "it was impossible to tell whether any of those districts was in fact a coalitional or influence district." *Id.* at 35.

vote-dilution claim under Section 2 of the Voting Rights Act.[226] While leaving the question open, however, the Court noted in *Voinovich v. Quilter*[227] that in order to provide a right to such districts "the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated."[228] The lower courts have uniformly rejected both coalition and influence district claims.[229] Thus, the majority in *Georgia v.*

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226 Voinovich v. Quilter, 507 U.S. 146, 154 (1993) (using the term "influence districts" for "districts in which black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice" - in other words, "coalition" or "crossover" districts). Also leaving open this possibility were *Thornburg v. Gingles*, 478 U.S. 30, 46-47 nn. 11-12 (1986); *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993); and *Johnson v. De Grandy*, 512 U.S. 997, 1009 (1994).

227 507 U.S. at 146.

228 *Id.* at 150, 158.

229 Numerous appellate courts have rejected influence district claims. *See, e.g.*, Cousins v. Sundquist, 145 F.3d 818, 828-29 (6th Cir. 1998) ("[W]e would reverse any decision to allow such a claim to proceed since we do not feel that an 'influence' claim is permitted under the Voting Rights Act."); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988) ("[W]e cannot consider claims that . . . districts merely impair plaintiffs' ability to influence elections."). Both coalition and influence districts have also consistently been rejected as options for satisfying the first prong of the *Gingles* test. *See, e.g.*, Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848, 851-53 (5th Cir. 1999); Negron v. City of Miami Beach, 113 F.3d 1563, 1569 (11th Cir. 1997); Romero v. City of Pomona, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989); *Rodriguez*, 308 F. Supp. at 375-76, 378, 383; *Hall*, 276 F. Supp. 2d at 534-36. *But see* Metts v. Murphy, 363 F.3d 8, 11-12 (1st Cir. 2004) (en banc) (vacating a lower court decision that dismissed a coalitional district claim in a Section 2 lawsuit and remanding for further proceedings.

Ashcroft created an option for covered jurisdictions seeking preclearance of redistricting plans which the federal courts, in practice, routinely deny minority plaintiffs in Section 2 litigation.

As Justice O'Connor put it, borrowing the language of political scientists, the Court in *Georgia v. Ashcroft* sought to expand the choice of jurisdictions seeking preclearance of redistricting plans to include not only the traditional "descriptive representation"--an equal opportunity to elect the preferred candidates of minority voters--but also "substantive representation"--an equal opportunity to elect "representatives sympathetic to the interests of minority voters."[230] This distinction stems not from legal precedents but from a substantial social science literature cited by Justice O'Connor.[231]

The studies cited by the Court focus on the question of substantive representation of minority interests in Congress, using roll call votes on numerous bills, arrayed along what amounts to a liberalism-conservatism scale, and treating the position of minority voters on issues measured in national

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230 *Georgia*, 539 U.S. at 483 ("Indeed, the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable. . . . The State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters.").

231 *Id.* at 482-83.

opinion polls as a proxy for the substantive interests of minority voters. The principal findings of these studies are that the substantive representation in Congress of both African American and (non-Cuban) Hispanic voters is best advanced by the election of Democrats--whether white or black, Anglo or Latino--and that something like a 40 percent minority voting-age population is a necessary threshold for electing such candidates.[232]

Without specifically mentioning the analysis of roll call votes, Justice O'Connor emphasized that "the very purpose of voting is to delegate to chosen representatives the power to make and pass laws," and that preclearance reviews should "examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts."[233] Under this approach, such an investigation would

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232 Among the studies cited by Justice O'Connor, those providing the most probative evidence are Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress*," 90 Amer. Pol. Sci. Rev. 794 (1996), and David Lublin, *Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress"*, 93 Amer. Pol. Sci. Rev. 183 (1999). *But see* Carol M. Swain, Black Faces, Black Interests: The Representation of African Americans in Congress 56-58, 211-16 (1993). The most thorough and careful investigation of the substantive representation issue is David Lublin, *The Paradox of Representation: Racial Gerrymandering and Minority Interests in Congress* (1997). If this sort of evidence is what the *Georgia* decision anticipated, then preclearance reviews of redistricting plans will for the first time need to examine legislative roll call votes in order to determine which legislators were generally responsive to the interests of minority voters.

233 *Georgia*, 539 U.S. at 483.

in most cases begin with the issue of which party controlled the legislative body, because from that determination flows the choice of committee chairmanships, control over the legislative agenda, and ability to secure passage of legislation.[234] "Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under § 5."[235] Thus, the courts and the Department will now have to examine a host of governance issues arising within the legislative process and having little directly to do with the electoral process.[236]

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234 *Id.* at 483-84 ("A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to shake hands on a deal.") In Georgia, as in most states, the party which provided the most leadership opportunities for representatives elected by minority voters, was the Democratic Party. Karlan, *supra* note 210, at 26, 33. Thus under this new view of retrogression, evidence that a plan maintained or enhanced the chances that Democrats would control the state senate would presumably enhance the likelihood of preclearance.

235 *Georgia*, 539 U.S. at 484.

236 This aspect of the Court's analysis, as Professor Karlan points out, [*supra* note 209, at 34], "stands in some tension with its decision in *Presley v. Etowah County Commission*[, 502 U.S. 491 (1992)]." In that case, the Court held that "[c]hanges which affect only the distribution of power among officials are not subject to section 5 because such changes have no direct relation to, or impact on, voting." 502 U.S. at 506. After Etowah County had agreed to shift from at-large to district elections, the county commission stripped the commissioner elected from the new black-majority district of traditional powers of his office. Presley v. Etowah County Comm'n, 869 F. Supp. 1555, 1573 (M.D. Ala. 1994). As a technical matter, *Presley* dealt only with defining the scope of voting changes covered by Section 5 - not with defining the evidence that is relevant in assessing retrogression, as in *Georgia v. Ashcroft*. Yet if changes that

Whether the representatives elected from majority-minority districts in the benchmark plan supported or opposed the new plan was to Justice O'Connor "significant, though not dispositive," not just in regard to the purpose of the plan but also in regard to assessing retrogressive effect.[237] The majority opinion treated these officeholders as knowledgeable observers of the political process whose view of "whether the proposed change will decrease minority voters' effective exercise of the electoral franchise" is entitled to deference.[238] Under this new standard, in short, minority legislators play a key role. Whether the party to which they belong is able to control a legislative majority, whether their party is generally responsive to the positions they take on particular roll calls, and whether or not they favor the proposed plan have become issues on which a preclearance decision can turn.[239]

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decrease the power of minority legislators within a governing body need not even be submitted for preclearance, we agree with Professor Karlan that it "seems perverse to treat maintaining or increasing such power as evidence of nonretrogression." Karlan, *supra* note 209, at 34.

237 *Georgia*, 539 U.S. at 484.

238 *Id.* Of course, sometimes those minority legislators are overconfident. Karlan, *supra* note 209, at 29 ("The senate majority leader, Charles Walker, who had expressed confidence that the reduction in black population and voting strength in his district would not affect minority voting strength - his district went from being roughly 63 percent in voting age population with a black voter-registration majority to being just slightly over 50 percent in voting age population and minority black in voter registration - was defeated by a white Republican in a racially polarized election.")

239 Professor Karlan points out that "the Court's analysis essentially equates the interests of minority voters with the

In short, the majority decision in *Georgia v. Ashcroft* makes the standard by which retrogression is to be determined much more ambiguous than before, especially in its license to utilize influence districts. By giving covered jurisdictions two different approaches from which to choose, Justice O'Connor's new standard may arguably have made it easier to secure preclearance for redistricting plans. Yet this should not be viewed as a foregone conclusion. When the trial court began to consider the case on remand, it proved necessary to reopen discovery on a host of evidentiary issues.[240]

We cannot agree with the assertion of one recent commentator that *Georgia v. Ashcroft* was "the most important voting-rights decision in a generation."[241] The full implications of the

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interests of incumbent minority politicians, completely ignoring the presence of any conflict in interest between them," such as the propensity of incumbent legislators to "redraw district lines to render themselves less vulnerable to robust political competition, thereby elevating their own interest in reelection over voters' interests." Karlan, *supra* note 209, at 33.

240 *See, e.g.*, *Georgia v. Ashcroft*, C.A. No. 1:01 CV 02111 (D.D.C. Jan. 7, 2004) (discovery order) (setting forth requirements for designation of experts, production of data required by experts, and deadlines for expert reports). Trial was initially scheduled for May, 2004, but the case became moot when a three-judge court in Georgia found that a similar plan (the plan corrected to secure preclearance and used in the 2002 elections) violated the one-person, one-vote principle. Larios v. Cox, 300 F. Supp. 2d 1320, 1338 (N.D. Ga. 2004), *aff'd*, 124 S. Ct. 2806 (2004).

241 Richard H. Pildes, *Less Power, More Influence*, N.Y. Times, Aug. 2, 2003, at A23 (cited in *The Supreme Court, 2002 Term--Leading Cases*, 117 Harv. L. Rev. 469, 470 (2003)). We quite agree, however, with Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 Mich.

opinion will likely become clear only when the Department and the trial courts wrestle with the new issues it poses and determine what sorts of evidence are necessary to meet the new standard.[242] This is not likely to happen in the near future, because the Court's decision came near the end of the redistricting cycle, so that few local and no statewide redistricting plans are left unprecleared. Furthermore the decision likely affects only the review of redistricting plans--not all voting changes. As our analysis has shown, the *Bossier II* decision had a far more profound and demonstrable impact on the enforcement of Section 5.

Conclusion

Because *Bossier II* was the most transformative decision regarding Section 5 of the Voting Rights Act since the 1976 opinion in *Beer v. United States*, the story we have told in the preceding pages focuses on that decision, the changes it wrought in Section 5 case law, and its impact on enforcement of the preclearance requirement by the Department of Justice. We began by describing the evolution of the standards for preclearance

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L. Rev. 2341, 2381 (June 2003)(commenting that in the Georgia case "[t]he Court accordingly relies on a far more malleable conception of retrogression than it espoused in the Bossier Parish cases").

242 In a very shrewd Note, Meghann E. Donahue estimates how, under the Department's guidelines for administering Section 5, the Court's command to examine the "totality of the circumstances" is likely to be implemented. Meghann E. Donahue, Note, *The Reports of My Death Are Greatly Exaggerated: Administering Section 5 of the Voting Rights Act*, 104 Colum. L. Rev. 1651, 1671-85 (2004). We find her assessment plausible.

review set forth in each of the significant Section 5 declaratory judgment cases. We also illustrated in some detail the legal basis on which the Department of Justice objected to voting changes of all types, and provided a systematic quantitative analysis of how the legal bases for objections evolved over time.

Our principal finding was that by the 1990s, the purpose prong of Section 5 had become the dominant legal basis for objections.[243] Almost half (45 percent) of all objections were based on purpose alone. If we include objections based both on purpose and retrogressive effect, and those based both on purpose and Section 2, the Department's finding of discriminatory purpose was present in 78 percent of all decisions to interpose objections in the decade preceding *Bossier II*. Looking only at redistricting plans, the pattern is even more stark. Purpose alone accounted for 58 percent of all objections in the 1990s; another 17 percent were based both on purpose and retrogressive effect; and another 14 percent were based on both purpose and Section 2. That means that a purpose finding was present in an astonishing 89 percent of all redistricting objections in that decade.[244]

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243 *See infra* Table 2.

244 Retrogressive effect was by far the most numerous basis for objections in the 1970s (72 percent) and still numerous in the 1980s (45 percent), but had shrunk to only 20 percent of all objections by the 1990s. Objections based only on the "clear violation of Section 2" rule were trivial in number throughout.

In short, the jurisprudential change likely to have the greatest impact on the incidence of objections by the late 1990s was to eliminate the purpose prong of Section 5. That is, in effect, what the majority opinion in *Bossier II* accomplished. By overturning the long-standing view that the purpose standard under Section 5 was identical to the purpose test in a Fourteenth Amendment challenge, in favor of the long-dismissed view that under Section 5 the purpose test was limited to whether the jurisdiction had a retrogressive intent, the majority in *Bossier II* guaranteed that the number of objections would be very substantially reduced.

When Congress turns its attention to deciding the future of Section 5, which is set to expire in 2007 if not extended, there will doubtless be calls for amendments to narrow (or increase) its scope, to narrow (or increase) its geographical coverage, and the like. Whatever changes Congress makes should, of course, be designed in light of the evidence as to the current threats facing minority voters. For the cause of minority voting rights, we believe there can be no more important change than to restore the traditional purpose requirement that guided enforcement of the preclearance requirement for the quarter century preceding *Bossier II*. The Court's decision in that case turned in many respects on what Justice Scalia saw as the garbled syntax of Section 5--syntax that had left the Supreme Court untroubled for 35 years. It does not seem too much to ask Congress to revise the provision's language so as to make clear that the purpose

standard under Section 5 is identical to the way in which discriminatory purpose is assessed in Fourteenth Amendment cases.

APPENDIX

TABLE 1: CHANGE TYPES TO WHICH OBJECTIONS WERE INTERPOSED

Change Type	1970s	%	1980s	%	1990s	%	Totals
Annexations	34	7%	47	11%	24	6%	105
At-large	110	22%	57	13%	31	8%	198
Enhancing Devices	182	37%	93	22%	73	18%	348
Districting	86	17%	165	38%	209	52%	460
Ballot Access	77	15%	64	15%	56	14%	197
Other Changes	9	2%	5	1%	9	2%	23
Totals	498	100%	431	100%	402	100%	1331

Note: In this and the following tables, the column headed "1970s" is actually the period 1968-1979, but few objections were interposed until 1970. The number of change types to which objections were interposed is greater than the total number of objections, because numerous objection decisions affected two or more change types.

TABLE 2: LEGAL BASES FOR OBJECTION DECISIONS, BY DECADE

Legal Bases	1970s	%	1980s	%	1990s	%	Totals
Exclusive Categories							
Intent	9	2%	83	25%	151	43%	243
Dilution	34	9%	--		--		34
Retrogression	297	77%	146	44%	73	21%	516
Technical	17	4%	15	5%	1	0%	33
Section 2	--		2	1%	6	2%	8
Minority Languages	2	1%	2	1%	5	1%	9
Combined Categories							
Intent/Retrogression	22	6%	73	22%	67	19%	162
Intent/Dilution	5	1%	--		--		5
Intent/Section 2	--		6	2%	41	12%	47
Other	--		3	1%	5	1%	8
Totals	386	100%	330	100%	349	100%	1065

TABLE 3: LEGAL BASES FOR OBJECTION DECISIONS,REDISTRICTINGS

Legal Bases	1970s	%	1980s	%	1990s	%	Totals
Exclusive Categories							
Intent	7	11%	75	46%	122	58%	204
Dilution	23	27%	--		--		23
Retrogression	37	40%	35	21%	20	10%	92
Technical	10	12%	9	5%	1	0%	20
Section 2	--		1	1%	1	0%	2
Combined Categories							
Intent/Retrogression	5	7%	40	24%	34	16%	79
Intent/Dilution	2	2%	--		--		2
Intent/Section 2	--		4	2%	30	14%	34
Other	2	2%	--		1	0%	3
Totals	86	101%	164	99%	209	98%	459

Note: Totals do not always equal 100 percent, due to rounding.

TABLE 4: LEGAL BASES FOR OBJECTIONS SINCE BOSSIER II

Change Type	Retrogres-sive Intent	%	Retrogres-sive Effect	%	Both	%	Totals
Annexations	1	50%	1	4%	1	8%	3
At-large	0		2	7%	1	8%	3
Enhancing Devices	0		6	21%	0		6
Districting	1	50%	15	54%	10	77%	26
Other	0		4	14%	1	8%	5
Totals	2	100%	28	100%	13	101%	43

Note: Totals do not always equal 100 percent, due to rounding.

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520 U.S. 471, 117 S.Ct. 1491, 137 L.Ed.2d 730, 65 USLW 4308, 97 Cal. Daily Op. Serv. 3519, 97 Daily Journal D.A.R. 6001, 97 CJ C.A.R. 679, 10 Fla. L. Weekly Fed. S 437
(Cite as: 520 U.S. 471, 117 S.Ct. 1491)

Briefs and Other Related Documents

Supreme Court of the United States
Janet RENO, Attorney General, Appellant,
v.
BOSSIER PARISH SCHOOL BOARD et al.
George PRICE, et al., Appellants,
v.
BOSSIER PARISH SCHOOL BOARD et al.
Nos. 95-1455, 95-1508.

Argued Dec. 9, 1996.
Decided May 12, 1997.

Louisiana parish school board sought preclearance under Voting Rights Act for its

proposed redistricting plan. The United States District Court for the District of Columbia, Silberman, Circuit Judge, 907 F.Supp. 434, granted request. Attorney General appealed. The Supreme Court, Justice O'Connor, held that: (1) preclearance under Voting Rights Act may not be denied solely on basis that covered jurisdiction's new voting standard, practice, or procedure violates Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color; (2) evidence that covered jurisdiction's redistricting plan dilutes minorities' voting power may be relevant to inquiry whether covered jurisdiction acted with purpose of denying or abridging right to vote on account or race or color under Voting Rights Act preclearance section; and (3) whether district court considered relevant proffered evidence showing that board's redistricting plan diluted minorities' voting power was unclear.

Vacated and remanded.

Justice Thomas, concurred and filed opinion.

Justice Breyer, concurred in part and in judgment and filed opinion in which Justice Ginsburg joined.

Justice Stevens, dissented in part and concurred in part and filed opinion in which Justice Souter joined.

West Headnotes

[1] **Elections 12(8)**
144k12(8) Most Cited Cases
Preclearance under Voting Rights Act may not be denied solely on basis that covered jurisdiction's new voting standard, practice, or procedure violates Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color. Voting Rights Act of 1965, § § 2(a), 5, 42 U.S.C.A. § § 1973(a), 1973c.

[2] **Elections 12(8)**
144k12(8) Most Cited Cases
To obtain judicial preclearance under Voting Rights Act, covered jurisdiction bears burden of proving that electoral change does not have purpose and will not have effect of denying or abridging right to vote on account of race. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

[3] **Elections 12(8)**
144k12(8) Most Cited Cases
Voting Rights Act preclearance section focuses on freezing election procedures, and thus, plan has impermissible "effect" under section only if it would lead to retrogression in position of racial minorities with respect to their effective exercise of electoral franchise. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

[4] **Elections 12(8)**
144k12(8) Most Cited Cases
Under Voting Rights Act preclearance section, proposed voting practice is measured against existing voting practice to determine whether retrogression would result from proposed change. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

[5] **Elections 12(8)**
144k12(8) Most Cited Cases
Under Voting Rights Act preclearance section, covered jurisdiction's existing voting plan is benchmark against which "effect" of voting changes is measured. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

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[6] **Elections 12(3)**
144k12(3) Most Cited Cases
Plaintiff claiming vote dilution under Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color must initially establish the following: racial group is sufficiently large and geographically compact to constitute majority in single member district; group is politically cohesive; and white majority votes sufficiently as bloc to enable it usually to defeat minority's preferred candidate. Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

[7] **Elections 12(3)**
144k12(3) Most Cited Cases
Plaintiff claiming vote dilution under Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color must demonstrate that totality of circumstances supports finding that voting scheme is dilutive. Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

[8] **Elections 12(3)**
144k12(3) Most Cited Cases
Plaintiff claiming vote dilution under Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color must postulate reasonable alternative voting practice to serve as benchmark undiluted voting practice. Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

[9] **Elections 12(3)**
144k12(3) Most Cited Cases
Violation of Voting Rights Act section barring states and their political subdivisions from maintaining voting standard, practice or procedure that results in denial or abridgment of right to vote on account of race or color is not a fortiori violation of Fourteenth or Fifteenth Amendment to Constitution; plaintiff bringing constitutional vote dilution challenge must establish that state or political subdivision acted with discriminatory purpose, which Act section does not require. U.S.C.A. Const.Amends. 14, 15; Voting Rights Act of 1965, § 2(a), 42 U.S.C.A. § 1973(a).

[10] **Elections 12(1)**
144k12(1) Most Cited Cases
Although Supreme Court normally accords Attorney General's construction of Voting Rights Act great deference, Supreme Court only does so if Congress has not expressed its intent with respect to question, and then only if administrative interpretation is reasonable. Voting Rights Act of 1965, § 2 et seq., 42 U.S.C.A. § 1973 et seq.

[11] **Equity 2**
150k2 Most Cited Cases
Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.

[12] **Elections 12(9.1)**
144k12(9.1) Most Cited Cases
Evidence that covered jurisdiction's redistricting plan dilutes minorities' voting power may be relevant to inquiry whether covered jurisdiction acted with purpose of denying or abridging right to vote on account of race or color under Voting Rights Act preclearance section. Voting Rights Act of 1965, § § 2(a),
5, 42 U.S.C.A. § § 1973(a), 1973c.

[13] **Federal Courts 480**
170Bk480 Most Cited Cases
Whether district court considered relevant proffered evidence showing that parish school board's reapportionment plan diluted minorities' voting power in determining whether to grant board preclearance under Voting Rights Act was unclear, requiring remand of that aspect of district court's holding. Voting Rights Act of 1965, § § 2(a), 5, 42 U.S.C.A. § § 1973(a), 1973c.

[14] **Constitutional Law 215**
92k215 Most Cited Cases
Important starting point for assessing discriminatory intent under *Arlington Heights*, which sets forth framework for analyzing whether invidious discriminatory purpose was motivating factor in government body's decision making, is impact of official action, whether it bears more heavily on one race than another; other relevant considerations include historical background of jurisdiction's decision, specific sequence of events leading up to challenged decision, departures from normal procedural sequence, and legislative or administrative history, especially any contemporary statements by members of decision making body.

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****1493** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***471** Appellee Bossier Parish School Board (Board) is subject to the preclearance requirements ****1494** of § 5 of the Voting Rights Act of 1965 (Act) and must therefore obtain the approval of either the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes to a voting "qualification, prerequisite, standard, practice, or procedure." Based on the 1990 census, the Board redrew its 12 single-member districts, adopting the redistricting plan that the Attorney General had recently precleared for use in elections of the parish's primary governing body (the Jury plan). In doing so, the Board rejected a plan proposed by the National Association for the Advancement of Colored People (NAACP), which would have created two majority-black districts. The Attorney General objected to preclearance, finding that the NAACP plan, which had not been available when the Jury plan was originally approved, demonstrated that black residents were sufficiently numerous and geographically compact to constitute a majority in two districts; that, compared with this alternative, the Board's plan unnecessarily limited the opportunity for minority voters to elect their candidates of choice and thereby diluted their voting strength in violation of § 2 of the Act; and that the Attorney General must withhold preclearance where necessary to prevent a clear § 2 violation. The Board then filed this action with the District Court, and appellant Price and others intervened as defendants. A three-judge panel granted the preclearance request, rejecting appellants' contention that a voting change's failure to satisfy § 2 constituted an independent reason to deny preclearance under § 5 and their related argument that a court must still consider evidence of a § 2 violation as evidence of discriminatory purpose under § 5.

Held:

1. Preclearance under § 5 may not be denied solely on the basis that a covered jurisdiction's new voting "standard, practice, or procedure" violates § 2. This Court has consistently understood § 5 and § 2 to combat ***472** different evils and, accordingly, to impose very different duties upon the States. See *Holder v. Hall*, 512 U.S. 874, 883, 114 S.Ct. 2581, 2587, 129 L.Ed.2d 687 (plurality opinion). Section 5 freezes election procedures in a covered jurisdiction until that jurisdiction proves that its proposed changes do not have the purpose, and will not have the effect, of denying or abridging the right to vote on account of race. See *Beer v. United States*, 425 U.S. 130, 140, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629. It is designed to combat only those effects that are retrogressive. Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan, see *Holder, supra*, at 883, 114 S.Ct., at 2587 (plurality opinion), and necessarily implies that the jurisdiction's existing plan is the benchmark against which the "effect" of voting changes is measured. Section 2, on the other hand, applies in *all* jurisdictions and uses as its benchmark for comparison in vote dilution claims a hypothetical, undiluted plan. Making compliance with § 5 contingent upon compliance with § 2, as appellants urge, would, for all intents and purposes, replace the standards for § 5 with those for § 2, thus contradicting more than 20 years of precedent interpreting § 5. See, *e.g.*, *Beer, supra*. Appellants' contentions that their reading of § 5 is supported by the *Beer* decision, by the Attorney General's regulations, and by public policy considerations are rejected. Pp. 1496-1501.

2. Evidence showing that a jurisdiction's redistricting plan dilutes minorities' voting power may be relevant to establish a jurisdiction's "intent to retrogress" under § 5, so there is no need to decide today whether such evidence is relevant to establish other types of discriminatory intent or whether § 5's purpose inquiry ever extends beyond the search for retrogressive intent. Because this Court cannot say with confidence that the District Court considered the evidence proffered to show that the Board's reapportionment plan was dilutive, this aspect of that court's holding must be vacated. Pp. 1501- 1503.

(a) Section 2 evidence may be "relevant" within the meaning of Federal Rule of Evidence 401, for the fact that a plan has a dilutive impact makes it "more probable" that the jurisdiction adopting that plan acted ****1495** with an intent to retrogress than "it would be without the evidence." This does not, of course, mean that evidence of a plan's dilutive impact is dispositive of the § 5 purpose inquiry. Indeed, if it were, § 2 would be effectively incorporated into § 5, a result this Court finds unsatisfactory. In

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conducting their inquiry into a jurisdiction's motivation in enacting voting changes, courts should look for guidance to *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450, which sets forth a framework for examining discriminatory purpose. Pp. 1501-1503.

(b) This Court is unable to determine whether the District Court deemed irrelevant all evidence of the dilutive impact of the redistricting ***473** plan adopted by the Board. While some language in its opinion is consistent with today's holding that the existence of less dilutive options was at least relevant to the purpose inquiry, the District Court also appears to have endorsed the notion that dilutive impact evidence is irrelevant even to an inquiry into retrogressive intent. The District Court will have the opportunity to apply the *Arlington Heights* test on remand as well as to address appellants' additional arguments that it erred in refusing to consider evidence that the Board was in violation of an ongoing injunction to remedy any remaining vestiges of a dual school system. P. 1503.

907 F.Supp. 434, vacated and remanded.

O'CONNOR, J., , delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined in full, and in which GINSBURG and BREYER, JJ., joined except insofar as Part III is inconsistent with the views expressed in the concurrence of BREYER, J., THOMAS, J., filed a concurring opinion, *post,* p. 1503. BREYER, J., iled an opinion concurring in part and concurring in the judgment, in which GINSBURG, J., joined, *post,* p. 1505. STEVENS, J., filed an opinion dissenting in part and concurring in part, in which SOUTER, J., joined, *post,* p. 1507.

Deval L. Patrick, Boston, MA, for appellant in No. 94-1455.

John W. Borkowski, Washington, DC, for appellants in No. 95-1508.

Michael A. Carvin, Washington, DC, for appellees.

***474** Justice O'CONNOR delivered the opinion of the Court.

Today we clarify the relationship between § 2 and § 5 of the Voting Rights Act of 1965, 79 Stat. 437, 439, as amended, 42 U.S.C. § § 1973, 1973c. Specifically, we decide two questions: (i) whether preclearance must be denied under § 5 whenever a covered jurisdiction's new voting "standard, practice, or procedure" violates § 2; and (ii) whether evidence that a new "standard, practice, or procedure" has a dilutive impact is always irrelevant to the inquiry whether the covered jurisdiction acted with "the purpose ... of denying or abridging the right to vote on account of race or color" under § 5. We answer both in the negative.

I

Appellee Bossier Parish School Board (Board) is a jurisdiction subject to the preclearance requirements of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and must therefore obtain the approval of either the United States Attorney General or the United States District Court for the District of Columbia before implementing any changes to a voting "qualification, prerequisite, standard, practice, or procedure." The Board has 12 members who are elected from single-member districts by majority vote to serve 4-year terms. When the 1990 census revealed wide population disparities among its districts, see App. to Juris. Statement 93a (Stipulations of Fact and Law ¶ 82), the Board decided to redraw the districts to equalize the population distribution.

During this process, the Board considered two redistricting plans. It considered, and initially rejected, the redistricting plan that had been recently adopted by the Bossier ****1496** Parish Police Jury, the parish's primary governing body (the Jury plan), to govern its own elections. Just months before, the Attorney General had precleared the Jury plan, which also contained 12 districts. *Id.,* at 88a (Stipulations ¶ 68). None of the 12 districts in the Board's existing plan or in the Jury plan contained a majority of black residents. *Id.,* at ***475** 93a (Stipulations ¶ 82) (under 1990 population statistics in the Board's existing districts, the three districts with highest black concentrations contain 46.63%, 43.79%, and 30.13% black residents, respectively); *id.,* at 85a (Stipulations ¶ 59) (population statistics for the Jury plan, with none of the plan's 12 districts containing a black majority). Because the Board's adoption of the Jury plan would have maintained the status quo regarding the number of black-majority districts, the parties stipulated that the Jury plan was not "retrogressive." *Id.,* at 141a (Stipulations ¶ 252) ("The ... plan is not retrogressive to minority voting strength compared to the existing benchmark plan ..."). Appellant George Price, president of the local

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chapter of the National Association for the Advancement of Colored People (NAACP), presented the Board with a second option--a plan that created two districts each containing not only a majority of black residents, but a majority of voting-age black residents. *Id.*, at 98a (Stipulations ¶ 98). Over vocal opposition from local residents, black and white alike, the Board voted to adopt the Jury plan as its own, reasoning that the Jury plan would almost certainly be precleared again and that the NAACP plan would require the Board to split 46 electoral precincts.

But the Board's hopes for rapid preclearance were dashed when the Attorney General interposed a formal objection to the Board's plan on the basis of "new information" not available when the Justice Department had precleared the plan for the Police Jury--namely, the NAACP's plan, which demonstrated that "black residents are sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts." *Id.*, at 155a-156a (Attorney General's August 30, 1993, objection letter). The objection letter asserted that the Board's plan violated § 2 of the Act, 42 U.S.C. § 1973, because it "unnecessarily limit[ed] the opportunity for minority voters to elect their candidates of choice," App. to Juris. Statement, at 156a, as compared to the new alternative. Relying on 28 CFR § 51.55(b)(2) (1996), which ***476** provides that the Attorney General shall withhold preclearance where "necessary to prevent a clear violation of amended Section 2 [42 U.S.C. § 1973]," the Attorney General concluded that the Board's redistricting plan warranted a denial of preclearance under § 5. App. to Juris. Statement 157a. The Attorney General declined to reconsider the decision. *Ibid.*

The Board then filed this action seeking preclearance under § 5 in the District Court for the District of Columbia. Appellant Price and others intervened as defendants. The three-judge panel granted the Board's request for preclearance, over the dissent of one judge. 907 F.Supp. 434, 437 (1995). The District Court squarely rejected the appellants' contention that a voting change's alleged failure to satisfy § 2 constituted an independent reason to deny preclearance under § 5: "We hold, as has every court that has considered the question, that a political subdivision that does not violate either the 'effect' or the 'purpose' prong of section 5 cannot be denied preclearance because of an alleged section 2 violation." *Id.*, at 440-441. Given this holding, the District Court quite properly expressed no opinion on whether the Jury plan in fact violated § 2, and its refusal to reach out and decide the issue in dicta does not require us, as Justice STEVENS insists, to "assume that the record discloses a 'clear violation' of § 2." See *post*, at 1508 (opinion dissenting in part and concurring in part). That issue has yet to be decided by any court. The District Court did, however, reject appellants' related argument that a court "must still consider evidence of a section 2 violation as evidence of discriminatory purpose under section 5." *Id.*, at 445. We noted probable jurisdiction on June 3, 1996. 517 U.S. 1232, 116 S.Ct. 1874, 135 L.Ed.2d 171.

II

[1] The Voting Rights Act of 1965(Act), 42 U.S.C. § 1973 *et seq.*, was enacted by Congress in 1964 to "attac[k] the blight of ****1497** voting discrimination" across the Nation. S.Rep. No. 97-417, ***477** 2d Sess., p. 4 (1982) U.S.Code Cong. & Admin.News 1982 pp. 177, 180; *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 86 S.Ct. 803, 808, 15 L.Ed.2d 769 (1966). Two of the weapons in the Federal Government's formidable arsenal are § 5 and § 2 of the Act. Although we have consistently understood these sections to combat different evils and, accordingly, to impose very different duties upon the States, see *Holder v. Hall*, 512 U.S. 874, 883, 114 S.Ct. 2581, 2587, 129 L.Ed.2d 687 (1994) (plurality opinion) (noting how the two sections "differ in structure, purpose, and application"), appellants nevertheless ask us to hold that a violation of § 2 is an independent reason to deny preclearance under § 5. Unlike Justice STEVENS, *post*, at 1509-1510, and n. 5 (opinion dissenting in part and concurring in part), we entertain little doubt that the Department of Justice or other litigants would "routinely" attempt to avail themselves of this new reason for denying preclearance, so that recognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2. Because this would contradict our longstanding interpretation of these two sections of the Act, we reject appellants' position.

[2][3] Section 5, 42 U.S.C. § 1973c, was enacted as

> "a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down.... Congress therefore decided, as the

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Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.' " *Beer v. United States,* 425 U.S. 130, 140, 96 S.Ct. 1357, 1363, 47 L.Ed.2d 629 (1976) (quoting H.R.Rep. No. 94-196, pp. 57-58 (1970)).

In light of this limited purpose, § 5 applies only to certain States and their political subdivisions. Such a covered jurisdiction ***478** may not implement any change in a voting "qualification, prerequisite, standard, practice, or procedure" unless it first obtains either administrative preclearance of that change from the Attorney General or judicial preclearance from the District Court for the District of Columbia. 42 U.S.C. § 1973c. To obtain judicial preclearance, the jurisdiction bears the burden of proving that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Ibid.; City of Rome v. United States,* 446 U.S. 156, 183, n. 18, 100 S.Ct. 1548, 1565, n. 18, 64 L.Ed.2d 119 (1980) (covered jurisdiction bears burden of proof). Because § 5 focuses on "freez[ing] election procedures," a plan has an impermissible "effect" under § 5 only if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer, supra,* at 141, 96 S.Ct., at 1364.

[4][5] Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan. See *Holder, supra,* at 883, 114 S.Ct., at 2587 (plurality opinion) ("Under § 5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change"). It also necessarily implies that the jurisdiction's existing plan is the benchmark against which the "effect" of voting changes is measured. In *Beer,* for example, we concluded that the city of New Orleans' reapportionment of its council districts, which created one district with a majority of voting-age blacks where before there had been none, had no discriminatory "effect." 425 U.S., at 141-142, 96 S.Ct., at 1364 ("It is thus apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5"). Likewise, in *City of Lockhart v. United States,* 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983), we found that the city's new charter had no retrogressive "effect" even though it maintained ***479** the city's prior ****1498** practice of electing its council members at-large from numbered posts, and instituted a new practice of electing two of the city's four council members every year (instead of electing all the council members every two years). While each practice could "have a discriminatory effect under some circumstances," *id.,* at 135, 103 S.Ct., at 1004, the fact remained that "[s]ince the new plan did not *increase* the degree of discrimination against [the city's Mexican-American population], it was entitled to § 5 preclearance [because it was not retrogressive]," *id.,* at 134, 103 S.Ct., at 1004 (emphasis added).

[6][7][8] Section 2, on the other hand, was designed as a means of eradicating voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups," S.Rep. No. 97-417, at 28, U.S.Code Cong. & Admin.News 1982 pp. 177, 205. Under this broader mandate, § 2 bars *all* States and their political subdivisions from maintaining any voting "standard, practice, or procedure" that "results in a denial or abridgement of the right ... to vote on account of race or color." 42 U.S.C. § 1973(a). A voting practice is impermissibly dilutive within the meaning of § 2

"if, based on the totality of the 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 class defined by race or color] 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." 42 U.S.C. § 1973(b).

A plaintiff claiming vote dilution under § 2 must initially establish that: (i) "[the racial group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; (ii) the group is "politically cohesive"; and (iii) "the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." ***480** *Thornburg v. Gingles,* 478 U.S. 30, 50-51, 106 S.Ct. 2752, 2766-2767, 92 L.Ed.2d 25 (1986); *Growe v. Emison,* 507 U.S. 25, 40, 113 S.Ct. 1075, 1084, 122 L.Ed.2d 388 (1993). The plaintiff must also demonstrate that the totality of the circumstances supports a finding that the voting scheme is dilutive. *Johnson v. DeGrandy,* 512 U.S. 997, 1011, 114 S.Ct. 2647, 2657, 129 L.Ed.2d 775 (1994); see *Gingles, supra,* at 44-45, 106 S.Ct., at 2762-2764 (listing factors to be considered by a court in assessing the totality of the circumstances).

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Because the very concept of vote dilution implies--and, indeed, necessitates--the existence of an "undiluted" practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark "undiluted" voting practice. *Holder v. Hall,* 512 U.S., at 881, 114 S.Ct., at 2586 (plurality opinion); *id.,* at 950-951, 114 S.Ct., at 2621-2622 (Blackmun, J., dissenting).

Appellants contend that preclearance must be denied under § 5 whenever a covered jurisdiction's redistricting plan violates § 2. The upshot of this position is to shift the focus of § 5 from nonretrogression to vote dilution, and to change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan.

But § 5, we have held, is designed to combat only those effects that are retrogressive. See *supra,* at 1497-1498. To adopt appellants' position, we would have to call into question more than 20 years of precedent interpreting § 5. See, *e. g., Beer, supra; City of Lockhart, supra.* This we decline to do. Section 5 already imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect. See, *e.g., Elkins v. United States,* 364 U.S. 206, 218, 80 S.Ct. 1437, 1445, 4 L.Ed.2d 1669 (1960) ("[A]s a practical matter it is never easy to prove a negative"). To require a jurisdiction to litigate whether its proposed redistricting plan also has a dilutive "result" before it can implement that plan--even if the Attorney General bears the burden of proving that "result"--is to increase further the serious federalism costs already implicated by § 5. See *Miller v. Johnson,* 515 U.S. 900, 926, 115 S.Ct. 2475, 2493, 132 L.Ed.2d 762 (1995) (noting the "federalism costs exacted by § 5 preclearance").

****1499 *481** Appellants nevertheless contend that we should adopt their reading of § 5 because it is supported by our decision in *Beer,* by the Attorney General's regulations, and by considerations of public policy. In *Beer,* we held that § 5 prohibited only retrogressive effects and further observed that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S., at 141, 96 S.Ct., at 1364. Although there had been no allegation that the redistricting plan in *Beer* "so ... discriminate[d] on the basis of race or color as to be unconstitutional," we cited in dicta a few cases to illustrate when a redistricting plan might be found to be constitutionally offensive. *Id.,* at 142, n. 14, 96 S.Ct., at 1364, n. 14. Among them was our decision in *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), in which we sustained a vote dilution challenge, brought under the Equal Protection Clause, to the use of multimember election districts in two Texas counties. Appellants argue that "[b]ecause vote dilution standards under the Constitution and Section 2 were generally coextensive at the time *Beer* was decided, *Beer* ' s discussion meant that practices that violated Section 2 would not be entitled to preclearance under Section 5." Brief for Federal Appellant 36-37.

[9] Even assuming, *arguendo,* that appellants' argument had some support in 1976, it is no longer valid today because the applicable statutory and constitutional standards have changed. Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose. See *City of Mobile v. Bolden,* 446 U.S. 55, 62, 100 S.Ct. 1490, 1497, 64 L.Ed.2d 47 (1980) (plurality opinion) ("Our decisions ... have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose"); *id.,* at 66, 100 S.Ct., at 1499 ("[O]nly if there is purposeful discrimination can there be a violation of the Equal Protection ***482** Clause of the Fourteenth Amendment"); see also *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"). When Congress amended § 2 in 1982, it clearly expressed its desire that § 2 *not* have an intent component, see S.Rep. No. 97-417, at 2, U.S.Code Cong. & Admin.News 1982 pp. 177, 178 ("Th[e 1982] amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2"). Because now the Constitution requires a showing of intent that § 2 does not, a violation of § 2 is no longer *a fortiori* a violation of the Constitution. Congress itself has acknowledged this fact. See *id.,* at 39 ("The Voting Rights Act is the best example of Congress' power to enact implementing legislation that goes beyond the direct prohibitions of the Constitution itself").

Justice STEVENS argues that the subsequent divergence of constitutional and statutory standards is

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of no moment because, in his view, we "did not [in *Beer*] purport to distinguish between challenges brought under the Constitution and those brought under the [Voting Rights] statute." *Post,* at 1510 (opinion dissenting in part and concurring in part). Our citation to *White,* he posits, incorporated *White's* standard into our exception for nonretrogressive apportionments that violate § 5, whether or not that standard continued to coincide with the constitutional standard. In essence, Justice STEVENS reads *Beer* as creating an exception for nonretrogressive apportionments that so discriminate on the basis of race or color as to violate any federal law that happens to coincide with what would have amounted to a constitutional violation in 1976. But this reading flatly contradicts the plain language of the exception we recognized, which applies solely to apportionments that "so discriminat[e] on the basis of race or color as to violate *the Constitution.*" *Beer, supra,* at 141, 96 S.Ct., at 1364 (emphasis added). We cited *White,* not for itself, but because it embodied the current ***483** *constitutional* standard for a violation of the Equal Protection Clause. See also ****1500**425 U.S., at 142, n. 14, 96 S.Ct., at 1364, n. 14 (noting that New Orleans' plan did "not remotely approach a violation of the *constitutional* standards enunciated in" *White* and other cited cases (emphasis added)). When *White* ceased to represent the current understanding of the Constitution, a violation of its standard--even though that standard was later incorporated in § 2--no longer constituted grounds for denial of preclearance under *Beer.*

[10] Appellants' next claim is that we must defer to the Attorney General's regulations interpreting the Act, one of which states:

> "In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2, the Attorney General shall withhold Section 5 preclearance." 28 CFR § 51.55(b)(2) (1996).

Although we normally accord the Attorney General's construction of the Act great deference, "we only do so if Congress has not expressed its intent with respect to the question, and then only if the administrative interpretation is reasonable." *Presley v. Etowah County Comm'n,* 502 U.S. 491, 508, 112 S.Ct. 820, 831, 117 L.Ed.2d 51 (1992). Given our longstanding interpretation of § 5, see *supra,* at 1496-1498, 1498-1500, which Congress has declined to alter by amending the language of § 5, *Arkansas Best Corp. v. Commissioner,* 485 U.S. 212, 222, n. 7, 108 S.Ct. 971, 977, n. 7, 99 L.Ed.2d 183 (1988) (placing some weight on Congress' failure to express disfavor with our 25-year interpretation of a tax statute), we believe Congress has made it sufficiently clear that a violation of § 2 is not grounds in and of itself for denying preclearance under § 5. That there may be some suggestion to the contrary in the Senate Report to the 1982 Voting Rights Act amendments, S.Rep. No. 97- 417, *supra,* at 12, n. 31, U.S.Code Cong. & Admin.News 1982 pp. 177, 189, does not ***484** change our view. With those amendments, Congress, among other things, renewed § 5 but did so without changing its applicable standard. We doubt that Congress would depart from the settled interpretation of § 5 and impose a demonstrably greater burden on the jurisdictions covered by § 5, see *supra,* at 1498, by dropping a footnote in a Senate Report instead of amending the statute itself. See *Pierce v. Underwood,* 487 U.S. 552, 567, 108 S.Ct. 2541, 2551, 101 L.Ed.2d 490 (1988) ("Quite obviously, reenacting precisely the same language would be a strange way to make a change"). See also *City of Lockhart v. United States,* 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983) (reaching its holding over Justice Marshall's dissent, which raised the argument now advanced by appellants regarding this passage in the Senate Report).

Nor does the portion of the House Report cited by Justice STEVENS unambiguously call for the incorporation of § 2 into § 5. That portion of the Report states:

> "[M]any voting and election practices currently in effect are outside the scope of [§ 5] ... because they were in existence before 1965.... Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation [under § 2] or preclearance [under § 5]." H.R.Rep. No. 97-227, p. 28 (1981).

The obvious thrust of this passage is to establish that pre-1965 discriminatory practices are not free from scrutiny under the Act just because they need not be precleared under § 5: Such practices might still violate § 2. But to say that pre-1965 practices can be reached solely by § 2 is not to say that all post-1965 changes that might violate § 2 may be reached by both § 2 *and* § 5 or that "the substantive standards for § 2 and § 5 [are] the same," see *post.* at 1511 (opinion dissenting in part and concurring in part). Our ultimate conclusion is also not undercut by statements found in the "postenactment legislative

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record," see *post,* at 1511, n. 9, given that "the views of a subsequent Congress form a hazardous ***485** basis for inferring the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960). We therefore decline to give these sources controlling weight.

****1501** Appellants' final appeal is to notions of public policy. They assert that if the district court or Attorney General examined whether a covered jurisdiction's redistricting plan violates § 2 at the same time as ruling on preclearance under § 5, there would be no need for two separate actions and judicial resources would be conserved. Appellants are undoubtedly correct that adopting their interpretation of § 5 would serve judicial economy in those cases where a § 2 challenge follows a § 5 proceeding. But this does not always happen, and the burden on judicial resources might actually increase if appellants' position prevailed because § 2 litigation would effectively be incorporated into *every* § 5 proceeding.

[11] Appellants lastly argue that preclearance is an equitable remedy, obtained through a declaratory judgment action in district court, see 42 U.S.C. § 1973c, or through the exercise of the Attorney General's discretion, see 28 CFR § 51.52(a) (1996). A finding that a redistricting plan violates § 2 of the Act, they contend, is an equitable "defense," on the basis of which a decisionmaker should, in the exercise of its equitable discretion, be free to deny preclearance. This argument, however, is an attempt to obtain through equity that which the law--*i.e.,* the settled interpretation of § 5--forbids. Because "it is well established that '[c]ourts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law,' " *INS v. Pangilinan,* 486 U.S. 875, 883, 108 S.Ct. 2210, 2216, 100 L.Ed.2d 882 (1988) (citing *Hedges v. Dixon County,* 150 U.S. 182, 192, 14 S.Ct. 71, 74-75, 37 L.Ed. 1044 (1893)), this argument must fail.

Of course, the Attorney General or a private plaintiff remains free to initiate a § 2 proceeding if either believes that a jurisdiction's newly enacted voting "qualification, prerequisite, standard, practice, or procedure" may violate that section. All we hold today is that preclearance under § 5 may not be denied on that basis alone.

***486** III

[12][13] Appellants next contend that evidence showing that a jurisdiction's redistricting plan dilutes the voting power of minorities is at least *relevant* in a § 5 proceeding because it tends to prove that the jurisdiction enacted its plan with a discriminatory "purpose." The District Court, reasoning that "[t]he line [between § 2 and § 5] cannot be blurred by allowing a defendant to do indirectly what it cannot do directly," 907 F.Supp., at 445, rejected this argument and held that it "will not permit section 2 evidence to prove discriminatory purpose under section 5," *ibid.* Because we hold that some of this "§ 2 evidence" may be relevant to establish a jurisdiction's "intent to retrogress" and cannot say with confidence that the District Court considered the evidence proffered to show that the Board's reapportionment plan was dilutive, we vacate this aspect of the District Court's holding and remand. In light of this conclusion, we leave open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent. See *Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 465, n. 5, 109 S.Ct. 1904, 1911, n. 5, 104 L.Ed.2d 506 (1989) (declining to decide an issue that "is not necessary to our decision"). Reserving this question is particularly appropriate when, as in this suit, it was not squarely addressed by the decision below or in the parties' briefs on appeal. See Brief for Federal Appellant 23; Brief for Appellant Price et al. 31-33, 34-35; Brief for Appellee 42-43. But in doing so, we do not, contrary to Justice STEVENS' view, see *post,* at 1507-1508 (opinion dissenting in part and concurring in part), necessarily assume that the Board enacted the Jury plan with some nonretrogressive, but nevertheless discriminatory, "purpose." The existence of such a purpose, and its relevance to § 5, are issues to be decided on remand.

Although § 5 warrants a denial of preclearance if a covered jurisdiction's voting change "ha[s] the purpose [or] ... the effect of denying or abridging the right to vote on account ***487** of race or color," 42 U.S.C. § 1973c, we have consistently interpreted this language in light of the purpose underlying § 5--"to insure that no voting-procedure ****1502** changes would be made that would lead to a retrogression in the position of racial minorities." *Beer,* 425 U.S., at 141, 96 S.Ct., at 1364. Accordingly, we have adhered to the view that the only "effect" that violates § 5 is a retrogressive one. *Ibid.; City of Lockhart,* 460 U.S., at 134, 103 S.Ct., at 1004.

Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or

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less probable than it would be without the evidence." Fed. Rule Evid. 401. As we observed in *Arlington Heights*, 429 U.S., at 266, 97 S.Ct., at 563-564, the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions. Thus, a jurisdiction that enacts a plan having a dilutive impact is more likely to have acted with a discriminatory intent to dilute minority voting strength than a jurisdiction whose plan has no such impact. A jurisdiction that acts with an intent to dilute minority voting strength is more likely to act with an intent to worsen the position of minority voters--*i.e.*, an intent to retrogress--than a jurisdiction acting with no intent to dilute. The fact that a plan has a dilutive impact therefore makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." To be sure, the link between dilutive impact and intent to retrogress is far from direct, but "the basic standard of relevance ... is a liberal one," *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587, 113 S.Ct. 2786, 2794, 125 L.Ed.2d 469 (1993), and one we think is met here.

That evidence of a plan's dilutive impact may be relevant to the § 5 purpose inquiry does not, of course, mean that such evidence is dispositive of that inquiry. In fact, we have previously observed that a jurisdiction's single decision to choose a redistricting plan that has a dilutive impact does not, without ***488** more, suffice to establish that the jurisdiction acted with a discriminatory purpose. *Shaw v. Hunt*, 517 U.S. 899, 914, n. 6, 116 S.Ct. 1894, 1904, n. 6, 135 L.Ed.2d 207 (1996) ("[W]e doubt that a showing of discriminatory effect under § 2, alone, could support a claim of discriminatory purpose under § 5"). This is true whether the jurisdiction chose the more dilutive plan because it better comported with its traditional districting principles, see *Miller v. Johnson*, 515 U.S., at 922, 115 S.Ct., at 2491 (rejecting argument that a jurisdiction's failure to adopt the plan with the greatest possible number of majority black districts establishes that it acted with a discriminatory purpose); *Shaw*, *supra*, at 912-913, 116 S.Ct., at 1904 (same), or if it chose the plan for no reason at all. Indeed, if a plan's dilutive impact were dispositive, we would effectively incorporate § 2 into § 5, which is a result we find unsatisfactory no matter how it is packaged. See Part II, *supra*.

As our discussion illustrates, 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." *Arlington Heights*, 429 U.S., at 266, 97 S.Ct., at 564. In conducting this inquiry, courts should look to our decision in *Arlington Heights* for guidance. There, we set forth a framework for analyzing "whether invidious discriminatory purpose was a motivating factor" in a government body's decisionmaking. *Ibid.* In addition to serving as the framework for examining discriminatory purpose in cases brought under the Equal Protection Clause for over two decades, see, *e. g.*, *Shaw v. Reno*, 509 U.S. 630, 644, 113 S.Ct. 2816, 2825, 125 L.Ed.2d 511 (1993) (citing *Arlington Heights* standard in context of Equal Protection Clause challenge to racial gerrymander of districts); *Rogers v. Lodge*, 458 U.S. 613, 618, 102 S.Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982) (evaluating vote dilution claim under Equal Protection Clause using *Arlington Heights* test); *Mobile*, 446 U.S., at 70-74, 100 S.Ct., at 1501- 1503 (same), the *Arlington Heights* framework has also been used, at least in part, to evaluate purpose in our previous § 5 cases. See *Pleasant Grove v. United States*, 479 U.S. 462, 469-470, 107 S.Ct. 794, 798-799, 93 L.Ed.2d 866 (1987) (considering city's history in rejecting annexation of ***489** black neighborhood and its departure from normal procedures when calculating costs of annexation ****1503** alternatives); see also *Busbee v. Smith*, 549 F.Supp. 494, 516-517 (D.C. 1982), summarily aff'd, 459 U.S. 1166, 103 S.Ct. 809, 74 L.Ed.2d 1010 (1983) (referring to *Arlington Heights* test); *Port Arthur v. United States*, 517 F.Supp. 987, 1019, aff'd, 459 U.S. 159, 103 S.Ct. 530, 74 L.Ed.2d 334 (1982) (same).

[14] The "important starting point" for assessing discriminatory intent under *Arlington Heights* is "the impact of the official action whether it 'bears more heavily on one race than another.' " 429 U.S., at 266, 97 S.Ct., at 564 (citing *Washington v. Davis*, 426 U.S. 229, 242, 96 S.Ct. 2040, 2048-2049, 48 L.Ed.2d 597 (1976)). In a § 5 case, "impact" might include a plan's retrogressive effect and, for the reasons discussed above, its dilutive impact. Other considerations relevant to the purpose inquiry include, among other things, "the historical background of the [jurisdiction's] decision"; "[t]he specific sequence of events leading up to the challenged decision"; "[d]epartures from the normal procedural sequence"; and "[t]he legislative or administrative history, especially ... [any] contemporary statements by members of the decisionmaking body." 429 U.S., at 268, 97 S.Ct., at

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565.

We are unable to determine from the District Court's opinion in this action whether it deemed irrelevant all evidence of the dilutive impact of the redistricting plan adopted by the Board. At one point, the District Court correctly stated that "the adoption of one nonretrogressive plan rather than another nonretrogressive plan that contains more majority-black districts cannot *by itself* give rise to the inference of discriminatory intent." 907 F.Supp., at 450 (emphasis added). This passage implies that the District Court believed that the existence of less dilutive options was at least relevant to, though not dispositive of, its purpose inquiry. While this language is consistent with our holding today, see *supra,* at 1501-1502, the District Court also declared that "we will not permit section 2 evidence to prove discriminatory purpose under section 5," *ibid.* With this statement, the District Court appears to endorse the notion that evidence ***490** of dilutive impact is irrelevant even to an inquiry into retrogressive intent, a notion we reject. See *supra,* at 1501-1502.

The Board contends that the District Court actually "presumed that white majority districts had [a dilutive] effect," Brief for Appellee 35, and "cut directly to the dispositive question 'started' by the existence of [a dilutive] impact: did the Board have 'legitimate, nondiscriminatory motives' for adopting its plan[?]" *Id.,* at 33. Even if the Board were correct, the District Court gave no indication that it was assuming the plan's dilutive effect, and we hesitate to attribute to the District Court a rationale it might not have employed. Because we are not satisfied that the District Court considered evidence of the dilutive impact of the Board's redistricting plan, we vacate this aspect of the District Court's opinion. The District Court will have the opportunity to apply the *Arlington Heights* test on remand as well as to address appellants' additional arguments that it erred in refusing to consider evidence that the Board was in violation of an ongoing injunction "to 'remedy any remaining vestiges of [a] dual [school] system,' " 907 F.Supp., at 449, n. 18.

* * *

The judgment of the District Court is vacated, and the case is remanded for further proceedings consistent with this decision.

It is so ordered.

Justice THOMAS, concurring.

Although I continue to adhere to the views I expressed in *Holder v. Hall,* 512 U.S. 874, 891, 114 S.Ct. 2581, 2591, 129 L.Ed.2d 687 (1994) (opinion concurring in judgment), I join today's opinion because it is consistent with our vote dilution precedents. I fully anticipate, however, that as a result of today's holding, all of the problems we have experienced in § 2 vote dilution cases will now be replicated and, indeed, exacerbated in the § 5 retrogression inquiry.

I have trouble, for example, imagining a reapportionment change that could not be deemed "retrogressive" under our ***491** vote dilution jurisprudence by a court inclined to find it so. We have held that a reapportionment plan that "enhances the position of racial minorities" by increasing the number ****1504** of majority-minority districts does not "have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). But in so holding we studiously avoided addressing one of the necessary consequences of increasing majority-minority districts: Such action *necessarily decreases* the level of minority influence in surrounding districts, and to that extent "dilutes" the vote of minority voters in those other districts, and perhaps dilutes the influence of the minority group as a whole. See, *e.g., Hays v. Louisiana,* 936 F.Supp. 360, 364, n. 17 (W.D.La.1996) (three-judge court) (noting that plaintiffs' expert "argues convincingly that our plan, with its one black majority and three influence districts, empowers more black voters statewide than does" a plan with two black-majority districts and five "bleached" districts in which minority influence was reduced in order to create the second black-majority district); cf. *Johnson v. De Grandy,* 512 U.S. 997, 1007, 114 S.Ct. 2647, 2655, 129 L.Ed.2d 775 (1994) (noting that dilution can occur by "fragmenting the minority voters among several districts ... or by packing them into one or a small number of districts to minimize their influence in the districts next door").

Under our vote dilution jurisprudence, therefore, a court could strike down *any* reapportionment plan, either because it did not include enough majority-minority districts or because it did (and thereby diluted the minority vote in the remaining districts). A court could presumably even strike down a new reapportionment plan that did not significantly alter

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the status quo at all, on the theory that such a plan did not measure up to some hypothetical ideal. With such an indeterminate "rule," § 5 ceases to be primarily a prophylactic tool in the important war against discrimination in voting, and instead becomes the means whereby the Federal Government, and particularly the Department of Justice, usurps ***492** the legitimate political judgments of the States. And such an empty "rule" inevitably forces the courts to make political judgments regarding which type of apportionment best serves supposed minority interests-- judgments that the courts are ill equipped to make.

I can at least find some solace in the belief that today's opinion will force us to confront, with a renewed sense of urgency, this fundamental inconsistency that lies at the heart of our vote dilution jurisprudence.

Beyond my general objection to our vote dilution precedent, the one portion of the majority opinion with which I disagree is the majority's new suggestion that preclearance standards established by the Department of Justice are "normally" entitled to deference. See *ante,* at 1500. [FN*] Section 5 sets up alternative routes for preclearance, and the primary route specified is through the District Court for the District of Columbia, not through the Attorney General's office. See 42 U.S.C. § 1973c (generally requiring District Court preclearance, with a proviso that covered jurisdictions may *obtain* preclearance by the Attorney General in lieu of District Court preclearance, but providing no authority for the Attorney General to *preclude* judicial preclearance). Requiring the District Court to defer to adverse preclearance decisions by the Attorney General based upon the very preclearance standards she articulates would essentially render the independence of the District Court preclearance route a nullity.

> FN* I do not address the separate question, not presented by this action, whether the Department's *interpretation* of the Voting Rights Act of 1965, as opposed to its articulation of standards applicable to its own preclearance determinations, is entitled to deference. The regulation at issue here only purports to be the latter.

Moreover, given our own "longstanding interpretation of § 5," see *ante,* at 1500, deference to the particular preclearance regulation addressed in this action would be inconsistent with another of the Attorney General's regulations, which provides: "In making determinations [under § 5] the Attorney General will be guided by the relevant decisions of the ***493** Supreme Court of the United States and of other Federal courts." 28 CFR § 51.56 (1996). Thus, while I agree with the majority's decision ****1505** not to defer to the Attorney General's standards, I would reach that result on different grounds.

Justice BREYER, with whom Justice GINSBURG joins, concurring in part and concurring in the judgment.

I join Parts I and II of the majority opinion, and Part III insofar as it is not inconsistent with this opinion. I write separately to express my disagreement with one aspect of the majority opinion. The majority says that we need not decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ante,* at 1501. In my view, we should decide the question, for otherwise the District Court will find it difficult to evaluate the evidence that we say it must consider. Cf. *post,* at 1512 (STEVENS, JJJJJJJJ., dissenting in part and concurring in part). Moreover, the answer to the question is that the "purpose" inquiry does extend beyond the search for retrogressive intent. It includes the purpose of unconstitutionally diluting minority voting strength.

The language of § 5 itself forbids a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," where that change either (1) has the "purpose" or (2) will have the "effect" of "denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. These last few words reiterate in context the language of the Fifteenth Amendment itself: "The right of citizens ... to vote shall not be denied or abridged ... on account of race [or] color...." This use of constitutional language indicates that one purpose forbidden by the statute is a purpose to act unconstitutionally. And a new plan enacted with the purpose of unconstitutionally diluting minority votes is an unconstitutional plan. *Mobile v. Bolden,* 446 U.S. 55, 62-63, 66, 100 S.Ct. 1490, 1497-1498, 1499, 64 L.Ed.2d 47 (1980) (plurality opinion); *ante,* at 1499.

***494** Of course, the constitutional language also applies to § 5's prohibition that rests upon "effects." The Court assumes, in its discussion of "effects," that the § 5 word "effects" does not now embody a *purely*

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constitutional test, whether or not it ever did so. See *ante*, at 1497; *City of Rome v. United States*, 446 U.S. 156, 173, 177, 100 S.Ct. 1548, 1559- 1560, 64 L.Ed.2d 119 (1980). And that fact, here, is beside the point. The separate argument about the meaning of the word "effect" concerns *how far beyond* the Constitution's requirements Congress intended that word to reach. The argument about "purpose" is simply whether Congress intended the word to reach *as far as* the Constitution itself, embodying those purposes that, in relevant context, the Constitution itself would forbid. I can find nothing in the Court's discussion that shows that Congress intended to restrict the meaning of the statutory word "purpose" short of what the Constitution itself requires. And the Court has previously expressly indicated that minority vote dilution is a harm that § 5 guards against. *Allen v. State Bd. of Elections*, 393 U.S. 544, 569, 89 S.Ct. 817, 833-834, 22 L.Ed.2d 1 (1969).

Consider a hypothetical example that will clarify the precise legal question here at issue. Suppose that a covered jurisdiction is choosing between two new voting plans, A and B. Neither plan is retrogressive. Plan A violates every traditional districting principle, but from the perspective of minority representation, it maintains the status quo, thereby meeting the "effects" test of § 5. See *ante*, at 1497-1498. Plan B is basically consistent with traditional districting principles and it also creates one or two new majority-minority districts (in a State where the number of such districts is significantly less than proportional to minority voting age population). Suppose further that the covered jurisdiction adopts Plan A. Without any other proposed evidence or justification, ordinary principles of logic and human experience suggest that the jurisdiction would likely have adopted Plan A with "the purpose ... of denying or abridging the right to vote on account of race or color." § 1973c. It is reasonable ***495** to assume that the Constitution would forbid the use of such a plan. See *Rogers v. Lodge*, 458 U.S. 613, 617, 102 S.Ct. 3272, 3275, 73 L.Ed.2d 1012 (1982) (Fourteenth Amendment covers vote dilution claims); *Mobile*, 446 U.S., at 66, 100 S.Ct., at 1499 (plurality opinion) (same). And compare *id.*, at 62-63, 100 S.Ct., at 1497-1498 ****1506** (intentional vote dilution may be illegal under the Fifteenth Amendment) and *Gomillion v. Lightfoot*, 364 U.S. 339, 346, 81 S.Ct. 125, 129-130, 5 L.Ed.2d 110 (1960) (Fifteenth Amendment covers municipal boundaries drawn to exclude blacks), with *Mobile*, *supra*, at 84, n. 3, 100 S.Ct., at 1509, n. 3 (STEVENS, J., concurring in judgment) (*Mobile* plurality said that Fifteenth Amendment does not reach vote dilution); *Voinovich v. Quilter*, 507 U.S. 146, 159, 113 S.Ct. 1149, 1158, 122 L.Ed.2d 500 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims ..."); *Shaw v. Reno*, 509 U.S. 630, 645, 113 S.Ct. 2816, 2825-2826, 125 L.Ed.2d 511 (1993) (endorsing the *Gomillion* concurrence's Fourteenth Amendment approach); and *Beer v. United States*, 425 U.S. 130, 142, n. 14, 96 S.Ct. 1357, 1364, n. 14, 47 L.Ed.2d 629 (1976). Then, to read § 5's "purpose" language to require approval of Plan A, even though the jurisdiction cannot provide a neutral explanation for its choice, would be both to read § 5 contrary to its plain language and also to believe that Congress would have wanted a § 5 court (or the Attorney General) to approve an unconstitutional plan adopted with an unconstitutional purpose.

In light of this example, it is not surprising that this Court has previously indicated that the purpose part of § 5 prohibits a plan adopted with the purpose of unconstitutionally diluting minority voting strength, whether or not the plan is retrogressive in its effect. In *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); for example, the Court doubted "that a showing of discriminatory effect under § 2, *alone*, could support a claim of discriminatory purpose under § 5." *Id.*, at 914, n. 6, 116 S.Ct., at 1904, n. 6 (emphasis added). The word "alone" suggests that the evidence of a discriminatory effect there at issue--evidence of dilution--could be relevant to a discriminatory purpose claim. And if so, the more natural understanding of § 5 is that an unlawful purpose includes more than simply a purpose to ***496** retrogress. Otherwise, dilution would either dispositively show an unlawful discriminatory effect (if retrogressive) or it would almost always be irrelevant (if not retrogressive). Either way, it would not normally have much to do with unlawful purpose. See also the discussions in *Richmond v. United States*, 422 U.S. 358, 378-379, 95 S.Ct. 2296, 2307-2308, 45 L.Ed.2d 245 (1975) (annexation plan did not have an impermissible dilutive effect but the Court remanded for a determination of whether there was an impermissible § 5 purpose); *Pleasant Grove v. United States*, 479 U.S. 462, 471-472, and n. 11, 107 S.Ct. 794, 800, and n. 11, 93 L.Ed.2d 866 (1987) (purpose to minimize *future* black voting strength is impermissible under § 5); *Port Arthur v. United States*, 459 U.S. 159, 168, 103 S.Ct. 530, 536, 74 L.Ed.2d 334 (1982) (a plan adopted for a discriminatory purpose is invalid under § 5 even if it "might otherwise be said to reflect the political

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strength of the minority community"); *post,* at 1512 (STEVENS, J., dissenting in part and concurring in part).

Miller v. Johnson, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), also implicitly assumed that § 5's "purpose" stretched beyond the purely retrogressive. There, the Justice Department pointed out that Georgia made a choice between two redistricting plans, one of which (call it Plan A) had more majority-black districts than the other (call it Plan B). The Department argued that the fact that Georgia chose Plan B showed a forbidden § 5 discriminatory purpose. The Court rejected this argument, but the reason that the majority gave for that rejection is important. The Court pointed out that Plan B embodied traditional state districting principles. It reasoned that "[t]he State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference" of an unlawful discriminatory purpose. *Id.,* at 924, 115 S.Ct., at 2492. If the only relevant "purpose" were a retrogressive purpose, this reasoning, with its reliance upon traditional districting principles, would have been beside the point. The Court would have concerned itself only with Georgia's intent to worsen the position of minorities, not with the reasons why Georgia could ***497** have adopted one of two potentially ameliorative plans. Indeed, the Court indicated that an ameliorative plan *would* run afoul of the § 5 purpose test if it violated the Constitution. ****1507** *Ibid.* See also *Shaw v. Hunt, supra,* at 912-913, 116 S.Ct., at 1904.

In sum, the Court today should make explicit an assumption implicit in its prior cases. Section 5 prohibits a covered State from making changes in its voting practices and procedures where those changes have the *unconstitutional* "purpose" of unconstitutionally diluting minority voting strength.

Justice STEVENS, with whom Justice SOUTER joins, dissenting in part and concurring in part.

In my view, a plan that clearly violates § 2 is not entitled to preclearance under § 5 of the Voting Rights Act of 1965. The majority's contrary view would allow the Attorney General of the United States to place her stamp of approval on a state action that is in clear violation of federal law. It would be astonishing if Congress had commanded her to do so. In fact, however, Congress issued no such command. Surely no such command can be found in the text of § 5 of the Voting Rights Act. [FN1] Moreover, a fair review of the text ***498** and the legislative history of the 1982 amendment to § 2 of that Act indicates that Congress intended the Attorney General to deny preclearance under § 5 whenever it was clear that a new voting practice was prohibited by § 2. This does not mean that she must make an independent inquiry into possible violations of § 2 whenever a request for preclearance is made. It simply means that, as her regulations provide, she must refuse preclearance when "necessary to prevent a clear violation of amended section 2." 28 CFR § 51.55(b)(2) (1996).

FN1. As originally enacted, § 5 provided:
"Sec. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code [28 U.S.C. § 2284]

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and any appeal shall lie to the Supreme Court." 79 Stat. 439.

It is, of course, well settled that the Attorney General must refuse to preclear a new election procedure in a covered jurisdiction if it will "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1364, 47 L.Ed.2d 629 (1976). A retrogressive effect or a retrogressive purpose is a sufficient basis for denying a preclearance request under § 5. Today, however, the Court holds that retrogression is the only kind of effect that will justify denial of preclearance under § 5, *ante*, at 1496-1501, and it assumes that "the § 5 purpose inquiry [never] extends beyond the search for retrogressive intent." *Ante*, at 1501. While I agree that this action must be remanded even under the Court's miserly interpretation of § 5, I disagree with the Court's holding/assumption that § 5 is concerned only with retrogressive effects and purposes.

Before explaining my disagreement with the Court, I think it important to emphasize the three factual predicates that underlie our analysis of the issues. First, we assume ***499** that the plan submitted by the Bossier Parish School Board (Board) was not "retrogressive" because it did not make matters any worse than they had been in the past. None of the 12 districts had ever had a black majority and a black person had never been elected to the Board. App. to Juris. Statement 67a. Second, because the majority in ****1508** both the District Court and this Court found that even clear violations of § 2 must be precleared and thus found it unnecessary to discuss whether § 2 was violated in this action, we may assume that the record discloses a "clear violation" of § 2. This means that, in the language of § 2, it is perfectly clear that "the political processes leading to nomination or election [to positions on the Board] are not equally open to participation by members of [the African-American race] in that its members have less opportunity than other members of the electorate to ... elect representatives of their choice." 42 U.S.C. § 1973(b). [FN2] Third, if the Court is correct in assuming that the purpose inquiry under § 5 may be limited to evidence of "retrogressive intent," it must also be willing to assume that the documents submitted in support of the request for preclearance clearly establish that the plan was adopted for the specific purpose of preventing African-Americans from obtaining representation on the Board. Indeed, for the purpose of analyzing the legal issues, we must assume that Judge Kessler, concurring in part and dissenting in part, accurately summarized the evidence when she wrote:

FN2. Although the majority in the District Court refused to consider any of the evidence relevant to a § 2 violation, the parties' stipulations suggest that the plan violated § 2. For instance, the parties' stipulated that there had been a long history of discrimination against black voters in Bossier Parish, see App. to Juris. Statement 130a-140a; that voting in Bossier Parish was racially polarized, see *id.*, at 122a-127a; and that it was possible to draw two majority black districts without violating traditional districting principles, see *id.*, at 76a, 82a-83a, 114a-115a.

"The evidence in this case demonstrates overwhelmingly that the School Board's decision to adopt the Police Jury redistricting plan was motivated by discriminatory ***500** purpose. The adoption of the Police Jury plan bears heavily on the black community because it denies its members a reasonable opportunity to elect a candidate of their choice. The history of discrimination by the Bossier School System and the Parish itself demonstrates the Board's continued refusal to address the concerns of the black community in Bossier Parish. The sequence of events leading up to the adoption of the plan illustrate the Board's discriminatory purpose. The School Board's substantive departures from traditional districting principles is similarly probative of discriminatory motive. Three School Board members have acknowledged that the Board is hostile to black representation. Moreover, some of the purported rationales for the School Board's decision are flat-out untrue, and others are so glaringly inconsistent with the facts of the case that they are obviously pretexts." 907 F.Supp. 434, 463 (D.C.1995).

If the purpose and the effect of the Board's plan were simply to maintain the discriminatory status quo as described by Judge Kessler, the plan would not have been retrogressive. But, as I discuss below, that is not a sufficient reason for concluding that it complied with § 5.

I

In the Voting Rights Act of 1965, Congress enacted a complex scheme of remedies for racial discrimination in voting. As originally enacted, § 2 of the Act was "an uncontroversial provision" that

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"simply restated" the prohibitions against such discrimination "already contained in the Fifteenth Amendment," *Mobile v. Bolden*, 446 U.S. 55, 61, 100 S.Ct., at 1496-1497 (1980) (plurality opinion). Like the constitutional prohibitions against discriminatory districting practices that were invalidated in cases like *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), and *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), § 2 was made applicable to every State and political subdivision in the country. ***501** Section 5, on the other hand, was highly controversial because it imposed novel, extraordinary remedies in certain areas where discrimination had been most flagrant. See *South Carolina v. Katzenbach*, 383 U.S. 301, 334-335, 86 S.Ct. 803, 821-822, 15 L.Ed.2d 769 (1966). [FN3] ****1509** Jurisdictions like Bossier Parish in Louisiana are covered by § 5 because their history of discrimination against African-Americans was a matter of special concern to Congress. Because these jurisdictions had resorted to various strategies to avoid complying with court orders to remedy discrimination, "Congress had reason to suppose that [they] might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.*, at 335, 86 S.Ct., at 822. Thus Congress enacted § 5, not to maintain the discriminatory status quo, but to stay ahead of efforts by the most resistant jurisdictions to undermine the Act's purpose of "rid[ding] the country of racial discrimination." *Id.*, at 315, 86 S.Ct., at 812 ("The heart of the Act is a complex scheme of stringent remedies aimed at areas where voting discrimination has been most flagrant").

FN3. Section 4 of the Act sets forth the formula for identifying the jurisdictions in which such discrimination had occurred, see *South Carolina v. Katzenbach*, 383 U.S., at 317-318, 86 S.Ct., at 812-813.

In areas of the country lacking a history of pervasive discrimination, Congress presumed that voting practices were generally lawful. Accordingly, the burden of proving a violation of § 2 has always rested on the party challenging the voting practice. The situation is dramatically different in covered jurisdictions. In those jurisdictions, § 5 flatly prohibits the adoption of any new voting procedure unless the State or political subdivision institutes an action in the Federal District Court for the District of Columbia and obtains a declaratory judgment that the change will not have a discriminatory purpose or effect. See 42 U.S.C. § 1973c. The burden of proving compliance with the Act rests on the jurisdiction. A proviso to § 5 gives the Attorney General the authority to allow the new procedure to go into effect, but ***502** like the immigration statutes that give her broad discretion to waive deportation of undesirable aliens, it does not expressly impose any limit on her discretion to refuse preclearance. See *ibid.* The Attorney General's discretion is, however, cabined by regulations that are presumptively valid if they "are reasonable and do not conflict with the Voting Rights Act itself," *Georgia v. United States*, 411 U.S. 526, 536, 93 S.Ct. 1702, 1708, 36 L.Ed.2d 472 (1973). Those regulations provide that preclearance will generally be granted if a proposed change "is free of discriminatory purpose and retrogressive effect"; they also provide, however, that in "those instances" in which the Attorney General concludes "that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2," preclearance shall be withheld. [FN4] There is no basis for the Court's speculation that litigants would so " 'routinely,' " *ante*, at 1497, employ this 10-year-old regulation as to "make compliance with § 5 contingent upon compliance with § 2," *ibid.* Nor do the regulations require the jurisdiction to assume the burden of proving the absence of vote ***503** dilution, see *ante*, at 1498. They merely preclude preclearance when "necessary to prevent a clear violation of ... section 2." While the burden of disproving discriminatory purpose or retrogressive effect is on the submitting jurisdiction, if the Attorney General's conclusion that the change would clearly violate § 2 is challenged, the burden on that issue, as in ****1510** any § 2 challenge, should rest on the Attorney General. [FN5]

FN4. Title 28 CFR § 51.55 (1996) provides: "Consistency with constitutional and statutory requirements.
"(a) *Consideration in general.* In making a determination the Attorney General will consider whether the change is free of discriminatory purpose and retrogressive effect in light of, and with particular attention being given to, the requirements of the 14th, 15th, and 24th amendments to the Constitution, 42 U.S.C. 1971(a) and (b), sections 2, 4(a), 4(f)(2), 4(f)(4), 201, 203(c), and 208 of the Act, and other constitutional and statutory provisions designed to safeguard the right to vote from denial or abridgment on account of race, color, or membership in a language minority group.
"(b) *Section 2.* (1) Preclearance under

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section 5 of a voting change will not preclude any legal action under section 2 by the Attorney General if implementation of the change subsequently demonstrates that such action is appropriate.
"(2) In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 preclearance."

FN5. Thus, I agree with those courts that have found that the jurisdiction is not required to prove that its proposed change will not violate § 2 in order to receive preclearance. See *Arizona v. Reno*, 887 F.Supp. 318, 321 (D.D.C.1995). Although several three-judge District Courts have concluded that § 2 standards should not be incorporated into § 5, none has held that preclearance should be granted when there is a clear violation of § 2; rather, they appear simply to have determined that a § 2 inquiry is not routinely required in a § 5 case. See, *e.g.*, *Georgia v. Reno*, 881 F.Supp. 7, 12-14 (D.D.C.1995); *New York v. United States*, 874 F.Supp. 394, 398-399 (D.D.C.1994); cf. *Burton v. Sheheen*, 793 F.Supp. 1329, 1350 (D.S.C.1992) (holding that although courts are not "obligated to completely graft" § 2 standards onto § 5, "[i]t would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of § 2").

The Court does not suggest that this regulation is inconsistent with the text of § 5. Nor would this be persuasive, since the language of § 5 forbids preclearance of any voting practice that would have "the purpose [or] effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Instead the Court rests its entire analysis on the flawed premise that our cases hold that a change, even if otherwise unlawful, cannot have an effect prohibited by § 5 unless that effect is retrogressive. The two cases on which the Court relies, *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), and *City of Lockhart v. United States*, 460 U.S. 125, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983), do hold (as the current regulations provide) that proof that a change is not retrogressive is normally sufficient to justify preclearance under § 5. In neither case, however, was the Court confronted with the question whether that showing would be sufficient if the proposed change was so discriminatory that it clearly violated some other federal law. ***504** In fact, in *Beer*--which held that a legislative reapportionment enhancing the position of African-American voters did not have a discriminatory effect--the Court stated that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S., at 141, 96 S.Ct., at 1364. [FN6] Thus, to the extent that the *Beer* Court addressed the question at all, it suggested that certain nonretrogressive changes that were nevertheless discriminatory should not be precleared.

FN6. In *Lockhart* the Court disavowed reliance on the ameliorative character of the change reviewed in *Beer*, see 460 U.S., at 134, n. 10, 103 S.Ct., at 1004, n. 10. It left open the question whether Congress had altered the *Beer* standard when it amended § 2 in 1982, 460 U.S., at 133, n. 9, 103 S.Ct., at 1003, n. 9, and said nothing about the possible significance of a violation of a constitutional or statutory prohibition against vote dilution.

The Court discounts the significance of the "unless" clause because it refers to a constitutional violation rather than a statutory violation. According to the Court's reading, the *Beer* dictum at most precludes preclearance of changes that violate the Constitution rather than changes that violate § 2. This argument is unpersuasive. As the majority notes, the *Beer* Court cites *White v. Regester*, 412 U.S., at 766, 93 S.Ct., at 2339- 2340, which found unconstitutional a reapportionment scheme that gave African-American residents "less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Because, in 1976, when *Beer* was decided, the § 2 standard was coextensive with the constitutional standard, *Beer* did not purport to distinguish between challenges brought under the Constitution and those brought under the statute. Rather *Beer* 's dictum suggests that any changes that violate the standard established in *White v. Regester* should not be precleared. [FN7]

FN7. In response to this dissent, the majority contends that, at most, *Beer v. United States*,

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425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), allows denial of preclearance for those changes that violate the Constitution. See *ante,* at 1499-1500. Thus, the majority apparently concedes that our "settled interpretation," *ante,* at 1500, of § 5 supports a denial of preclearance for at least some nonretrogressive changes.

***505** As the Court recognizes, *ante,* at 1499, the law has changed in two respects since the announcement of the *Beer* dictum. In 1980, in what was perceived by Congress to be a change in the standard applied in *White v. Regester,* a plurality of this Court concluded that discriminatory purpose is an essential ****1511** element of a constitutional vote dilution challenge. See *Mobile v. Bolden,* 446 U.S., at 62, 100 S.Ct., at 1497. In reaction to that decision, in 1982 Congress amended § 2 by placing in the statute the language used in the *White* opinion to describe what is commonly known as the "results" standard for evaluating vote dilution challenges. See 96 Stat. 134 (now codified at 42 U.S.C. § § 1973(a)-(b)); *Thornburg v. Gingles,* 478 U.S. 30, 35, 106 S.Ct. 2752, 2758, 92 L.Ed.2d 25 (1986). [FN8] Thus Congress preserved, as a matter of statutory law, the very same standard that the Court had identified in *Beer* as an exception to the general rule requiring preclearance of nonretrogressive changes. Because in 1975 *Beer* required denial of preclearance for voting plans that violated the *White* standard, it follows that Congress, in preserving the *White* standard, intended also that the Attorney General should continue to refuse to preclear plans violating that standard.

FN8. The amended version of § 2 tracks the language in *White v. Regester,* 412 U.S. 755, 766, 93 S.Ct. 2332, 2339-2340, 37 L.Ed.2d 314 (1973).

That intent is confirmed by the legislative history of the 1982 Act. The Senate Report states:

"Under the rule of *Beer v. United States,* 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), a voting change which is ameliorative is not objectionable unless the change 'itself so discriminates on the basis of race or color as to violate the Constitution.' 425 U.S. at 141 [96 S.Ct., at 1364]; *see also* 142 n. 14 [96 S.Ct., at 1364, n. 14] (citing to the dilution cases from *Fortson v. Dorsey* [379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965),] through *White v. Regester*). In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so ***506** discriminates as to violate section 2." S.Rep. No. 97- 417, p. 12, n. 31 (1982) U.S.Code Cong. & Admin.News 1982 pp. 177, 189.

The House Report conveys the same message in different language. It unequivocally states that whether a discriminatory practice or procedure was in existence before 1965 (and therefore only subject to attack under § 2) or is the product of a recent change (and therefore subject to preclearance under § 5) "affects only the mechanism that triggers relief." H.R.Rep. No. 97-227, p. 28 (1981). This statement plainly indicates that the Committee understood the substantive standards for § 2 and § 5 violations to be the same whenever a challenged practice in a covered jurisdiction represents a change subject to the dictates of § 5. [FN9] Thus, it is reasonable to assume that Congress, by endorsing the "unless" clause in *Beer,* contemplated the denial of preclearance for any change that clearly violates amended § 2. The majority, by belittling this legislative history, abrogates Congress'effort, ***507** in enacting the 1982 amendments, "to broaden the protection afforded by the Voting Rights Act." *Chisom v. Roemer,* 501 U.S. 380, 404, 111 S.Ct. 2354, 2368, 115 L.Ed.2d 348 (1991).

FN9. The postenactment legislative record also supports the Attorney General's interpretation of § 5. In 1985, the Attorney General first proposed regulations requiring a denial of preclearance "based upon violation of Section 2 if there is clear and convincing evidence of such a violation." 50 Fed.Reg. 19122, 19131. Congress held oversight hearings in which several witnesses, including the Assistant Attorney General, Civil Rights Division, testified that clear violations of § 2 should not be precleared. See Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act, 99th Cong., 1st Sess., 47, 149, 151-152 (1985). Following these hearings, the House Judiciary Subcommittee on Civil and Constitutional Rights issued a Report in which it concluded "that it is a proper interpretation of the legislative history of the 1982 amendments to use Section 2 standards in the course of making Section 5 determinations."

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> Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Voting Rights Act: Proposed Section 5 Regulations, 99th Cong., 2d Sess., Ser. No. 9, p. 5 (Comm. Print 1986). Although this history does not provide direct evidence of the enacting Congress' intent, it does constitute an informed expert opinion concerning the validity of the Attorney General's regulation.

Despite this strong evidence of Congress' intent, the majority holds that no deference to the Attorney General's regulation is warranted. The Court suggests that had Congress wished to alter "our longstanding interpretation" ****1512** of § 5, Congress would have made this clear. *Ante,* at 1500. But nothing in our "settled interpretation" of § 5, *ante,* at 1500, is inconsistent with the Attorney General's reading of the statute. To the contrary, our precedent actually indicates that nonretrogressive plans that are otherwise discriminatory under *White v. Regester* should not be precleared. As neither the language nor the legislative history of § 5 can be said to conflict with the view that changes that clearly violate § 2 are not entitled to preclearance, there is no legitimate basis for refusing to defer to the Attorney General's regulation. See *Presley v. Etowah County Comm'n,* 502 U.S. 491, 508, 112 S.Ct. 820, 831, 117 L.Ed.2d 51 (1992).

II

In Part III of its opinion the Court correctly concludes that this action must be remanded for further proceedings because the District Court erroneously refused to consider certain evidence that is arguably relevant to whether the Board has proved an absence of discriminatory purpose under § 5. Because the Court appears satisfied that the disputed evidence may be probative of an " 'intent to retrogress,' " it concludes that it is unnecessary to decide "whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ante,* at 1501. For two reasons, I think it most unwise to reverse on such a narrow ground.

First, I agree with Justice BREYER, see *ante,* at 1505, that there is simply no basis for imposing this limitation on the purpose inquiry. None of our cases have held that § 5's purpose test is limited to retrogressive intent. In ***508***Pleasant Grove v. United States,* 479 U.S. 462, 469-472, 107 S.Ct. 794, 798-801, 93 L.Ed.2d 866 (1987), for instance, we found that the city had failed to prove that its annexation of certain white areas lacked a discriminatory purpose. Despite the fact that the annexation lacked a retrogressive effect, we found it was subject to § 5 preclearance. *Ibid.;* see also *id.,* at 474-475, 107 S.Ct., at 801-802 (Powell, J., dissenting) (contending that the majority erred in holding that a discriminatory purpose could be found even though there was no intent "to have a retrogressive effect"). Furthermore, limiting the § 5 purpose inquiry to retrogressive intent is inconsistent with the basic purpose of the Act. Assume, for example, that the record unambiguously disclosed a long history of deliberate exclusion of African-Americans from participating in local elections, including a series of changes each of which was adopted for the specific purpose of maintaining the status quo. None of those changes would have been motivated by an "intent to regress," but each would have been motivated by a "discriminatory purpose" as that term is commonly understood. Given the long-settled understanding that § 5 of the Act was enacted to prevent covered jurisdictions from "contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination," *South Carolina v. Katzenbach,* 383 U.S., at 335, 86 S.Ct., at 822, it is inconceivable that Congress intended to authorize preclearance of changes adopted for the sole purpose of perpetuating an existing pattern of discrimination.

Second, the Court's failure to make this point clear can only complicate the task of the District Court on remand. If that court takes the narrow approach suggested by the Court, another appeal will surely follow; if a majority ultimately agrees with my view of the issue, another remand will then be necessary. On the other hand, if the District Court does not limit its consideration to evidence of retrogressive intent, and if it therefore rules against the Board, appellees will bring the action back and the Court would then have to resolve the issue definitively.

***509** In sum, both the interest in orderly procedure and the fact that a correct answer to the issue is pellucidly clear should be sufficient to persuade the Court to state definitively that § 5 preclearance should be denied if Judge Kessler's evaluation of the record is correct.

Accordingly, while I concur in the judgment insofar as it remands the action for further proceedings, I dissent from the decision insofar as it fails to authorize proceedings in accordance with the views set forth above.

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• 1997 WL 143493 (Appellate Brief) MOTION FOR COUNTIES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND COUNTIES BRIEF AMICUS CURIAE FOR AFFIRMANCE OF DISTRICT COURT DECISION (Mar. 24, 1997)

• 1996 WL 718469 (Oral Argument) Oral Argument (Dec. 09, 1996)

• 1996 WL 607731 (Appellate Brief) REPLY BRIEF FOR THE FEDERAL APPELLANT (Oct. 21, 1996)

• 1996 WL 616261 (Appellate Brief) REPLY BRIEF OF APPELLANTS GEORGE PRICE, ET AL. (Oct. 21, 1996)

• 1996 WL 531765 (Appellate Brief) BRIEF OF APPELLEE BOSSIER PARISH (Sep. 17, 1996)

• 1996 WL 475706 (Appellate Brief) BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE (Aug. 15, 1996)

• 1996 WL 439253 (Appellate Brief) BRIEF OF APPELLANTS GEORGE PRICE, ET AL. (Aug. 01, 1996)

• 1996 WL 439256 (Appellate Brief) BRIEF FOR THE FEDERAL APPELLANT (Aug. 01, 1996)

• 1996 WL 439257 (Appellate Brief) BRIEF AMICI CURIAE OF AMERICAN CIVIL LIBERTIES UNION AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLANTS (Aug. 01, 1996)

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528 U.S. 320, 120 S.Ct. 866, 145 L.Ed.2d 845, 68 USLW 4086, 141 Ed. Law Rep. 27, 00 Cal. Daily Op. Serv. 559, 2000 Daily Journal D.A.R. 873, 2000 CJ C.A.R. 444, 2000 CJ C.A.R. 445, 2000 CJ C.A.R. 450, 2000 CJ C.A.R. 451, 2000 CJ C.A.R. 460, 2000 CJ C.A.R. 461, 13 Fla. L. Weekly Fed. S 87
(Cite as: 528 U.S. 320, 120 S.Ct. 866)

P

Briefs and Other Related Documents

Supreme Court of the United States
Janet RENO, Attorney General, Appellant,
v.
BOSSIER PARISH SCHOOL BOARD.
George Price, et al., Appellants,
v.
Bossier Parish School Board.
Nos. 98-405, 98-406.

Argued April 26, 1999.
Reargued Oct. 6, 1999.
Decided Jan. 24, 2000.

Louisiana parish school board filed motion for declaratory judgment of preclearance under Voting Rights Act for its proposed redistricting plan. A three judge panel of the United States District Court for the District of Columbia, 907 F.Supp. 434, Silberman, Circuit Judge, granted motion. Attorney General appealed. The Supreme Court, 520 U.S. 471, 117 S.Ct. 1491, 137 L.Ed.2d 730, vacated and remanded. On remand, the District Court, 7 F.Supp.2d 29, Robertson, J., granted motion. Attorney General appealed. The Supreme Court, Justice Scalia, held that: (1) case was not moot, and (2) Act does not prohibit preclearance of redistricting plan enacted with discriminatory but nonretrogressive purpose.

Affirmed.

Justice Thomas filed concurring opinion.

Justice Souter file opinion concurring in part and dissenting in part, in which Justices Stevens, Ginsburg and Breyer joined.

Justice Stevens filed dissenting opinion in which Justice Ginsburg joined.

Justice Breyer filed dissenting opinion.

West Headnotes

[1] **Declaratory Judgment 210**
118Ak210 Most Cited Cases

[1] **Schools 53(1)**
345k53(1) Most Cited Cases
Action for declaratory judgment of preclearance under Voting Rights Act for 1992 school redistricting plan was not mooted by fact that next scheduled election would occur in 2002, when school board would have new plan in place based upon data from 2000 census; absent successful subsequent challenge, 1992 plan, rather than 1980 predecessor plan, which contained quite different voting districts, would serve as baseline against which parish's next voting plan would be evaluated for purposes of preclearance, and whether and how that future plan represented change from baseline, and, if so, whether it was retrogressive in effect, would depend on whether preclearance of 1992 plan was proper. Voting Rights Act of 1965, § 2, as amended, 42 U.S.C.A. § 1973.

[2] **Elections 12(8)**
144k12(8) Most Cited Cases
Voting Rights Act does not prohibit preclearance of redistricting plan enacted with discriminatory but nonretrogressive purpose. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

[3] **Elections 12(8)**
144k12(8) Most Cited Cases
In order to obtain preclearance of redistricting plan under Voting Rights Act, covered jurisdiction must show that proposed change does not have purpose of denying or abridging right to vote on account of race or color, and that proposed change will not have effect of denying or abridging right to vote on account of race or color. Voting Rights Act of 1965, § 5, as amended, 42 U.S.C.A. § 1973c.

[4] **Statutes 209**
361k209 Most Cited Cases
Supreme Court will not adopt construction of statute that would attribute different meanings to same phrase in same sentence, depending on which object it is modifying.

****867 *320** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the

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opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Bossier Parish, Louisiana, a jurisdiction covered by § 5 of the Voting Rights Act of 1965, is thereby prohibited from enacting any change in a "voting qualification[,] prerequisite[,] standard, practice, or procedure" without first obtaining preclearance from either the Attorney General or the District Court. When, following the 1990 census, the Bossier Parish School Board (Board) submitted a proposed redistricting plan to the Attorney General, she denied preclearance. The Board then filed this preclearance action in the District Court. Section 5 authorizes preclearance of a proposed voting change that "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Appellants conceded that the Board's plan did not have a prohibited "effect" under § 5, since it was not "retrogressive," *i.e.*, did not worsen the position of minority voters, see *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629, but claimed that it violated § 5 because it was enacted for a discriminatory "purpose." The District Court granted preclearance. On appeal, this Court disagreed with the District Court's proposition that *all* evidence of a dilutive (but nonretrogressive) effect forbidden by § 2 was irrelevant to whether the Board enacted the plan with a retrogressive purpose forbidden by § 5. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 486-487, 117 S.Ct. 1491, 137 L.Ed.2d 730 *(Bossier Parish I)*. This Court vacated and remanded for further proceedings as to the Board's purpose in adopting its plan, *id.*, at 486, 117 S.Ct. 1491, leaving for the District Court the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent, *ibid.* On remand, the District Court again granted preclearance. Concluding, *inter alia*, that there was no evidence of discriminatory but nonretrogressive purpose, the court left open the question whether § 5 prohibits preclearance of a plan enacted with such a purpose.

***321** *Held:*

1. The Court rejects the Board's contention that these cases are mooted by the fact that the 1992 plan will never again be used because the next scheduled election will occur in 2002, when the Board will have a new plan in place based upon data from the 2000 census. In at least one respect, the 1992 plan will have probable continuing effect: It will serve as the baseline against which appellee's next voting plan will be evaluated for preclearance purposes. P. 871.

2. In light of § 5's language and *Beer's* holding, § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose. Pp. 871-878.

(a) In order to obtain preclearance, a covered jurisdiction must establish that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The covered jurisdiction bears the burden of persuasion on both points. See, *e.g.*, *Bossier Parish I*, *supra*, at 478, 117 S.Ct. 1491. In *Beer*, the Court concluded that, in the context of a § 5 vote-dilution claim, the phrase "abridging the right to vote on account of race or color" limited the term "effect" to retrogressive effects. 425 U.S., at 141, 96 S.Ct. 1357. Appellants' contention that in qualifying the term "purpose," the very same phrase does *not* impose a limitation to retrogression, but means discrimination more generally, is untenable. See *Bankamerica Corp. v. United States*, 462 U.S. 122, 129, 103 S.Ct. 2266, 76 L.Ed.2d 456. *Richmond v. United States*, 422 U.S. 358, 378-379, 95 S.Ct. 2296, 45 L.Ed.2d 245, distinguished. Appellants argue that subjecting both prongs to the same limitation

****868** produces a purpose prong with a trivial reach, covering only "incompetent retrogressors." If this were true--and if it were adequate to justify giving the very same words different meanings when qualifying "purpose" and "effect"--there would be instances in which this Court applied such a construction to the innumerable statutes barring conduct with a particular "purpose or effect," yet appellants are unable to cite a single case. Moreover, the purpose prong has *value and effect* even when it does not cover conduct additional to that of a so-called incompetent retrogressor: The Government need only refute a jurisdiction's prima facie showing that a proposed voting change does not have a retrogressive purpose, and need not counter the jurisdiction's evidence regarding actual retrogressive effect. Although virtually identical language in § 2(a) and the Fifteenth Amendment has been read to refer not only to retrogression, but to discrimination more generally, giving the language different meaning in § 5 is faithful to the different context in which in which the term "abridging" is used.

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Appellants' reading would exacerbate the "substantial" federalism costs that the preclearance procedure already exacts, *Lopez v. Monterey County*, 525 U.S. 266, 282, 119 S.Ct. 693, 142 L.Ed.2d 728, perhaps to the extent ***322** of raising concerns about § 5's constitutionality, see *Miller v. Johnson*, 515 U.S. 900, 926-927, 115 S.Ct. 2475, 132 L.Ed.2d 762. The Court's resolution of this issue renders it unnecessary to address appellants' challenge to the District Court's factual conclusion that there was no evidence of discriminatory but nonretrogressive intent. Pp. 871-876.

(b) The Court rejects appellants' contention that, notwithstanding that *Bossier Parish I* explicitly "le[ft] open for another day" the question whether § 5 extends to discriminatory but nonretrogressive intent, 520 U.S., at 486, 117 S.Ct. 1491, two of this Court's prior decisions have already reached the conclusion that it does. Dictum in *Beer, supra*, at 141, 96 S.Ct. 1357, and holding of *Pleasant Grove v. United States*, 479 U.S. 462, 107 S.Ct. 794, 93 L.Ed.2d 866, distinguished. Pp. 876-878.

7 F.Supp.2d 29, affirmed.

SCALIA, J., delivered the opinion of the Court, Part II of which was unanimous, and Parts I, III, and IV of which were joined by REHNQUIST, C.J., and O'CONNOR, KENNEDY, and THOMAS, JJ. THOMAS, J., filed a concurring opinion, *post*, p. 878. SOUTER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, GINSBURG, and BREYER, JJ., joined, *post*, p. 878. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 895. BREYER, J., filed a dissenting opinion, *post*, p. 895.

Paul R.Q. Wolfson, Washington, DC, for the appellant in no. 98-405.

Patricia A. Brannan, Washington, DC, for the appellant in no. 98-406.

Michael A. Carvin, Washington, DC, for the appellee.

Justice SCALIA delivered the opinion of the Court.

These cases present the question whether § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, ***323**42 U.S.C. § 1973c, prohibits preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.

I

This is the second time the present cases are before us, and we thus recite the facts and procedural history only in brief. Like every other political subdivision of the State of Louisiana, Bossier Parish, because ****869** of its history of discriminatory voting practices, is a jurisdiction covered by § 5 of the Voting Rights Act. See 42 U.S.C. § § 1973c, 1973b(a), (b); 30 Fed.Reg. 9897 (1965). It is therefore prohibited from enacting any change in a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," without first obtaining either administrative preclearance from the Attorney General or judicial preclearance from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c.

Bossier Parish is governed by a 12-member Police Jury elected from single-member districts for 4-year terms. In the early 1990's, the Police Jury set out to redraw its electoral districts in order to account for demographic changes reflected in the decennial census. In 1991, it adopted a redistricting plan which, like the plan then in effect, contained no majority-black districts, although blacks made up approximately 20% of the parish's population. On May 28, 1991, the Police Jury submitted its new districting plan to the Attorney General; two months later, the Attorney General granted preclearance.

The Bossier Parish School Board (Board) is constituted in the same fashion as the Police Jury, and it too undertook to redraw its districts after the 1990 census. During the course of that redistricting, appellant-intervenor George Price, president of the local chapter of the National Association for the Advancement of Colored People (NAACP), proposed that the Board adopt a plan with majority-black districts. In the fall of 1992, amid some controversy, the ***324** Board rejected Price's suggestion and adopted the Police Jury's 1991 redistricting plan as its own.

On January 4, 1993, the Board submitted its redistricting plan to the Attorney General for preclearance. Although the Attorney General had precleared the identical plan when submitted by the Police Jury, she interposed a formal objection to the Board's plan, asserting that "new information"-- specifically, the NAACP plan proposed by appellant-intervenor Price-- demonstrated that "black residents

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are sufficiently numerous and geographically compact so as to constitute a majority in two single-member districts." App. to Juris. Statement in No. 98-405, p. 235a. The Attorney General disclaimed any attempt to compel the Board to "adopt any particular plan," but maintained that the Board was "not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice." *Ibid.*

After the Attorney General denied the Board's request for reconsideration, the Board filed the present action for judicial preclearance of the 1992 plan in the United States District Court for the District of Columbia. Section 5 of the Voting Rights Act authorizes preclearance of a proposed voting change that "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Before the District Court, appellants conceded that the Board's plan did not have a prohibited "effect" under § 5, since it did not worsen the position of minority voters. (In *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), we held that a plan has a prohibited "effect" only if it is retrogressive.) Instead, appellants made two distinct claims. First, they argued that preclearance should be denied because the Board's plan, by not creating as many majority-black districts as it should create, violated § 2 of the Voting Rights Act, which bars discriminatory voting practices. Second, they contended that, ***325** although the Board's plan would have no retrogressive effect, it nonetheless violated § 5 because it was enacted for a discriminatory "purpose."

The District Court granted preclearance. *Bossier Parish School Bd. v. Reno*, 907 F.Supp. 434 (D.D.C.1995). As to the first of appellants' two claims, the District ****870** Court held that it could not deny preclearance of a proposed voting change under § 5 simply because the change violated § 2. Moreover, in order to prevent the Government "[from doing] indirectly what it cannot do directly," the District Court stated that it would "not permit section 2 evidence to prove discriminatory purpose under section 5." *Id.*, at 445. As to the second of appellants' claims, the District Court concluded that the Board had borne its burden of proving that the 1992 plan was adopted for two legitimate, nondiscriminatory purposes: to assure prompt preclearance (since the identical plan had been precleared for the Police Jury), and to enable easy implementation (since the adopted plan, unlike the NAACP's proposed plan, required no redrawing of precinct lines). *Id.*, at 447. Appellants filed jurisdictional statements in this Court, and we noted probable jurisdiction. *Reno v. Bossier Parish School Bd.*, 517 U.S. 1232, 116 S.Ct. 1874, 135 L.Ed.2d 171 (1996).

On appeal, we agreed with the District Court that a proposed voting change cannot be denied preclearance simply because it violates § 2, but disagreed with the proposition that *all* evidence of a dilutive (but nonretrogressive) effect forbidden by § 2 was irrelevant to whether the Board enacted the plan with a retrogressive purpose forbidden by § 5. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 486-487, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (*Bossier Parish I*). Since some language in the District Court's opinion left us uncertain whether the court had in fact applied that proposition in its decision, we vacated and remanded for further proceedings as to the Board's purpose in adopting the 1992 plan. *Id.*, at 486, 117 S.Ct. 1491. In light of our disposition, we left open the additional question "whether ***326** the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." *Ibid.* "The existence of such a purpose," we said, "and its relevance to § 5, are issues to be decided on remand." *Ibid.*

On remand, the District Court, in a comparatively brief opinion relying on, but clarifying, its extensive earlier opinion, again granted preclearance. 7 F.Supp.2d 29 (D.D.C.1998). First, in response to our invitation to address the existence of a discriminatory but nonretrogressive purpose, the District Court summarily concluded that "the record will not support a conclusion that extends beyond the presence or absence of retrogressive intent." *Id.*, at 31. It noted that one could "imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory, purpose,' but those imagined facts are not present here." *Ibid.* The District Court therefore left open the question that we had ourselves left open on remand: namely, whether the § 5 purpose inquiry extends beyond the search for retrogressive intent.

Second, the District Court considered, at greater length, how any dilutive impact of the Board's plan bore on the question whether the Board enacted the plan with a retrogressive intent. It concluded, applying the multifactor test we articulated in

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Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), that allegations of dilutive effect and of discriminatory animus were insufficient to establish retrogressive intent. 7 F.Supp.2d, at 31-32.

In their jurisdictional statements in this Court, appellants contended, first, that the District Court's conclusion that there was no evidence of discriminatory but nonretrogressive purpose was clearly erroneous, and second, that § 5 of the Voting Rights Act prohibits preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose. Appellants did not challenge the District Court's determination that there was no evidence of retrogressive intent. We again noted probable jurisdiction. 525 U.S. 1118, 119 S.Ct. 899, 142 L.Ed.2d 898 (1999).

****871 *327** II

Before proceeding to the merits, we must dispose of a challenge to our jurisdiction. The Board contends that these cases are now moot, since its 1992 plan "will never again be used for any purpose." Motion to Dismiss or Affirm 9. Under Louisiana law, school board members are elected to serve 4- year terms. La.Rev.Stat. Ann. § 17:52(A) (West 1995). One month after appellants filed the jurisdictional statements for this appeal, the scheduled 1998 election for the Board took place. The next scheduled election will not occur until 2002, by which time, as appellants concede, the data from the upcoming decennial census will be available and the Board will be required by our "one-man-one-vote" precedents to have a new apportionment plan in place. Accordingly, appellee argues, the District Court's declaratory judgment with respect to the 1992 plan is no longer of any moment and the dispute no longer presents a live "case or controversy" for purposes of Article III of the Constitution. *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975); *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895).

[1] Appellants posit several contingencies in which the Board's 1992 plan would be put to use--including resignation or death of one of the 12 Board members before 2002, and failure to agree upon a replacement plan for the 2002 election. They also assert that, if we were to hold preclearance improper, they "could seek" an injunction voiding the elections held under the 1992 plan and ordering a special election, Brief for Appellants Price et al. Opposing Motion to Dismiss or Affirm 3, and "might be entitled" to such an injunction, Brief for Appellant Reno in Opposition to Motion to Dismiss or Affirm 2. We need not pause to consider whether the possibility of these somewhat speculative and uncertain events suffices to keep these cases alive, since in at least one respect the 1992 plan will have probable continuing effect: Absent a successful subsequent challenge under § 2, it, rather than the 1980 predecessor plan--which contains quite ***328** different voting districts--will serve as the baseline against which appellee's next voting plan will be evaluated for the purposes of preclearance. Whether (and precisely how) that future plan represents a change from the baseline, and, if so, whether it is retrogressive in effect, will depend on whether preclearance of the 1992 plan was proper.

We turn, then, to the merits.

III

[2] Appellants press the two claims initially raised in their jurisdictional statements: first, that the District Court's factual conclusion that there was no evidence of discriminatory but nonretrogressive intent was clearly erroneous, and second, that § 5 of the Voting Rights Act prohibits preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose. Our resolution of the second claim renders it unnecessary to address the first. When considered in light of our longstanding interpretation of the "effect" prong of § 5 in its application to vote-dilution claims, the language of § 5 leads to the conclusion that the "purpose" prong of § 5 covers only retrogressive dilution.

[3] As noted earlier, in order to obtain preclearance under § 5, a covered jurisdiction must demonstrate that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. A covered jurisdiction, therefore, must make two distinct showings: first, that the proposed change "does not have the purpose ... of denying or abridging the right to vote on account of race or color," and second, that the proposed change "will not have the effect of denying or abridging the right to vote on account of race or color." The covered jurisdiction bears the burden of persuasion on both points. See ****872***Bossier Parish I*, 520 U.S., at 478, 117 S.Ct. 1491 (judicial preclearance); 28 CFR § 51.52(a) (1999) (administrative preclearance).

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***329** In *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), this Court addressed the meaning of the no-effect requirement in the context of an allegation of vote dilution. The case presented the question whether a reapportionment plan that would have a discriminatory but nonretrogressive effect on the rights of black voters should be denied preclearance. Reasoning that § 5 must be read in light of its purpose of "insur[ing] that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," we held that "a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5." *Id.*, at 141, 96 S.Ct. 1357. In other words, we concluded that, in the context of a § 5 challenge, the phrase "denying or abridging the right to vote on account of race or color"--or more specifically, in the context of a vote-dilution claim, the phrase "abridging the right to vote on account of race or color"--limited the term it qualified, "effect," to retrogressive effects.

[4] Appellants contend that in qualifying the term "purpose," the very same phrase does *not* impose a limitation to retrogression--*i.e.*, that the phrase "abridging the right to vote on account of race or color" means retrogression when it modifies "effect," but means discrimination more generally when it modifies "purpose." We think this is simply an untenable construction of the text, in effect recasting the phrase "does not have the purpose and will not have the effect of *x* " to read "does not have the purpose of *y* and will not have the effect of *x*." As we have in the past, we refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying. See *Bankamerica Corp. v. United States*, 462 U.S. 122, 129, 103 S.Ct. 2266, 76 L.Ed.2d 456 (1983) (declining to give ***330** different meanings to the phrase "other than" when it modified "banks" and "common carriers" in the same clause).

Appellants point out that we did give the purpose prong of § 5 a broader meaning than the effect prong in *Richmond v. United States*, 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975). That case involved requested preclearance for a proposed annexation that would have reduced the black population of the city of Richmond, Virginia, from 52% to 42%. We concluded that, although the annexation may have had the effect of creating a political unit with a lower percentage of blacks, so long as it "fairly reflect[ed] the strength of the Negro community as it exist[ed] after the annexation" it did not violate § 5. *Id.*, at 371, 95 S.Ct. 2296. We reasoned that this interpretation of the effect prong of § 5 was justified by the peculiar circumstances presented in annexation cases:

> "To hold otherwise would be either to forbid all such annexations or to require, as the price for approval of the annexation, that the black community be assigned the same proportion of council seats as before, hence perhaps permanently overrepresenting them and underrepresenting other elements in the community, including the nonblack citizens in the annexed area. We are unwilling to hold that Congress intended either consequence in enacting § 5." *Ibid.*

We refused, however, to impose a similar limitation on § 5's purpose prong, stating that preclearance could be denied when the jurisdiction was acting with the purpose of effecting a percentage reduction in the black population, even though it could not be denied when the jurisdiction's action ****873** merely had that effect. *Id.*, at 378-379, 95 S.Ct. 2296.

It must be acknowledged that *Richmond* created a discontinuity between the effect and purpose prongs of § 5. We regard that, however, as nothing more than an *ex necessitate* limitation upon the effect prong in the particular context of annexation--to avoid the invalidation of all annexations of ***331** areas with a lower proportion of minority voters than the annexing unit. The case certainly does not stand for the proposition that the purpose and effect prongs have fundamentally different meanings--the latter requiring retrogression, and the former not--which is what is urged here. The approved *effect* of the redistricting in *Richmond*, and the hypothetically disapproved *purpose*, *were both retrogressive*. We found it necessary to make an exception to normal retrogressive-*effect* principles, but not to normal retrogressive-*purpose* principles, in order to permit routine annexation. That sheds little light upon the issue before us here.

Appellants' only textual justification for giving the purpose and effect prongs different meanings is that to do otherwise "would reduce the purpose prong of Section 5 to a trivial matter," Brief for Federal Appellant on Reargument 13; would "effectively

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delet[e] the 'purpose' prong," Reply Brief for Appellants Price et al. on Reargument 3; and would give the purpose prong "a trivial reach, limited to the case of the incompetent retrogressor," Reply Brief for Federal Appellant 9. If this were true--and if it were adequate to justify giving the very same words a different meaning when qualifying "purpose" than when qualifying "effect"--one would expect appellants to cite at least some instances in which this Court applied such muscular construction to the innumerable statutes barring conduct with a particular "purpose or effect." See, *e.g.*, 7 U.S.C. § 192(d) (prohibiting sale of any article "for the purpose or with the effect of manipulating or controlling prices" in the meatpacking industry); 12 U.S.C. § 1467a(c)(1)(A) (barring savings and loan holding companies from engaging in any activity on behalf of a savings association subsidiary "for the purpose or with the effect of evading any law or regulation applicable to such savings association"); 47 U.S.C. § 541(b)(3)(B) (1994 ed., Supp. III) (prohibiting cable franchising authorities from imposing any requirement that "has ***332** the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof"). They cite not a single one, and we are aware of none.

It is true enough that, whenever Congress enacts a statute that bars conduct having "the purpose or effect of *x*," the purpose prong has application entirely separate from that of the effect prong only with regard to unlikely conduct that has "the purpose of *x*" but fails to have "the effect of *x*"--in the present context, the conduct of a so-called "incompetent retrogressor." The purpose prong has *value and effect*, however, even when it does not cover additional conduct. With regard to conduct that has both "the purpose of *x*" and "the effect of *x*," the Government need only prove that the conduct at issue has "the purpose of *x*" in order to prevail. In the specific context of § 5, where the covered jurisdiction has the burden of persuasion, the Government need only refute the covered jurisdiction's prima facie showing that a proposed voting change does not have a retrogressive purpose in order for preclearance to be denied. When it can do so, it is spared the necessity of countering the jurisdiction's evidence regarding actual retrogressive effect--which, in vote-dilution cases, is often a complex undertaking. This advantage, plus the ability to reach malevolent incompetence, may not represent a massive addition to the effect prong, but it is enough to justify the separate existence of the purpose prong in this statute, and is no less than what justifies the ****874** separate existence of such a provision in many other laws. [FN1]

FN1. Justice SOUTER criticizes us for "assum[ing] that purpose is easier to prove than effect ... in voting rights cases." *Post*, at 887, n. 10 (opinion concurring in part and dissenting in part). As is obvious from our discussion in text, we do not suggest that purpose is *always* easier to prove, but simply that it may *sometimes* be (which suffices to give force to the "purpose" prong without the necessity of doing violence to the English language). Indeed, Justice SOUTER acknowledges that "intent to dilute is conceptually simple, whereas a dilutive abridgment-in-fact is not readily defined and identified independently of dilutive intent." *Post*, at 892.

***333** At bottom, appellants' disagreement with our reading of § 5 rests not upon textual analysis, but upon their opposition to our holding in *Beer*. Although they do not explicitly contend that *Beer* should be overruled, they all but do so by arguing that it would be "untenable" to conclude (as we did in *Beer*) that the phrase "abridging the right to vote on account of race or color" refers only to retrogression in § 5, Reply Brief for Federal Appellant on Reargument 1, in light of the fact that virtually identical language elsewhere in the Voting Rights Act--and indeed, in the Fifteenth Amendment--has never been read to refer only to retrogression. See § 2(a) of the Voting Rights Act, 42 U.S.C. § 1973(a) ("No voting [practice] shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color ..."); U.S. Const., Amdt. 15, § 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"). [FN2] The term "abridge," however--whose ***334** core meaning is "shorten," see Webster's New International Dictionary 7 (2d ed.1950); American Heritage Dictionary 6 (3d ed.1992)--necessarily entails a comparison. It makes no sense to suggest that a voting practice "abridges" the right to vote without some baseline with which to compare the practice. In § 5 preclearance proceedings--which uniquely deal only and specifically with *changes* in

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voting procedures--the baseline is the status quo that is proposed to be changed: If the change "abridges the right to vote" relative to the status quo, preclearance is denied, and the status quo (however discriminatory *it* may be) remains in effect. In § 2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the *status quo* "results in [an] abridgement of the right to vote" or "abridge [s] [the right to vote]" relative to what the right to vote *ought to be*, the status quo itself must be changed. Our reading of "abridging" as referring only to retrogression in § 5, but to discrimination ****875** more generally in § 2 and the Fifteenth Amendment, is faithful to the differing contexts in which the term is used. [FN3]

FN2. Appellants also cite § 3(c) of the Voting Rights Act, which provides, with regard to a court that has found a violation of the right to vote guaranteed by the Fourteenth or Fifteenth Amendment, that "the court ... shall retain jurisdiction for such period as it may deem appropriate and during such period no voting [practice] different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such [practice] does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color ...." 42 U.S.C. § 1973a(c). This provision does not assist appellants' case because it is not at all clear that it confers the power to deny approval to nonretrogressive redistricting. That is to say, it may well contemplate that, once a court has struck down an unconstitutional practice and granted relief with regard to that practice, it may assume for that jurisdiction a function identical to that of the District Court for the District of Columbia in § 5 preclearance proceedings. This is suggested by the fact that the State may avoid the court's jurisdiction in this regard by obtaining preclearance from the Attorney General; and that § 3(c), like § 5, explicitly leaves open the possibility that a proposed change approved by the court can be challenged as unconstitutional in a "subsequent action." *Ibid.* We of course intimate no holding on this point, but limit our conclusion to the nonprobative character of § 3(c) with regard to the issue in the present cases.

FN3. Even if § 5 did not have a different baseline than the Fifteenth Amendment, appellants' argument that § 5 should be read in parallel with the Fifteenth Amendment would fail for the simple reason that we have never held that vote dilution violates the Fifteenth Amendment. See *Voinovich v. Quilter*, 507 U.S. 146, 159, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (citing *Beer v. United States*, 425 U.S. 130, 142-143, n. 14, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976)). Indeed, contrary to Justice SOUTER's assertion, *post*, at 20, n. 11 (opinion concurring in part and dissenting in part), we have never even "suggested" as much. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), involved a proposal to redraw the boundaries of Tuskegee, Alabama, so as to exclude all but 4 or 5 of its 400 black voters without excluding a single white voter. See *id.*, at 341, 81 S.Ct. 125. Our conclusion that the proposal would deny black voters the right to vote in municipal elections, and therefore violated the Fifteenth Amendment, had nothing to do with racial vote dilution, a concept that does not appear in our voting-rights opinions until nine years later. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 569, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969). As for the other case relied upon by Justice SOUTER, the plurality opinion in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), not only does that not suggest that the Fifteenth Amendment covers vote dilution, it suggests the opposite, rejecting the appellees' vote-dilution claim in the following terms: "The answer to the appellees' argument is that ... their freedom to vote has not been denied or abridged by anyone. The Fifteenth Amendment does not entail the right to have Negro candidates elected.... Having found that Negroes in Mobile 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." *Id.*, at 65, 100 S.Ct. 1490; see also *id.*, at 84, n. 3, 100 S.Ct. 1490

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(STEVENS, J., concurring in judgment) (characterizing plurality opinion as concluding that "the Fifteenth Amendment applies only to practices that directly affect access to the ballot").

***335** In another argument that applies equally to our holding in *Beer*, appellants object that our reading of § 5 would require the District Court or Attorney General to preclear proposed voting changes with a discriminatory effect or purpose, or even with both. That strikes appellants as an inconceivable prospect only because they refuse to accept the limited meaning that we have said preclearance has in the vote-dilution context. It does *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of § 5, but must be attacked through the normal means of a § 2 action. As we have repeatedly noted, in vote-dilution cases § 5 prevents nothing but backsliding, and preclearance under § 5 affirms nothing but the absence of backsliding. *Bossier Parish I*, 520 U.S., at 478, 117 S.Ct. 1491; *Miller v. Johnson*, 515 U.S. 900, 926, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Beer*, 425 U.S., at 141, 96 S.Ct. 1357. [FN4] This explains why the ***336** sole consequence of failing to obtain preclearance is continuation of the status quo. To deny preclearance to a plan that is *not* retrogressive--*no matter how unconstitutional it may be*--would risk leaving in effect a status quo that is even worse. For example, in the case of a voting change with a discriminatory but nonretrogressive purpose and a ****876** discriminatory but ameliorative effect, the result of denying preclearance would be to preserve a status quo with more discriminatory effect than the proposed change.

FN4. In search of support for the argument that § 5 prevents not just backsliding on vote dilution but all forms of vote dilution, Justice SOUTER embarks upon a lengthy expedition into legislative history. *Post*, at 889- 892 (opinion concurring in part and dissenting in part). He returns emptyhanded, since he can point to nothing suggesting that the Congress thought § 5 covered both retrogressive and nonretrogressive *dilution*. Indeed, it is doubtful whether the Congress that passed the 1965 Voting Rights Act even had the practice of racial vote dilution in mind. As Justice SOUTER acknowledges, this Court did not address the concept until 1969, see *post*, at 890, n. 13, and the legislative history of the 1969 extension of the Act, quoted by Justice SOUTER, see *post*, at 890-891, refers to at-large elections and consolidation of counties as "new, unlawful ways to diminish the Negroes' franchise" developed since passage of the Act. H.R.Rep. No. 91-397, pp. 6-7 (1969).

In sum, by suggesting that § 5 extends to discriminatory but nonretrogressive vote-dilutive purposes, appellants ask us to do what we declined to do in *Bossier Parish I*: to blur the distinction between § 2 and § 5 by "shift [ing] the focus of § 5 from nonretrogression to vote dilution, and ... chang [ing] the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." 520 U.S., at 480, 117 S.Ct. 1491. Such a reading would also exacerbate the "substantial" federalism costs that the preclearance procedure already exacts, *Lopez v. Monterey County*, 525 U.S. 266, 282, 119 S.Ct. 693, 142 L.Ed.2d 728 (1999), perhaps to the extent of raising concerns about § 5's constitutionality, see *Miller*, *supra*, at 926-927, 115 S.Ct. 2475. Most importantly, however, in light of our holding in *Beer*, appellants' reading finds no support in the language of § 5. [FN5]

FN5. Justice SOUTER asserts that "[t]he Justice Department's longstanding practice of refusing to preclear changes that it determined to have an unconstitutionally discriminatory purpose, both before and after *Beer*," is entitled to deference. *Post*, at 892 (opinion concurring in part and dissenting in part); accord, *post*, at 895 (STEVENS, J., dissenting). But of course before *Beer* the Justice Department took the position that even the *effects* prong was not limited, in redistricting cases, to retrogression. Indeed, that position had been the basis for its denial of preclearance in *Beer*, see 425 U.S., at 136, 96 S.Ct. 1357, and was argued in its brief before us as the basis for sustaining the District Court's denial, see Brief for United States in *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357. We rejected that position as to the effects prong, and there is even more reason to reject it in the present cases, whose

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outcomes depend as much upon the implication of one of our prior cases (as to which we owe the Department no deference) as upon a raw interpretation of the statute.

***337** IV

Notwithstanding the fact that *Bossier Parish I* explicitly "le[ft] open for another day" the question whether § 5 extends to discriminatory but nonretrogressive intent, see 520 U.S., at 486, 117 S.Ct. 1491, appellants contend that two of this Court's prior decisions have already reached the conclusion that it does. First, appellants note that, in *Beer*, this Court stated that "an ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S., at 141, 96 S.Ct. 1357. Appellants contend that this suggests that, at least in some cases in which the covered jurisdiction acts with a discriminatory but nonretrogressive dilutive purpose, the covered jurisdiction should be denied preclearance because it is acting unconstitutionally.

We think that a most implausible interpretation. At the time *Beer* was decided, it had not been established that discriminatory purpose as well as discriminatory effect was necessary for a constitutional violation, compare *White v. Regester*, 412 U.S. 755, 765-766, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), with *Washington v. Davis*, 426 U.S. 229, 238-245, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). If the statement in *Beer* had meant what appellants suggest, it would either have been anticipating (without argument) that later holding, or else would have been gutting *Beer*'s holding (since a showing of discriminatory but nonretrogressive effect *would* have been a constitutional violation and *would*, despite the holding of *Beer*, have sufficed to deny preclearance). A much more plausible explanation of the statement is that it referred to a constitutional violation *other than* vote dilution ***338** and, more specifically, a violation consisting of a "denial" of the right to vote, rather than an "abridgement." Although in the context of denial claims, no less than in the context of abridgment claims, the antibacksliding rationale for § 5 (and its effect of avoiding preservation of an even worse status quo) ****877** suggests that retrogression should again be the criterion, arguably in that context the word "deny" (unlike the word "abridge") does not import a comparison with the status quo. [FN6]

FN6. Justice BREYER suggests that "[i]t seems obvious ... that if Mississippi had enacted its 'moral character' requirement in 1966 (after enactment of the Voting Rights Act), a court applying § 5 would have found 'the purpose ... of denying or abridging the right to vote on account of race,' even if Mississippi had intended to permit, say, 0.4%, rather than 0.3%, of the black voting age population of Forrest County to register." *Post*, at 897 (dissenting opinion). As we note above, however, our holding today does not extend to violations consisting of an outright "denial" of an individual's right to vote, as opposed to an "abridgement" as in dilution cases. In any event, if Mississippi had attempted to enact a "moral character" requirement in 1966, it would have been precluded from doing so under § 4, which bars certain types of voting tests and devices altogether, and the issue of § 5 preclearance would therefore never have arisen. See 42 U.S.C. § § 1973b(a)(1), (c).

In any event, it is entirely clear that the statement in *Beer* was pure dictum: The Government had made no contention that the proposed reapportionment at issue was unconstitutional. 425 U.S., at 142, n. 14, 96 S.Ct. 1357. And though we have quoted the dictum in subsequent cases, we have never actually applied it to deny preclearance. See *Bossier Parish I, supra*, at 481, 117 S.Ct. 1491; *Shaw v. Hunt*, 517 U.S. 899, 912, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) *(Shaw II)*; *Miller*, 515 U.S., at 924, 115 S.Ct. 2475. We have made clear, on the other hand, what we reaffirm today: that proceedings to preclear apportionment schemes and proceedings to consider the constitutionality of apportionment schemes are entirely distinct.

> "Although the Court concluded that the redistricting scheme at issue in *Beer* was nonretrogressive, it ***339** did not hold that the plan, for that reason, was immune from constitutional challenge .... Indeed, the Voting Rights Act and our case law make clear that a reapportionment plan *that satisfies § 5* still may be enjoined as unconstitutional." *Shaw v. Reno*, 509 U.S. 630, 654, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) *(Shaw I)* (emphasis added).

See also *City of Lockhart v. United States*, 460 U.S. 125, 134, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983) (describing the holding of *Beer* as follows:

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"Although the new plan may have remained discriminatory, it nevertheless was not a regressive change .... Since the new plan did not increase the degree of discrimination against blacks, it was entitled to § 5 preclearance"); *Allen v. State Bd. of Elections*, 393 U.S. 544, 549-550, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969) ("Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality ..."). As we noted in *Shaw I*, § 5 explicitly states that neither administrative nor judicial preclearance " 'shall bar a subsequent action to enjoin enforcement' of [a change in voting practice]." 509 U.S., at 654, 113 S.Ct. 2816 (quoting 42 U.S.C. § 1973c). That fully available remedy leaves us untroubled by the possibility that § 5 could produce preclearance of an unconstitutionally dilutive redistricting plan.

Second, appellants contend that we denied preclearance on the basis of a discriminatory but nonretrogressive purpose in *Pleasant Grove v. United States*, 479 U.S. 462, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987). That case involved an unusual fact pattern. The city of Pleasant Grove, Alabama--which, at the time of the District Court's decision, had 32 black inhabitants, none of whom was registered to vote and of whose existence city officials appear to have been unaware, *id.*, at 465, n. 2, 107 S.Ct. 794--sought to annex two parcels of land, one inhabited by a few whites, and the other vacant but likely to be inhabited by whites in the near future. We upheld the District Court's conclusion that the city acted with a discriminatory purpose in ****878** annexing the land, rejecting the city's contention ***340** that it could not have done so because it was unaware of the existence of any black voters against whom it could have intended to discriminate:

> "[The city's] argument is based on the incorrect assumption that an impermissible purpose under § 5 can relate only to present circumstances. Section 5 looks not only to the present effects of changes, but to their future effects as well .... Likewise, an impermissible purpose under § 5 may relate to anticipated as well as present circumstances.
>
> "It is quite plausible to see [the annexation] as motivated, in part, by the impermissible purpose of minimizing future black voting strength .... This is just as impermissible a purpose as the dilution of present black voting strength." *Id.*, at 471-472, 107 S.Ct. 794 (citations and footnotes omitted).

Appellants assert that we must have viewed the city's purpose as discriminatory but nonretrogressive because, as the city noted in contending that it lacked even a discriminatory purpose, the city could not have been acting to worsen the voting strength of any present black residents, since there were no black voters at the time. However, as the above quoted passage suggests, we did not hold that the purpose prong of § 5 extends beyond retrogression, but rather held that a jurisdiction with no minority voters can have a retrogressive purpose, at the present time, by intending to worsen the voting strength of *future* minority voters. Put another way, our holding in *Pleasant Grove* had nothing to do with the question whether, to justify the denial of preclearance on the basis of the purpose prong, the purpose must be retrogressive; instead, it involved the question whether the purpose must be to achieve retrogression at once or could include, in the case of a jurisdiction with no present minority voters, retrogression with regard to operation of the proposed plan (as compared with ***341** operation of the status quo) against new minority voters in the future. Like the dictum from *Beer*, therefore, *Pleasant Grove* is simply inapposite here.

* * *

In light of the language of § 5 and our prior holding in *Beer*, we hold that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose. Accordingly, the judgment of the District Court is affirmed.

It is so ordered.

Justice THOMAS, concurring.

The Bossier Parish School Board first sought preclearance of the redistricting plan at issue in this litigation almost seven years ago. The Justice Department and private appellants opposed that effort, arguing throughout this litigation that a "safe" majority-minority district is necessary to ensure the election of a black school board member. Ironically, while this litigation was pending, three blacks were elected from majority-white districts to serve on the Bossier Parish School Board. Although these election results are not part of the record, they vividly illustrate the fact that the federal intervention that spawned this litigation was unnecessary.

Justice SOUTER, with whom Justice STEVENS,

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Justice GINSBURG, and Justice BREYER join, concurring in part and dissenting in part.

Under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, a jurisdiction required to obtain preclearance of changes to its voting laws must show that a proposed amendment will not have the effect, and does not reflect a purpose, to deny or abridge the vote on account of race. I respectfully dissent [FN1] from the Court's holding that § 5 is indifferent ***342** to a racially ****879** discriminatory purpose so long as a change in voting law is not meant to diminish minority voting strength below its existing level. It is true that today's decision has a precursor of sorts in *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), which holds that the only anticipated redistricting effect sufficient to bar preclearance is retrogression in minority voting strength, however dilutive of minority voting power a redistricting plan may otherwise be. But if today's decision achieves a symmetry with *Beer*, the achievement is merely one of well-matched error. The Court was mistaken in *Beer* when it restricted the effect prong of § 5 to retrogression, and the Court is even more wrong today when it limits the clear text of § 5 to the corresponding retrogressive purpose. Although I adhere to the strong policy of respecting precedent in statutory interpretation and so would not reexamine *Beer*, that policy does not demand that recognized error be compounded indefinitely, and the Court's prior mistake about the meaning of the effects requirement of § 5 should not be expanded by an even more erroneous interpretation of the scope of the section's purpose prong.

FN1. I agree with the Court's conclusion on the matter of mootness.

The Court's determination that Congress intended preclearance of a plan not shown to be free of dilutive intent (let alone a plan shown to be intentionally discriminatory) is not, however, merely erroneous. It is also highly unconvincing. The evidence in these very cases shows that the Bossier Parish School Board (School Board or Board) acted with intent to dilute the black vote, just as it acted with that same intent through decades of resistance to a judicial desegregation order. The record illustrates exactly the sort of relentless bad faith on the part of majority-white voters in covered jurisdictions that led to the enactment of § 5. The evidence all but poses the question why Congress would ever have meant to permit preclearance of such a plan, and it all but invites the answer that Congress could hardly have intended any such thing. While the evidence goes substantially unnoticed on the Court's narrow reading of the purpose ***343** prong of § 5, it is not only crucial to my resolution of these cases, but insistent in the way it points up the implausibility of the Court's reading of purpose under § 5.

I

In *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), this Court set out a checklist of considerations for assessing evidence going to discriminatory intent: the historical background of a challenged decision, its relative impact on minorities, specific antecedent events, departures from normal procedures, and contemporary statements of decisionmakers. *Id.*, at 266-268, 97 S.Ct. 555. We directed the District Court to follow that checklist in enquiring into discriminatory intent following remand in these cases, *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 488, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (*Bossier Parish I*). The *Arlington Heights* enquiry reveals the following account of the School Board's redistricting activity and of the character of the parish in which it occurred.

The parish's institution of general governance is known as the Police Jury, a board of representatives chosen from districts within the parish. After the 1990 census showed a numerical malapportionment among those districts, the Police Jurors prepared a revised districting plan, which they submitted to the Attorney General of the United States with a request for the preclearance necessary under § 5 of the Voting Rights Act before the parish, a covered jurisdiction, could modify its voting district lines. Based on information then available to the Department of Justice, the Attorney General understood the parish to have shown that the new plan would not have the effect and did not have the purpose of abridging the voting rights of the parish's 20% black population, and the revised Police Jury plan received preclearance ****880** in the summer of 1991. In fact, as the parish's School Board has now admitted, the Police Jury plan thus approved dilutes the voting strength of the minority population, ***344** Plaintiff's Brief on Remand 12; that is, the plan discriminates by abridging the rights of minority voters to participate in the political process and elect candidates of their choice. *Thornburg v. Gingles*, 478 U.S. 30, 46-47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

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The same population shifts that required the Police Jury to reapportion required the elected School Board to do the same. Although the Board had approached the Police Jury about the possibility of devising a joint plan of districts common to both Board and jury, the jury rebuffed the Board, see App. to Juris. Statement 172a (Stipulations 83-84), and the Board was forced to go it alone. History provides a good indication of what might have been expected from this endeavor.

As the parties have stipulated, the School Board had applied its energies for decades in an effort to "limit or evade" its obligation to desegregate the parish schools. *Id.,* at 216a (Stipulation 237). When the Board first received a court order to desegregate the parish's schools in the mid-1960's, it responded with the flagrantly defiant tactics of that era, see *id.,* at 216a-217a (Stipulations 236-237), and the record discloses the Board's continuing obstructiveness down to the time covered by these cases. During the 1980's, the degree of racial polarization in the makeup of the parish's schools rose, *id.,* at 218a (Stipulations 241-243), and the disproportionate assignment of black faculty to predominantly black schools increased, *id.,* at 217a-218a (Stipulation 240). While the parish's superintendent testified that the assignment of black faculty to predominantly black schools came in response to black parents' requests for positive black examples for their children, see App. 289, the black leaders who testified in these cases uniformly rejected that claim and insisted that, in accord with the parish's desegregation decree, black faculty were to be distributed throughout the parish's schools, to serve as models for white, as well as black, students, see *id.,* at 326-327; 2 Tr. 126-128.

***345** Other evidence of the Board's intransigence on race centers on the particular terms of the integration decree that since 1970 has required the Board to maintain a "Bi-Racial Advisory Review Committee" made up of an equal number of black and white members in order to " 'recommend to the ... Board ways to attain and maintain a unitary system and to improve education in the parish.' " App. to Juris. Statement in No. 98-405 p. 182a (Stipulation 111) (hereinafter App. to Juris. Statement). Although the Board represented to the District Court overseeing desegregation that the committee was in place, see 2 Tr. 16 (testimony of Superintendent William T. Lewis), the committee actually met only two or three times in the mid-1970's and then with only its black members in attendance, see App. to Juris. Statement 183a (Stipulation 112). In 1993, the Board set up a short-lived "Community Affairs Committee" to replace the "Bi-Racial Committee." Despite the Board's resolution charging the committee " 'with the responsibility of investigating, consulting and advising the court and school board periodically with respect to all matters pertinent to the retention *[sic]* of a unitary school system,' " *ibid.* (Stipulation 114), the Board disbanded the committee after only three months because, as a leading Board member put it, " 'the tone of the committee made up of the minority members of the committee quickly turned toward becoming involved in policy,' " *id.,* at 184a (Stipulation 116). "Policy," however, was inevitably implicated by the committee's purpose, and the subjects of its recommendations (such as methods for more effective recruitment of black teachers and their placement throughout the school system in accord with the terms of the desegregation decree, see *id.,* at 183a-184a (Stipulation 115)) fell squarely within its ****881** mandate. It is thus unsurprising that the Board has not achieved a unitary school system and remains under court order to this day. See *id.,* at 217a (Stipulation 239); App. 139 (testimony of S.P. Davis).

***346** About the time the Board appointed its "Community Affairs Committee," it sought preclearance under § 5 from the Attorney General for the redistricting plan before us now. The course of the Board's redistricting efforts tell us much about what it had in mind when it proposed its plan. Following the rebuff from the Police Jury, the Board was able to follow a relaxed redistricting timetable, there being no Board elections scheduled before 1994. While the Board could simply have adopted the Police Jury plan once the Attorney General had precleared it, the Board did not do so, App. to Juris. Statement 147a (Stipulation 11), despite just such a proposal from one Board member at the Board's September 5, 1991, meeting. No action was then taken on the proposal, *id.,* at 174a (Stipulations 89-90), and although the Board issued no explanation for its inaction, it is noteworthy that the jury plan ignored some of the Board's customary districting concerns. Whereas one of those concerns was incumbency protection, see App. 251; cf. App. to Juris. Statement 152a (Stipulation 26), the jury plan would have pitted two pairs of incumbents against each other and created two districts in which no incumbent resided, *id.,* at 181a-182a (Stipulation 109). [FN2] The jury plan disregarded school attendance zones, and even

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included two districts containing no schools. *Id.,* at 174a, 151a, 191a (Stipulations 88, 24, 141). The jury plan, moreover, called for a total variation in district populations exceeding the standard normally used to gauge satisfaction of the "one person, one vote" principle, see *id.,* at 162a-163a (Stipulation 58); App. 231-232; 1 Tr. 147, four of its districts failed the standard measure of compactness used by the Board's own cartographer, *id.,* at 174-176, ***347** and one of its districts contained noncontiguous elements, App. 234-235.

FN2. While two of the incumbents were considering stepping down by the time the Board subsequently adopted the plan, at least one of those decisions was anything but firm. See App. 103; 4 Record, Doc. No. 72, in Civ. Action No. 94-1495 (D.D.C.), pp. 60-61 (joint designations of portions of deposition of David Harvey); 1 Tr. 85.

In addressing the need to devise a plan of its own, the Board hired the same redistricting consultant who had advised the Police Jury, Gary Joiner. Joiner and the Board members (according to Joiner's testimony) were perfectly aware of their responsibility to avoid vote dilution in accordance with the Voting Rights Act, see Record, Doc. No. 38 (direct testimony of Joiner 5), and he estimated that it would take him between 200 to 250 hours to devise a plan for the Board. The Board then spent nearly a year doing little in public about redistricting, while its members met in private with Joiner to consider alternatives. In March 1992, George Price, president of the parish's branch of the National Association for the Advancement of Colored People (NAACP), wrote to the superintendent of parish schools asking for a chance to play some role in the redistricting process. App. 184. Although the superintendent passed the letter on to the Board, the Board took no action, and neither the superintendent nor the Board even responded to Price's request. App. to Juris. Statement 175a (Stipulation 93). In August, Price wrote again, this time in concert with a number of leaders of black community organizations, again seeking an opportunity to express views about the redistricting process, as well as about a number of Board policies bearing on school desegregation. App. 187-189; see also App. to Juris. Statement 175a (Stipulation 94). Once again the Board made no response.

Being frustrated by the Board's lack of responsiveness, Price then asked for help from the national NAACP's Redistricting Project, which sent him a map showing how two compact majority-black districts might be drawn in the parish. *Id.,* at 177a ****882** (Stipulation 98). When Price showed the map to a school district official, he was told it was unacceptable because it failed to show all 12 districts. At Price's request, the Redistricting Project then provided a ***348** plan showing all 12 districts, which Price presented to the Board at its September 3, 1992, meeting, explaining that it showed the possibility of drawing majority-black districts. *Id.,* at 177a-178a (Stipulations 99-100). Several Board members said they could not consider the NAACP plan unless it was presented on a larger map, *id.,* at 178a (Stipulation 100), and both the Board's cartographer and its legal advisor, the parish district attorney, dismissed the plan out of hand because it required precinct splits, *id.,* at 179a (Stipulation 102).

There is evidence that other implications of the NAACP proposal were objectionable to the Board. According to one black leader, Board member Henry Burns told him that while he personally favored black representation on the Board, a number of other Board members opposed the idea. [FN3] App. 142. According to George Price, Board member Barry Musgrove told him that the Board was hostile to the creation of a majority-black district. *Id.,* at 182. [FN4]

FN3. One other Board member, Marguerite Hudson, when asked to explain why two of the schools in Plain Dealing, one of the parish's towns, were predominantly black, stated: "[T]hose people love to live in Plain Dealing..... And most of them don't want to get a big job, they would just rather stay out there in the country, and stay on Welfare, and stay in Plain Dealing." App. 118.

FN4. Musgrove denied making the statement. See 1 Tr. 56. If, as the District Court majority suggested, the significance of the latter statement is uncertain, see *Bossier Parish School Bd. v. Reno,* 907 F.Supp. 434, 448 (D.D.C.1995) *(Bossier Parish I),* it was tantamount to opposition to the most obvious cure for the admitted dilution; there was in any event nothing ambiguous about the Burns statement.

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Although the NAACP plan received no further public consideration, the pace of public redistricting activity suddenly speeded up. At the Board's September 17, 1992, meeting, without asking Joiner to address the possibility of creating any majority-black district, the Board abruptly passed a statement of intent to adopt the Police Jury plan. App. to Juris. Statement 179a-180a (Stipulation 106). At a public ***349** hearing on the plan one week later, attended by an overflow crowd, a number of black voters spoke against the plan, and Price presented the Board with a petition bearing over 500 signatures urging consideration of minority concerns. No one spoke in favor of the plan, *Bossier Parish I*, 907 F.Supp. 434, 439 (D.D.C.1995), and Price explained to the Board that preclearance of the jury plan for use by the Police Jury was no guarantee of preclearance of the same plan for the Board. App. to Juris. Statement 180a-181a (Stipulation 108). Nonetheless, at its October 1 meeting, the voting members of the Board unanimously adopted the Police Jury plan, with one member absent and the Board's only black member (who had been appointed just two weeks earlier to fill a vacancy) abstaining. *Id.*, at 181a-182a (Stipulation 109). The Board did not submit the plan for preclearance by the Attorney General until January 4, 1993. *Id.*, at 182a (Stipulation 110).

II

The significance of the record under § 5 is enhanced by examining in more detail several matters already mentioned as free from dispute, by testing some of the Board's stated reasons for refusing to consider any NAACP plan, and by looking critically at the District Court's reasons for resolving disputed issues in the School Board's favor.

A

The parties stipulate that for decades before this redistricting the Board had sought to "limit or evade" its obligation to ****883** end segregation in its schools, an obligation specifically imposed by Court order nearly 35 years ago and not yet fulfilled. The Board has also conceded the discriminatory impact of the Police Jury plan in falling "more heavily on blacks than on whites," Plaintiff's Brief on Remand in Civ. Action No. 94-1495 (D.D.C.), p. 12, and in diluting "black voting strength," *id.*, at 21. Even without the stipulated history, the conceded dilution would be evidence of a correspondingly ***350** discriminatory intent. With the history, the implication of intent speaks louder, and it grows more forceful still after a closer look at two aspects of the dilutive impact of the Police Jury plan.

First, the plan includes no majority-black districts even though residential and voting patterns in Bossier Parish meet the three conditions we identified in *Thornburg v. Gingles*, 478 U.S., at 50-51, 106 S.Ct. 2752, as opening the door to drawing majority-minority districts to put minority voters on an equal footing with others. The first *Gingles* condition is that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.*, at 50, 106 S.Ct. 2752. The Board does not dispute that black voters in Bossier Parish satisfy this criterion. The Board joined in a stipulation of the parties that in 1991, "it was obvious that a reasonably compact black-majority district could be drawn within Bossier City," App. to Juris. Statement 154a-155a (Stipulation 36); see also 1 Tr. 60 (statement of Board member Barry Musgrove), and that the NAACP plan demonstrated that two such districts could have been drawn in the parish, see App. to Juris. Statement 192a (Stipulation 143). [FN5] As to the second and third *Gingles* conditions, that the minority population be politically cohesive and that the majority-white block voting be enough to defeat the minority's preferred candidate, see *Gingles*, *supra*, at 51, 106 S.Ct. 2752, the Government introduced expert testimony showing such polarization in Bossier Parish's voting patterns. See App. to Juris. Statement 201a-***351** 207a (Stipulations 181-196); App. 163-173 (declaration of Dr. Richard Engstrom). While acknowledging the somewhat limited data available for analysis, the expert concluded that "African American voters are likely to have a realistic opportunity to elect candidates of their choice to the ... Board only in districts in which they constitute a majority of the voting age population." *Id.*, at 174. [FN6]

FN5. While the cartographer hired by the Board stated during the redistricting process that the parish's black population was too dispersed to draw a majority-black district, he later acknowledged that in fact two such districts could be drawn, see App. to Juris. Statement 160a-161a (Stipulations 52, 53), and not only the original NAACP plans but also the Cooper Plans, two alternative plans developed by an expert for the defendant-intervenors, demonstrated as much, see App. 238 (Cooper Plans); App. to Juris. Statement 193a (Stipulation 147).

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FN6. The parties agreed that black candidates for other offices have been able to win from majority-white districts in the parish, see *id.*, at 201a (Stipulation 180), but those instances all involved districts in which the presence of an Air Force base, see *id.*, at 206a-207a (Stipulation 196), meant both that the effective percentage of black voters was considerably higher than the raw figures suggested and, in the view of all the successful black candidates, that the degree of hostility to black candidates among white voters was lower than in the rest of the parish, see App. 131-132 (statement of Jeff Darby), 133-134 (statement of Jerome Darby), 143-144 (statement of Johnny Gipson).

Second, the Police Jury plan diluted black votes by dividing neighboring black communities with common interests in and around at least two of the Parish's municipalities, thereby avoiding the creation of a majority-black district. [FN7] See *id.*, at 154-**884 156 (declaration of George J. Castille III); *id.*, at 141 (testimony of S.P. Davis). Even the Board's own cartographer conceded that one of these instances " 'appear[ed]' " to constitute " 'fracturing,' " App. to Juris. Statement 191a (Stipulation 138), which he defined as "divid[ing] a 'population that has a traditional cohesiveness, lives in the same general area, [and] has a lot of commonalties' ... with '[the] intent to ... fracture that population into adjoining white districts,' " *id.*, at 189a-190a (Stipulation 133).

FN7. Counsel for the Board suggested in cross-examining one of the Government's experts that one of the instances of dividing black communities arose from a state-law prohibition on the Board's "split[ting] existing corporate lines." 2 Tr. 189. He offered no authority for that proposition. But in any case, the example the expert gave did not involve dividing a municipality, but including in a single district areas both within the municipality and outside it.

***352** B

The Board's cartographer and lawyer objected that the NAACP plan was unacceptable because it split precincts in violation of state law. And yet the Board concedes that school boards were free to seek precinct changes from the police juries of their parishes, as they often successfully did. See *id.*, at 150a-151a (Stipulations 22-23). One of the Government's experts, see App. 214, 217, 354, and the Board's own cartographic consultant, see App. to Juris. Statement 151a (Stipulation 23), acknowledged this practice. Indeed, the parties agree that Joiner advised the Board about the option of going to the Police Jury for precinct changes, see *id.*, at 174a (Stipulation 89); see also *id.*, at 179a (Stipulation 102), but that the Board never asked him to pursue that possibility, see *id.*, at 188a (Stipulation 128). [FN8] Judge Kessler in the District Court was therefore surely correct that the Board's claimed inability to divide precincts was no genuine obstacle to a plan with a majority-black district. See *Bossier Parish I*, 907 F.Supp., at 460-461 (opinion concurring in part and dissenting in part).

FN8. The District Court majority stated that it was not merely the fact that the NAACP plan required precinct splits, but that it required a large number of splits that made it unappealing. This claim is untenable for several reasons. First, again it assumes that the act to be explained is the rejection of the NAACP plan rather than the adoption of the Police Jury plan. While the NAACP plan required 46 precinct splits, see App. to Juris. Statement 194a-195a (Stipulation 151), the Cooper II plan, which also included two majority-black districts meeting traditional districting criteria, required only 27, *ibid.*, and the establishment of a single majority-black district would have required just 14, see App. 269-270, 277. Second, and more importantly, the Board's cartographer and lawyer stated that they told the Board the NAACP plan was unacceptable because it split any precincts at all, not because it split lots of them, see App. to Juris. Statement 179a (Stipulation 102), and a leading supporter of the Police Jury plan on the Board, see 1 Tr. 129, and the Board's interim black member at the time of redistricting, see App. 130, agree on that score.

***353** It becomes all the clearer that the prospect of splitting precincts was no genuine reason to reject the NAACP plan (or otherwise to refuse to consider creating any majority-black districts) when one realizes that from early on in the Board's redistricting process it gave serious thought to adopting a plan that would have required just such precinct splits. When

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the Board hired Joiner as its cartographer in May 1991, his estimate of 200 to 250 hours to prepare a plan for the Board, see App. to Juris. Statement 173a (Stipulation 86), indicated that there was no intent simply to borrow the recently devised Police Jury plan or to build on the precincts established by the Police Jury, a possibility that Joiner thought could be explored in "[s]everal hours at least," App. 271. It seems obvious that from the start the Board expected its plan to require precinct splitting, and Joiner acknowledged in his testimony that any plan "as strong as" the Police Jury plan in terms of traditional districting criteria would require precinct splits. *Ibid.* Splitting precincts only became an insuperable obstacle once the NAACP made its proposal to create majority-black districts.

C

1

Despite its stated view that the record would not support a conclusion of nonretrogressive ****885** discriminatory intent, the District Court majority listed a series of "allegedly dilutive impacts" said to point to discriminatory intent: "[t]hat some of the new districts have no schools, that the plan ignores attendance boundaries, that it does not respect communities of interest, that there is one outlandishly large district, that several of them are not compact, that there is a lack of contiguity, and that the population deviations resulting from the jury plan are greater than the limits (+- 5%) imposed by Louisiana law." 7 F.Supp.2d 29, 32 (D.D.C.1998) *(Bossier Parish II).* The District Court found this evidence ***354** "too theoretical, and too attenuated," to be probative of retrogressive intent in the absence of corroborating evidence of a "deliberate attempt." *Ibid.* But whatever the force of such evidence may be on the issue of intent to cause retrogression, there is nothing "theoretical" or "attenuated" in its significance as showing intent to dilute generally.

2

If we take the District Court opinions in *Bossier Parish I* and *Bossier Parish II* together and treat the court's § 5 discussions as covering nonretrogressive discriminatory intent, it is clear that the court rested on two reasons for finding that the plan's dilutive effect could not support an inference of nonretrogressive discriminatory intent. First, the court thought any such inference inconsistent with the view expressed in *Miller v. Johnson,* 515 U.S. 900, 924, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), that a refusal to adopt a plan to maximize the number of majority-minority districts is insufficient alone to support an inference of intentional discrimination. *Miller* is not on point, however. In *Miller,* Georgia had already adopted a plan that clearly improved the position of minority voters by establishing two majority-black districts. The question was simply whether the State's refusal to create a third betrayed discriminatory intent. *Id.,* at 906-908, 923-924, 115 S.Ct. 2475. In these cases, the issue of inferred intent did not arise upon rejection of a plan maximizing the number of majority-black districts after a concededly ameliorative plan had already been adopted; the issue arose on the Board's refusal to consider a plan with any majority-black districts when more than one such district was possible under *Gingles.* The issue here is not whether Bossier Parish betrayed a discriminatory purpose in refusing to create the maximum number of majority-black districts, see *Bossier Parish II, supra,* at 33 (Silberman, J., concurring), but simply whether it was significant that the parish refused to consider creating a majority-black district at all. The refusal points to a discriminatoryintent ***355** that the refusal to maximize in *Miller v. Johnson* did not show.

The District Court's second ground for discounting the evidence of intent inherent in the Police Jury plan's dilutive effect was its finding that the Board had legitimate, nondiscriminatory reasons for approving the plan. The evidence, however, is powerful in showing that the Board had no such reasons. As I have already noted, the Board's respect for existing precinct lines was apparently pretextual. The other supposedly legitimate reason for the Board's choice, that the Police Jury was a safe harbor under § 5, is equally unlikely. If the Police Jury plan was a safe harbor, it had been safe from the day the Attorney General precleared it for the Police Jury, whereas the Board ignored it for more than a year after that preclearance. Interest in the Police Jury plan developed only after pressure from Price and the NAACP had intensified to the point that the redistricting process would have to be concluded promptly if the minority proposals were not to be considered. The Police Jury, therefore, became an attractive harbor only when it seemed to offer safety from demands for a fair reflection of minority voting strength. It was chosen by a Board, described by the District Court majority as possessing a "tenacious determination to maintain the status quo," *Bossier Parish II, supra,* at 32, and the only ****886** fair inference is that when the Board suddenly embraced the Police Jury plan it was running true to form.

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[FN9]

FN9. My conclusion indicates my disagreement with Justice THOMAS's concurring opinion. The factual predicate for raising and resolving the issue of the scope of discriminatory intent relevant under § 5 is a subject of the Board's obligation to produce evidence and the District Court's obligation to make findings, and nothing in the conduct of the Justice Department has impeded either the Board or the court from addressing this evidentiary issue. The fact that black members have been elected to the Board is outside the record and is no more before us than evidence showing the extent to which the particular members were the choices of the minority voters who have suffered the conceded dilution.

***356** D

In sum, for decades the School Board manifested sedulous resistance to the constitutional obligation to desegregate parish schools, which have never attained unitary status and are still subject to court order. When faced with the need to act alone in redrawing its voting districts, the Board showed no interest in the Police Jury plan, which made no sense for school purposes and was at odds with normal districting principles applied by the Board. The Board hired a cartographer in anticipation of drawing district lines significantly different from the Police Jury lines, and the Attorney General's preclearance of the Police Jury plan for the jury's use produced no apparent Board interest in adopting that same plan. When minority leaders sought a role in proposing a plan, the Board ignored them and when they produced concrete proposals prepared by the NAACP, the Board sidestepped with successive technical reasons culminating in a patently pretextual objection. It was only then, as its pretexts for resisting the NAACP were wearing thin, that the Board evidently scrapped its intention to obtain an original plan tailored to school district concerns and acted with unwonted haste on the year-old proposal to adopt the manifestly unsuitable Police Jury plan. The proposal received no public hearing support and nothing but objection from minority voters, who pointed out what the Board now agrees, that the Police Jury plan dilutes minority voting strength. The objections were unavailing and the Board adopted the dilutive plan.

There is no reasonable doubt on this record that the Board chose the Police Jury plan for no other reason than to squelch requests to adopt the NAACP plan or any other plan reflecting minority voting strength, and it would be incredible to suggest that the resulting submergence of the minority voters was unintended by the Board whose own expert testified that it understood the illegality of dilution. If, as I conclude below, see Part III, *infra,* dilutive but nonretrogressive intent ***357** behind a redistricting plan disqualifies it from § 5 preclearance, then preclearance is impossible on this record. Since the burden to negate such intent (like the burden to negate retrogressive intent and effect) rests on the voting district asking for preclearance, nothing more is required to show the impossibility of preclearance. See, *e.g., Pleasant Grove v. United States,* 479 U.S. 462, 469, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987). It is worth noting, however, that the parish should likewise lose even if we assume, as the District Court majority seems to have done at one point, that the burden to show disqualifying intent is on the Government and the intervenors. *Bossier Parish II,* 7 F.Supp.2d, at 31 ("We can imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory purpose,' but those imagined facts are not present here"). It is not only that Judge Kessler was correct in her conclusion that dilutive but nonretrogressive intent was shown; the contrary view of the District Court majority raises " 'the definite and firm conviction that a mistake [has] been committed,' " *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.,* 508 U.S. 602, 622, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) ****887** (quoting *United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). Regardless of the burden of persuasion, therefore, the parish should lose under the intent prong of § 5, if the purpose that disqualifies under § 5 includes an intent to dilute minority voting strength regardless of retrogression.

III

A

The legal issue here is the meaning of "abridging" in the provision of § 5 that preclearance of a districting change in a covered jurisdiction requires a showing that the new plan does not "have the purpose ... of denying or abridging the right to vote on account of race or color ...." The language tracks that of the Fifteenth Amendment's guarantee that "[t]he right of citizens ... to vote shall not be ***358** denied or abridged ... on account of race [or] color ...." Since

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the Act is an exercise of congressional power under § 2 of that Amendment, *South Carolina v. Katzenbach*, 383 U.S. 301, 325-327, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), the choice to follow the Amendment's terminology is most naturally read as carrying the meaning of the constitutional terms into the statute. *United States v. Kozminski*, 487 U.S. 931, 945, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988) ("By employing the constitutional language, Congress apparently was focusing on the prohibition of comparable conditions"); cf. *Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 96 L.Ed. 288 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice,it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed"). Any construction of the statute, therefore, carries an implication about the meaning of the Amendment, absent some good reason to treat the parallel texts differently on some particular point, and a reading of the statute that would not fit the Constitution is presumptively wrong. [FN10]

FN10. The majority argues that we should construe purpose and effect uniformly, as we would in laws regulating price discrimination, savings and loans, and cable franchises. See *ante*, at 873. I find the Fifteenth Amendment more relevant in interpreting § 5; the constitutional language provides a reason to give purpose its full breadth. The majority also claims that its reading leaves the purpose prong with some meaning because the Government need only refute a jurisdiction's claim that a change lacks retrogressive purpose in order to deny preclearance, without countering the jurisdiction's evidence regarding actual retrogressive effect. *Ibid.* This assumes that purpose is easier to prove than effect. While that may be true in price-fixing cases, it is not true in voting rights cases (even though purpose is conceptually simpler than effect under § 5, see *infra*, at 892). Here, as in many other race discrimination cases, the parties agreed about the effects of the proposed changes while hotly disputing the reasons for them. The majority limits the purpose prong to the few cases in which attempted retrogression fails of its goal, a rather paltry coverage given that it is discriminatory purpose, not discriminatory effect, that is at the heart of the Fifteenth Amendment.

359** In each context, it is clear that abridgment necessarily means something more subtle and less drastic than the complete denial of the right to cast a ballot, denial being separately forbidden. Abridgment therefore must be a condition in between complete denial, on the one hand, and complete enjoyment of voting power, on the other. The principal concept of diminished voting strength recognized as actionable under our cases is vote dilution, defined as a regime that denies to minority voters the same opportunity to participate in the political process and to elect representatives of their choice that majority voters enjoy. See, *e.g.*, *Thornburg v. Gingles*, 478 U.S., at 46-47, 106 S.Ct. 2752; 42 U.S.C. § 1973. The benchmark of dilution pure and simple is thus a system in which every minority voter has as good a chance at political participation ****888** and voting effectiveness as any other voter. Our cases have also recognized retrogression as a subspecies of dilution, the consequence of a scheme that not only gives a minority voter a lesser practical chance to participate and elect than a majority voter enjoys, but even reduces the minority voter's practical power from what a preceding scheme of electoral law provided. See *Beer v. United States*, 425 U.S., at 141, 96 S.Ct. 1357. Although our cases have dealt with vote dilution only under the Fourteenth Amendment, see, *e.g.*, *Shaw v. Reno*, 509 U.S. 630, 645, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), I know of no reason in text or history that dilution is not equally violative of the Fifteenth Amendment guarantee against abridgment. And while there has been serious dispute in the past over the Fourteenth Amendment's coverage of voting rights, see, *e.g.*, *Oregon v. Mitchell*, 400 U.S. 112, 154, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970) (Harlan, J., concurring in part and dissenting in part), I know of no reason to doubt that "abridg[e]" in the Fifteenth Amendment includes dilutive discrimination. See ***360Bossier Parish I*, 520 U.S., at 494-495, 117 S.Ct. 1491 (BREYER, J., concurring in part and concurring in judgment). [FN11]

FN11. We have suggested, but have never explicitly decided, that the Fifteenth Amendment applies to dilution claims. See *Mobile v. Bolden*, 446 U.S. 55, 62-63, 100

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S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion); *Gomillion v. Lightfoot*, 364 U.S. 339, 346, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (singling out racial minority for discriminatory treatment in voting violates Fifteenth Amendment, which prohibits municipal boundaries drawn to exclude blacks). But see *Mobile, supra*, at 84, n. 3, 100 S.Ct. 1490 (STEVENS, J., concurring in judgment) (suggesting that *Mobile* plurality said that Fifteenth Amendment does not reach vote dilution); *Voinovich v. Quilter*, 507 U.S. 146, 159, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993) (reserving the question); *Shaw v. Reno*, 509 U.S. 630, 645, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (endorsing the practice of considering dilution claims under the Fourteenth Amendment); *Beer v. United States*, 425 U.S. 130, 142, n. 14, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976).

The majority claims that *Gomillion* was not about dilution because it involved the exclusion of black voters from municipal elections. *Ante*, at 875, n. 3. The voters excluded from the gerrymandered Tuskegee were left in unincorporated areas, where they could, at most, vote for county and state officials. Changing political boundaries to affect minority voting power would be called dilution today. *Gomillion* shows that the physical image evoked by the term "dilution" does not encompass all the ways in which participation in the political process can be made unequal. That the Court did not use the word "dilution" in its modern sense in *Gomillion* does not diminish the force of its Fifteenth Amendment analysis.

The majority also suggests, *ante*, at 875, n. 3, that the *Mobile* plurality explicitly rejected reliance on the Fifteenth Amendment. But the same plurality recognized that " 'deny or abridge' " in § 2 of the Voting Rights Act mirrored the cognate language of the Fifteenth Amendment, *Mobile, supra*, at 60-61, 100 S.Ct. 1490, and we have since held that the language of § 2 includes nonretrogressive dilution claims. See, *e.g.*, *Voinovich v. Quilter, supra*, at 157, 113 S.Ct. 1149.

The Court has never held (save in *Beer*) that the concept of voting abridgment covers only retrogressive dilution, and any such reading of the Fifteenth Amendment would be outlandish. The Amendment contains no textual limitation on abridgment, and when it was adopted, the newly emancipated citizens would have obtained practically nothing from a mere guarantee that their electoral power would not be further reduced. Since § 5 of the Act is likewise free of any ***361** language qualifying or limiting the terms of abridgment which it shares with the Amendment, abridgment under § 5 presumably covers any vote dilution, not retrogression alone, and no redistricting scheme should receive preclearance without a showing that it is nondilutive. See *Bossier Parish I, supra*, at 493, 117 S.Ct. 1491 (BREYER, J., concurring in part and concurring in judgment) (use in § 5 of Fifteenth Amendment language indicates that § 5 prohibits new plans with dilutive purposes). Such, in fact, was apparently just what Congress had in mind when it addressed § 5 to the agility of covered jurisdictions in keeping ****889** one step ahead of dilution challenges under the Constitution (and previous versions of the Voting Rights Act) by adopting successive voting schemes, each with a distinctive feature that perpetuated the abridgment of the minority vote:

> "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits. After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S., at 328, 86 S.Ct. 803 (footnote omitted).

This evil in Congress's sights was discrimination, abridgment of the right to vote, not merely discrimination that happens to cause retrogression, and Congress's intent to frustrate the unconstitutional evil by barring a replacement scheme of discrimination from being put into effect was not confined to any one subset of discriminatory schemes. The School Board's purpose thus seems to lie at the very center of what Congress meant to counter by requiring preclearance, and the Court's holding that any nonretrogressive purpose survives § 5 is an exceedingly odd conclusion.

***362** B

The majority purports to shoulder its burden to

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justify a limited reading of "abridging" by offering an argument from the "context" of § 5. Since § 5 covers only changes in voting practices, this fact is said to be a reason to think that "abridging" as used in the statute is narrower than its cognate in the Fifteenth Amendment, which covers both changes and continuing systems. *Ante,* at 872, 874-875. In other words, on the majority's reading, the baseline in a § 5 challenge is the status quo that is to be changed, while the baseline in a Fifteenth Amendment challenge (or one under § 2 of the Voting Rights Act) is a nondiscriminatory regime, whether extant or not. From the fact that § 5 applies only when a voting change is proposed, however, it does not follow that the baseline of abridgment is the status quo; Congress could perfectly well have decided that when a jurisdiction is forced to change its voting scheme (because of malapportionment shown by a new census, say), it ought to show that the replacement is constitutional. This, of course, is just what the unqualified language and its Fifteenth Amendment parallel would suggest.

In fact, the majority's principal reason for reading intent to abridge as covering only intent to cause retrogression is not the peculiar context of changes in the law, but *Beer v. United States,* 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), which limited the sort of "effect" that would be an abridgment to retrogressive effect. The strength of the majority's position, then, depends on the need for parallel limitations on the purpose and effect prongs of § 5. The need, however, is very much to the contrary.

1

Insofar as *Beer* is authority for defining the "effect" of a redistricting plan that would bar preclearance under § 5, I will of course respect it as precedent. The policy of *stare decisis* is at its most powerful in statutory interpretation ***363** which Congress is always free to supersede with new legislation), see *Hilton v. South Carolina Public Railways Comm'n,* 502 U.S. 197, 202, 112 S.Ct. 560, 116 L.Ed.2d 560 (1991), and § 5 presents no exception to the rule that when statutory language is construed it should stay construed. But it is another thing entirely to ignore error in extending discredited reasoning to previously unspoiled statutory provisions. That, however, ****890** is just what the Court does in extending *Beer* from § 5 effects to § 5 purpose.

Beer was wrongly decided, and its error should not be compounded in derogation of clear text and equally clear congressional purpose. The provision in § 5 barring preclearance of a districting plan portending an abridging effect is unconditional (and just as uncompromising as the bar to plans resting on a purpose to abridge). The *Beer* Court nonetheless sought to justify the imposition of a nontextual limitation on the forbidden abridging effect to retrogression by relying on a single fragment of legislative history, a statement from a House Report that § 5 would prevent covered jurisdictions from " 'undo[ing] or defeat[ing] the rights recently won' " by blacks. *Beer, supra,* at 140, 96 S.Ct. 1357 (quoting H.R.Rep. No. 91-397, p. 8 (1969)). [FN12] Relying on this one statement, however, was an act of distorting selectivity, for the legislative history is replete with references to the need to block changes in voting practices that would perpetuate existing discrimination and stand in the way of truly nondiscriminatory alternatives. In the House of Representatives, the Judiciary Committee noted that "even after apparent defeat[s] resisters seek new ways and means of discriminating. ***364** Barring one contrivance too often has caused no change in result, only in methods." H.R.Rep. No. 439, 89th Cong., 1st Sess., 10 (1965), and the House Report described how jurisdictions had used changes in voting practices to stave off reform. By making trifling changes in registration requirements, for example, Dallas County, Alabama, was able to terminate litigation against it without registering more than a handful of minority voters, see *id.,* at 10-11, and new practices were similarly effective devices for perpetuating discrimination in other jurisdictions as well, see S.Rep. No. 162, pt. 3, pp. 8-9 (1965) (Joint Statement of Individual Views by Sens. Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott, and Javits). After losing voting rights cases, jurisdictions would adopt new voting requirements " 'as a means for continuing the rejection of qualified Negro applicants.' " *Id.,* at 12 (quoting *United States v. Parker,* 236 F.Supp. 511, 517 (M.D.Ala.1964)). Thanks to the discriminatory traditions of the jurisdictions covered by § 5, these new practices often avoided retrogression [FN13] even as they stymied improvements. In the days before § 5, the ongoing litigation would become moot and minority litigants would be back at square one, shouldering the burden of new challenges with the prospect of further dodges to come. *Beer, supra,* at 152, n. 9, 96 S.Ct. 1357 (Marshall, J., dissenting).

FN12. Section 5 was promulgated by the 89th Congress, but Congress's attention has

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repeatedly returned to it as the duration of the Voting Rights Act has been extended and the Act has been amended. See, *e.g.*, *Bossier Parish I*, 520 U.S. 471, 505-506, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (STEVENS, J., dissenting in part and concurring in part) (discussing 1982 amendments); Voting Rights Act of 1965, Amendments of 1975, 89 Stat. 400; Voting Rights Act Amendments of 1970, 84 Stat. 315.

FN13. The legislative history did not use the terms "retrogression" and "dilution" to describe discriminatory regimes. In the Voting Rights Act context, the former appears for the first time in a federal case in *Beer*, 425 U.S., at 141, 96 S.Ct. 1357; the latter made its first appearance in *Allen v. State Bd. of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).

The intent of Congress to address the frustration of running to stay in place was manifest when it extended the Voting Rights Act in 1969:

"Prior to the enactment of the 1965 act, new voting rules of various kinds were resorted to in several States in order to perpetuate discrimination in the face of ***365** adverse Federal court decrees and enactments by the Congress.... ****891** In order to preclude such future State or local circumvention of the remedies and policies of the 1965 act, [§ 5 was enacted]....

"The record before the committee indicates that as Negro voter registration has increased under the Voting Rights Act, several jurisdictions have undertaken new, unlawful ways to diminish the Negroes' franchise and to defeat Negro and Negro-supported candidates. The U.S. Commission on Civil Rights has reported that these measures have taken the form of switching to at-large elections where Negro voting strength is concentrated in particular election districts and facilitating the consolidation of predominently *[sic]* Negro and predominently *[sic]* white counties. Other changes in rules or practices affecting voting have included increasing filing fees in elections where Negro candidates were running; abolishing or making appointive offices sought by Negro candidates; extending the term of office of incumbent white officials, and withholding information about qualifying for office from Negro candidates." H.R.Rep. No. 91-397, at 6-7.

See also 115 Cong. Rec. 38486 (1969) (remarks of Rep. McCulloch) (listing "new methods by which the South achieves an old goal" of maintaining white control of the political process).

Congress again expressed its views in 1975:

"In recent years the importance of [§ 5] has become widely recognized as a means of promoting and preserving minority political gains in covered jurisdictions....

. . . . .

"... As registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength. Such other measures may include switching to at-large elections, ***366** annexations of predominantly white areas, or the adoption of discriminatory redistricting plans." S.Rep. No. 94-295, pp. 15-17 (citation omitted).

Congress thus referred to § 5 as a way to make the situation better ("promoting"), not merely as a stopgap to keep it from getting worse ("preserving").

It is all the more difficult to understand how the majority in *Beer* could have been so oblivious to this clear congressional objective, when a decade before *Beer* the Court had realized that modifying legal requirements was the way discriminatory jurisdictions stayed one jump ahead of the Constitution. In *United States v. Mississippi*, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965), the Court described a series of ingenious devices preventing minority registration, and in *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), the Court said that

"Congress knew that some of the States ... had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *Id.*, at 335, 86 S.Ct. 803 (footnote omitted); see also *id.*, at 314-315, 86 S.Ct. 803.

Likewise, well before *Beer*, our nascent dilution jurisprudence addressed practices mentioned in the congressional lists of tactics targeted by § 5. See, *e.g.*, *White v. Regester*, 412 U.S. 755, 765-766, 768-769, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

In fine, the full legislative history shows beyond any

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doubt just what the unqualified text of § 5 provides. The statute contains no reservation in favor of customary abridgment grown familiar after years of relentless discrimination, and the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles. See *post,* at 896- ****892** 897 (BREYER, J., dissenting). *Beer* was ***367** wrong, and while it is entitled to stand under our traditional *stare decisis* in statutory interpretation, *stare decisis* does not excuse today's decision to compound *Beer's* error. [FN14]

FN14. The Court says this "lengthy expedition into legislative history" leaves me "empty-handed" for the reason that nothing shows that today's notions of vote dilution were particularly in the congressional mind. *Ante,* at 875, n. 4. But the whole point of the legislative history is that Congress meant to guard against just those discriminatory devices that were as yet untried. Congress did not know what the covered jurisdictions would think up next.

2

Giving purpose-to-abridge the broader, intended reading while preserving the erroneously truncated interpretation of effect would not even result in a facially irrational scheme. This is so because intent to dilute is conceptually simple, whereas a dilutive abridgment-in-fact is not readily defined and identified independently of dilutive intent. A purpose to dilute simply means to subordinate minority voting power; exact calibration is unnecessary to identify what is intended. Any purpose to give less weight to minority participation in the electoral process than to majority participation is a purpose to discriminate and thus to "abridge" the right to vote. No further baseline is needed because the enquiry goes to the direction of the majority's aim, without reference to details of the existing system.

Dilutive effect, for the reason the majority points out, is different. Dilutive effect requires a baseline against which to compare a proposed change. While the baseline is in theory the electoral effectiveness of majority voters, dilution is not merely a lack of proportional representation, see *Davis v. Bandemer,* 478 U.S. 109, 131, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986) (opinion of White, J.), and we have held that the maximum number of possible majority-minority districts cannot be the standard, see, *e.g., Miller v. Johnson,* 515 U.S., at 925-926, 115 S.Ct. 2475. Thus we have held that an enquiry into dilutive effect must rest on some ***368** idea of a reasonable allocation of power between minority and majority voters; this requires a court to compare a challenged voting practice with a reasonable alternative practice. See *Holder v. Hall,* 512 U.S. 874, 880, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (opinion of KENNEDY, J.); *id.,* at 887-888, 114 S.Ct. 2581 (O'CONNOR, J., concurring in part and concurring in judgment); see also *Johnson v. De Grandy,* 512 U.S. 997, 1018, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). Looking only to retrogression in effect, while looking to any dilutive or other abridgment in purpose, avoids the difficulty of baseline derivation. The distinction was not intended by Congress, but such a distinction is not irrational.

Indeed, the Justice Department has always taken the position that *Beer* is limited to the effect prong and puts no limitation on discriminatory purpose in § 5. See Brief for Federal Appellant 32-33. The Justice Department's longstanding practice of refusing to preclear changes that it determined to have an unconstitutionally discriminatory purpose, both before and after *Beer,* is entitled to "particular deference" in light of the Department's "central role" in administering § 5. *Dougherty County Bd. of Ed. v. White,* 439 U.S. 32, 39, 99 S.Ct. 368, 58 L.Ed.2d 269 (1978); see also *United States v. Sheffield Bd. of Comm'rs,* 435 U.S. 110, 131-132, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978); *Perkins v. Matthews,* 400 U.S. 379, 390-391, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971). Most significant here, the fact that the Justice Department has for decades understood *Beer* to be limited to effect demonstrates that such a position is entirely consistent and coherent with the law as declared in *Beer,* even though it may not have been what Congress intended.

3

Giving wider scope to purpose than to effect under § 5 would not only preserve ****893** the capacity of § 5 to bar preclearance to all intended violations of the Fifteenth Amendment, [FN15] it would also enjoy the virtue of consistency with ***369** prior decisions apart from *Beer.* In *Richmond v. United States,* 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975), the Court held that a city's territorial annexation reducing the percentage of black voters could not be recognized as a legal wrong under the effect prong of § 5, but remanded for further consideration of discriminatory purpose. The majority distinguishes

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Richmond as "nothing more than an *ex necessitate* limitation upon the effect prong in the particular context of annexation." *Ante,* at 873. But in fact, *Richmond* laid down no eccentric effect rule and is squarely at odds with the majority's position that only an act taken with intent to produce a forbidden effect is forbidden under the intent prong.

FN15. Justice BREYER developed this justification for giving full effect to the "purpose" prong in his opinion in *Bossier Parish I,* 520 U.S., at 493-497, 117 S.Ct. 1491 (opinion concurring in part and concurring in judgment). Section 2, as amended, now invalidates facially neutral practices with discriminatory effects even in the absence of purposeful discrimination, and is thus no longer coextensive with our understanding of the Constitution. The effects-only standard was added after the Court made clear, after years of uncertainty, that the Constitution prohibited only purposeful discrimination, not neutral action with a disparate impact on minorities.
The Court has divided on the effect of this change on § 5. Compare *id.,* at 484, 117 S.Ct. 1491, with *id.,* at 505-506, 117 S.Ct. 1491 (STEVENS, J., dissenting in part and concurring in part). As Justice BREYER explained, that the effects prong now goes beyond the Constitution has no bearing on whether we should limit the meaning of the purpose prong, which does no more than repeat what the Constitution requires. *Id.,* at 493-494, 117 S.Ct. 1491. Both retrogressive and nonretrogressive discriminatory purposes violate the Constitution. As I have said already, I agree with Justice BREYER that there is no evidence that Congress intended to include in § 5 only part of what the Constitution prohibits. See *id.,* at 494, 117 S.Ct. 1491. The tides of constitutional interpretation have buffeted both § 2 and § 5, but have never ebbed so low as to approve of discriminatory, dilutive purpose.

As to forbidden effect, the *Richmond* Court said this:

"As long as the ward system fairly reflects the strength of the Negro community as it exists after the annexation, we cannot hold, without more specific legislative direction, that such an annexation is nevertheless barred by § 5. It is true that the black community, if there is racial bloc voting, will command fewer seats on the city council; and the annexation will have effected a decline ***370** in the Negroes' relative influence in the city. But a different city council and an enlarged city are involved after the annexation. Furthermore, Negro power in the new city is not undervalued, and Negroes will not be underrepresented on the council.
"As long as this is true, we cannot hold that the effect of the annexation is to deny or abridge the right to vote." 422 U.S., at 371, 95 S.Ct. 2296.

As *Richmond's* references to "undervaluation" and "underrepresentation" make clear, the case involves application of standard Fifteenth Amendment principles to the annexation context, not an annexation exception. As long as the postannexation city allowed black voters to participate on equal terms with white voters, the annexation did not "abridge" their voting rights even if they thereafter made up a smaller proportion of the voting population. The Court also held, however, that in adopting the very plan whose effect had been held to be outside the scope of legal wrong, the city could have acted with an unlawful, discriminatory intent that would have rendered the annexation unlawful and barred approval under § 5:

"[I]t may be asked how it could be forbidden by § 5 to have the purpose and intent of achieving only what is a perfectly legal result under that section and ****894** why we need remand for further proceedings with respect to purpose alone. The answer is plain, and we need not labor it. An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute. Section 5 forbids voting changes taken with the purpose of denying the vote on the grounds of race or color." *Id.,* at 378, 95 S.Ct. 2296.

***371** It follows from *Richmond* that a plan lacking any underlying purpose to cause disqualifying retrogression may be barred by a discriminatory intent.

The majority's attempt to distinguish *Pleasant Grove v. United States,* 479 U.S. 462, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987), is equally vain. Whereas *Richmond* dealt with the argument that law and logic barred finding a disqualifying intent when effect was lawful, *Pleasant Grove* dealt with the argument that finding a disqualifying intent was impossible in fact. The Court in *Pleasant Grove* denied preclearance to

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an annexation that added white voters to the city's electorate, despite the fact that at the time of the annexation minority voting strength was nonexistent and officials of the city seeking the annexation were unaware of any black voters whose votes could be diluted. One thing is clear beyond peradventure: the annexation in that case could not have been intended to cause retrogression. No one could have intended to cause retrogression because no one knew of any minority voting strength from which retrogression was possible. 479 U.S., at 465, n. 2, 107 S.Ct. 794. The fact that the annexation was nonetheless barred under the purpose prong of § 5, 11 years after *Beer*, means that today's majority cannot hold as they do without overruling *Pleasant Grove*.

The majority seeks to avoid *Pleasant Grove* by describing it as barring "future retrogression" by nipping any such future contingency even before the bud had formed. This gymnastic, however, not only overlooks the contradiction between *Pleasant Grove's* holding that a voting change without possible retrogressive intent could fail under the purpose prong and the majority's reasoning today that the baseline for the purpose prong is the status quo; it even ignores what the Court actually said. While the *Pleasant Grove* Court said that impermissible purpose could relate to anticipated circumstances, 479 U.S., at 471-472, 107 S.Ct. 794, it said nothing about anticipated retrogression (a concept familiar to the Court ***372** since the time of *Beer*). The Court found it "plausible" that the city had simply acted with "the impermissible purpose of minimizing future black voting strength." 479 U.S., at 471-472, 107 S.Ct. 794 (footnote omitted). The Court spoke of "minimizing," not "causing retrogression to." But there is more:

> "One means of thwarting [integration] is to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance. This is just as impermissible a purpose as the dilution of present black voting strength. Cf. *City of Richmond*, [422 U.S.,] at 378 [, 95 S.Ct. 2296]." *Id.*, at 472, 107 S.Ct. 794.

That is, a nonretrogressive dilutive purpose is just as impermissible under § 5 as a retrogressive one. Today's holding contradicts that. The majority is overruling *Pleasant Grove*.

The majority proffers no justification for denying the precedential value of *Pleasant Grove*. Instead it observes that reading the purpose prong of § 5 as covering more than retrogression (as *Richmond* and *Pleasant Grove* read it) would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts." *Ante*, at 876. But my reading, like the Court's own prior reading, would not raise the cost of federalism one penny above what the Congress meant it to be. The behavior of Bossier Parish is a plain effort to deny the voting equality that the Constitution just as plainly guarantees. The ****895** point of § 5 is to thwart the ingenuity of the School Board's effort to stay ahead of challenges under § 2. Its object is to bring the country closer to transcending a history of intransigence to enforcement of the Fifteenth Amendment. Now, however, the promise of § 5 is substantially diminished. Now executive and judicial officers of the United States will be forced to preclear illegal and unconstitutional voting schemes patently intended to perpetuate discrimination. The appeal to federalism is no excuse. I respectfully dissent.

***373** Justice STEVENS, with whom Justice GINSBURG joins, dissenting.

In its administration of the voting rights statute for the past quarter century, the Department of Justice has consistently employed a construction of the Voting Rights Act of 1965 contrary to that imposed upon the Act by the Court today. Apart from the deference such constructions are always afforded, the Department's reading points us directly to the necessary starting point of any exercise in statutory interpretation--the plain language of the statute.

It is not impossible that language alone would lead one to think that the phrase "will not have the effect" includes some temporal measure; the noun "effect" and the verb tense "will have" could imaginably give rise to a reading that requires a comparison between what is and what will be. But there is simply nothing in the word "purpose" or the entire phrase "does not have the purpose" that would lead anyone to think that Congress had anything in mind but a present-tense, intentional effort to "den[y] or abridg[e] the right to vote on account of race." See, *e.g.*, Webster's Third New International Dictionary 1847 (1966). Ergo, if a municipality intends to deny or abridge voting rights because of race, it may not obtain preclearance.

Like Justice SOUTER, I am persuaded that the dissenting opinions of Justices White and Marshall were more faithful to the intent of the Congress that

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enacted the Voting Rights Act of 1965 than that of the majority in *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976). One need not, however, disavow that precedent in order to explain my profound disagreement with the Court's holding today. The reading above makes clear that there is no necessary tension between the *Beer* majority's interpretation of the word "effect" in § 5 and the Department's consistent interpretation of the word "purpose." For even if retrogression is an acceptable standard for identifying prohibited effects, that assumption does not justify an interpretation of the word ***374** "purpose" that is at war with both controlling precedent and the plain meaning of the statutory text.

Accordingly, for these reasons and for those stated at greater length by Justice SOUTER, I respectfully dissent.

Justice BREYER, dissenting.

I agree with Justice SOUTER, with one qualification. I would not reconsider the correctness of the Court's decision in *Beer v. United States*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976)--an "effects" case--because, regardless, § 5 of the Voting Rights Act of 1965 prohibits preclearance of a voting change that has the purpose of unconstitutionally depriving minorities of the right to vote.

As Justice SOUTER points out, *ante*, at 888-889 (opinion concurring in part and dissenting in part), Congress enacted § 5 in 1965 in part to prevent certain jurisdictions from limiting the number of black voters through "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *South Carolina v. Katzenbach*, 383 U.S. 301, 335, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966). This "stratagem" created a moving target with a consequent risk of judicial runaround. See, *e.g.*, ****896***Perkins v. Mathews*, 400 U.S. 379, 395-396, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971). And this "stratagem" could prove similarly effective where the State's "new rules" were intended to retrogress and where they were not. Indeed, since at the time, in certain places, historical discrimination had left the number of black voters at close to zero, retrogression would have proved virtually impossible where § 5 was needed most.

An example drawn from history makes the point clear. In Forrest County, Mississippi, as of 1962, precisely three-tenths of 1% of the voting age black population was registered to vote. *United States v. Mississippi*, 229 F.Supp. 925, 994, n. 86 (S.D.Miss.1964) (dissenting opinion), rev'd, 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965). This number was due in large part to the county registrar's discriminatory application of the State's ***375** voter registration requirements. Prior to 1961, the registrar had simply refused to accept voter registration forms from black citizens. See *United States v. Lynd*, 301 F.2d 818, 821 (C.A.5 1962). After 1961, those blacks who were allowed to apply to register had been subjected to a more difficult test than whites, while whites had been offered assistance with their less taxing applications. And the registrar, upon denying the applications of black citizens, had refused to supply them with an explanation. *Id.*, at 822. The Government attacked these practices, and the Fifth Circuit enjoined the registrar from "[f]ailing to process applications for registrations submitted by Negro applicants on the same basis as applications submitted by white applicants." *Id.*, at 823.

Mississippi's "immediate response" to this injunction was to impose a "good moral character requirement," *Mississippi*, *supra*, at 997, a standard this Court has characterized as "an open invitation to abuse at the hands of voting officials," *Katzenbach*, *supra*, at 313, 86 S.Ct. 803. One federal judge believed that this change was designed to avoid the Fifth Circuit's injunction by "defy[ing] a Federal Appellate Court determination that particular applicants were qualified [to vote]." *Mississippi*, *supra*, at 997. Such defiance would result in *maintaining*--though *not*, in light of the absence of blacks from the Forrest County voting rolls, in *increasing*--white political supremacy.

This is precisely the kind of activity for which § 5 was designed, and the purpose of § 5 would have demanded its application in such a case. See, *e.g.*, *Perkins*, *supra*, at 395-396, 91 S.Ct. 431 (Congress knew that the "Department of Justice d[id] not have the resources to police effectively all the States ... covered by the Act," and § 5 was intended to ensure that States not institute "new laws with respect to voting that might have a racially discriminatory purpose"); *Katzenbach*, *supra*, at 314, 86 S.Ct. 803 (Prior to 1965, "[e]ven when favorable decisions ha[d] finally been obtained, some of the States affected ha[d] ***376** merely switched to

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discriminatory devices not covered by the federal decrees").

And nothing in the Act's language or its history suggests the contrary. See, *e.g.*, H.R.Rep. No. 439, 89th Cong., 1st Sess., 10 (1965) ("Barring one contrivance too often has caused no change in result, only in methods"); S.Rep. No. 162, 89th Cong., 1st Sess., pt. 3, p. 12 (1965) (joint views of 12 members of Senate Judiciary Committee, describing *United States v. Parker*, 236 F.Supp. 511, 517 (M.D.Ala.1964), in which a jurisdiction responded to an injunction by instituting various means for "the rejection of qualified Negro applicants"); Hearings on H.R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., 5 (1965) (testimony of Attorney General Katzenbach) (discussing those jurisdictions that are "able, even after apparent defeat in the courts, to devise whole new methods of discrimination"); Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., pt. 1, p. 11 (1965) (testimony of Attorney General Katzenbach) (similar).

****897** It seems obvious, then, that if Mississippi had enacted its "moral character" requirement in 1966 (after enactment of the Voting Rights Act), a court applying § 5 would have found "the purpose ... of denying or abridging the right to vote on account of race," even if Mississippi had intended to permit, say, 0.4%, rather than 0.3%, of the black voting age population of Forrest County to register. And if so, then irrespective of the complexity surrounding the administration of an "effects" test, the answer to today's *purpose* question is "yes."

528 U.S. 320, 120 S.Ct. 866, 145 L.Ed.2d 845, 68 USLW 4086, 141 Ed. Law Rep. 27, 00 Cal. Daily Op. Serv. 559, 2000 Daily Journal D.A.R. 873, 2000 CJ C.A.R. 444, 2000 CJ C.A.R. 445, 2000 CJ C.A.R. 450, 2000 CJ C.A.R. 451, 2000 CJ C.A.R. 460, 2000 CJ C.A.R. 461, 13 Fla. L. Weekly Fed. S 87

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• 1999 WL 33609323 (Appellate Petition, Motion and Filing) Reply Brief on Reargument of Appellants George Price, et al (Aug. 11, 1999)

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• 1999 WL 33612736 (Joint Appendix) (Mar. 05, 1999)

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