

Section 5 of the Voting Rights Act: By Now, a Murky Mess

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As it was first enacted, the Voting Rights Act was flawless.¹ Scholars still disagree over the wisdom and legitimacy of parts of the 1964 Civil Rights Act.² But almost immediately, debate over the 1965 legislation fell silent, and even at the outset, only southerners (who came to the matter with dirty hands) raised serious questions about federalism and other issues.³ And thus in 1997 the Supreme Court depicted the original 1965 Act as an occasion on which Congress understood precisely its enforcement power under Section 5 of the Fourteenth Amendment.⁴

That statute, however, barely resembles the Voting Rights Act of today.⁵ True, the core guarantees of basic Fifteenth Amendment rights remain.⁶ But while once upon a time every provision in the Act resembled an essential element in a beautifully constructed house with no extraneous or jarring parts, that old house is now a jumbled mess. The result is that after four decades in which courts and the Department of Justice (DOJ), as well as Congress, have basically rewritten the statute, its constitutional legitimacy has been seriously undermined. This is particularly true of Section 5, which is the focus of this article.

The Act is part permanent, part temporary. Section 5, the most important of the temporary provisions, was passed in 1965 on an emergency basis in response to the crisis of southern black disfranchisement ninety-five years after

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1. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C.S. §§ 1971, 1973 to 1973bb-1 (LexisNexis 2006)).

2. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C. (2000)). See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAW* (1992); see also James E. Macdonald & Caryn L. Beck-Dudley, *A Natural Law Defense to the Employment Law Question: A Response to Richard Epstein*, 38 AM. BUS. L.J. 363 (2001).

3. Thus, Justice Hugo Black, from Alabama, complained that “Section 5, by providing that some of the States cannot pass State laws or adopt State constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between State and Federal power almost meaningless.” *South Carolina v. Katzenbach*, 383 U.S. 301, 358 (1966) (Black, J., concurring and dissenting). Other southerners saw the ghost of Reconstruction. See ABIGAIL THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 19-20 (1987).

4. *City of Boerne v. Flores*, 521 U.S. 507, 525-27 (1997).

5. Voting Rights Act of 1965, 42 U.S.C.S. §§ 1971, 1973 to 1973bb-1 (LexisNexis 2006).

6. U.S. CONST. amend. XV, § 1 (providing that citizens’ right to vote will not be abridged by the United States or any State based on race, color, or previous status as a slave).

the enactment of the Fifteenth Amendment. The provision requires federal preclearance (pre-approval) of all changes in election procedure in “covered” jurisdictions in the racially suspect South.⁷ While it was expected to expire in 1970, it has been repeatedly renewed and revised, most recently for twenty-five years as the centerpiece of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA).⁸

If a challenge to the constitutionality of the amended Section 5 reaches the Supreme Court, as is likely, the provision may no longer be regarded as unimpeachably valid.⁹ Today there is near agreement in Congress, the mainstream media, and the civil rights community that, while blacks are going to the polls, electoral discrimination remains a real threat. Moreover, the revised statute is generally seen as all benefits and no costs.¹⁰ Hence the paucity of critics of the proposed VRARA.¹¹ But, even if the preclearance provision survives constitutional scrutiny, that consensus may not last another decade.

The reworked statute rests on a racism-everywhere vision, particularly, but not exclusively, in the South. While that perspective was accurate in the 1960s, it no longer is.¹² There is bound to be a reality check down the road. In passing the 2006 VRARA, undoubtedly Congress hoped to end argument over the statute until 2031. Race-related debates are perilous today, but given the pace of racial change, events are likely to force that debate in legislative halls, on the bench, and within the DOJ. For the moment, the amended temporary provisions of the Act have been extended for another (arbitrarily chosen) quarter century.¹³ It is a careless, politically expedient promise unlikely to be kept and it carries a high cost.

I. A PERFECT ACT

It is important to understand the perfect design of every component of the 1965 Act. Very quickly, its internal logic was almost totally forgotten, with the result that the legitimacy of changes were difficult to judge, making their radical nature hardly apparent to political players and other observers.

In the original Act, every provision was designed to attack the clear moral

7. 42 U.S.C.S. § 1973c.

8. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 7, 120 Stat. 577.

9. See *City of Boerne*, 521 U.S. at 508 (requiring congruence and proportionality between “the injury to be prevented or remedied and the means adopted to that end”).

10. See, e.g., Jim Wooten, Editorial, *Our Opinion*, ATLANTA J.-CONST., July 16, 2006, at C6.

11. The vote in Congress for the VRARA was overwhelming, after a media blitz in favor of reauthorization. See *infra* Part VI.B.

12. For an extended examination of the changing status of blacks and changing racial attitudes, see generally STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE (1997). The data are now over a decade old, but the picture drawn has only gotten better in the years since the book was published.

13. *Id.*

wrong of deliberate disfranchisement in the Jim Crow South.¹⁴ That single aim was unmistakable in the congressional hearings prior to the passage of the statute.¹⁵ Section 2, its permanent opening provision, restated in stronger language the promise of the Fifteenth Amendment, while Section 3 gave federal courts permanent authority to appoint “examiners” (registrars) or observers where necessary to guarantee Fourteenth and Fifteenth Amendment voting rights. Those federal officers could be sent to any jurisdiction in the nation.¹⁶

The temporary emergency provisions of the Act made the statute the effective instrument for racial change that it was. Section 4 contained a statistical trigger designed to identify the states and counties targeted for extraordinary federal intervention. No southern state was singled out by name. Instead, jurisdictions that met two criteria—the use of a literacy test and total voter turnout (black and white) below fifty percent in the 1964 presidential election—were “covered.”¹⁷ These covered jurisdictions could not administer any literacy or understanding test as a condition for voter registration. At the discretion of the Attorney General, federal “examiners” and observers could be sent to monitor elections.¹⁸ And, as noted above, covered states and counties were required to

14. See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”).

15. Attorney General Katzenbach made that goal very clear on the opening day of the congressional hearings held prior to the passage of the legislation. “Our concern today is to enlarge representative government,” he said. “It is to increase the number of citizens who can vote.” The point was reiterated throughout his testimony. “The whole bill is really aimed at getting people registered,” he explained. Other witnesses did not even mention the purpose of the bill, viewing it as obvious and beyond discussion. Instead, they poured forth in detail the continuing obstacles to rudimentary electoral participation. Every advocate had the same thing in mind—realizing the promise of the Fifteenth Amendment almost 100 years after its passage. *Voting Rights: Hearings before Subcomm. No. 5 of the H. Comm. on the Judiciary on H.R. 6400 and other proposals to enforce the Fifteenth Amendment to the Constitution of the United States*, 89th Cong. 60 (March-April 1965) [hereinafter *1965 Hearings*] (statement of Att’y Gen. Katzenbach); see generally THERNSTROM, *supra* note 3, at 21-22.

16. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 2-5, 79 Stat. 437, 438 (codified as amended at 42 U.S.C.S. §§ 1973b-1973c (LexisNexis 2006)). In addition to Sections 2 and 3, the permanent provisions included Section 208, which enabled voters not able to read to have someone of their choice assist them at the polls. Other permanent sections provided for criminal and civil penalties for stopping otherwise eligible citizens from voting. Section 3, in addition to enabling a court to certify a jurisdiction for examiners (registrars) and observers, allowed the judicial imposition of the preclearance provision on jurisdictions not otherwise covered. Preclearance will be explained in subsequent pages.

17. *Id.* § 4. The statutory language refers to registration or turnout, but the registration figure was, in fact, irrelevant. If any southern state had had registration of, say, 51%, but turnout of only 30%, that under-50% turnout would trigger coverage.

18. *Id.* § 3. Examiners were last used in 1982 and 1983 to register voters in a total of only eight counties nationwide. U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION: THE DEP’T OF JUSTICE’S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS (2006), available at <http://www.usccr.gov/pubs/051006VRAStatReport.pdf>. Registration procedures are now governed by the National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C. § 1973gg (2000)). On the other hand, as the report points out, the DOJ continues to send observers to monitor elections. Indeed, despite the fact that the Attorney General’s power (in contrast to that of a federal court) extends only to the jurisdictions covered by the special, temporary provisions,

submit all changes in election procedure to federal authorities for preclearance.

The logic of the statistical trigger was clear. Literacy tests were constitutional, the Supreme Court had held in 1959,¹⁹ but the framers of the Act knew the South was using *fraudulent* tests to stop blacks from registering.²⁰ Blacks were being tested, for instance, on their ability to interpret obscure sections of state constitutions and were asked such absurd questions as “how many bubbles does a bar of soap contain?”²¹ Thus, those who designed the legislation took the well-established relationship between literacy tests and low voter political participation in the South, and used the carefully chosen fifty percent turnout figure as circumstantial evidence indicating the use of intentionally fraudulent, disfranchising tests.

Section 5 was an extraordinary provision; state and local laws are usually presumed valid until found otherwise by a court.²² In 1965, it was perfectly reasonable to believe that *any* move affecting black enfranchisement in the Deep South was deeply suspect. And only such a punitive measure had any hope of forcing the South to let blacks vote.

The Act worked as intended. Almost instantaneously, it did force the South to let blacks vote. In Alabama an estimated 19.3% of blacks were registered as of March 1965; the figure rose to 51.6% by September 1967. Impressive change also took place in Georgia, Louisiana, South Carolina, and Virginia. North Carolina, which began with relatively high black registration (46.8%), naturally experienced a more modest gain. At the other extreme, Mississippi took off from a low point of 6.7%, but two years later had the highest percentage of black registered voters (59.8%) anywhere in the South.²³

As the emergency of black disfranchisement subsided, however, the emer-

the DOJ sends observers to locations not identified by the Section 4 trigger through a process of agreements with the jurisdictions themselves.

19. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (holding literacy tests constitutional).

20. Every historian of voting in the South prior to the passage of the 1965 Act has noted the fraudulent nature of the southern literacy test. See, e.g., V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 576 (1949) (“No matter from what direction one looks at it, the Southern literacy test is a fraud and nothing more.”).

21. STEVEN F. LAWSON, *RUNNING FOR FREEDOM: CIVIL RIGHTS AND BLACK POLITICS IN AMERICA SINCE 1941*, at 22 (1991).

22. The Supreme Court, in sanctioning the constitutionality of the Act in 1966, acknowledged the extraordinary nature of its special, temporary provisions. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308-09 (1966). Four decades later, we have grown accustomed to their presence, and yet they are still perceived as unique. As Nathaniel Persily has written, “[t]he measure remains alone in American history in its intrusiveness on values of federalism and the unique and complicated procedures it requires of states and localities that want to change their laws. No other statute on the books (1) applies only to a subset of the country; and (2) requires ‘covered’ states and localities to get permission from the federal government . . . before implementing a certain type of law.” Nathaniel Persily, *Options and Strategies for Renewal of Section 5 of the Voting Rights Act*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 223, 223 (David Epstein et al. eds., 2006).

23. U.S. COMM’N ON CIVIL RIGHTS., *THE VOTING RIGHTS ACT: TEN YEARS AFTER* 43 (1975), available at <http://www.law.umaryland.edu/Marshall/usccr/documents/cr12v943b.pdf>.

gency powers of the statute expanded. As two voting rights scholars have noted, “[t]he fact that the major provisions of the Act were temporary has turned out to be an advantage to proponents of minority voting rights, rather than a hindrance, for each time the Act has been scheduled to expire it has been not only renewed, but strengthening or broadening amendments have been added.”²⁴

Courts, Congress, and the DOJ have all participated in the amendment of the Act, altering the definition of a literacy test, the meaning of the right to vote, the standards by which disfranchisement is judged, and the list of minority groups and jurisdictions covered by extraordinary emergency provisions that were designed to expire in five years. Most of these changes have involved Section 5 and the formula contained in Section 4 that is used to identify which jurisdictions are covered by the preclearance provision, necessitating federal approval of all newly instituted rules affecting elections.

The amended Act has a radically revised aim. Today, its main purpose is to ensure the creation or maintenance of reserved seats for black and Hispanic candidates, on the assumption that the number of blacks and Hispanics holding legislative seats is an accurate gauge of minority representation.²⁵ With the exception of five Justices on the Supreme Court in a now overturned 2003 decision interpreting the legal standards under Section 5, dissent from that assumption is rare.²⁶ In general, DOJ attorneys, judges, members of Congress, and law school professors, as well as civil rights organizations are committed to that view.²⁷ And there is widespread consensus as well on its corollary: only minorities can properly represent minority interests.²⁸ Indeed, that consensus was built into the VRARA, which rewrote Section 5 in order to make the point

24. DANIEL HAYS LOWENSTEIN & RICHARD L. HANSEN, *ELECTION LAW: CASES AND MATERIALS* 40 (3d ed. 2004).

25. The Fourteenth Amendment line of cases beginning with *Shaw v. Reno*, 509 U.S. 630 (1993), which found egregious racial gerrymandering a violation of the Equal Protection Clause, does impose some minimal constraint on the degree to which jurisdictions can draw districting lines to maximize black and Hispanic officeholding, however.

26. The decision was *Georgia v. Ashcroft*, 539 U.S. 461 (2003). See *infra* Part IV.B.

27. See, e.g., T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 360 (1992) (“Under both constitutional and statutory litigation, plaintiffs who demonstrate unlawful vote dilution are usually awarded redrawn electoral districts that virtually guarantee the election of minority-backed candidates in rough proportion to the group’s representation in the overall population. Such relief has become a matter of course: and lends support to the claim that the ‘results’ test of section 2 of the Voting Rights Act—despite a specific statutory disclaimer—creates group rights in the form of a mandate for proportional representation.”).

28. See, e.g., Bernard Grofman, *Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of Georgia v. Ashcroft: Social Science Perspectives on Minority Influence, Opportunity and Control*, 5 *ELECTION L.J.* 250, 257 (2006) (“A fourth issue is whether districts in which minorities can be decisive in choosing between two white candidates, neither of whom is a minority candidate of choice, in both the primary and the general, should be counted as districts in which minorities have a realistic opportunity to elect candidates of choice. Our answer to this question is a clear no. While such districts might prove to be minority influence districts . . . districts in which minority members can elect candidates of choice, but only as long as those candidates are white, are not really districts in which minorities have a realistic opportunity to elect candidates of choice.”).

clear.²⁹

That assumption made indisputable sense in the years immediately following the passage of the 1965 Act, when the emergency provisions covered only the South, and southern whites certainly believed that only whites could represent white interests. Times have changed, however. 2006 is not 1969. Deciding who counts as a “representative” has become much more complicated as the level of white racism has dropped dramatically. And while the Act itself once had clear and logical lines, by now it is a murky mess. The revised aim of the statute combined with careless congressional amendments, ideologically driven DOJ enforcement indifferent to the actual law, and courts lost in the difficult terrain of race and representation all have contributed to the jerrybuilt, ramshackle, illogical, almost unworkable—and arguably unconstitutional—structure of the Voting Rights Act, particularly Section 5.

II. THE ARGUMENT IN BRIEF

This article concentrates on one facet of that unworkable structure: Section 5, the preclearance provision. Of necessity, however, I begin with a discussion of Section 4, the formula that establishes the reach of federal preclearance.³⁰ There is a plethora of law review articles on the logic and wisdom of Section 5, but the Section 4 trigger for preclearance, so essential to understanding the evolution of federal oversight, is seldom discussed. Thus, I start with a look at that all-important trigger before moving on to an analysis of Section 5.

A. Section 4

As suggested above, the statistical trigger for coverage was perfectly designed in 1965 to hit only those states in the Deep South with egregious

29. The VRARA is intended to stop states and courts from counting as “minority” districts those in which black and Hispanic voters play a decisive role in the election of a white representative. *See infra* Part VI.C.

30. It should be noted, however, that much could be said about other increasingly questionable parts of the Act as well. The prime candidate for additional discussion is Section 2, which is one of the permanent provisions of the Act and was amended in 1982. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134. It prohibits a method of voting in any jurisdiction (not just in those covered by Section 5) that “results in a denial or abridgment of the right to vote.” The provision directs courts to look at the “totality of circumstances” in order to determine whether political processes are “equally open to participation” by members of protected groups. Election processes violate the law if minority voters have “less opportunity [than whites] . . . to participate in the political process and to elect representatives of their choice.” But what is the “totality” that judges must assess? Against what standard is the absence of proper “opportunity” to be measured? And who counts as a representative of choice for minority voters? The fill-in-the-blanks statutory language was an invitation to judicial mischief—and one that has been accepted with alacrity. The result has been the Justice Department and courts immersed in the “political thicket” (more dense than ever) of which Justice Felix Frankfurter warned in a very early reapportionment case, *Colegrove v. Green*, 328 U.S. 549, 556 (1946). Frankfurter eloquently elaborated on the argument in *Baker v. Carr*, 369 U.S. 186, 311-24 (1962) (Frankfurter, J., dissenting). But Section 2 is a topic for another article.

histories of intentional Fifteenth Amendment violations.³¹ Even by 1970, however, it had already ceased to function as a means of identifying accurately those localities whose history justified putting them into federal receivership, with every change in any aspect of voting subject to pre-approval by either the DOJ or the U.S. District Court for the District of Columbia.³² In addition, with the 1975 amendments, the literacy test was redefined and additional groups without the same history of disfranchisement as southern blacks came under Section 5 protection.³³ Coverage thus became increasingly arbitrary, and the Act no longer functioned exclusively to vindicate Fifteenth Amendment rights, which had been the sole rationale for its unprecedented intrusion on the state prerogatives with respect to districting and related election matters.

B. Section 5: Purpose and Effect

Section 5 protects against both discriminatory purpose and effect, with the burden on the jurisdiction to prove itself above suspicion.³⁴ Judicial and DOJ interpretations of both terms, however, have made enforcement unpredictable at best, totally subjective at worst. In addition, in the 1990s the DOJ frequently ignored the question of discriminatory effect because the Supreme Court had quite narrowly defined the legal standards in the Section 5 context. Instead, it used the charge of suspicious purpose to strike down districting plans that contained, say, two majority-minority districts when a third could be drawn. States and localities came to believe that the VRA demanded the drawing of a maximum number of safe minority legislative districts, one result being racially gerrymandered districting plans to promote both black and Republican officeholding.

In 2000 the Supreme Court acted to stop that freewheeling use of the prohibition on intentional discrimination,³⁵ but the civil rights community persuaded Congress to overturn the Court's decision in the 2006 VRARA.

The politics of the passage of the VRARA were not pretty. The bill was rammed through with a minimum of debate. No one is sure what the new, so-eagerly-embraced statutory language means. The 2006 amendments have handed the Justice Department and the D.C. District Court a new blank check

31. This included Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most counties in North Carolina. See U.S. COMM'N ON CIVIL RIGHTS, BRIEFING REPORT, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT'S SECTION 5 PRECLEARANCE PROVISION, at 2 (2006).

32. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 2-5, 84 Stat. 314, 315 (amending preclearance statistical formula to include 1968 voter turnout); see also Abigail Thernstrom, Op-Ed., *Emergency Exit*, N.Y. SUN, July 29, 2005, at 10, available at <http://daily.nysun.com/Repository/getmailfiles.asp?Style=OliveXLib:ArticleToMail&Type=text/html&Path=NYS/2005/07/29&ID=Ar01000> (arguing that changes in statistical formula expand Section 5 coverage, creating anomalous results).

33. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 401-402.

34. See 42 U.S.C.S. § 1973c (LexisNexis 2006).

35. See *Reno v. Bossier Parish Sch. Bd.* (*Bossier II*), 528 U.S. 320 (2000).

on which they can write any numbers that seem, at the moment, sufficient to create a district in which blacks have the “right” degree of electoral power.

The 2006 amendments thus compound an already serious problem: in interpreting and enforcing the VRA, judges and federal attorneys are asked to answer questions involving race and representation, the complexity of which amount to a “political thicket”³⁶ from which there is no clear exit.

The preclearance provision fundamentally altered federal-state relations. Federal intrusion on constitutionally sanctioned local prerogatives is all the greater when the legal boundaries are not clear and decisions are made on the basis of seeming administrative partisanship or whim.

C. Section 5 and Racial Change

In *Georgia v. Ashcroft* in 2003—another decision that the VRARA subsequently overturned—the Supreme Court acknowledged that the normal districting process involves a complicated weighing of numerous political objectives. It reinterpreted Section 5 to allow black legislators to make districting deals that might even sacrifice safe black seats for more districts in which black voters were a swing vote.³⁷ In other words, in the twenty-first century, the normal political process could be trusted—which it decidedly could not in 1965.

Distrust of the South was the foundation upon which the temporary, emergency provisions in the 1965 Act were built. But is that distrust still warranted in 2006? In 1965, the temporary provisions were passed on an emergency basis and were slated to sunset in five years as noted earlier.³⁸ Is there a near-permanent emergency that justified another extension of the Act’s emergency powers in 2006 as well? The question was not even seriously debated—but the lid on that debate cannot remain sealed tight until 2031. The currents of racial change are swift. The conversation is changing almost as I write.³⁹

Congressman John Lewis recognized a transformed racial landscape in his deposition in *Ashcroft*.⁴⁰ The pessimism that Congress embraced in passing the 2006 VRARA—in sharp contrast both to hard data on racial progress and to Congressman Lewis’s celebration of that change—carries a heavy cost. The race-based districting that will now remain so integral to the enforcement of the VRA amounts to a form of political exclusion masquerading as inclusion.

36. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

37. 539 U.S. 461, 483 (2003) (“A legislator, no less than a voter, is ‘not immune from the obligation to pull, haul, and trade to find common political ground.’ Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws.”).

38. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4-5, 79 Stat. 437 (codified as amended at 42 U.S.C.S. §§ 1973b-1973c (LexisNexis 2006)).

39. See generally JUAN WILLIAMS, ENOUGH: THE PHONY LEADERS, DEAD-END MOVEMENTS, AND CULTURE OF FAILURE THAT ARE UNDERMINING BLACK AMERICA—AND WHAT WE CAN DO ABOUT IT (2006) (representing the changing conversation on the political left).

40. Direct Testimony of John Lewis, *Georgia v. Ashcroft*, in the U.S. District Court for the District of Columbia, February 1, 2002, pp. 12, 15-16, 18, quoted in John J. Miller, *Every Man’s Burden: Will the Voting Rights Act Be Necessary . . . Forever?*, NAT’L REV., April 10, 2006.

Blacks will continue to be separated into what Justice O'Connor called "segregated" districts.⁴¹ That "segregation" raises the fundamental question: Do the benefits of the newly reauthorized Section 5 outweigh its costs?

In the pages below, I elaborate on the above three points.

III. THE STATISTICAL TRIGGER

A. *The Original Design*

The basic elements of the original statistical trigger have already been described. The use of a literacy test coupled with voter turnout under fifty percent in the 1964 presidential election subjected states and counties to draconian federal intervention.⁴²

Critics complained that the fifty percent figure was arbitrary. But the framers of the statute had worked backwards. Knowing which states were using fraudulent literacy tests, they fashioned a statistical formula that would bring under coverage only those jurisdictions in which blacks would remain disfranchised without overwhelming federal intervention. It was thus from the inferred presence of egregious and *intentional* Fifteenth Amendment violations in the states that had both a literacy test and low voter turnout that severe consequences followed, the most important of which were the suspension of literacy tests and the preclearance requirement.

The latter reinforced the former. Section 4 banned literacy tests in the covered jurisdictions—those southern states identified for emergency intervention.⁴³ Section 5 made sure the effect of that ban stuck.⁴⁴ It was a preventative measure—a means of guarding against renewed efforts to stop blacks from registering and voting. And while states or localities could seek preclearance from the Attorney General or a declaratory judgment from the D.C. District Court, the former quickly became the usual route, saving elected officials both time and money.⁴⁵

Originally, Section 5 applied to Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most counties in North Carolina.⁴⁶ Had the trigger

41. *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993). "[A] reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Id.* (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)).

42. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438 (codified as amended at 42 U.S.C.S. §§ 1973b-1973c (LexisNexis 2006)); see also discussion *supra* note 17.

43. See *id.*

44. *Id.* § 5.

45. As Daniel Hays Lowenstein has pointed out, actually seeking the preclearance of districting plans from the D.C. District Court is "utterly impracticable." Daniel H. Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 814 (1998). Plans must be enacted before elections can take place; the Justice Department will act within 60 days. *Id.* Moreover, state legislators want to know what they have to do to obtain preclearance; the Justice Department will tell them. *Id.*

46. *Id.*

been less accurate, it would not have survived constitutional scrutiny. The emergency provisions were passed in the context of the “unremitting and ingenious defiance of the Constitution,” Chief Justice Earl Warren noted a year later in upholding the constitutionality of the Act.⁴⁷ But, in recognition of their extraordinary nature, these special provisions were designed to expire in 1970—thirty-six years ago.

B. Increasing Incoherence

In 1970, however, the South was still rightly viewed as racially suspect and the temporary provisions were extended for another five years.⁴⁸ A straight reauthorization was legitimate—both in 1970 and 1975. But the trigger was also unnecessarily amended, a move that undermined the Act’s legitimacy.

The 1970 amendment updated the trigger to rest on turnout in the 1968 presidential election.⁴⁹ As a result, the formula to determine coverage no longer worked to identify jurisdictions that deliberately disfranchised blacks. Turnout in the 1968 presidential election had been low across the nation and, reflecting the national trend, participation in three boroughs in New York City, for instance, had dropped slightly to just under the determining fifty percent mark.⁵⁰ Blacks had been freely voting in the city since the enactment of the Fifteenth Amendment in 1870 and for decades had held public office. The doors of political opportunity had not suddenly closed. Rather, faced with a choice between Nixon and Humphrey, more New Yorkers than before had simply stayed home.⁵¹ Did this lower turnout signify a rise in discriminatory barriers to voting in these boroughs? Of course not.

In addition, assorted counties in such disparate states as Wyoming, Arizona, California, and Massachusetts with no history of black disfranchisement were put into federal receivership.⁵² None of these counties were in the South, and no other evidence suggested that these were jurisdictions in which minority voters

47. See *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1968) (holding that emergency provisions in the Voting Rights Act do not violate the Constitution).

48. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, §§ 2–5, 84 Stat. 314, 315 (amending the Voting Rights Act of 1965 and extending the temporary provisions; codified as amended at 42 U.S.C.S. §§ 1971, 1973 to 1973bb-1 (LexisNexis 2006)); see also U.S. COMM’N ON CIVIL RIGHTS, BRIEFING REPORT, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT’S SECTION 5 PRECLEARANCE PROVISION, at 2 (2006) (“In 1970 and 1975 Congress recognized the continuing need for Section 5 and extended its life first for five years and then for seven years.”).

49. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 4, 84 Stat. 314.

50. Thernstorm, *supra* note 32.

51. *Id.*

52. See U.S. COMM’N ON CIVIL RIGHTS, BRIEFING REPORT, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT’S SECTION 5 PRECLEARANCE PROVISION, at 2 (2006) (“The additional coverage formulas adopted in 1970 and 1975 extended Section 5 coverage to political subdivisions in a number of additional states, including Alaska, Arizona, and Texas in their entirety, and portions of California, Florida, Michigan, New York, North Carolina, and South Dakota.”).

were at a distinctive disadvantage. In 1965, the fifty percent mark (combined with the use of a literacy test) was carefully chosen to make sure the right localities were affected. That same cut-off point was arbitrary when applied to the 1968 turnout data. And there was another problem: two New York City boroughs escaped coverage, and yet what was the logical distinction between Manhattan and Queens? In fact, why not at that point cover Chicago or Cleveland? Once minorities in Brooklyn qualified for the extraordinary benefits of Section 5, there was no logical place to stop.

Further amendments in 1975 compounded the problem of increasing incoherence. The trigger for coverage was once again senselessly updated to rest, as well, on 1972 turnout data.⁵³ In addition, literacy tests were redefined.⁵⁴ Henceforth, English-only ballots and other election material were considered a literacy test when used in jurisdictions in which more than five percent of voting age citizens were members of a “language minority”—defined as citizens who were “American Indian, Asian American, Alaskan Natives or of Spanish heritage.”⁵⁵

The analogy between the southern, fraudulent literacy test and the use of English-only ballots should not have withstood the laugh test. If English-only material was a problem, the solution was bilingual ballots, not the imposition of preclearance requirements. But the goal of extending Section 5 to Texas—enabling the DOJ to attack districting plans seemingly unfavorable to Hispanic political power—was regarded as justifying any and all means.⁵⁶ And yet, if minority voters in Texas and Arizona were entitled to the extraordinary federal protection that Section 5 provided, why not those in nearby New Mexico, where Hispanics were already over one third of the population, as compared to sixteen percent in Arizona?⁵⁷ New Mexico, however, escaped coverage because turnout in the 1972 presidential election was over sixty percent, but that figure only reinforces the point that “Hispanics”—an umbrella term that refers to a very disparate people—were not necessarily a disadvantaged group.⁵⁸

The emergency provisions were once again renewed in 1982, but the trigger continued to rest on turnout in the presidential elections of 1964, 1968, and

53. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 204, 89 Stat. 400, 402.

54. *Id.* § 202, 89 Stat. at 401-402 (“[T]est or device’ shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.”).

55. *Id.* § 207, 89 Stat. at 402 (“The term ‘language minorities’ or ‘language minority group’ means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.”).

56. See generally THERNSTROM, *supra* note 3, at 43-62.

57. FRANK D. BEAN & MARTA TIENDA, *THE HISPANIC POPULATION OF THE UNITED STATES* 81 (1987) (Hispanics represented thirty-seven percent of the population of New Mexico in 1970.).

58. See generally U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES*, 1974, tbl.704 (1974).

1972.⁵⁹ In 2006, the idea of updating the trigger again, this time relying on turnout in 2004, was floated.⁶⁰ But, as had been the case previously, such an updated trigger would not have targeted jurisdictions engaging in deliberate Fifteenth Amendment violations. There was no proven relationship between contemporary turnout and disfranchisement. The arbitrary nature of the coverage was a problem that had started with the VRA amendments in the 1970s and it had grown over time. And yet the constitutional legitimacy of the special provisions, which allowed extraordinary intrusiveness on traditional state electoral powers, rested entirely on their status as an appropriate means to enforce the constitutional prohibition against a denial or abridgment of the right to vote “on account of race, color, or previous condition of servitude.”⁶¹

IV. THE MEANING OF DISCRIMINATORY “EFFECT”

The language of the Fifteenth Amendment, which the Voting Rights Act was designed to enforce, runs through the statute. Thus, changes in election procedures are eligible for preclearance only if they do “not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.”⁶² But when is a change in an electoral setting discriminatory in either “purpose” or “effect”? Or rather, when is it *arguably* discriminatory, since doubt is a sufficient basis for finding a change objectionable? The burden is always on the jurisdiction in Section 5 cases to prove itself above suspicion.

A. *The Retrogression Test*

In 1965, the reference to discriminatory effect was innocuous and thus unnoticed. The framers and sponsors of the Act hoped to eliminate every device that kept southern blacks from the polls—whatever its stated purpose.⁶³ And, in

59. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (leaving unchanged the turnout requirements in the earlier Act).

60. See, e.g., Press Release, Congressman Charlie Norwood, New Analysis Shows Norwood Amendment Expands Voting Rights Act Protections (June 28, 2006), available at http://www.house.gov/list/press/ga09_norwood/VRAanalysis.html.

61. See U.S. CONST. amend. XV, § 1.

62. 42 U.S.C. § 1973c(a) (2000). The most recent amendment to the Voting Rights Act (July 27, 2006) substituted “neither has the purpose nor will have the effect” for “does not have the purpose and will not have the effect.” See Voting Rights Act Amendments of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577.

63. References to Section 5 in the 1965 congressional hearings were altogether sparse. Moreover, the Senate Committee report, in fact, failed even to mention Section 5 in its summary of the bill’s key provisions, while the House Report gave it only a cursory and unilluminating glance. But at the House hearings Attorney General Katzenbach did briefly explain it. “Our experience in the areas that would be covered by this bill,” he said, “has been such as to indicate frequently on the part of state legislatures a desire in a sense to outguess the courts of the United States or even to outguess the Congress of the United States.” 1965 Hearings, *supra* note 15 (statement of Att’y Gen. Katzenbach); see generally THERNSTROM, *supra* note 3, at 21-22.

That is, the courts and Congress could ban familiar disfranchising devices only to confront novel ones devised by southern states bent on evading the law. But for such changes in voting

that context, “effect” and “purpose” were close to interchangeable terms; the former was simply circumstantial evidence of the latter at a time when it was still reasonable to assume that deliberate disfranchisement in the South was pervasive. That is, when the question was the legality of a recent alteration in voting procedure in a jurisdiction known to have had a long history of Fifteenth Amendment violations, the effect of the alteration was assumed to suggest its purpose. The adverse impact of a sudden change in rules involving the franchise was viewed as a signal of improper motive when that change took place in the South and affected newly enfranchised blacks.⁶⁴

Preclearance was initially envisioned as a means to stop southern states from instituting new disfranchising rules involving voting registration procedures, absentee ballots, the format of ballots, and other such devices.⁶⁵ But following the passage of the Act, Mississippi tried to stop blacks from getting elected to local office by allowing counties to replace single-member districts with county-wide voting in the election of local supervisors (commissioners).⁶⁶ In response, the Supreme Court in *Allen v. State Board of Elections*⁶⁷ expanded the list of potentially disfranchising procedures to include those that diluted the power of the new black vote.

Thus, after *Allen*, new districting maps, annexations, and other changes affecting the weight of the ballots cast were covered by the preclearance provision. “Effect,” as a consequence, was released from its intimate connection with “purpose.”⁶⁸ When a municipality subject to Section 5 preclearance annexes a suburban area,⁶⁹ it may add more white voters than black voters to the

procedure to be rejected, Katzenbach went on, they would have to have the effect of denying the rights guaranteed by the Fifteenth Amendment. And numerous witnesses at the hearings reassured their audience that those rights were expected to be narrowly defined.

Thus Roy Wilkins, executive director of the NAACP, spoke of the need to protect the citizen “from the beginning of the registration process until his vote has been cast and counted.” New York Representative William F. Ryan referred to the Act as “eliminating discrimination at the ballot box.”

THERNSTROM, *supra* note 3, at 21-22.

64. That effect and purpose were one and the same was an assumption that ran through the 1965 congressional hearings. *See, e.g., 1965 Hearings, supra* note 15 (statement of Att’y Gen. Katzenbach). He referred to the desire of states to disfranchise blacks in the same breath as he referred to the effect of proposed changes in voting procedure. The narrow definition of voting rights—from registration to votes cast and counted—also made the point clear. If black registration was intentionally denied, then the inevitable impact was disfranchisement.

65. *See generally* U.S. COMM’N ON CIVIL RIGHTS, BRIEFING REPORT, REAUTHORIZATION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT: AN EXAMINATION OF THE ACT’S SECTION 5 PRECLEARANCE PROVISION, at 1-2 (2006).

66. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 550 (1969).

67. *Id.* at 569 (“The right to vote can be affected by a dilution of voting power as well as an absolute prohibition on casting a ballot.”).

68. *Id.* at 570 (“As in all these cases, we do not consider whether this change has a discriminatory purpose or effect.”).

69. The case of annexations is barely mentioned in this article, but a city that incorporates suburban areas, even if the additional territory has no residents, must adopt single-member districts reflecting its

city's voting rolls, but such an effect is not necessarily a clue to its purpose. The Court's decision suddenly applied the prohibition of Section 5 to all changes that might have a disparate racial impact, whether intended or not. A districting plan that was racially neutral in intent could nevertheless be found discriminatory in effect. Whenever a covered jurisdiction moves a polling place even half a block, redraws a districting map after a decennial census, expands a city's boundaries or in any other way alters the setting in which voting takes place, guilt is presumed.

The point of Section 5 had been to bar changes that would result in a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," the Supreme Court held in *Beer v. United States*.⁷⁰ And thus the standard by which to measure the discriminatory effect of a change in election procedure was backsliding—whether blacks had been robbed of gains they had already made as a consequence of the passage of the statute. A redrawn districting map, for instance, could not reduce the number of safe black districts that the previous plan had contained. It was an interpretation of the preclearance provision that squared with the framers' original intent to create a prophylactic device that would prevent southern states from returning to old disfranchising ways.⁷¹ It also relegated to DOJ attorneys and their staff of equal opportunity specialists and paralegals the limited and thus relatively manageable task of assessing backsliding.

In theory, that is. In fact, the retrogression test was never as straightforward as it might seem. Annexations submissions were always distinctive. When cities that conducted elections at large absorbed suburban territory, that expansion of municipal boundaries, in itself, was considered retrogressive. For reasons never adequately explained, a hypothetical number of safe minority single-member districts became the benchmark against which the new electoral setting was compared.⁷² Thus, in annexation cases, racial fairness by an absolute standard

racial composition. That is, it must adopt a districting plan that ensures proportionate racial and ethnic representation, to the degree that map drawing can accomplish that end. *See City of Richmond v. United States*, 376 F. Supp. 1344 (D.D.C. 1975), *vacated*, 422 U.S. 358 (1975); *see also City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972).

70. 425 U.S. 130, 141 (1976).

71. The view that Section 5 was a prophylactic device ran through the 1965 congressional hearings. Congress was well aware that southern states were adept at the fine art of circumvention. Banishing literacy tests, it was feared, might not be sufficient; new devices could be created with the same impact as old ones, and the vote could be blocked anew. Thus, as the distinguished civil rights attorney Joseph Rauh put it, the preclearance provision was included in the statute "to stop ways around [Congressional] voting legislation . . . simply [as] self-defense." *1965 Hearings, supra* note 15, at 399 (statement of Joseph Rauh).

72. THERNSTROM, *supra* note 3, contains an extended discussion of the annexation cases in Chapter 7. Why an annexation that added more white voters to a city was different than changing demographics due to in- or out-migration was never explained by any court. The difference was not one of discriminatory intent. In the first annexation case, *City of Petersburg v. United States*, a black city council member who was convinced that the economic health of the city would benefit from the expansion of the tax base had actually initiated the boundary change. 354 F. Supp. 1021, 1024 (D.D.C. 1972). Economic considerations are generally the driving force behind annexations.

was used in determining retrogression—despite the fact that the very notion of backsliding involved a before-and-after comparison.

In districting cases, the pretense has been maintained that black electoral strength relative to that in the last legally enforceable plan is the test (in keeping with federal regulations),⁷³ but *Beer* referred to the right of minority voters to an “effective exercise of the electoral franchise,” a phrase obviously open to a variety of interpretations.⁷⁴ In addition, DOJ regulations have changed considerably over time, reflecting congressional amendments and Supreme Court decisions.⁷⁵

Today, for instance, DOJ regulations indicate that the relevant factors include “the extent to which a reasonable and legitimate justification for the change exists”;⁷⁶ “the extent to which minorities have been denied an equal opportunity to participate meaningfully in the political processes in the jurisdiction”;⁷⁷ “the extent to which minorities have been denied an equal opportunity to influence elections and the decisionmaking of elected officials in the jurisdiction”;⁷⁸ the extent to which minority concentrations are fragmented among different districts”;⁷⁹ “the extent to which minorities are overconcentrated in one or more districts”;⁸⁰ and so forth.⁸¹

In 2001, however, the federal guidelines stated that, while the minority population count in proposed districts is the starting point in analyzing retrogression, voting section attorneys look at a host of other factors including the following: minority opportunity to elect candidates of their choice, racial polarization in the jurisdiction, the fragmentation of minority residential areas, and differences in turnout among minority populations to gauge whether poorly-participating voters had been substituted for more politically active ones.⁸² Even in the 1980s, the DOJ had a great deal of administrative liberty in determining discriminatory effect.⁸³

73. 28 C.F.R. § 51.54(b)(1) (2006) (“the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction”).

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

75. *See supra* Parts III.B-IV.A.

76. 28 C.F.R. § 51.57(a).

77. *Id.* § 51.58(b)(1).

78. *Id.* § 51.58(b)(2).

79. *Id.* § 51.59(c).

80. *Id.* § 51.59(d).

81. *See id.* § 51.57-59.

82. Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (2000), 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001). Katharine Butler has also pointed to another problem with determining the proper benchmark: “[N]ormal population shifts among districts from one census to the next make it difficult to both satisfy one person, one vote and avoid decreasing the number of minority districts.” Katharine I. Butler, *Racial Fairness and Traditional Districting Standards: Observations on the Impact of the Voting Rights Act on Geographic Representation*, 57 S.C. L. REV. 749, 767 (2006). Are malapportioned districts a proper benchmark?

83. In the 1980s, Justice Department letters further confused the legal standards governing findings of discriminatory effect by using a hypothetical racially “fair” plan as a benchmark in assessing districting maps (ignoring *Beer*), and by routinely mentioning both effect and purpose in letters of

In the 1990s, the problem was greatly amplified by the incorporation of Section 2 standards into Section 5 so that a suspected violation of the Section 2 “results” test was also read as a finding of discriminatory “effect,” prohibited by Section 5.⁸⁴ That is, although only courts can adjudicate Section 2 questions, the Justice Department decided to expand the retrogression (backsliding) test to include an assessment of absolute electoral opportunity—as measured by criteria that allowed a great deal of subjectivity—for purposes of administrative preclearance. In addition, the Justice Department took to labeling the failure of jurisdictions to create a maximum number of majority-minority districts as evidence of illegal intent. Thus, it used the ban on purposeful discrimination to strike down nonretrogressive electoral changes. I will return to this history below.⁸⁵

B. Ashcroft Redefines “Effect”

Georgia v. Ashcroft,⁸⁶ as noted above, increased that already enormous interpretive freedom by further blurring the definition of districting plans with a discriminatory effect. The 2006 statutory amendments overturned the decision,⁸⁷ but despite its short life, it is worth reviewing. The Court had recognized the cost of assuming that black representation can be gauged simply by the number of blacks in office and thus by the number of safe minority districts the state had drawn. That insight will not disappear and has already surfaced in Section 2 litigation.⁸⁸

objection, with the jurisdiction having no way of knowing what sort of evidence contributed to which finding. See THERNSTROM, *supra* note 3, at 157-91. Thus, for instance, as early as 1981, an internal voting section memo on Barbour County, Alabama, explained to the Assistant Attorney General for Civil Rights, Bradford Reynolds, that the benchmark against which a newly drawn districting plan should be compared was one that was “fairly drawn”—i.e., that gave blacks seats in proportion to their population. DOJ letters in 1983 to Virginia and Texas objecting to districting plans referred to plans that “needlessly fragment” the black population or “unnecessarily fragment” the Mexican-American community. All of these letters contained formulaic sentences that referred to both purpose and effect. They were obtained when I had access to some of the internal files of the voting section of the Justice Department in the mid-1980s.

84. See 42 U.S.C. § 1973 (2000) (amended by Pub. L. No. 109-246, 120 Stat. 577 (2006)); see also *Remarks of John R. Dunne*, 14 CARDOZO L. REV. 1127, 1128 (1993) (“Under its regulations, the Civil Rights Division may also interpose an objection if it finds that the submitted plan ‘clearly violates’ section 2 of the Voting Rights Act.”).

85. See discussion *infra* Part V.

86. 539 U.S. 461 (2003).

87. Fannie Lou Hamer, Rosa Parks, and Corretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2, 120 Stat. 577, 578.

88. Section 2 entitles minority voters to an equal opportunity to participate in the political process and elect representatives of their choice. Even twenty years ago, Justice O’Connor suggested (in a concurring opinion) that “a court should consider all relevant factors The court should not focus solely on the minority group’s ability to elect representatives of its choice [I]t should . . . bear in mind that ‘the power to influence the political process is not limited to winning elections.’” *Thornburg v. Gingles*, 478 U.S. 30, 99 (1986) (O’Connor, J., concurring) (citing *Davis v. Bandemer*, 478 U.S. 109, 132 (1986)). The resemblance to her argument in *Ashcroft* seventeen years later will become clear below. Richard L. Hasen also points to the fact that several lower courts have looked to *Ashcroft* for

Ashcroft involved districting for the Georgia Senate. The State had gone to the D.C. District Court (rather than using the administrative route),⁸⁹ seeking a declaratory judgment that its districts did not violate Section 5.⁹⁰ A three-judge panel had refused preclearance, even though 10 out of 11 black state senators had supported the submitted map, along with 33 out of 34 black representatives in the House.⁹¹ “Where there is evidence of racially polarized voting,” the court stated, “a redistricting plan that reduces African American votes in a district with no offsetting gains elsewhere raises the specter of impermissible retrogression. In this situation, the State is hard-pressed to demonstrate that there has been no ‘backsliding’ in African American voting strength.”⁹² And indeed, it said, Georgia could not make the requisite showing.⁹³

The Supreme Court vacated the judgment, however, and remanded the case for further consideration consistent with its fresh analysis of the retrogression standard.⁹⁴ The plan that the lower court had refused to preclear had lowered the percentage of black voters in some districts (although not below fifty percent), but increased the number of districts certain to elect white Democrats. The Court explained the logic: “The goal of the Democratic leadership—black and white—was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats.”⁹⁵ More Democratic seats would mean more black representation. “No party contests that a substantial majority of black voters in Georgia vote Democratic.”⁹⁶ Excessive concentrations of black voters benefited Republicans.⁹⁷ Congressman John Lewis (as well as the black leadership in the state) had signed on to the plan, since, as Lewis

guidance on what it means to comply with Section 2, and that, in theory, a state might defend its failure to draw a majority-minority district by pointing to the creation of influence districts. See Richard L. Hansen, *No Exit? The Roberts Court and the Future of Election Law*, S.C. L. REV. 669, 680 (2006); see also Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2600 (2004) (“In light of recent evidence that voting is less racially polarized than previously believed and that the increase in descriptive minority representation may have come at the expense of substantive minority representation, courts are likely to face more Section 2 vote dilution litigation involving coalitional and influence districts after the most recent round of redistricting.”). On the other hand, in *League of United Latin American Citizens v. Perry*, Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, rejected the argument that Section 2 protected Martin Frost’s district, despite the fact that black voters had considerable influence in determining his election under the previous plan. 126 S. Ct. 2594, 2625-26 (2006).

89. See 42 U.S.C.S. § 1973a(c) (LexisNexis 2006).

90. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 31 (D.D.C. 2002).

91. *Georgia v. Ashcroft*, 539 U.S. 461, 471 (2003).

92. *Ashcroft*, 195 F. Supp. 2d at 31 (citing *Reno v. Bossier Parris Sch. Bd. (Bossier II)*, 528 U.S. 320 (2000)).

93. *Id.* at 93-97.

94. *Ashcroft*, 539 U.S. at 491.

95. *Id.* at 469.

96. *Id.*

97. See *id.* at 469 (Senator Brown’s statement regarding the design of the Senate plan); *id.* at 470 (“[W]e [African-Americans] have a better chance to participate in the political process under the Democratic majority than we would have under a Republican majority,” Charles Walker, the Senate majority leader, had testified.).

put it, he believed it was “in the best interest of African American voters . . . to have a continued Democratic-controlled legislature in Georgia.”⁹⁸

Justice O’Connor recognized that a maximum number of safe black districts does not necessarily increase black representation, and that indeed minority “representation” is not so easy to define.⁹⁹ Who counts as a “representative”? The Court’s answer: White Democrats elected in “coalition” or “influence” districts could be considered “representative” of minority voters.¹⁰⁰ “Coalition” districts were those under fifty percent black in which black voters could nevertheless elect their candidates of choice by forming reliable coalitions with members of other racial and ethnic groups.¹⁰¹ An “influence” district was one in which 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,” thereby ensuring attention to their interests.¹⁰² There were other factors to be weighed, such as the leadership positions held by white incumbents who had been supported by black voters.

The Court had never “determined the meaning of ‘effective exercise of the electoral franchise,’”¹⁰³ and Justice O’Connor acknowledged that fact—admitting that the *Beer* standard left much unsettled.¹⁰⁴ And it must do so now, she went on. “The power to influence the electoral process is not limited to winning elections.”¹⁰⁵ Section 5 gives states the flexibility to choose substantive over descriptive representation—districting plans more likely to increase the number of black and white elected officials sensitive to black interests over those that ensure a maximum number of safe minority constituencies.¹⁰⁶ “[A] court or the [DOJ] should assess the totality of circumstances in determining retrogression under § 5.”¹⁰⁷

“The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine,” the Court had noted.¹⁰⁸ Too complex, it might be argued—especially given the greatly altered racial landscape, four decades after the passage of the Act, as *Ashcroft* recognized. But, in any case, if a federal law guaranteeing minority voters “the ability to elect the candidates of their choice” is still essential, *Ashcroft* was no guide. It provided no coherent legal standards to govern an inevitably limited administrative

98. *Ashcroft*, 195 F. Supp. 2d at 92.

99. *Ashcroft*, 539 U.S. at 480.

100. *See id.* at 483 (“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.”).

101. *Id.* at 481.

102. *Id.* at 482.

103. *Id.* at 479.

104. *Id.* at 480 (citing *Beer v. United States*, 425 U.S. 130, 141 (1976)).

105. *Id.* at 482 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 99 (1986) (O’Connor, J., concurring)).

106. *Id.* at 482.

107. *Id.* at 484 (citing *Johnson v. De Grandy*, 512 U.S. 997 (1994)).

108. *Id.* at 480.

preclearance process. When was an “influence” district influential?¹⁰⁹ When did a white incumbent hold committee or other legislative power invaluable to black constituents? With *Ashcroft*, Justice Potter Stewart’s famous definition of pornography applied equally to the question of minority representation: Judges and DOJ attorneys were expected to know it when they saw it.¹¹⁰

C. *The Leaked Memo*

The thicket of confusion that the Court created in *Georgia v. Ashcroft* is fully apparent in a Justice Department staff memo written a few months after the 2003 decision, although kept under wraps for two years, and then leaked to the *Washington Post* in early December 2005.¹¹¹ It recommended that the Attorney General reject a 2003 Texas congressional districting map as impermissibly diluting black and Hispanic voting power.¹¹² “The state of Texas has not met its burden in showing that the proposed congressional redistricting plan does not have a discriminatory effect,” the memo concluded.¹¹³ The Attorney General disagreed and approved the plan.¹¹⁴

Such internal memos should never be leaked, and are not available for

109. In dissent, Justice Souter wrote:

Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-minority district? Would it take three? Or four? The Court gives no guidance for measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters. Nor do I see how the Court could possibly give any such guidance. The Court’s “influence” is simply not functional in the political and judicial world.

Id. at 495 (Souter, J., dissenting). Although I agree with him on this point, Justice Souter in this dissent is arguing for a return to the status quo ante in interpreting the preclearance provision, a proposal that I cannot sign on to, for reasons that should be apparent.

110. In a famous concurrence Justice Potter Stewart quipped that while hard-core pornography is hard to define, “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

111. The memorandum was published as a supplement to Dan Eggen, *Justice Staff Saw Texas Districting as Illegal: Voting Rights Finding on Map Pushed by DeLay Was Overruled*, WASH. POST, Dec. 2, 2005, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/01/AR2005120101927.html>.

112. Memorandum from the Dep’t of Justice Voting Section on Recommendations for Section 5 of the Voting Rights Act (Dec. 12, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf>.

113. *Id.* at 66.

114. Although, officially, preclearance decisions are in the hands of the Attorney General, in fact the power to decide has been delegated to the Assistant Attorney General for Civil Rights. 28 C.F.R. § 51.3 (2004). The process of analyzing submissions starts with equal opportunity specialists (paralegals), whose work is reviewed by career attorneys, although the political appointees at the top have the last word. But those appointees come and go with changing administrations, while the career staffers, upon whom the political appointees must rely, tend to stay over time. Their generally long tenure in the Division gives them an advantage over political newcomers. In addition, however, prior to the administration of George W. Bush, the Republicans and mostly left-leaning staff, for different reasons, have been equally committed to maximizing the number of majority-minority districts. The Texas dispute was thus unusual.

outsiders to see. At the same time, for scholars (like myself) who have persistently sought to penetrate the walls of secrecy surrounding the DOJ voting section, the leaked memo was truly a gift¹¹⁵—a treasure trove of information on the troubling way in which the staff attorneys in the DOJ voting section thought about the legal standards governing the enforcement of the Voting Rights Act in the wake of *Ashcroft*.

The 73-page memo was a long, rambling effort to apply *Georgia v. Ashcroft* to the question of the legality of the redrawn Texas map. Both Texas and DOJ staff attorneys agreed that a new plan must not reduce the number of districts that sent blacks or Hispanics to Congress.¹¹⁶ The memo examined numerous districts, but at the heart of the dispute were three in which white Democrats had previously been elected.¹¹⁷ Texas argued that there was nothing sacred about these districts—that they were not among those that had to be protected in calculating fair minority representation. Having elected whites, they did not “provide minority voters with the ability to elect candidates of choice.”¹¹⁸ But the career attorneys who crafted the memo had a different view.

The first of the three disputed districts—number 24 under the old plan—was majority-white in voting-age population.¹¹⁹ It had elected Martin Frost, whom the memo depicted as a “candidate of choice” for minority voters because he was “responsive” to their interests.¹²⁰ He was also the dean of the Texas congressional delegation and thus a political powerhouse. Here we see the first fruit of *Ashcroft*: a white Democrat entitled to his seat under the Voting Rights Act because he is said to represent minority voters.

Chris Bell, also white, had represented the second of the three districts—number 25.¹²¹ The memo stated that Bell, too, was “responsive” to black and Hispanic interests and therefore that his district should be left as it was, even though the designers of the 2003 plan deemed their new, substitute District 9 more likely to elect a black representative.¹²² Time would bear them out: In the 2004 election, held under the new district lines, District 9 elected Al Green, adding a third black congressman to the Texas delegation. Throughout the memo, the career attorneys attempted to read political tealeaves, predicting the race or political sympathies of candidates who would be elected from the various districts under the new plan.¹²³ It was a practice invited by the *Ashcroft* Court, but, as the example of District 9 suggests, attorneys in Washington were (inevitably) not very good at it.

115. I was briefly given access to the internal files in the mid-1980s, *see supra* note 83, but have had no luck since then, and that was under very special circumstances.

116. Memorandum from the Dep’t of Justice, *supra* note 112, at 31.

117. *Id.* at 33-61.

118. *Id.* at 33.

119. *Id.* at 15.

120. *Id.* at 33.

121. *Id.* at 7.

122. *Id.* at 17-18.

123. *See id.*

Gene Green had represented the third district, number 29.¹²⁴ But Green, the memo said, quoting a Houston city councilman, was “basically Hispanic himself.”¹²⁵ It was an interesting description. In the Jim Crow South, white civil rights workers were often depicted as “black.” And there are blacks that are trashed by their political enemies as “white.” In the memo, some whites (like Green) were, well, not really white. On the other hand, the staff attorneys suggested that Representative Henry Bonilla did not count as a Hispanic for purposes of retrogression. They certainly had a partial point: his Hispanic support had been declining in recent years.¹²⁶ But he had been raised in a Latino neighborhood on the south side of San Antonio and his ethnic identity was unmistakable. And thus the memo perhaps suggests a question: Was it Bonilla’s Republican affiliation or his declining Hispanic support that truly eliminated him from the Hispanic count?

Running through the DOJ conclusion that Texas had failed to prove an absence of discriminatory “effect” in defending its newly drawn map¹²⁷ were three convictions. Section 5 protects the majority-minority districts from which black and Hispanic incumbents have previously been elected, reflecting the established interpretation of retrogression. White Democrats who have relied in part on black and Hispanic support are also entitled to the constituents they previously had; they can qualify as minority representatives. On the other hand, a Republican minority with weak support from minority voters does not count as a “minority” representative. A poorly crafted Supreme Court opinion cannot be held entirely responsible for the ideologically driven work of career attorneys in the Justice Department, but *Ashcroft* did give those attorneys permission to spin a tale based on highly dubious assumptions about racial identity and minority representation.

V. THE MEANING OF DISCRIMINATORY “PURPOSE”

A. *The Lawless Department of Justice*

Retrogression was the legal standard that governed the assessment of discriminatory effect. But the language of *Beer* allowed the Justice Department in its regulations to assume considerable interpretative leeway,¹²⁸ and *Ashcroft* further expanded that liberty.¹²⁹ As Katharine Butler has written, as a result, “the DOJ never limited its objections to those permitted by *Beer*. Despite *Beer*’s explicit standard, the Justices continued to require covered jurisdictions to create majority-minority districts beyond those needed to avoid retrogression, even in situations

124. *Id.* at 8.

125. *Id.* at 56.

126. *See id.* at 41-46.

127. *See id.* at 67-68.

128. *See Beer v. United States*, 425 U.S. 130, 141 (1976).

129. *See Georgia v. Ashcroft*, 539 U.S. 461, 479-80, 485 (2003).

indistinguishable from *Beer*.”¹³⁰ Beginning in the 1980s and to a greater degree in the 1990s, the Justice Department made much use of an additional tool to push jurisdictions to ignore the constraints of the Court’s 1976 decision: Section 5’s prohibition against electoral practices suspected of having a discriminatory purpose.¹³¹

Civil rights groups, career attorneys in the Justice Department (as well as most political appointees), numerous judges on the D.C. District Court, and a minority on the Supreme Court have all believed that the retrogression test was deeply mistaken.¹³² It allowed jurisdictions to maintain the status quo, even when that meant sticking with two majority-minority districts where, in fact, four could be drawn. Or zero, when at least one could be drawn.¹³³ Critics wanted maps that were racially “fair” by the standard of proportionate racial and ethnic representation.¹³⁴ But if the retrogressive effects test seemed too constraining, perhaps there was a solution: don’t use it. Instead, rest objections to new districting maps and other revised election procedures on the charge of suspected discriminatory purpose.

This was a tactic adopted in the 1980s and used routinely in the 1990s. When states and localities had to revise their electoral maps in the wake of a decennial census, the Justice Department used the prohibition against purposeful discrimination to force the creation of a maximum number of possible majority-minority districts. Anything less, it said, smacked of discriminatory intent, depriving minority voters of their entitlement to an “effective exercise of the electoral franchise.”¹³⁵

Indeed, John Dunne, the Assistant Attorney General for Civil Rights from 1990 to 1993, explained the definition of discriminatory purpose in an August 1991 speech.¹³⁶ “A discriminatory purpose means a design or desire to restrict a minority group’s voting strength, that is, the ability of that group to elect

130. Butler, *supra* note 82, at 767.

131. *Id.* at 769.

132. See, e.g., *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 342 (2000) (Souter, J., concurring in part and dissenting in part) (“[T]he Court was mistaken in *Beer* when it restricted the effect prong of § 5 to retrogression.”).

133. I will return below to the discontent with *Ashcroft*. But it should be noted, as Daniel Hays Lowenstein and Richard L. Hasen have pointed out, in the 1970s there were so few majority-minority districts that the question of retrogression seldom arose, and in the 1980s and 1990s, legal and sometimes political pressure pressured legislators to create additional safe minority districts.

As a result, *reducing* the number of majority-minority districts often was not even possible and almost never was likely as a practical matter. Whatever could be said for or against *Beer* as a matter of statutory construction, for practical purposes the decision seemed to make Section 5 marginal at best in the districting process.

LOWENSTEIN & HASEN, *supra* note 24, at 167-68.

134. Butler, *supra* note 82, at 765.

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

136. John R. Dunne, Remarks at National Conference of State Legislators (Aug. 13, 1991), *quoted in* MAURICE T. CUNNINGHAM, *MAXIMIZATION WHATEVER THE COST: RACE, REDISTRICTING AND THE DEPARTMENT OF JUSTICE* 74 (2001).

candidates of its choice, below the level that minority might otherwise have enjoyed,” he said.¹³⁷ A plan that provides less, he went on, needs “to be explained in a Section Five submission so that we can be sure that the state has satisfied its burden of proving the absence of racially discriminatory purpose.”¹³⁸ The *Beer* Court had held, explicitly, that jurisdictions had no obligation to improve on the status quo—no obligation to draw districting plans that provided black and Hispanic voters with proportional representation.¹³⁹ Preclearance protected only against efforts to *reduce* the electoral power of minority voters. Nevertheless, in 2003, Dunne wrote that “[t]he Civil Rights Division recognizes that there may be many legitimate reasons for not creating additional minority districts. But a jurisdiction’s desire to preserve the status quo is not one of them, when doing so means perpetuating underrepresentation of minority voters.”¹⁴⁰

B. *The Case of Georgia*

The drive to force states to maximize the number of safe minority seats in the redistricting round of the early 1990s—in violation of the retrogression standard—and the use of Section 5’s protection against purposeful discrimination was fully on display in the extended litigation over Georgia’s congressional districts in the mid-1990s.¹⁴¹ The second plan that the state submitted was turned down because, according to the Justice Department’s letter of objection to the redistricting plan, it was possible to draw one of the districts differently.¹⁴² “[N]o legitimate reason has been suggested to explain the exclusion of the second largest concentration of blacks in the state from a majority black Congressional District,” the March 20, 1992 letter read.¹⁴³ In fact, the state had good reasons for rejecting the district DOJ envisioned: successful candidates would have had to run in four major media markets; the district would still be just shy of majority-minority; and all reasonable standards of compactness and contiguity would be violated.¹⁴⁴

What was possible to draw in the way of safe black districts—the evidence for which became the basis of the discriminatory purpose charge—came straight from the ACLU, which, as the district court said, had an “informal and familiar”

137. *Id.*

138. *Id.*

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

140. *Remarks of John R. Dunne*, *supra* note 84, at 1128-29.

141. *See* *Miller v. Johnson*, 515 U.S. 900 (1995). This drive is explored at length in CUNNINGHAM, *supra* note 136.

142. Letter from John Dunne, Assistant Att’y Gen. for Civil Rights (Mar. 20, 1992), *quoted in* *Johnson v. Miller*, 864 F. Supp. 1354, 1365 (S.D. Ga. 1994).

143. *Id.* An earlier letter had referred to both discriminatory effect and purpose, but since there was no retrogression from the previous congressional districting plan, the reference to “effect” was just idly thrown in.

144. *Johnson*, 864 F. Supp. at 1365.

relationship with DOJ line attorneys.¹⁴⁵ As the court described that relationship, “[t]here were countless communications, including notes, maps, and charts, by phone, mail and facsimile, between Wilde [, the ACLU attorney,] and the DOJ team . . . DOJ was more accessible—and amenable—to the opinions of the ACLU than to those of the Attorney General of the State of Georgia.”¹⁴⁶ DOJ’s second objection letter, quoted above,¹⁴⁷ actually arrived at the state Attorney General’s office after members of the Georgia Black Caucus were already discussing it with the press, since the Justice Department attorneys had informed the ACLU lawyers of their decision before informing any state official.¹⁴⁸

What the ACLU (and therefore the Justice Department) wanted was a map referred to as “max-black,” and that end justified any and all means.¹⁴⁹ The DOJ attorneys cultivated “informants” within the Georgia legislature; “‘whistleblowers’ became ‘secret agents,’” the court noted.¹⁵⁰ One of these informants revealed that one black state senator, who had not towed the line, was a “quintessential Uncle Tom” and “the worst friend of blacks in Georgia.”¹⁵¹ “Succinctly put,” the court concluded, “the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment.”¹⁵²

This story of the power of a civil rights advocacy group over the DOJ’s assessment of the Georgia congressional plan was not unique to that state. Maurice T. Cunningham, in his book on the period, provides a comprehensive review of the use of allegations of discriminatory purpose to insist on “max-black” districting maps in direct violation of the standards established by the *Beer* Court—and often in direct opposition to the wishes of a state black legislative caucus.¹⁵³ In the case of North Carolina, the ACLU attorney alleged that the black caucus had “sold out” and informed DOJ line attorneys that black elected officials had been complicit in purposeful discrimination.¹⁵⁴ But John Dunne vigorously defended the Civil Rights Division’s reliance on the ACLU and allied groups, while dismissing the argument that a plan cannot be called discriminatory if it has the support of black legislators:

[M]inority legislators . . . may have a host of reasons for going along with a redistricting plan, even if the plan is not optimal for minority voters outside their districts. Those legislators may have been promised choice committee

145. *Id.* at 1362.

146. *Id.*

147. See Letter from John Dunne, *supra* note 142.

148. *Johnson*, 864 F. Supp. at 1368.

149. *Id.* at 1367-68.

150. *Id.* at 1367.

151. *Id.*

152. *Id.* at 1368.

153. CUNNINGHAM, *supra* note 136.

154. *Id.* at 99.

assignments or leadership positions, or they may be acting out of party loyalty

On the other hand, close attention is paid to the positions of such advocacy groups as MALDEF, ACLU, LULAC and the NAACP.¹⁵⁵

It was a heady time for the civil rights advocacy groups, whose map-drawing was greatly aided by the availability of more refined racial and ethnic census data coupled with sophisticated software that allowed interested parties to process and use those data to map alternative districting choices with the click of a mouse.¹⁵⁶ In addition, Republicans were their allies. The GOP benefited from the concentration of black voters in “max-black” districts in the South. The surrounding “bleached” areas were fertile ground for GOP candidates.¹⁵⁷

C. *The Supreme Court Intervenes*

That freewheeling use of Section 5’s prohibition on intentional discrimination temporarily came to an end in 2000 when the Supreme Court ruled in *Reno v. Bossier Parish School Board (Bossier II)* that the retrogression standard applied as well to the question of discriminatory purpose.¹⁵⁸ For a majority of five, Justice Scalia argued:

Appellants contend 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.¹⁵⁹

In other words, protection against retrogression—against pulling blacks back from the gains that Section 4 promised—was the entire point of preclearance.

155. *Remarks of John R. Dunne, supra* note 84, at 1133.

156. Several Fourteenth Amendment voting rights decisions recognized the crucial role that the new census data and sophisticated software played in the racial gerrymandering of legislative districts. *See, e.g., Shaw v. Hunt*, 861 F. Supp. 408, 457 (E.D.N.C. 1994); *Johnson v. Miller*, 864 F. Supp. 1354, 1363 n.6 (S.D. Ga. 1994).

157. The connection between Republican gains and race-based districting is a point that has been frequently made by scholars and journalists. *See, e.g.,* THERNSTROM, *supra* note 3; *see also* Abigail Thernstrom, *A Republican-Civil Rights Conspiracy*, WASH. POST, Sept. 23, 1991, at A11; DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS* (1997).

158. *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320, 329 (2000). There was a 1997 decision with the same name, *Reno v. Bossier Parish Sch. Bd. (Bossier I)*, 520 U.S. 471 (1997), but involving a slightly different issue, and thus the two cases are usually referred to as *Bossier I* and *Bossier II*.

159. *Bossier II*, 528 U.S. at 329.

That purpose informed *all* of Section 5. Appellants' broad reading of the term "purpose" would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts . . . perhaps to the extent of raising concerns about § 5's constitutionality."¹⁶⁰

The fact that Justice Department attorneys can refuse preclearance on the ground of *suspected* discriminatory intent heightens the potential for excessive federal intrusion into traditional state prerogatives, Justice Scalia could have added. Moreover, an expansive definition of "purpose" was inappropriate to the relatively informal, speedy, nonadversarial process of administrative review in which no testimony is taken and information comes from self- or DOJ-selected interested parties. As the Court had said in 1973 with respect to constitutional inquiries, assessments of purposeful electoral exclusion require "an intensely local appraisal."¹⁶¹ Such an appraisal was clearly beyond the scope of equal opportunity specialists and voting section attorneys in the Civil Rights Division of DOJ.

VI. STATUTORY CHANGE

A. *Bossier II* and *Ashcroft on the Chopping Block*

The civil rights community regarded the decisions in both *Ashcroft* and *Bossier II* as severe setbacks to voting rights. Roughly the same objection to *Bossier II* ran through the writing and testimony of all critics. It was put succinctly in a June 2003 memorandum issued by the Lawyers' Committee for Civil Rights Under Law:

[The] decision seriously weakened Section 5 of the Act by holding that Section 5 does not prohibit DOJ preclearance of a redistricting plan enacted with a discriminatory purpose if the plan does not worsen the position of minority voters. Under this interpretation, a jurisdiction that proposes to perpetuate its existing level of minority vote dilution is entitled to preclearance under Section 5, even if alternative redistricting plans that reduce minority vote dilution are readily available.¹⁶²

In directing those who assess preclearance submissions to permit election changes that arguably violate constitutional standards governing a finding of discriminatory purpose, the decision "essentially read the purpose standard out of the Section 5 test since voting changes rarely, if ever, will be motivated by an intent to regress but lack a retrogressive effect," former Justice Department

160. *Id.* at 336.

161. *White v. Regester*, 412 U.S. 755, 769 (1973).

162. Memorandum from the Lawyers' Comm. On Civil Rights Under Law, Preserving a Fundamental Right: Reauthorization of the Voting Rights Act, at 7 (June 2003), *available at* <http://www.lawyerscomm.org/2005website/features/40thfeatures/PDF/40thpapers/vra.pdf>.

attorney Mark Posner added.¹⁶³ Well, yes, that is correct. But the structure of Section 5, as it was designed in 1965, does not separate effect and purpose; effect was viewed as circumstantial evidence of invidious purpose. When electoral changes had a disfranchising impact, it could be assumed that the purpose was precisely to achieve the evident effect.¹⁶⁴ *Bossier II* restored the original logic upon which Section 5 rested.

My own views on *Ashcroft* were sketched above;¹⁶⁵ the decision provided woefully inadequate guidance to those entrusted with enforcing Section 5. This is an argument that has been made by other academics. Nathaniel Persily, for instance, has pointed out that without a clear definition of electoral and legislative influence (which are “malleable concepts”), covered jurisdictions have a great deal of freedom in deciding what the mix should be between “control” and “influence” districts, and could substitute many of the latter for the former.¹⁶⁶ Daniel Tokaji has described the standard for determining when a plan is “retrogressive” as “murkier” as a result of *Ashcroft*.¹⁶⁷ On the other hand, as Richard Pildes has noted, blacks are important players in Southern politics today and will not support districting that diminishes black electoral power.¹⁶⁸

As Tokaji pointed out in May 2006, “[a]mong the most striking aspects of the discussions of VRA renewal . . . [was] the significant divide that appear[ed] to exist between the civil rights and scholarly communities over Section 5 of the VRA.”¹⁶⁹ It was normally a more or less united group, but spokespersons for the organized civil rights community were both more alarmed by *Ashcroft* and more convinced of the importance of overturning the decisions.¹⁷⁰

Thus, in June 2006 Laughlin McDonald, director of the ACLU Voting Rights Project, warned that *Ashcroft* “may allow states to turn black and other minority

163. REPORT TO THE UNITED STATES COMM’N ON CIVIL RIGHTS REGARDING THE EXTENSION OF THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT OF 1965, 18 (2004).

164. See discussion *supra* Part II.B.

165. See discussion *supra* Part IV.B.

166. *Understanding the Benefits and Costs of Section 5 Pre-Clearance: Hearing on Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 Before the S. Comm. on the Judiciary*, 109th Cong. __, available at <http://electionlawblog.org/archives/persily-answers.pdf> (2006) (supplemental testimony of Nathaniel Persily, Professor, University of Pennsylvania School of Law, to written questions received from Senators Tom Coburn, John Cornyn and Edward Kennedy).

167. Posting of Daniel Tokaji to Election Law Blog, <http://electionlawblog.org/archives/005582.html> (May 11, 2006, 8:42 AM). Tokaji is an assistant professor of law, Moritz College of Law, Ohio State University.

168. *The Continuing Need for Section 5 Preclearance: Hearing on Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 Before the S. Comm. on the Judiciary*, 109th Cong. 13 (2006) (supplemental response of Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law, to written questions from Sen. Arlen Specter). The volume of literature on *Ashcroft* is large. See, e.g., Pamela Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression* (Stanford Pub. Law and Legal Theory Working Paper Series, Research Paper No. 69, Oct. 2003), available at <http://papers.ssrn.com/abstract=460460>.

169. Posting of Daniel Tokaji, *supra* note 167.

170. *Id.*

voters into second-class voters, who can ‘influence’ the election of white candidates, but cannot elect candidates of their choice, or, if they so choose, of their own race.”¹⁷¹ David Becker, a voting rights attorney who formerly served in the Justice Department, has labeled the whole notion of influence districts a fiction that robs black and Hispanic voters of their right to elect the candidates of their choice.¹⁷² The danger that little would be left of the Voting Rights Act once “influence” districts became a legitimate way of guaranteeing minority electoral opportunity was a common theme. At House hearings, Theodore M. Shaw of the NAACP Legal Defense and Education Fund testified that “spreading minority voters among more districts”—i.e., creating influence districts—“dilutes the collective power of their votes . . . [by offering] sanctuary even to those who intentionally seek to dilute minority voting strength,”¹⁷³ while Nina Perales, attorney for MALDEF, described *Ashcroft* as leaving “minority voters with little protection against redistricting plans that diminish their political strength.”¹⁷⁴

The decision actually provoked apprehension on both the left and the right.¹⁷⁵

171. Laughlin McDonald, *Why The Renewed Voting Rights Act Will Pass Constitutional Muster—Despite Predictions that the Roberts Court May Strike It Down*, FINDLAW, Jun. 9, 2006, http://writ.news.findlaw.com/commentary/20060609_mcdonald.html.

172. Original post of David Becker to electionlawblog.org and reposted on <http://www.moresoftmon-eyhardlaw.com/news.html?AID=742> (June 20, 2006).

173. *Voting Rights Act: Section 5—Judicial Evolution of the Retrogression Standard: Hearing on Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. __, available at <http://electionlawblog.org/archives/ShawTestimony.pdf> (2006) (statement of Theodore M. Shaw, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.). The House Judiciary Committee report on the 2006 bill, shaped primarily by witnesses closely connected to the civil rights groups, described both *Ashcroft* and *Bossier II* as decisions that “left covered jurisdictions with discretion under Section 5 to enact and enforce voting changes that may harm minority voters and limit their ability to elect their preferred candidates of choice in a manner never intended by Congress.” *Id.*

174. *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing on Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3 (2005) (statement of Nina Perales, Southwestern Regional Counsel, Mexican American Legal Defense Fund).

175. *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options after LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary*, 109th Cong. __, available at <http://electionlawblog.org/archives/thernstrom2.doc> (2006) [hereinafter *Renewing the Temporary Provisions Hearing*] (statement of Abigail Thernstrom, Vice Chairman, U.S. Commission on Civil Rights) (“‘No party,’ Justice O’Connor said, ‘contests that a substantial majority of black voters in Georgia vote Democratic’ and thus any increase in the number of Democratic state senators, even if they were white, would boost minority representation. So, in reviewing districting maps for preclearance, the Justice Department can assume that what’s good for Democrats is good for blacks, the Court found, in effect. But will the same point hold into the indefinite future for Hispanics? And when even a slight majority of Hispanics in a district vote Republican, will that now be a Hispanic- and Republican-opportunity district that will remain protected by the Voting Rights Act? Down the road, both parties can play definitional games that further partisan interests, and the Sensenbrenner bill encourages such gamesmanship.”); see also *id.* at __, available at http://judiciary.senate.gov/testimony.cfm?id=1992&wit_id=5574 (statement of Michael Carvin, Partner, Jones Day). For a critical view of *Ashcroft* from the political left, see discussion *supra* Part IV.B.

Among conservatives, the concern was the Court's reference to blacks as reliable Democrats, with the suggestion that white Democrats arguably represent black interests.¹⁷⁶ "No party," Justice O'Connor said, "contests that a substantial majority of black voters in Georgia vote Democratic" and thus any increase in the number of Democratic state senators, even if they were white, would boost minority representation.¹⁷⁷ In reviewing districting maps for preclearance, the Justice Department could thus assume that what was good for Democrats was good for blacks. The seats of white Democrats elected with minority "influence" would arguably become untouchable. And if they were, the Act had been turned into a partisan gerrymandering statute—a means of ensuring a maximum number of possible Democratic districts.¹⁷⁸

There was a further point. Justice O'Connor in *Ashcroft* had described "coalition" districts as those in which it was likely that "minority voters [would] be able to elect candidates of their choice."¹⁷⁹ Only Democratic districts would fit that description; *Ashcroft* appeared to make such coalition districts an entitlement as well.¹⁸⁰

B. *The Politics of Passage*

The concerns of the civil rights groups carried the day. The reauthorization and amendments to the Act passed the House of Representatives on July 13, 2006, by a vote of 390 to 33, with many in the small band of opponents objecting primarily to a bilingual ballot requirement, probably the least important of the issues on the table.¹⁸¹ The bill reached the Senate a week later, on the day the President was rushing to the NAACP's annual convention to beg for appreciation.¹⁸² That afternoon, the final Senate vote came down 98-0.¹⁸³ The President quickly signed the bill into law on July 27—not even waiting for the Act's forty-first anniversary, ten days later.¹⁸⁴ It was altogether a rush-job. Congress had acted twelve months ahead of the deadline in a political panic,

176. *Georgia v. Ashcroft*, 539 U.S. 461, 508 (2003).

177. *Id.* at 469.

178. *Renewing the Temporary Provisions Hearing*, *supra* note 175 (statement of Abigail Thernstrom, Vice Chairman, U.S. Commission on Civil Rights)

179. *Ashcroft*, 539 U.S. at 480.

180. *Renewing the Temporary Provisions Hearing*, *supra* note 175 (statement of Michael Carvin, Partner, Jones Day).

181. Final Vote Results for Roll Call 374, July 13, 2006, <http://clerk.house.gov/evs/2006/roll374.xml>.

182. Press Release, Office of the Press Secretary, President Bush Addresses NAACP Annual Convention (July 20, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/07/print/20060720.html>.

183. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, S. 2703, 109th Cong. (2006); *see also* Record Vote Number 212, *available at* http://www.senate.gov/legislative/RIS/roll_call_lists/roll_call_vote_cf212.

184. H.R. 9: To amend the Voting Rights Act of 1965, All Congressional Actions, <http://thomas.loc.gov/bss/109search.html> (search "H.R. 9"; then follow "H.R. 9" hyperlink; then follow "All Congressional Actions" hyperlink).

with the Administration's blessing and scarcely any debate.

In great part, the complete triumph of the Lawyers' Committee and its allies was due to the protected status of civil rights bills in general. Moreover, the title of the Act itself—containing the names of Fannie Lou Hamer, Rosa Parks, and Coretta Scott King—was politically intimidating. But, in addition, the statute is barely understood by most of the public. It was easy to distort and demagogue the question of reauthorization.

Just a taste of that distortion and demagoguery: "Most people do not know the Voting Rights Act is in jeopardy It'll be time to go back to the streets and march to alert people and mobilize people before the fact, not after the fact. 2007 will be too late," Jesse Jackson said in an interview reported in August 2005.¹⁸⁵ Georgia Rep. Sanford Bishop spoke of the danger of "Reconstruction revisited" if Congress did the wrong thing—by which he undoubtedly meant the end of Reconstruction.¹⁸⁶ Shortly before the 2004 elections, the NAACP branch in Tacoma, Washington sent out a newsletter that declared: "In the year 2007 we [i.e., black Americans] could lose the right to vote!"¹⁸⁷ That widely circulated rumor forced the Justice Department to post on its web site a "Clarification" to reassure Americans that "[t]he voting rights of African Americans are guaranteed by the United States Constitution and the Voting Rights Act, and those guarantees are permanent and do not expire."¹⁸⁸

"From the beginning of the reauthorization process . . . critical facts were repeatedly ignored or misunderstood,"¹⁸⁹ Senators Cornyn and Coburn noted in the "Additional Views" appended to the Senate Judiciary Committee Report on the bill. "[M]isunderstanding about the nature and timing of the expiration of certain provisions of the Voting Rights Act," they went on, "contributed to an unnecessarily heightened political environment that prohibited the Senate from conducting the kind of thorough debate that would have produced a superior product."¹⁹⁰

C. A Blank Check

What emerged from that "unnecessarily heightened political environment"¹⁹¹ was the reauthorization of the special provisions for another quarter of a century—which makes them set to expire in the midst of the post-2030 redistrict-

185. Hazel Trice Edney, *Rally Planned for Reauthorizing the Voting Rights Act*, PHILADELPHIA NEW OBSERVER (Black USA Press), August 2, 2005, available at <http://www.pnonews.com/News/Article/Article.asp?NewsID=4567&sID=3>.

186. Bob Kemper, *Voting Rights Act Under Scrutiny: Georgians in D.C. Oppose Provision*, THE ATLANTA J.-CONST., October 28, 2005, at 15A.

187. John J. Miller, *Every Man's Burden: Will the Voting Rights Act Be Necessary . . . Forever?*, NAT'L REV., April 10, 2006 (quoting Tacoma, WA NAACP Newsletter).

188. U.S. Dep't of Justice, Civil Rights Division Voting Section, Voting Rights Act Clarification, <http://www.usdoj.gov/crt/voting/misc/clarify3.htm>.

189. S. REP. NO. 109-295, pt. XI (2006).

190. *Id.*

191. *Id.*

ing cycle, another sign of the haste and carelessness that surrounded the process. In addition, both *Ashcroft* and *Bossier II* were overturned (as noted above) by amendments to the Act.¹⁹²

The amendment overturning *Ashcroft* protects the ability of minority voters “to elect their preferred candidates of choice.”¹⁹³ Influence districts in which minority voters could “play a substantial, if not decisive, role in the electoral process,” no longer count in assessing retrogression, in other words.¹⁹⁴ The language that purports to solve the *Bossier II* problem for the first time explicitly separated “purpose” and “effect” in the Section 5 language—giving each term a distinct meaning. Election-related changes will be precleared only if jurisdictions can demonstrate that they have neither the purpose nor the effect of “diminishing the ability of . . . [minority voters] to elect their preferred candidates of choice.”¹⁹⁵ And while “effect” still refers to retrogressive impact, “purpose” is defined as “any discriminatory purpose.”¹⁹⁶

No one is sure what the new, so-eagerly-embraced statutory language means, although the civil rights community certainly celebrated in the aftermath of its passage. On the day the President signed the bill, Wade Henderson, executive director of the Leadership Conference on Civil Rights, offered a toast: “We had the commitment; we had the expertise; we had the drive and we had the optimism of the most wonderful civil rights coalition, men and women right here in this room And it worked, better than we could possibly have imagined.”¹⁹⁷

Perhaps he’ll still be celebrating several years from now, but, as Michael Pitts asked when the bill was still being debated: if the *Ashcroft* standards were vague, wasn’t “the lack of a clear rule for DOJ to administer also a reason *not* to reverse *Bossier Parish II*? Put differently, isn’t unconstitutional discriminatory purpose a murky totality of the circumstances test in the same vein that *Ashcroft* is a murky totality of the circumstances test?”¹⁹⁸ And if it is, he goes on, then the standard “could give partisan politicians the ability to act like, well, partisan politicians.”¹⁹⁹ Pitts, it should be noted, is a former DOJ voting section attorney who was not opposed to overturning *Bossier II*, but was simply raising, as he put it, an “intentionally provocative question.”²⁰⁰ In the same vein, Nathaniel Persily worried about a possible “cruel result . . . if the new retrogression

192. See 42 U.S.C.S. § 1973c (LexisNexis 2006).

193. *Id.* § 1973c(b).

194. *Georgia v. Ashcroft*, 539 U.S. 461, 463-64 (2003).

195. 42 U.S.C.S. § 1973c(b).

196. *Id.* § 1973c(c).

197. Hazel Trice Edney, *Leaders Toast Voting Rights Victory But Worry About Getting Toasted*, ATLANTA DAILY WORLD, Aug. 4, 2006 (quoting Wade Henderson, executive director of the Leadership Conference on Civil Rights).

198. Posting of Michael Pitts to Election Law Blog, *Connecting Ashcroft with Bossier II?*, http://electionlawblog.org/archives/2006_05.html (May 14, 2006, 13:57 EST).

199. *Id.*

200. *Id.*

standard prevented the most common form of Democratic gerrymandering (cracking) but gave its blessing to the most common form of Republican gerrymandering (packing).”²⁰¹ And Richard Pildes asked: “If a covered state cannot modify districts in any way that ‘diminishes’ the ‘ability to elect’ candidates of choice of minority voters, then can a state change a 25% black district to a 20% district? Can it do so if those additional voters are used to shift a 53% black district to a 58% one? Can the state do so *only* if those additional voters are used to increase the influence of a black voting community elsewhere?”²⁰²

The 2006 amendments have handed the Justice Department and the D.C. District Court a new blank check on which they can write such numbers. Arriving at the right number in a particular electoral context will require a guess as to the probable impact of one percentage against another on the ability of minority voters to elect candidates of their choice. The Justice Department has already proven itself poorly equipped to play such guessing games. As noted above, in its leaked memo on congressional redistricting in Texas, the DOJ disagreed with the state over the likelihood that a newly elected black candidate would replace the white incumbent in a new District 9.²⁰³ But the state was proven right; not surprisingly, it knew local politics better than the career attorneys sitting in Washington. The memo was rife with such questionable political predications.²⁰⁴ Both before and after *Ashcroft*—and now in the wake of the 2006 amendments—federal attorneys are being asked to answer complicated questions involving race and representation in remote settings. They’re not very good at it; it’s a job for which they are ill prepared.

VII. RACIAL CHANGE

“*Georgia v. Ashcroft* may be a dubious piece of jurisprudence,”²⁰⁵ Robert Bauer has written on a blog site devoted to commentary on regulating the political process. “But there is something there worth taking seriously, which is respect for politics—for ‘horse-trading’ and the like by those elected to do precisely that and to answer for it.”²⁰⁶ Bauer had made an important point. *Ashcroft*, despite its obvious flaws, was arguably a blow for common sense. The Court had recognized that the normal districting process involves a complicated

201. Posting of Nathaniel Persily to Election Law Blog, *Thoughts on VRA Reauthorization*, <http://electionlawblog.org/archives/005656.html> (May 18, 2006, 10:07 EST).

202. Posting of Richard H. Pildes to Election Law Blog, *Response of Richard H. Pildes to Written Questions from Senator Arlen Specter*, <http://electionlawblog.org/archives/pildes3.doc> (July 18, 2006, 17:01 EST).

203. See Eggen, *supra* note 111.

204. *Id.*

205. Posting of Bob Bauer to More Soft Money Hard Law Blog, *Thinking About the Politics of Georgia v. Ashcroft and its Critics*, http://moresoftmoneyhardlaw.com/updates/voting_rights_act_redistricting_issues.html?AID=742 (June 6, 2006).

206. *Id.*

weighing of numerous political objectives.²⁰⁷ As Daniel Lowenstein has noted, “districting is part of the woof and warp of [a] state’s politics and political culture.”²⁰⁸

The Court in *Ashcroft* said (in effect), let legislators be legislators. And let black legislators make the deals they see as politically beneficial to their constituents (without being called “Uncle Toms”). Give the process some respect, in other words. In 1965 that normal process in a state like Georgia could not be trusted, but the entire black establishment had been a partner in the post-2000 redistricting process.

There was a fundamental problem with the Court’s message, however: it was at odds with the core of the Voting Rights Act, the whole point of which had been to deny covered jurisdictions the privilege of running their own political shop. Distrust of the South was the foundation upon which the temporary, emergency provisions in the 1965 Act had been built.

Is that distrust still warranted in 2006?

The new amendments, as I argued at the outset, rest on a vision that sees America—particularly the South—as still deeply racist. It is that vision that justified the extension of the extraordinary, temporary provisions once again. Thus, the House report accompanying the 2006 bill concluded that “[d]espite the progress made by minorities, the evidence before Congress reveals that 40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment”²⁰⁹ Those “vestiges of discrimination” to which the report refers include annexations, at-large voting, and the use of multimember districts,²¹⁰ methods of election that were not peculiar to the South and even in the South often preceded Jim Crow laws.

Nevertheless, one might think, on the basis of the House report, that these were still serious problems affecting the electoral opportunity of minority voters—problems serious enough to justify a twenty-five year extension of extraordinary protection against deliberate Fifteenth Amendment violations, which is the sole rationale for such intrusive federal power. The emergency of 1965 that legitimized the extraordinary provisions is more or less permanent, in other words. In fact, however, between 1995 and 2004, there were a total of twenty-three Section 5 objections to annexations and thirty-one to “methods of election” (a category that includes at-large voting and multimember districts).²¹¹

If these numbers suggest that the obstacles to political participation that justified Section 5 in 1965 are still with us, at what point would the evidence

207. See *Georgia v. Ashcroft*, 539 U.S. 461, 485-87 (2003).

208. Lowenstein, *supra* note 45, at 810-11.

209. H.R. REP. NO. 109-478, at 2-3 (2006).

210. *Id.* at 2.

211. U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION: THE DEPARTMENT OF JUSTICE’S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS 38 (May 4, 2006).

suggest the era of disfranchisement is over? And how did Congress arrive at its pessimistic conclusion that preclearance would still be needed well into the twenty-first century? It is tempting to conclude that the question of evidence was irrelevant; the passage of the bill and its support by the Administration was nothing but pure political grandstanding.

Hispanics are an ethnic group that never had a history comparable to that of southern blacks. And in the decades since 1964, there has been a revolution in the status of blacks. The black middle class has tripled in size, and the old image of “chocolate city, vanilla suburb” has become outmoded.²¹² The share of the black population living in suburbs has soared from 15% to 36%, and the proportion of suburban residents who are African American has doubled.²¹³ A majority of blacks are now employed in white-collar jobs, more than double the proportion four decades ago.²¹⁴

These huge advances could not have occurred without a dramatic decline of white racism. By every measure of racial attitudes, the United States has become a far more tolerant and inclusive society than it was in the turbulent 1960s. The proportion of whites who reported having a “fairly close personal friend” who was black jumped from a mere 9% in 1975 to 75% in 2005; the share of blacks with close white friends soared from 21% to 82% over the same period.²¹⁵

Not only have African Americans made enormous gains since the Voting Rights Act was passed, but most of these advances have been more rapid in the South than in the rest of the country. For that reason, the historic movement of black people from the oppressive South to the more liberal and tolerant North came to a halt more than three decades ago. The proportion of all African Americans living in the South plunged from 89% in 1910 to 53% in 1970.²¹⁶ That year was the end of black flight from the South; since 1970, more blacks have moved into the region than have moved out of it.²¹⁷ The notion that the southern states are still the racially hostile and oppressive places that they were more than four decades ago is frankly absurd.

Even Congressman John Lewis recognized the new reality in Georgia in his deposition in *Ashcroft*. “There has been a transformation. It’s a different state, it’s a different political climate, it’s a different political environment. It’s

212. THERNSTROM & THERNSTROM, *supra* note 12 at 185, 200, 211.

213. *Id.*

214. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, MARCH 2002: RACIAL STATISTICS BRANCH, Table 21 (April 25, 2003); U.S. CENSUS BUREAU, WE THE PEOPLE: BLACKS IN THE UNITED STATES, 2000 SPECIAL REPORTS 12 (U.S. Dep’t of Commerce, 2005).

215. THERNSTROM & THERNSTROM, *supra* note 12, at 521; *Race Relations*, Table 3 (ABC News Poll June 20, 2005).

216. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SPECIAL STUDIES, P23-80, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978, at 13 (1979).

217. WILLIAM H. FREY, THE BROOKINGS INSTITUTION, CENTER ON URBAN AND METROPOLITAN POLICY, THE NEW GREAT MIGRATION: BLACK AMERICANS’ RETURN TO THE SOUTH, 1965-2000, at 1-16 (2004).

altogether a different world we live in, really,” he said.²¹⁸ And he went on: “We’ve come a great distance [I]t’s not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race.”²¹⁹

The pessimism that Congress embraced in passing the 2006 statute—in sharp contrast both to the hard data on racial progress and to Congressman Lewis’s celebration of that change—carries a heavy cost. The denial of racial change locks the Justice Department and the D.C. District Court into too narrow a definition of minority representation. When the white South feared black voices, it was legitimate to assume that only black voices could represent black interests. By now, such an assumption skews the whole districting process in ways that do not serve minority voters well.

Ensuring safe minority districts by means of racial gerrymandering clusters black residents, with the districting lines often chasing minority families who have tried to distance themselves from their old urban neighborhoods by moving to greener pastures. It also places a ceiling on the number of blacks likely to be elected to legislative seats. The message to would-be candidates is clear: You need majority-minority constituencies in which to run. Don’t try to run in more risky settings. A greater number of districts whose population mix would encourage biracial or multi-ethnic coalitions might mean greater black representation, as Justice O’Connor understood in *Ashcroft*—leaving aside the drawbacks of that decision. They might also mean more minority representatives whose political views are centrist.²²⁰ All of these points apply to Hispanics as well; I have focused on blacks for reasons of simplicity.

The contorted majority-minority districts that DOJ forces jurisdictions to draw thus act as a brake on racial change—on the greater integration of black voters and officeholders into American mainstream politics. The problem is not simply that such districts seldom provide incentives for coalitions across racial and ethnic lines. American law contains important messages about our basic values, and race-driven legislative maps send the wrong message. Race-based districting has become equated with minority electoral opportunity, with the implication that blacks are different from whites; that it’s okay for the state to label them as such; and that statements that say, in effect, “blacks are . . . x,” or “blacks believe . . . y” pose no problem.

The point can be put slightly differently. When the state treats blacks as fungible members of a racial group, they become, in Ralph Ellison’s famous

218. Direct Testimony of John Lewis, *supra* note 40.

219. *Id.*

220. Safe majority-minority districts arguably tend also to reward candidates who are at the far left of the political spectrum. The only contest that counts in such settings is the Democratic primary, and where there is competition between black candidates, a racially charged message usually brings out the base. *But see* DAVID CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS (1999) (arguing that minority districting is good for the country because it promotes a biracial politics of commonality because black candidates need white “swing” votes to win).

phrase, “invisible men,”²²¹ whose blackness is their only observed trait. But that view—the view that individual identity is defined by race, that group racial traits override individuality—is precisely what the civil rights movement fought so hard against.

Race-based districts amount to a form of political exclusion—masquerading, of course, as inclusion. And the overwhelming majority of Americans don’t like them. In 2001, a national poll contained the following question: “In order to elect more minorities to public office, do you think race should be a factor when boundaries for U.S. Congressional voting districts are drawn . . . ?” Seventy percent of blacks and eighty-three percent of Hispanics said race should not figure into map drawing.²²²

“It’s a sordid business, this divvying us up by race,” Chief Justice Roberts remarked in *League of United Latin American Citizens v. Perry*.²²³ Indeed. And the point raises the rock-bottom question: Do the benefits of the newly reauthorized Section 5 outweigh its costs?

CONCLUSION

Beautifully designed in 1965, Section 5 of the Voting Rights Act has turned into a murky mess over the decades. The problem started in 1970 when the trigger was “updated” to rest on turnout in the 1968 elections, as well as those in 1964. The result was a formula that no longer targeted localities with a history of deliberately disfranchising blacks. Three boroughs in New York City (although not the other two), as well as other counties in an assortment of states outside the South, suddenly found themselves in the category of the racially suspect and placed in federal receivership, unable even to move a polling place without judicial or Justice Department approval. Moreover, the burden of proving nondiscrimination was on them; in order to obtain preclearance for any election-related change, they had to demonstrate their innocence.

Subsequent amendments to the Section 5 statistical trigger only compounded the problem. Today, coverage rests on the turnout figures for 1972, combined with a literacy test—redefined to include the use of English-only ballots. What do 1972 turnout figures tell us about possible Fifteenth Amendment violations today? And is there any reason to believe that the South (where the great majority of covered jurisdictions are still located) remains distinctive in its treatment of minority voters?

Leaving aside the question of arbitrary coverage, the Justice Department is way over its head in its enforcement of the preclearance provision. That is, the

221. See generally RALPH ELLISON, *INVISIBLE MAN* (1952).

222. Washington Post/Kaiser/Harvard Racial Attitudes Survey, Question 52b, 2001, <http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/race071101.htm>.

223. 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). This was a Section 2 case, but the remark applies equally well to the “divvying up” that Section 5 requires.

process of administrative review cannot possibly resolve (on a sixty-day timetable) complicated questions involving race and representation about which the voting section staff has only the most superficial knowledge. Had the DOJ stuck with the backsliding standard established in *Beer*, the process would have been more manageable, although that 1976 decision did leave numerous questions unanswered. The heart of the preclearance review would have consisted of counting safe minority districts before and after the submitted electoral change. Instead, the Justice Department used a variety of unsanctioned arguments to circumvent the constraining notion of retrogression and force jurisdictions to engage in racial gerrymandering aimed at creating the maximum number of majority-minority districts.²²⁴ Proportionate racial and ethnic representation (to the degree that single-member districts could create such proportionality) became the standard by which racial fairness was measured. The sphere of voting rights was not unique in this regard. In employment, contracting, and education, as well, the standard of racial equity became representation reflecting the relevant minority population.²²⁵

As in other areas of public policy, voting rights policy was fashioned by government bureaucrats and judges rendering decisions far below the radar screen of most Americans. The principles that govern the enforcement of Section 5 (and thus the distribution of political power among racial and ethnic groups) have never been openly debated in the public arena. In fact, debate has been stifled by distortion and demagoguery—images of blacks once again without franchise, although there is not the remotest possibility that the Jim Crow South will rise again.

The belief that black representation requires black officeholding was the foundation upon which the demand for “max-black” districting rested. But racial change will surely force, once again, the question of trade-offs with which Justice O’Connor struggled in *Ashcroft*. In fact, almost immediately after the President signed the 2006 statute, David Epstein in the leftist magazine *American Prospect* began to ask whether liberals might come to regret getting Congress to overturn the decision.²²⁶ “The fact is, the voting arrangements that elect the most minorities as possible to office are not the same as those that do the most to promote the policy goals supported by minority voters,” he wrote.²²⁷

This wasn’t always the case; it used to be that the best way to get pro-minority legislation was to construct districts that were sure to elect minority-supported representatives. But with the decrease in polarized voting in the South, and

224. See U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT AND REAUTHORIZATION: THE DEPARTMENT OF JUSTICE’S RECORD OF ENFORCING THE TEMPORARY VOTING RIGHTS ACT PROVISIONS (2006).

225. *Id.* at 83.

226. See David Epstein, *Democratic Dilemmas: The Conversation No One is Having About the Voting Rights Act*, AMERICAN PROSPECT, Aug. 4, 2006, available at <http://www.prospect.org/web/page.ww?section=root&name=ViewWeb&articleId=11805>.

227. *Id.* at 1.

increased polarization between the parties in Congress, this equation no longer holds. Indeed, . . . with the rise of the Republican Party's fortunes in the South, the "hazard rate" in that region is now 2 to 1: for every extra majority-minority district created, that is, two extra Republicans get elected from surrounding districts. This means that, on average, each additional majority-minority district results in the *loss* of one vote for minority-supported legislation

. . . No one is willing to broach the topic of whether it might ever serve minorities' interests to support voting arrangements aimed at advancing their policy interests, even if it comes at a small cost to their concentrated impact as voters or to the electoral prospects of minority politicians.²²⁸

Perhaps Epstein's remarks are a first and very early sign that, while on paper the controversy over Section 5's legal standards have been settled for the next quarter century, in fact, renewed debate has already begun. The amended language of the statute is a Rorschach test. We will see how the Justice Department and the judges read the inkblot over time.

228. *Id.*