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July 17, 2006

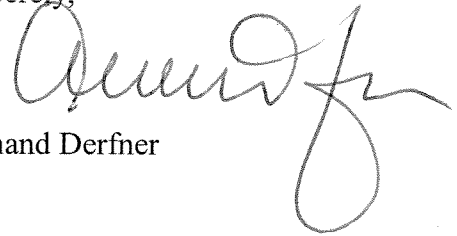
The Honorable Senator Arlen Specter
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Specter:

Thank you for sending me a transcript of the hearing on May 17, 2006. I have made small corrections on pages 27-29 and also on page 53, 60 and they are enclosed.

With best regards.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Armand Derfner', with a large, stylized loop at the end.

Armand Derfner

AD/sh

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July 17, 2006

The Honorable Senator Arlen Specter
Committee on the Judiciary
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Dear Senator Specter:

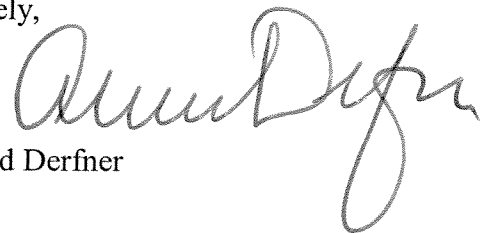
It was a pleasure to appear before your Committee on May 17, 2006, to provide testimony on the Voting Rights Act. The Committee staff were very helpful in every respect.

Thank you for that opportunity to testify, and than you also for the opportunity to respond to supplemental questions posed by several members of the Committee. Attached to this letter are my responses to the questions of Sens. Cornyn, Coburn, Leahy, Kennedy and Schumer. Also attached is a law review article published this year in the South Carolina Law Review, that I believe will be very informative to the Committee.

Finally, Senator Hatch asked each witness who testified on May 17 to comment on an article by Stuart Taylor. I responded to that request in a letter directly to Sen. Hatch, and I am attaching to this letter a copy of my letter to Sen. Hatch.

With best regards.

Sincerely,



Armand Derfner

AD/sah
Enclosure

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Attachment 1 to letter to Sen. Specter:
(Answers to Senators' supplemental questions)
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SENATOR CORNYN

1. *What empirical data can you cite that indicates the ability of minorities in the covered jurisdictions to participate fully in the electoral process is substantially different from minorities outside the covered jurisdictions? Please be specific with respect to covered jurisdictions vs. non-covered jurisdictions.*

If the question is meant to suggest that Congress has a constitutional obligation to find a significant difference today between covered and non-covered jurisdictions, I do not agree. Congress' task under cases like *City of Boerne v. Flores* is to determine whether the record shows a continuing need for the section 5 remedy in the jurisdictions where it has been held to be appropriate thus far. The record presented in support of the current reauthorization bill clearly does that.

There are several forms of empirical data that show that Congress has more than met its burden under *Boerne* for the covered jurisdictions, data which also indicates differences between the covered jurisdictions and other jurisdictions. These data include items such as: the number of successful Section 2 cases; court findings of high levels of racially polarized voting that interact with certain election methods and procedures to deny minorities equal opportunities to elect their candidates of choice; successful Section 5 enforcement actions; and the Justice Department's Section 5 objections, More Information Requests, and resulting withdrawals of discriminatory voting changes. The Senate has received thousands of pages of empirical evidence supporting reauthorization. The fourteen state reports and the ACLU's summary of its litigation (some of which were cases I participated in), among other sources, describes this evidence in detail.

I will provide one example to illustrate the continuing need for Section 5 in one of the covered jurisdictions, my home state of South Carolina. Just two years ago, the South Carolina General Assembly – Senators and Representatives from the entire State – voted to adopt for the Charleston County School Board the precise election method that a federal court had already held was racially discriminatory. The school board bill was widely recognized to be discriminatory. The Justice Department objected to the new law under section 5 of the Voting Rights Act. I have searched in vain in non-covered states for examples of such blatant efforts to

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adopt laws that were known to discriminate on account of race, particularly so closely on the heels of a federal court decision striking down the same method of election.

2. *Currently, the Voting Rights Act identifies those jurisdictions subject to additional oversight by looking at voter turnout in the presidential elections of 1964, 1968, and 1972. Re-authorization of the Act in its current form would preserve these dates as the "triggers."*
 - a. *Would you support updating the coverage formula to refer to the Presidential elections of 2000 & 2004, instead of 1964, 1968, and 1972? Why or why not?*
 - a. No. The trigger is not a routine remedy for low voter participation. Rather, we have had a historical malignancy of discrimination with regard to the right to vote, and the trigger (a literacy test combined with low voter turnout) was designed as a litmus test to see where the malignancy was present in 1964, 1968 and 1972. Based on the records before Congress at those times, the litmus test was remarkably accurate in pinpointing those places where the malignancy existed and in generally leaving alone those places where it did not. Thus, the purpose of the original triggers has no logical connection with mere showings of low voter participation in a particular recent election in a given jurisdiction.

As discussed in my response to the first question, Congress has developed an extensive record showing the persistence of voting discrimination in the covered jurisdictions.
 - b. *Would you support adding the Presidential election of 2000 and/or 2004 as well as any political subdivisions that have been subject to section 2 litigation say, in the last 5 years, to this formula in order to pick up jurisdiction that have begun discriminating since the 1970s? Why or why not?*
 - b. No. There is no showing of any general rise in non-covered jurisdictions of discrimination serious enough to make the special provisions of the Act generally applicable. If there is a specific showing of such discrimination in a particular case, section 3(c) authorizes a court to impose such remedies in a judicial order. Federal courts have not been reluctant to do so, adding Section 5 coverage to

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several states (Arkansas and New Mexico) and localities (Escambia County, Florida; Buffalo County, South Dakota; and Cicero, Illinois).

In City of Boerne v. Flores, the Supreme Court indicated that Congress may not rely on data over forty years old as a basis for legislating under the Fourteenth and Fifteenth Amendments. City of Boerne v. Flores, 521 U.S. 507, 530 (1997). In striking down the Religious Freedom Restoration Act, the Court observed, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."

3. *Given this statement, would you support removing - at a minimum - the year 1964 from the coverage formula? Why or why not?*

No. You have misunderstood what *Boerne* says in two ways. First, the Voting Rights Act identified then-current discrimination, so the question is not whether passing the Act in the first instance today would be justified, but whether the covered jurisdictions – which had engaged in such shameful conduct for a century – have changed enough to allow Congress to remove its protections. Secondly, the evidence on which Congress has acted in previous reauthorizations, and which it must judge now, is the evidence of continuing voting discrimination in the present and the very recent past (namely, since the last reauthorization in 1982). There is abundant evidence since 1982 of a need to continue protecting minority citizens in the covered jurisdictions from their own governments. Therefore, the evidence here is not 40 years old. There is a substantial record of discrimination that supports reauthorization using the existing trigger.

In 1894, Congress repealed most of the civil rights laws it had passed a quarter century before, believing or hoping that minority citizens in the southern states would have their rights protected. How tragically wrong Congress was! The 1894 repeal was followed by more than a half century of the most lawless conduct by state officials, a giant conspiracy to despoil the Constitution. Congress should beware of doing the same thing again. Evidence of current and recent voting discrimination in the covered jurisdictions demonstrates the real dangers of removing the most effective tool ever adopted to stop that discrimination.

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4. *While I am still reviewing the record, it seems to me the arguments thus far focus mostly on anecdotes regarding specific covered jurisdictions - yet, for the period 1996 through 2005, the Department of Justice reviewed 54,090 Section 5 submissions and objected to 72, or 0.153 percent. What percentage of objections below 0.153 do covered jurisdictions need to achieve before Congress can let Section 5 expire? Last year, according to DOJ data, there was only 1 objection out of 4734 submissions. Is that sufficient to warrant Section 5 coverage? Why or why not?*

The example I gave above of the determination of the South Carolina General Assembly – two legislative houses representing the entire state – to enact discrimination is hardly an “anecdote.” To use that word trivializes the right to vote, and treats racial discrimination as a minor peccadillo. In any event, these “anecdotes” are backed up by numbers in my state, where in the last five years there have been nine Section 5 objections including: four discriminatory countywide redistricting plans; two annexations and the reduction in the size of an elected body that diminished minority voting power; a numbered post and majority vote requirement that would have prevented the election of the only successful Black candidate; and South Carolina’s enactment of the discriminatory method of election struck down in the Charleston County litigation.

Even if the quoted statistics are accurate, they would not be an excuse for scuttling the Act. Congress has been engaged in a painstaking examination of all the circumstances surrounding this fundamental issue, not looking for magic numbers. Bearing in mind that each objection is the equivalent of an injunction, these objections are part of the tapestry depicting a continuing major problem. Moreover, section 5, as a prophylactic, prevents many potentially discriminatory voting changes that never get reflected in an objection – for example, proposed changes that don’t get enacted or that are withdrawn in the face of requests for more information. In addition, the number of objections has been artificially reduced by the Supreme Court’s misreading of the Act in *Bossier Parish v. Reno*, which blocked objections even to changes that are grossly discriminatory in purpose.

Finally, many of the recent objections have involved statewide voting changes, thus having the broadest effect on the most voters. These statewide objections have prevented many sophisticated efforts to disenfranchise minority voters, as I have discussed above.

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5. *In light of the lack of clear differentiation between covered jurisdictions and non-covered jurisdictions, would you support reauthorization for a term of 5 years instead of 25? Why or why not? 10 years? Why or why not?*

I do not agree with your premise that there is no clear differentiation. In any event, Congress has a duty under the 14th and 15th amendments to protect minority citizens from their own state and local governments. Where the evidence shows that such protection is still necessary, it would be irresponsible for Congress to scrimp on its protections. Congress can always end the protections at any time – and certainly the Senators and Representatives, all of whom come from states – will be alert to insure that protections go on no longer than necessary. In fact, the Act has a built-in look-and-see provision calling for a review after 15 years, which provides a perfect opportunity for a progress review.

We do not deal here with a transient problem, but with the most ingrained determination to discriminate, going back generations. Why would you and Congress be ready to abandon necessary protections before you have the clearest proof that the lessons have been *completely* learned? The record before Congress shows the contrary, and it is not surprising because this type of discrimination doesn't end overnight.

The Senate has developed a very fact-intensive record that supports re-authorization. The Court has made it clear that it is not going to second guess Congress's choice of a reasonable duration as long as this burden is met.

6. *Putting aside the constitutional questions with regard to overturning Georgia v. Ashcroft - I want a better understand some of the practical implications. Assuming the new language in the re-authorization is adopted, would it be your view that even districts that are "influence" districts, with relatively low numbers of minority voters, should be protected under the plan? Why or why not?*

I prefer to leave this answer to other witnesses who may be more familiar with the precise language being considered.

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SENATOR COBURN

1. *With the improved state of race relations in the US since 1965, including vastly improved minority voter registration and turnout, is the Section 4 trigger for coverage under Section 5 still appropriate to the proposed re-authorization of the Voting Rights Act?*

Yes, for the reasons in my responses to Senator Cornyn's questions 2 and 3.

2. *If the trigger is to be maintained as 1972 presidential election participation, is it appropriate to extend coverage for 25 years?*

Yes, for the reasons in my responses to Senators Cornyn's questions 2 and 3.

3. *Are there alternative conceptualizations of the trigger that might address concerns of critics who wish to update the trigger, while also alleviating the concerns of "backsliding" if the trigger is updated from 1972?*

I have considered possible alternatives, without finding any.

4. *Does leaving the trigger unchanged increase the likelihood that a reauthorization until 2031 will be struck down by the Supreme Court?*

No. In considering the length of time that the special provisions of Act will have been in effect, the Supreme Court will be aware that racial discrimination has been part of the backbone of our Nation and has affected every aspect of individual and national life. To expect that a problem as serious as voting discrimination – so ingrained for so many generations – can be solved in a few decades is simply being unrealistic or disingenuous. the persistence of voting discrimination in the covered states since 1982, as demonstrated by Congress's substantial record supporting reauthorization, confirms this point.

In *Louisiana v. United States*, 380 U.S. 145 (1965), the Supreme Court held that courts have "not only the power but the duty" to eliminate discrimination of the past and present its recurrence in the future." Congress, a coordinate branch of government, has an equal power and duty under the Constitution, and its evaluation of its own constitutional obligation is entitled to the Court's respect.

5. *Please discuss how a possible broad-based "bailout" of covered jurisdictions might be*

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implemented?

I do not see any need for a "broad-based" bailout when the current bailout has not proved to be an obstacle.

6. *Are there alternative conceptualizations of the bailout provision that would increase the opportunity for a jurisdiction to succeed in a bailout attempt?*

I do not see a need for any such.

7. *In the Unofficial Transcript of the hearing on May 16, 2006, page 35-36, Professor Pam Karlan said in reference to Georgia's redistricting plan at issue in Georgia v. Ashcroft, that the Department of Justice "got it right" because two of the white Democrats elected under the new plan switched party affiliation and became Republicans. She said "Now I am sure that the Republicans in Georgia are very fair folks, but those black voters have no influence in those districts." Do you agree with Professor Karlan's assertion that minority voters in Republican districts "have no influence"?*

Professor Karlan's comment obviously applied to the two districts in question, and as to them her point is self-evidently correct: if minority voters had significant influence in those districts, the two elected officials would doubtless not have changed parties after being elected with black voters' support.

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SENATOR LEAHY

1. *Mr. Derfner, in your testimony you noted that opponents of minority voting have "simply shifted from denial to abridgement of the right to vote." Can you explain how the barriers have changed throughout your many years litigating VRA cases and whether the legislation we are considering is flexible enough to protect against these ever-evolving tactics?*

After literacy tests were banned and federal examiners put an end to outright denial of the right to register and vote, the tactics shifted to methods of abridgement, sometimes called dilution, which aimed at limiting the effectiveness of black voters. Much of this was what could be called "rigging" elections, such as shifting to at-large elections so that black voters who were a majority in some areas of the city or county but a minority overall would be unable to win any seats on the city or county council. The Supreme Court took note of the shift in approach in the early Voting Rights Act cases, including *Allen v. State Board of Elections* (1969), and *Perkins v. Matthews* (1971).

In those cases, the Supreme Court held that Section 5 was broad enough to cover these methods, which could be just as effective in limiting minority voters' rights as outright denial. That is the genius of Section 5. It did not aim at specific tactics, but was a broad prophylactic measure. In effect, Congress said "we don't know exactly what you will try next, but whatever it is, we'll be ready." That is why Section 5 has adapted to meet new methods of discrimination, and what we have learned under Section 5 has been of great value in other areas of the law. Earlier voting laws, such as the Civil Rights Acts of 1957 and 1960, were ineffective because they dealt only with specific problems, and it was easy for state and local officials to come up with new tactics to sidestep the laws. The drafting of section 5 to sweep broadly at any voting change was necessitated by that lawless pattern of conduct by officials in the covered jurisdictions.

2. *Your testimony is full of concrete examples of continuing discrimination and abridgement of the right to vote in South Carolina. In your professional opinion, what are the benefits of Section 5's pre-clearance process? And is Section 2 litigation a sufficient substitute?*

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Section 5 not only prevents discrimination in advance, without requiring burdensome litigation by the victims, but it also encourages compliance with the Constitution, because government officials in the covered jurisdictions have to keep Section 5 constantly in mind as they consider voting legislation or changes.

Section 2 is not an adequate substitute because it puts the burden on the victim. Unlike Section 5, Section 2 allows the discriminatory voting change to go into effect. In addition, Section 2 cases are expensive and time-consuming to litigate and hard to win. The Federal Judicial Center studies the complexity of different types of cases, and has reported that voting cases rank near the top of all civil cases in complexity. See 2004 Case-Weights Study, Appendix Y, Table 1. In my recent Charleston County case, the County spent over \$2,000,000 defending the case, and we had to put in over 2000 hours representing the plaintiffs, in addition to many more hours that the Justice Department put in. Lay persons may not be fully aware of the realities and burdens of litigation, but they are real.

Those who would narrow or do away with Section 5 often claim, without support, that Section 5 is not needed because other litigation will do the job. A stark example of this kind of naked assertion is Justice Scalia's statement in *Reno v. Bossier Parish School Board*, 528 U.S. 320, 337 n.6 (2000), that if a covered state had passed a "good moral character" test in 1965, "it would have been precluded from doing so under Section 4, which bans certain types of voting tests and devices altogether, and the issue of Section 5 preclearance would therefore never have arisen." Of course, Section 4 does not "ban" or "preclude" anything unless someone brings a lawsuit and gets an injunction. (Justice Scalia may not have been aware that laws do not enforce themselves.) The whole point of Section 5 – which Justice Scalia says would "never have arisen" – was to nip such discriminatory laws in the bud without requiring a burdensome lawsuit. Moreover, even Section 4 lawsuits were burdensome. For example, the suit to require Louisiana to comply with the Voting Rights Act continued on for nearly two years after the Act was passed and more than a year after the Supreme Court's decision in *South Carolina v. Katzenbach*.

3. *From your experience working with state and local officials on VRA compliance, do you have a sense of the burdens imposed under Section 5? Do the burdens outweigh the benefits in your opinion?*

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The burden is not great, and is invariably a tiny fraction of the time needed to consider the voting change. I have represented or assisted a number of jurisdictions in making submissions, and the work is less than the paperwork associated with other state or federal regulations.

4. *Other witnesses have testified that racially polarized voting has subsided or is no longer an issue what we should consider in crafting legislation. What have you observed in the many voting rights cases you have litigated?*

My most recent experience is in South Carolina, where the federal court in *Colleton County v. McConnell*, the most recent statewide reapportionment case, found continuing, pervasive and universal racial polarization in voting. The same was found again in the Charleston County Council case, where even the defendant's statistical expert agreed that there was polarized voting. Even in non-partisan races, with no political party designations, the voting was completely racially polarized.

5. *Some witnesses have testified that Section 5 should be amended to include an exception to pre-clearance in covered jurisdiction for so-called "de minimis" voting changes, such as the relocation of a polling place. Do you agree that changes such as moving a polling place have such a minor effect of the ability of minority citizens to vote that they should not require pre-clearance? What is your opinion of such an exception?*

Such a change would open a wide gap in the Act's protections of minority voters. So-called "de minimis" changes are hardly that, because they are often the easiest to manipulate and have the most drastic impact. For example, in a recent election in Charleston County, a last minute polling place change helped affect the outcome, and the election had to be run over again.

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SENATOR KENNEDY

1. *Some of our witnesses have told us that the percentage of Section 5 submissions resulting in Justice Department objections has been very low in recent years. In South Carolina, haven't there been quite a few Department of Justice objections since 2000? As a general matter, does an overall reduction in the percentage of objections mean that we no longer need Section 5?*

A report by John Ruoff and Herb Buhl shows at least nine objections in South Carolina in the past five years, which are summarized in my response to Senator Cornyn's fourth question. In fact, as I look at their list, the first two are objections to voting changes in Sumter County and Union County. I represented voters in successfully suing Union County in the 1970s and Sumter County in the 1980s, and yet here they are again. How long will it take my state to learn the lessons of the Voting Rights Act?

Second, a small number of objections does not mean the problem has gone away, but may simply mean the medicine (the Voting Rights Act) is effective. Almost no one gets diphtheria today, but we are not yet ready to stop giving our children diphtheria shots. On the other hand, we *have* stopped giving smallpox shots, but only because we are sure that smallpox has in fact been *completely* eradicated.

Finally, sometimes a single objection tells volumes. In 2004, South Carolina enacted state law adopting a known discriminatory method of elections for school board immediately after a federal court held that the same method of election discriminated against black voters in Charleston County. This is strong evidence that the South Carolina General Assembly – the statewide legislature – does not hesitate to discriminate, even by using such obvious and known discriminatory methods.

2. *Some witnesses suggested as exemption from Section 5 coverage for voting changes they view as minor, such as changes in polling place locations. Others suggest that preclearance for such local changes is even more important than for statewide changes. They argue that preclearance of statewide redistricting is unnecessary, because the political parties are certain to litigate any problems related to minority voters. In your view, what would be the impact of exempting so-called de minimis changes and/or*

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statewide changes from the preclearance requirements of Section 5?

Either one of these changes would cut the head or the tail off the Act. So-called "de minimis" changes are hardly that, because they are often the easiest to manipulate and have the most direct impact. For example, in Charleston County, a last minute polling place change helped affect the outcome, and the election had to be run over again.

At the other extreme, although it is true that statewide redistricting plans attract lots of attention, the political parties and other litigants have their own agendas which may not coincide with protecting the rights of minority voters.

An excellent law review article detailing the experience under section 5 shows how dangerous it would be to make snap judgments that one type of change or another can be excluded from section 5 coverage on the theory that it doesn't have "much" potential for damage. Peyton McCrary, *How the Voting rights Act Works: Implementation of a Civil Rights Policy*, 57 U.S.C.L.REV. 785 (2006). I am taking the liberty of attaching this article to this statement, for the Committee's consideration.

3. *According to Dr. Thernstrom, the Voting Rights Act makes "sure that majority-black districts stay black" and creates "racially safe boroughs." Based upon the most recent round of redistricting in 2000, does the evidence support that argument? Why or why not?*

I do not know why I keep hearing this claim with no evidence ever offered in support. The districts that Dr. Thernstrom is complaining about are in fact the most racially integrated districts. For example, in my recent case involving Charleston County, the newly adopted single-member district plan has three majority-black districts, and these districts are 58%, 53% and 52% black. These are the most racially competitive districts we have ever had.

It is in fact the persistence of racial bloc voting, in jurisdictions where large numbers of white voters will not vote for a minority-preferred candidate – especially for candidates who are minority persons themselves – that makes it necessary to take account of race in drawing districts. The persistence of racial

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bloc voting is not assumed – as some believe – but has to be proved separately in each case. And the findings are strong, for example in the last South Carolina redistricting, *Colleton County v. McConnell*. Thus, it is the opponents of the Voting rights Act who make the unwarranted assumption: they assume that racial bloc voting has disappeared, and they charge that the Act creates divisiveness. But, as Professor Everett Carl Ladd testified, that is like believing that a fever causes a cold rather than the reverse. He said the divisiveness is there – as shown by the voting patterns – and drawing districts to bring all voters into the process reduces divisiveness rather than increasing or creating it.

4. *Dr. Thernstrom also contends that taking race into account in redistricting is “political exclusion - masquerading, of course, as inclusion.” Do you agree with Dr. Thernstrom? Why or why not?*

She is wrong on two counts. First, race has always been taken into account by those who draw districts, but in the past it was done covertly for purposes of excluding or marginalizing minority voters.

The best evidence of this comes from the two periods, just before the coming of total disfranchisement in the late 19th century and just after the ending of total disfranchisement in the aftermath of the Voting Rights Act. In both periods, when white officials and politicians had to recognize that there would be black voters, the tactic of choice was racial manipulation of districts. In the late 19th century, South Carolina was carved up to put every conceivable black voter in a single district, to insure white control of the other districts. In this century, Mississippi's congressional district lines had been traditionally drawn from south to north, which meant that the Mississippi Delta was one congressional district. The Delta had a large black population majority. That was no “problem” as long as blacks couldn't vote in Mississippi. However, as soon as blacks started voting, and especially with the Voting Rights Act, that pattern made it too likely that black voters would control the “Delta district.” Solution? Change the historic pattern so that the new congressional lines went from east to west, thus fragmenting the black population in the Delta.

Recognizing race in drawing districts limits politicians' ability to use it in this

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covert, discriminatory way.

Second, the evidence just does not support her rhetorical turn of phrase that this districting is exclusionary. Just ask white voters who live in Rep. James Clyburn's 6th Congressional District in South Carolina. They have never had such effective representation that is responsive to all voters, regardless of their race.

5. *Some have questioned whether the Voting Rights Act needs to be extended for twenty-five years. Can you explain why you believe the protections provided by the Voting Rights Act need to be extended for that period of time?*

Please see my response to Senator Cornyn's fifth question.

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SENATOR SCHUMER

The proposed reauthorization bill, S. 2703, addresses the Supreme Court's decision *Georgia v. Ashcroft*, 539 U.S. 461 (2003), by clarifying that the purpose of Section 5 of the Voting Rights Act is to protect the ability of minority citizens to elect their preferred candidates of choice. Some opponents to the bill have suggested that the pre-*Georgia v. Ashcroft* mandates racial gerrymandering in covered jurisdictions.

1. *Do you agree that the bill, as drafted, mandates racial gerrymandering?*

No. The Voting rights Act has always been designed to create "equal opportunity," that is, an equal opportunity for minority voters to nominate and elect candidates of their choice. That opportunity had to be realistic, but it was only that, an opportunity, not a racial gerrymander. The proposed bill is consistent with that meaning, and with the Supreme Court's rulings that race may be taken into account in drawing districts.

2. *Under the proposed bill, could districts that are not majority-minority still be considered districts in which minority voters have the ability to elect their preferred candidates of choice? If so, please explain and give an example of a district that is not majority-minority that could be considered an "ability to elect" district.*

The key again is a realistic opportunity to nominate and elect candidates of choice. In a district where, for example, the concrete evidence shows that racial bloc voting is not strong, or where there is a demonstrated history of coalitions across racial lines, minority voters who are numerically in the minority may have that realistic opportunity. These conditions must exist as fact, not just surmise, and be based on an intensely localized appraisal, to rely on them.

3. *Under the proposed bill, must a preferred candidate of choice be a majority? If not, please explain and give an example of a non-minority who is the preferred candidate of choice for minority voters under the pre-*Georgia v. Ashcroft* standard.*

No. If minority voters in a given district vote in favor of a non-minority

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candidate, he or she can be their candidate of choice. However, for this to be a realistic assessment, there must have been a real choice for the minority voters in casting their ballots. For example, if two white candidates are both unresponsive to minority voters, the mere fact that one of them wins more minority votes than the other (as will *inevitably* be the case) doesn't necessarily make that candidate the minority voters' candidate of choice.

Armand Derfner

Attachment 2 to letter to Sen. Specter:

(U.S.C.L.REV. Article)

July 17, 2006

SOUTH CAROLINA LAW REVIEW

HOW THE VOTING RIGHTS ACT WORKS:
IMPLEMENTATION OF A CIVIL RIGHTS POLICY, 1965-2005

Peyton McCrary

VOLUME 57

SUMMER 2006

NUMBER 4

HOW THE VOTING RIGHTS ACT WORKS: IMPLEMENTATION OF A CIVIL RIGHTS POLICY, 1965-2005

PEYTON MCCRARY*

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I. INTRODUCTION

The Voting Rights Act, initially adopted in 1965 and extended in 1970, 1975, and 1982,¹ is considered one of the most successful pieces of civil rights legislation ever adopted by the United States Congress.² The Act's principal target in 1965 was seven southern states, where only one in three African Americans of voting age were on the voting rolls, as compared with more than two of every three whites.³ Two decades later, almost two out of every three blacks were registered in those states, not far below the level for whites.⁴ Virtually excluded from all public offices

1. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)); Act of August 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

2. *Shaw v. Reno*, 509 U.S. 630, 640 (1993); S. REP. NO. 97-417, at 111 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 282; Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1360 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994)); *see* *Miller v. Johnson*, 515 U.S. 900, 927-28 (1995); Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 7, 7 (Bernard Grofman & Chandler Davidson eds., 1992); Hugh Davis Graham, *Voting Rights and the American Regulatory State*, in *CONTROVERSIES*, *supra*, at 177; Thomas E. Mann, *Preface to CONTROVERSIES*, *supra*, at xiii.

3. U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 222-23 app. VII, tbl.1 (1968). The Act applied to six Southern states—Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia—and in 40 counties in North Carolina. *Id.* at ii.

4. *See id.* at 222-23 app. VII, tbl.1 (1968) (showing Pre-Act and Post-Act registration for whites and nonwhites). Prior to the Voting Rights Act's enactment, thirty-five percent of eligible nonwhites and seventy-three percent of whites were registered. *Id.*; *cf.* HAROLD W. STANLEY, *VOTER MOBILIZATION AND THE POLITICS OF RACE: THE SOUTH AND UNIVERSAL SUFFRAGE, 1952-1984*, at 97 tbl.15 (1987) (reporting a slightly higher figure of forty-three percent of eligible blacks registered in 1964 and sixty-six percent registered in 1984). The percentage of eligible blacks registered in 1964 varied from seven percent in Mississippi to forty-seven percent in North Carolina. *Id.* By 1984, the range had narrowed from fifty-eight percent in Georgia to seventy-four percent in Alabama. *Id.*

in the South in 1965, blacks in those states made up nine percent of all state representatives and eight percent of all state senators by 1990, and approximately six percent of the members of local governing bodies.⁵

Few policies are self-effectuating. Federal court decisions, congressional oversight, and periodic revision shaped the implementation of the Act. The words of the statute and the evolution of voting rights case law guided the Civil Rights Division of the Department of Justice, the federal agency charged with enforcing key provisions of the Act. This Article explains how the Voting Rights Act has worked in the four decades since its adoption in 1965, assesses its impact on minority voting and representation in the South, and explains the process of implementation responsible for the Act's success.⁶

II. THE POLICIES SET FORTH IN THE STATUTE

Before the Act's adoption in 1965, only lawsuits brought under the Reconstruction Amendments afforded legal protection for minority voting rights in the South.⁷ The Civil Rights Act of 1957 created a Civil Rights Division in the Department of Justice and gave it authority to bring constitutional challenges to barriers on minority voting.⁸ Frustration with the slow progress of the Department's jurisdiction-by-jurisdiction campaign before often hostile Southern courts, however, fueled demands by civil rights groups and their congressional supporters for a strong voting rights law.⁹

The Voting Rights Act of 1965 departed from precedent by providing for direct federal action to enable African Americans in the South to register and vote. Section 4 suspended, initially for only five years, the use of literacy tests as a prerequisite to voting.¹⁰ To counter the broad discretion previously exercised by

5. See QUIET REVOLUTION, *supra* note 2, at 66 tbl.2.10, 102 tbl.3.10, 134 tbl.4.10, 154 tbl.5.10, 190 tbl.6.10, 232 tbl.7.10, 298 tbl.9.10, 345 tbl.11.1.

6. My use of the terms "implementation" and "impact" is consistent with the conventional meaning of these terms. See, for example, EUGENE BARDACH, *THE IMPLEMENTATION GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW* 36-38 (Jeffrey Pressman & Martha Weinberg eds., 1977); Paul Sabatier & Daniel Mazmanian, *The Implementation of Public Policy: A Framework of Analysis*, 8 POL'Y STUD. J. 538, 540-41 (1980); and Donald S. Van Meter & Carl E. Van Horn, *The Policy Implementation Process: A Conceptual Framework*, 6 ADMIN. & SOC'Y 455, 477-79 (1975).

7. See Warren M. Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 3 (1965) (discussing the failure of the Reconstruction legislation to adequately address and provide remedies for discriminatory election practices).

8. Civil Rights Act of 1957, Pub. L. No. 85-315, §§ 101-104, 71 Stat. 634, 634-36; see Christopher, *supra* note 7, at 4 (analyzing the Civil Rights Act of 1957 and its effects); Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 546-47 (1973) ("The Act created a Commission on Civil Rights, and upgraded the Civil Rights Section to a division of the Justice Department.").

9. See DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965*, at 12-14, 35-39 (1978); STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969*, at 206-12, 220-22 (1976).

10. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438-39.

local registrars and poll officials, other provisions authorized federal examiners to register persons in designated counties and permitted federal observers to monitor the conduct of elections.¹¹ The Act also required the Department of Justice to file lawsuits challenging poll tax requirements in states where the poll tax appeared to be used to deter minority voting.¹²

The most novel feature of the Act—and, to those concerned with the operation of our federal system, the most intrusive—was the preclearance requirement set forth in Section 5.¹³ Here, too, the statute blended judicial enforcement with administrative implementation. Under the terms of Section 5, a federal factfinder—either a panel of three federal judges or the U.S. Attorney General—has to preclear all changes to “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” before that voting practice could take effect.¹⁴ Administrative preclearance by the Department of Justice has proven far speedier and less costly than judicial preclearance, and jurisdictions have almost always preferred administrative over judicial preclearance.¹⁵

In 1966, the Supreme Court ruled the preclearance requirement, like other challenged provisions of the Act, was constitutional.¹⁶ Whenever the Department of Justice obtained favorable decisions striking down particular tests, southern states simply enacted new discriminatory devices.¹⁷ As the Court stated, “Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself.”¹⁸

III. THE IMPLEMENTATION OF ENFRANCHISEMENT

In the first three years, the Department of Justice’s implementation of the Act focused on removing barriers to registration and voting.¹⁹ The Attorney General dispatched federal examiners to register blacks and sent federal observers to

11. *Id.* §§ 3, 6–9.

12. Davidson, *supra* note 2, at 20.

13. For a criticism of the intrusive nature of the preclearance provisions of the Act, see ABIGAIL THERNSTROM, *WHOSE VOTES COUNT: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 26, 38, 157–58, 162 (1987).

14. Voting Rights Act of 1965 § 5, 42 U.S.C. 1973c (2000).

15. See *Morris v. Gressette*, 432 U.S. 491, 503 (1977) (examining the speed of the administrative method); *Allen v. State Bd. of Elections*, 393 U.S. 544, 549 (1969) (discussing rapid administrative systems); GARROW, *supra* note 9, at 198; see also *South Carolina v. Katzenbach*, 383 U.S. 301, 315–18, 334–35 (1966) (criticizing labor-intensive litigation).

16. *Katzenbach*, 383 U.S. at 308. “Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures . . .” *Id.* at 309.

17. *Id.* at 314.

18. *Id.* at 335.

19. See *QUIET REVOLUTION*, *supra* note 2, at 47.

monitor elections in counties that had a record of obstruction and discrimination.²⁰ Although the Attorney General only used examiners in approximately 60 counties,²¹ the threat that they might be dispatched—coupled with other provisions of the Act that provided criminal penalties for interfering with voters' efforts to cast their ballots—reportedly convinced officials throughout the region to permit relatively free registration and voting by most blacks.²² Initially, however, the Department of Justice had to go to court to prevent state court judges from blocking the work of federal examiners and private voter registration activists.²³ The federal courts also struck down the poll tax in four states that still used it as a prerequisite to voting in state elections.²⁴ The Department of Justice also interposed Section 5 objections to various changes in state law or local practices that had the potential for restricting access to the ballot.²⁵ The combination of administrative and judicial implementation brought a dramatic increase in voter registration among both black and white Southerners.²⁶ Thus, the Act indisputably accomplished its initial goal—universal suffrage.

IV. THE COURT CONFRONTS MINORITY VOTE DILUTION

Faced with the prospect that black voters might cast a majority of the ballots in some single-member districts, southern legislatures, both before and after adoption of the Act, often shifted to at-large election systems, numbered place or runoff

20. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 153–62; see also LAWSON, *supra* note 9, at 329–339 (discussing the effect of federal examiners on elections); Richard Scher & James Button, *Voting Rights Act: Implementation and Impact*, in IMPLEMENTATION OF CIVIL RIGHTS POLICY 20, 30 (Charles S. Bullock, III & Charles M. Lamb eds., 1984) (asserting “the most important initial aspect of federal intervention into the electoral process under the Voting Rights Act was the federal examiner and observer programs”).

21. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 154; GARROW, *supra* note 9, at 190; Scher & Button, *supra* note 20, at 32.

22. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 162 (discussing the criminal remedies established as part of the Voting Rights Act); Scher & Button, *supra* note 20, at 32 (“[T]he credible threat of a federal presence seemed to prompt many county authorities to register citizens fairly in order to avoid such intrusions into their affairs.”); cf. GARROW, *supra* note 9, at 181 (“Justice Department officials made it clear . . . that their goal would be to achieve as much voluntary compliance with the act’s commands by local registrars as possible in an effort to minimize the number of examiners sent South.”); LAWSON, *supra* note 9, at 334 (“[T]he presence of federal registrars in nearby locales perhaps prompted the county authorities to carry out the law faithfully, thus averting a similar intrusion into their domains.”).

23. See U. S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 162–65; Peyton McCrary et al., *Alabama*, in QUIET REVOLUTION, *supra* note 2, 39, 52.

24. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 166–67; see also *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666–67 (1966) (finding a poll tax an unconstitutional voting barrier in state elections). Payment of the poll tax as a prerequisite for voting in federal elections had previously been eliminated by the Twenty-Fourth Amendment. U.S. CONST. amend. XXIV, § 1.

25. See Scher & Button, *supra* note 20, at 33–37.

26. See STANLEY, *supra* note 4, at 94–99 (noting the difficulty of identifying a precise statistical measure of the impact of the Act on registration or turnout).

requirements, or gerrymandered district lines to minimize the number of black-majority districts.²⁷ Voting rights lawyers were able to challenge the use of these devices because in early 1965, the Supreme Court, in *Fortson v. Dorsey*,²⁸ suggested that minority vote dilution was justiciable in a Georgia challenge to at-large elections.²⁹ In 1966, Fred Gray, the African American lawyer who six years earlier in *Gomillion v. Lightfoot*³⁰ successfully challenged racial gerrymandering in Alabama, brought the first minority vote-dilution case.³¹ Gray attacked the adoption of at-large elections for the Democratic Executive Committee of Barbour County, Alabama.³² Judge Frank Johnson ruled that because black voters comprised a majority of those registered in some districts, but not in the county as a whole, the bloc votes of the white majority would dilute minority voting strength in a county-wide election.³³ He also found that the change was motivated by a racially discriminatory purpose and thus violated the Fourteenth and Fifteenth Amendments.³⁴

Not all federal judges were as willing to protect the rights of minority voters as Alabama's Frank Johnson. For this reason, African American plaintiffs sought to persuade the courts that Section 5 of the Voting Rights Act required preclearance for changes that would potentially dilute minority voting strength and not just those affecting the right to register and cast a ballot.³⁵ The effort focused on Mississippi legislation that authorized a shift from single-member districts to at-large elections for county boards of supervisors and boards of education because, as one state

27. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 21–39; GARROW, *supra* note 9, at 202–206; Derfner, *supra* note 8, at 552–58. Use of at-large elections was the cornerstone of this new legislative program for maintaining white control. Political scientists had long understood that city-wide or county-wide elections enable a white majority, if it votes as a cohesive bloc, to prevent a racial minority from electing representatives of its choice. See generally EDWARD C. BANFIELD & JAMES Q. WILSON, CITY POLITICS 87–96, 307–309 (1963) (contrasting voting systems and subsequent effects on black candidates); EVERETT CARLL LADD, JR., NEGRO POLITICAL LEADERSHIP IN THE SOUTH 29–30, 102–03, 306–07 (1966) (discussing election of black candidates); DONALD R. MATTHEWS & JAMES W. PROTHRO, NEGROES AND THE NEW SOUTHERN POLITICS 4–5, 143–44, 208, 220–21 (1966) (recounting effects of at-large systems).

28. 379 U.S. 433 (1965).

29. *Id.* at 438–39. For an examination of the evidence of racial vote dilution that could have been placed on the record in *Fortson*, see Peyton McCrary & Steven F. Lawson, *Race and Reapportionment, 1962: The Case of Georgia Senate Redistricting*, 12 J. POL'Y HIST. 293 (2000).

30. 364 U.S. 339 (1960).

31. *Smith v. Paris*, 257 F. Supp. 901 (M.D. Ala. 1966), *modified and aff'd*, 386 F.2d 979 (5th Cir. 1967). For another discussion of malapportionment and racially-based voting dilution, see *Sims v. Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965), which applied the “one-man, one-vote” standard from *Reynolds v. Sims*, 377 U.S. 533 (1964).

32. *Paris*, 257 F. Supp. at 902. Barbour County was George Wallace's home county.

33. *Id.* at 904.

34. *Id.* Judge Johnson wrote that the change was “born of an effort to frustrate and discriminate against Negroes in the exercise of their right to vote.” *Id.* For a more complete account, see Peyton McCrary et al., *Alabama*, in *QUIET REVOLUTION*, *supra* note 2, at 39–41, 399–400.

35. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 23 n.18.

senator stated, “countywide balloting will safeguard ‘a white board [of supervisors] and preserve our way of doing business.’”³⁶

In 1969, the Supreme Court ruled in *Allen v. State Board of Elections*³⁷ that the Mississippi law, like all other voting changes adopted in covered jurisdictions, must be submitted either to the U. S. Attorney General or to a three-judge district court in the District of Columbia for preclearance.³⁸ The Court noted that a change from district to at-large voting for county supervisors could have a discriminatory effect because “[v]oters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole.”³⁹ Under those circumstances, at-large elections could, if voting patterns followed racial lines, “nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.”⁴⁰ *Allen*, by expanding the concept of vote dilution from the *quantitative* (one-person, one-vote) context to include *qualitative* (racial) vote dilution, shaped enforcement of the Voting Rights Act for the next quarter century.⁴¹

Even conservative commentator Abigail Thernstrom—who is sharply critical of the preclearance requirement on theoretical grounds—concedes the Mississippi laws at issue in *Allen* were racially discriminatory in both intent and effect.⁴² Yet she argues that the *Allen* decision improperly extended the Voting Rights Act beyond the intent of the original framers, which was merely to protect the right of minority voters “to enter a polling booth and pull the lever.”⁴³ The primary concern of the framers of the Voting Rights Act in 1965 was, understandably, to protect the right of black voters to register and cast a ballot. During the hearings, however, Attorney General Nicholas Katzenbach and House members explicitly referred to the racial gerrymander struck down by the Supreme Court a few years earlier in *Gomillion v.*

36. See Billy Skelton, *Eastland Sees Change In Wind With New ‘Rights’ Legislation*, JACKSON CLARION-LEDGER (Miss.), May 18, 1966, at 1; FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965*, at 54 (1990). For a detailed account of the efforts of the 1966 Mississippi legislature’s attempt to minimize the effects of the Act, see PARKER, *supra*, at 34–66.

37. 393 U.S. 544 (1969).

38. *Id.* at 563.

39. *Id.* at 569.

40. *Id.* The *Allen* Court also cited the Alabama reapportionment case, *Reynolds v. Sims*, for the proposition at the heart of the Court’s expansive interpretation of the Voting Rights Act: “The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.” *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

41. See generally Peyton McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960-1990*, 5 U. PA. J. CONST. L. 665 (2003) (analyzing the change in the structure of southern politics because of protections against quantitative and qualitative vote dilution).

42. THERNSTROM, *supra* note 13, at 24–27. “Clearly the Court could not stand by while southern whites in covered states—states with dirty hands on questions of race—altered electoral rules to buttress white hegemony.” *Id.* at 4.

43. *Id.* at 5. The concurrence by Justices Clarence Thomas and Antonin Scalia in *Holder v. Hall*, 512 U.S. 874, 891–946 (1994) (Thomas, J. concurring) reflects Thernstrom’s view that the Supreme Court wrongly decided *Allen*.

*Lightfoot*⁴⁴—a gerrymander that would have diluted minority voting strength in Tuskegee, Alabama, by de-annexing virtually all black residents from the city—as one sort of voting change they designed the preclearance requirement to foil.⁴⁵

When Congress voted to extend the Voting Rights Act in 1970 and to expand its coverage to include language minorities in 1975, Congress unhesitatingly confirmed its intent to cover efforts to dilute minority voting strength.⁴⁶ As the Supreme Court asserted, “Had Congress disagreed with the interpretations of § 5 in *Allen*, it had ample opportunity to amend the statute.”⁴⁷ In short, both the Supreme Court and Congress had created a blueprint for the Department’s implementation of the preclearance requirement.

V. DEVELOPMENT OF THE PRECLEARANCE PROCESS

The effects of *Allen* were profound. Mississippi had to submit the 1966 at-large election statute for preclearance, and the Department of Justice refused to preclear the change.⁴⁸ Thirteen Mississippi counties nevertheless tried to switch to at-large supervisor elections⁴⁹ and another seventeen counties to at-large school board elections, but the Department and, in some cases, the federal courts blocked all of

44. 364 U.S. 339 (1960).

45. *Id.* at 341; H.R. REP. NO. 439 (1965), as reprinted in 1965 U.S.C.C.A.N. 2437, 2439–40, 2500; see Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 401 n.38 (1989); Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 J.L. & POL., 751, 755–57 (1988) (reviewing THERNSTROM, *supra* note 13). In a simultaneous debate on another bill, Senator Robert F. Kennedy of New York referred to the use of at-large elections as part of the effort of Southern white legislators “to keep the Negro a political cripple indefinitely.” 111 CONG. REC. 19329 (1965), quoted in ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* (1968).

46. See STEVEN F. LAWSON, *IN PURSUIT OF POWER: SOUTHERN BLACKS AND ELECTORAL POLITICS* 130–151, 154–57, 227–29, 236–53 (1985).

47. *Georgia v. United States*, 411 U.S. 526, 533 (1973).

48. Mississippi chose to seek preclearance from the Attorney General rather than from a three-judge panel in the District of Columbia. See Letter from Jerris Leonard, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to A.F. Summer, Attorney Gen. State of Miss. (May 21, 1969) (disallowing laws requiring appointment of county superintendents of education, new qualification requirements for independent candidates, and optional use of at-large elections for county boards of supervisors). Subsequently, the state adopted a revised version of the at-large provision for county boards. MISS. CODE ANN. § 37-5-15 (1972). When the Department discovered this change five years later, it objected once again. Letter from Drew S. Days III, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to A.F. Summer, Attorney Gen., Miss. (July 8, 1977). See also LAWSON, *supra* note 46, at 161–62 (discussing the evolution of voting rights enforcement); Frank R. Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391, 396 n.32 (1973) (detailing the Attorney General’s enforcement efforts in Mississippi in the late 1960s and early 1970s).

49. U.S. COMM’N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: TEN YEARS AFTER* 271 (1975) [hereinafter *THE VOTING RIGHTS ACT*].

these efforts.⁵⁰ The task of winning constitutional challenges to the proposed changes on a case-by-case basis would have been formidable.

The Department sees its role in preclearance reviews as a “surrogate” for the District of Columbia trial courts.⁵¹ From the beginning, the Attorney General has delegated responsibility for preclearance decisions to the Assistant Attorney General (“AAG”) who heads the Civil Rights Division. Administrative reorganization in 1969 produced a separate section within the Civil Rights Division that specializes in voting rights. The new Voting Rights Section then provided the factual investigation for preclearance reviews and made detailed recommendations to the AAG for Civil Rights.⁵² Prodded by liberal critics in Congress, the Department developed detailed guidelines for enforcing Section 5 that the Supreme Court subsequently endorsed.⁵³ Other Supreme Court decisions over the next decade expanded the scope of Section 5 and strengthened the Department’s enforcement powers.⁵⁴

The Supreme Court, however, has agreed to hear arguments and issue opinions in only a few cases. As a result, the District of Columbia trial courts that hear preclearance lawsuits have played a major role in shaping Section 5 case law.⁵⁵ The Supreme Court often declined to hear oral argument and summarily affirmed the trial court’s decision. Although summary affirmances simply endorse the lower court’s decision and not necessarily its reasoning, they are binding precedent for the lower courts and the Department of Justice until contradicted by a future Supreme Court decision.⁵⁶

50. *Id.* at 271–72; Testimony of Frank R. Parker, *Extension of the Voting Rights Act: Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate*, 94th Cong., 1st Sess. (1975), Exhibit 3, p. 149; *see also* WASHINGTON RESEARCH PROJECT, *THE SHAMEFUL BLIGHT: THE SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH* 149–50 (1972) (declaring implementation in several Mississippi counties); Kathryn Healy Hester, Comment, *Mississippi and the Voting Rights Act: 1965–1982*, 52 *MISS. L.J.*, 803, 835 n.222 (1982) (listing all the Department of Justice objections to the state of Mississippi from 1965 until 1982).

51. 28 C.F.R. § 51.52(a) (2004). The Department’s original Section 5 guidelines set forth the responsibility to act as a surrogate for the District of Columbia court. 28 C.F.R. § 51.19 (1972).

52. *See* LAWSON, *supra* note 46, at 162–63.

53. For procedures of the Administration of Section 5 of the Voting Rights Act of 1965, *see* 28 Fed. Reg. 18,186 (Sept. 10, 1971). The guidelines, which the Department has revised several times over the years, are found at 28 C.F.R. § 51 (2004). Shortly after their adoption, the Supreme Court found the regulations “wholly reasonable and consistent with the Act.” *Georgia v. United States*, 411 U.S. 526, 541 (1973). For an analysis of the development of the procedures for enforcing Section 5, *see* HOWARD BALL ET AL., *COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT* 64–73, 91–92 (1982), and LAWSON, *supra* note 46, at 162–78.

54. *See* Drew S. Days, III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, in *MINORITY VOTE DILUTION*, 167, 167–80 (Chandler Davidson ed., 1984); John P. MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 *CATH. U. L. REV.* 107, 110–19 (1979).

55. MacCoon, *supra* note 54, at 120.

56. *See Hicks v. Miranda*, 422 U.S. 332, 344–345 (1975) (“[L]ower courts are bound by summary decisions by this Court ‘until such time as the Court informs [them] that [they] are not.’”) (alterations in original) (quoting *Doe v. Hudgson*, 478 F.2d 537, 539 (1973)); *see also* Picou v. Gillum,

VI. PURPOSE AND EFFECT IN *BEER V. UNITED STATES*

Section 5, like the Fourteenth and Fifteenth Amendments, contains both an effect prong and a purpose prong.⁵⁷ Initially, both the courts and the Department viewed the effect standard of Section 5 as equivalent to that of a constitutional challenge.⁵⁸ However, in a key 1976 decision, *Beer v. United States*,⁵⁹ the Supreme Court bifurcated the statutory and constitutional effect standards. The Court announced that in the Section 5 context, the Department should preclear a voting change likely to produce a racially discriminatory effect prohibited by either the Fourteenth or Fifteenth Amendments unless the change would make matters worse for minority voters than the existing plan, an effect the Court referred to as “retrogression.”⁶⁰

Even so, the *Beer* Court recognized that the concept of “purpose” should have the same definition under both Section 5 of the Act and the Constitution: “[A]n ameliorative new legislative apportionment cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.”⁶¹ As the Court explained a year earlier in *City of Richmond v. United*

813 F.2d 1121, 1122 (11th Cir. 1987) (“A summary affirmance by the Supreme Court has binding precedential effect.”) (citing *Hicks*, 422 U.S. at 344). On the other hand, the precedential value of a summary affirmance has distinct limits. See *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) (“We have often recognized that the precedential effect of a summary affirmance extends no further than ‘the precise issues presented and necessarily decided by those actions.’”) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977)); *Mandel*, 432 U.S. at 176 (“Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below . . . [but does] prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.”).

57. See 42 U.S.C. § 1973c (2000) (“[T]hat such qualification, prerequisite, standard, practice, or procedure does not have the *purpose* and will not have the *effect* of denying or abridging the right to vote on account of race or color . . .”) (emphasis added). This Article uses the terms “purpose” and “intent” and the terms “result” and “effect” interchangeably.

58. In *Perkins v. Matthews*, 400 U.S. 379, 390 (1971), the Supreme Court observed that in adopting Section 5, “Congress intended to adopt the concept of voting articulated in *Reynolds v. Sims* . . . and protect Negroes against a dilution of their voting power.” *Id.* (quoting *Fairley v. Patterson*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring and dissenting)). In 1974, the United States District Court for the District of Columbia relied on the Fourteenth Amendment decision in *White v. Regester*, 412 U.S. 755, 764–65 (1973), *vacated*, 422 U.S. 935 (1975), a Texas vote-dilution case, to assess discriminatory effect and never reached the Section 5 purpose issue. *Beer v. United States*, 374 F. Supp. 363, 387 (D.D.C. 1974), *vacated*, 425 U.S. 130, 143 (1976).

59. 425 U.S. at 130.

60. *Id.* at 141.

61. *Id.* at 141 (emphasis added). Commentators generally thought the reference in *Beer* to a constitutional violation meant that courts and the Department of Justice should assess purpose in a Section 5 context according to the same standard as in a constitutional challenge. See Mark A. Posner, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in *RACE AND REDISTRICTING IN THE 1990S*, at 100 (Bernard Grofman ed., 1998) (“Both the Attorney General and the federal courts consistently have construed the Section 5 purpose test as being co-extensive with the constitutional prohibition on enacting redistricting plans (or other voting practices and procedures) that minimize minority electoral opportunity for a discriminatory reason.”); see Steve

States,⁶² a voting change adopted “for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute.”⁶³ The federal courts continued to apply a constitutional purpose test in preclearance cases for the next quarter-century.⁶⁴

VII. APPLYING THE RETROGRESSION STANDARD

A. Registering and Casting the Ballot

The factual circumstances described in illustrative objection letters demonstrate the sort of discriminatory practices Section 5 empowers the Department to confront. When the Department interposes an objection, it sends the submitting jurisdiction a letter explaining the objectionable change is not legally enforceable and indicating the legal basis on which the Department made its decision. Although in the early years these letters were often cryptic, they nevertheless provide the best publicly available evidence of the Department’s legal reasoning. During the 1970s, the Department based most of its objections primarily on Section 5’s effect prong.⁶⁵

Bickerstaff, *Reapportionment by State Legislatures: A Guide for the 1980’s*, 34 SW. L.J. 607, 669 (1980) (“The *Beer* Court dealt only with whether the reapportionment plan in question had the effect of denying the right to vote on account of race. A state carries the additional burden of showing that the plan does not have such a purpose.”); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 685 (1983) (“Even without retrogression, a covered jurisdiction will violate section 5 if an impermissible racial purpose is behind an electoral change.”).

62. 422 U.S. 358 (1975).

63. *Id.* at 378 (1975).

64. *See City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982) (holding that even a non-retrogressive plan “would nevertheless be invalid if adopted for racially discriminatory purposes”); *see also City of Pleasant Grove v. United States*, 479 U.S. 462, 469, 471 n.11, 472 (1987) (applying the purpose test to conclude that refusing to annex a certain area after annexing others was a racially motivated and discriminatory decision). Even Justices who opposed a strong Voting Rights Act seemed to agree. *See, e.g., City of Rome v. United States*, 446 U.S. 156, 210 (1980) (Rehnquist, J., dissenting) (“[I]t is clear that if the proposed changes would violate the Constitution, Congress could certainly prohibit their implementation.”); *Busbee v. Smith*, 549 F. Supp. 494, 516–17 (D.D.C. 1982), *aff’d mem.*, 459 U.S. 1166 (1983) (“Simply demonstrating that a plan increases black voting strength does not entitle the State to the declaratory relief it seeks; the State must also demonstrate the absence of a discriminatory purpose.”); *Mississippi v. United States*, 490 F. Supp. 569, 583 (D.D.C. 1979), *aff’d*, 444 U.S. 1050 (1980) (“The prohibited ‘purpose’ of section 5 may be described as the sort of invidious discriminatory purpose that would support a challenge to official action as an unconstitutional denial of equal protection.”).

65. Peyton McCrary et al. *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. (forthcoming 2006) This study examines all objection decisions between 1965 and 2004 (as conveyed to covered jurisdictions in 1,037 letters) and codes them as to the legal basis or bases for the objection (e.g., whether the change was seen as having a retrogressive effect, a discriminatory purpose, or perhaps both). The need to apply a consistent coding scheme for all letters necessitated treating all changes as retrogressive if they satisfied the *Beer* standard, including those decided before *Beer*. Some changes were, of course, seen as discriminatory in effect but not retrogressive.

From its inception, the Voting Rights Act eliminated literacy tests for registration and voting and required assistance at the polls for illiterate persons who requested it.⁶⁶ For that reason, the Department objected in 1969 to the repeal of a Mississippi code provision that required assistance to illiterate voters.⁶⁷ Ten years later, Mississippi again sought to restrict assistance for illiterates by requiring the assistant to be a registered voter, limiting the assistant to helping five voters, and requiring the poll manager's presence during the assistance.⁶⁸ The Department objected.⁶⁹

Jurisdictions often sought to use all-white service clubs as polling places. In 1972, for example, a Louisiana parish proposed to use a Knights of Columbus Hall to which "black citizens are not normally permitted access."⁷⁰ Despite objection letters from the Department of Justice, this practice did not die out. Two decades later, a Georgia county sought to move a polling place from the county courthouse (desegregated in 1968) to the American Legion Hall, despite the fact that "the American Legion in Johnson County has a wide-spread reputation as an all-white club with a history of refusing membership to black applicants."⁷¹ The Department objected to the plan because "locating a polling place there [would have] the effect of discouraging black voters from turning out to vote."⁷²

The Department found changes to polling places to make them less convenient to minority voters to be retrogressive. New Orleans, for example, moved a polling place in a ninety-two percent black precinct—without proper public notice and without securing preclearance of the change—to an elementary school in a noncontiguous precinct so that voters, "many of whom are elderly, would have to

66. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 70.

67. See Letter from Jerris Leonard, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to A.F. Summer, Attorney Gen., Miss. (May 26, 1969) (asserting that under state law Mississippi had an obligation to "provide to each illiterate voter who may request it such reasonable assistance as may be necessary to permit such voter to cast his ballot in accordance with the voter's own decision" (quoting *United States v. Mississippi*, 256 F. Supp. 344 (S.D. Miss. 1966))); see also *O'Neal v. Simpson*, 350 So. 2d 998, 1012 (Miss. 1977) (holding "[t]hat only blind, physically disabled or illiterate voters may have a person accompany them into a voting booth for the purpose of assisting a voter mark his ballot").

68. Letter from Drew S. Days III, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to A.F. Summer, Attorney Gen., Miss. (July 6, 1979).

69. *Id.* ("Under existing law . . . illiterate voters could receive assistance from the person of their choice, whether or not that person was a registered voter . . . , there was no limit on the number of voters that one person could assist, and no other person was permitted or required to be present when the assistance was given." (citing *O'Neal*, 350 So. 2d at 1012)).

70. Letter from David L. Norman, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to George Buller, President, St. Landry Parish Police Jury (Dec. 6, 1972); see also Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to George E. Crawford, Court of Ordinary, Jones County, Ga. (Aug. 12, 1974) (objecting to use of a whites-only Lions' Club as a polling place).

71. Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Charlotte Beall, Probate Judge, Johnson County, Ga. (Oct. 28, 1992).

72. *Id.* at 2.

cross an interstate highway approximately 170 feet wide to reach the new polling place.”⁷³ Further, no public transportation to the new polling place existed.⁷⁴ As recently as 1995, a Georgia county tried to switch a polling place in an urban black neighborhood with sidewalks, crosswalks, street lights, and a speed limit of 35 miles per hour to a location outside of the city limits on a blind curve on a highway with a speed limit of 55 miles per hour in a predominantly white neighborhood.⁷⁵ The Department saw that change as retrogressive.⁷⁶

In 1991, the Lubbock County, Texas, Water Control and Improvement District created polling places in the City of Lubbock convenient to white voters, but required residents of two primarily minority precincts to travel to remote and inaccessible rural communities to vote on election day.⁷⁷ As the Department saw it, “the now eliminated county courthouse voting site has been the most convenient polling location for most minority voters.”⁷⁸ In another county, the location of a polling place for a particular precinct was “an issue that has divided the county along racial lines for some years.”⁷⁹ The first black person elected to the county board in 1988 arranged to move the polling place to a community center located in the predominantly black area of the precinct.⁸⁰ After his defeat by a white candidate in a racially polarized election in 1992, the county moved the polling place one-to-two miles away to a volunteer fire department in a heavily white part of the precinct.⁸¹

73. Letter from Drew S. Days III, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Ernest L. Salatch, Assistant City Attorney, New Orleans, Orleans Parish, La. (May 12, 1978). The Department also objected when a Mississippi county sought to establish a polling place at the local Y.M.C.A., located in a white residential neighborhood “approximately five miles from the predominantly black areas” in the precinct, and where “no public transportation to the polling place existed.” Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to John W. Prewitt, Attorney, Warren County Bd. of Supervisors (June 16, 1975).

74. *Id.* at 2.

75. Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to William E. Woodrum, County Attorney, Jenkins County, Ga. (Mar. 20, 1995). Because the black community had no opportunity for input and the county provided no non-racial explanation for the change, the Department saw this change as discriminatory in purpose as well as retrogressive. *Id.* at 2–3.

76. *Id.* at 3.

77. See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Don Graf, Esquire, McCleskey, Harniger, Brazil & Graf (Mar. 19, 1991).

78. *Id.* at 2.

79. Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to James P. Finstrom, District Attorney, Marion County, Tex. (Apr. 18, 1994).

80. *Id.* at 1.

81. *Id.* at 2. The Department viewed the county’s claim that a concern for voter safety motivated the move as pretextual because both races routinely used the community center for numerous non-voting matters without evidence of safety problems. *Id.* at 2.

B. At-Large Elections

Adopting at-large systems (multi-member districts) would necessarily be retrogressive where voting patterns were racially polarized.⁸² In objecting to a change to the at-large county commission elections in a Georgia county, the Department pointed out African Americans were a majority of the registered voters in one of the existing districts but a minority countywide.⁸³ The Department added that the dilutive effect of the at-large system was “magnified by the election of commissioners from residency districts—essentially a [numbered] post system”—and a majority vote requirement.⁸⁴

Changes from appointment to election caused objections where the jurisdiction used at-large elections. For example, in 1967, the Department objected when the county council of Sumter County, South Carolina, adopted at-large elections to replace a system of gubernatorial appointment.⁸⁵ The Department saw the change as discriminatory in effect; subsequently, a federal court saw the change as racially discriminatory in purpose as well because the change took place when legislative redistricting threatened to place the county in a black-majority senatorial district, thus risking the appointment of council members responsive to black voters.⁸⁶

In 1983, the Department objected to a similar change from appointment to at-large election of the school board in a Georgia county on both purpose and retrogression grounds.⁸⁷ The legislative delegation pushed the change through

82. See Chandler Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION, *supra* note 41, at 1, 4–5; McCrary, *supra* note 40 at 669–70; Peyton McCrary, *Racially Polarized Voting in the South: Quantitative Evidence from the Courtroom*, 14 SOC. SCI. HIST. 507 (1990) [hereinafter *Racially Polarized Voting*].

83. See Letter from David L. Norman, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to B. Rabun Faulk, Twiggs County Attorney, Jeffersonville, Ga. (Aug. 7, 1972).

84. *Id.* at 2.

85. See Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to E.M. Dubose, County Adm’r, Sumter County, S.C. (Dec. 3, 1976).

86. *County Council of Sumter County v. United States*, 596 F. Supp. 35, 36 (D.D.C. 1984). For a discussion of this objection and the evidence regarding the change from appointive to elective councils developed in subsequent litigation, see Vernon Burton et al., *South Carolina*, in QUIET REVOLUTION, *supra* note 2, at 208–09. In a similar instance, the Georgia legislature enacted a change from appointment by the local grand jury to at-large elections for the school board in Harris County, Georgia. The Department saw the change as discriminatory in effect because under the appointive system, two of the board’s members were black, and Harris County’s election history made it likely that at-large elections would dilute black voting strength. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Ken Askew, County Attorney, Harris County, Ga. (Aug. 18, 1975).

87. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to George M. Stembridge, Jr., Attorney for Baldwin County Bd. of Educ. (Sept. 19, 1983).

“even though members of the minority community and the members of the board of education sitting at that time strongly opposed the adoption of such a system.”⁸⁸

Multi-member districts were still a part of state legislative redistrictings in the 1980s and were the subject of frequent objections. North Carolina adopted a constitutional amendment in 1968 that prohibited the splitting of any county in drawing legislative districts but did not submit it for preclearance until 1981. The Department objected to the constitutional provision as retrogressive on the grounds that its practical effect was to require the use of multi-member districts and thus, because of the state’s pattern of racially polarized voting, to increase the likelihood of diluting minority voting strength.⁸⁹ North Carolina also used multi-member districts for both its senate and house, and the Department found both of these plans retrogressive as well.⁹⁰

C. Enhancing Devices

Even when voting patterns are racially polarized, a cohesive minority group can use single-shot voting in a simple at-large system to elect one representative if voters are filling several offices.⁹¹ There are several methods that can make single-shot voting impossible: 1) requiring all voters to vote for the full-slate, in other words “to vote for as many candidates as there are positions available;” 2) requiring each candidate to qualify for a separate place or post; 3) requiring candidates to reside in a particular geographic district; or 4) requiring the council members to serve staggered terms of office.⁹²

88. *Id.* at 2 (“Public opposition was based on the concern that the changes would likely reduce the minority representation which had been accomplished as a result of a special effort to assure minority representation on the then appointed board of education.”).

89. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Alex K. Brock, Executive Sec’y-Dir., N.C. State Bd. of Elections (Nov. 30, 1981).

90. *See* Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Alex K. Brock, Executive Sec’y-Dir. N.C. State Bd. of Elections (Jan. 20, 1982) (finding North Carolina’s house reapportionment plans retrogressive); Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Alex K. Brock, Executive Sec’y-Dir., N.C. State Bd. of Elections (Dec. 7, 1981) (objecting to state senate’s redistricting plans as retrogressive). On April 19, 1982, the Department once again objected to both plans, but on the basis of the demographic configuration of districts rather than to the use of at-large elections. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Jerris Leonard, Esquire, Jerris Leonard & Assoc., P.C. (Apr. 19, 1982). Revised state senate and house plans were eventually precleared, but private plaintiffs ultimately launched a successful challenge on the grounds that the use of multi-member districts diluted African American voting strength in violation of Section 2 of the Act. *See* Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), *aff’d sub nom.* Thornburg v. Gingles, 478 U.S. 30 (1986).

91. THE VOTING RIGHTS ACT, *supra* note 49, at 207.

92. *Id.* at 207–08; *see also* Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 863–67 (1982) (examining the impact election structure has on black candidates). For another pioneering study, *see* ROY E. YOUNG, *THE PLACE SYSTEM IN TEXAS ELECTIONS* (1965).

As the Department explained in objecting to such devices in Lancaster County, South Carolina, minority voters have the potential to elect a candidate of their choice through "the selective use of single-shot voting."⁹³ However, this potential is thwarted "if an otherwise at-large election to fill multiple identical offices is transformed into a number of separate election contests through the imposition of numbered and residency post requirements and the staggering of terms of office."⁹⁴ A Georgia municipality, Jonesboro, in Clayton County, added numbered place and majority vote requirements shortly after voters elected the first black person to the council under the old plurality vote rule. Despite his incumbency, the black councilman lost when he ran for reelection under the new system, and the Department subsequently objected to Jonesboro's municipal election laws.⁹⁵

Reidsville, North Carolina, adopted staggered terms for its city council members, reducing the number of open seats from five to either two or three. In its objection letter, the Department expressed concern "in the fact that all three of the black persons who were elected successively to the council over the last eleven years initially obtained incumbency by placing fifth, a position that would not have resulted in their election under the proposed change."⁹⁶ The Department also objected to the use of staggered terms for a South Carolina city council.⁹⁷ Under the proposed system, "only the candidates who place[d] first or second [would] be elected," but the record showed that "the one black candidate who ha[d] been

93. See Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Treva Ashworth, Assistant Attorney Gen., S.C. (Oct. 1, 1974) (objecting to the numbered post requirement, residency districts, staggered terms, and the majority vote requirement for the county council).

94. *Id.* at 2.

95. Letter from David L. Norman, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Lee Hutcheson, Esquire, Hutcheson, Kilpatrick, Watson, Crumley & Brown (Feb. 4, 1972). In objecting to a numbered place requirement for the city of Lakeland, in Lanier County, Georgia, on Oct. 17, 1978, the Department quoted *Dunston v. Scott*:

"It is clear that the numbered seat law may have the effect of curtailing minority voting power. In a true at large election, if the majority spreads its vote around and the minority single shot votes, the minority strength is concentrated, thus increasing their [sic] chance of electing. However, if the minority candidate is forced to run against a specific candidate or candidates for a specific seat, the majority can readily identify for whom they must vote in order to defeat the minority candidate."

Letter from Drew S. Days, III, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice to George Wynn, Attorney, Lakeland, Ga. (Oct. 17, 1978) (quoting *Dunston v. Scott*, 336 F. Supp. 206, 213 n.9 (E.D.N.C. 1972)).

96. Letter from John Z. Muerta, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice to Albert J. Post, City Attorney, Reidsville, N.C. (Aug. 3, 1979).

97. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., U.S. Dep't of Justice, to R. Powell Black, Town Advisor, Jefferson, S.C. (Mar. 26, 1984).

successful in city council elections [came] in third out of eleven candidates in 1976, fourth out of seven in 1980, and third out of eight in 1982.”⁹⁸

Requiring runoff elections when no candidate receives a majority of the votes can also have a discriminatory effect. Where a plurality rule applies, one minority candidate can defeat several white candidates if white voters sufficiently split their ballots. Requiring a runoff eliminates that possibility by setting up a head-to-head contest between the top two choices so that white voters can rally as a bloc behind the white candidate.⁹⁹

In Augusta, Georgia, the city council had sixteen members, and voters from the entire city elected two persons from each of eight residency districts to three-year staggered terms under a plurality rule.¹⁰⁰ African American candidates typically won only two of eight contests in any election, and thus held only four seats (twenty-five percent of the council), although they were forty to forty-five percent of the city’s registered voters.¹⁰¹ The Department objected to the proposed majority vote requirement as retrogressive, observing the substantial under-representation of African Americans, and that black council members managed to get elected in the past only because of the plurality rule.¹⁰²

As more and more jurisdictions changed from at-large to district elections in the 1980s, usually in response to lawsuits or the threat of litigation, the number of objections to the adoption of numbered posts, staggered terms, and runoff requirements declined. Even in the 1990s, however, these enhancing devices still sometimes surfaced as problems. When faced with a Section 2 lawsuit from

98. *Id.* at 1. The Department also objected to staggered terms for the city council in Barnwell, South Carolina, and for the school board in Lancaster County, South Carolina. *See* Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to C. Havird Jones, Assistant Attorney Gen., S.C. (Apr. 27, 1984) (indicating “the use of staggered terms in Lancaster County school board elections, where the at-large system is used and racial bloc voting seems to exist, limits the potential for black voters to participate effectively in the electoral process”); Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Thomas M. Boulware, Esq., Brown, Jeffries & Boulware (Mar. 26, 1984) (determining that the city’s plan to reduce the number of council positions available in Barnwell by staggering terms “has the effect of limiting the potential of minority voters to elect the candidate of their choice and, thus, constitutes a retrogression”).

99. *See* CHANDLER DAVIDSON, *BIRACIAL POLITICS: CONFLICT AND COALITION IN THE METROPOLITAN SOUTH* 63–67 (1972); Butler, *supra* note 92, at 865–67.

100. Peyton McCrary, *The Dynamics of Minority Vote Dilution: The Case of Augusta, Georgia, 1945–1986*, 25 J. OF URB. HIST. 199, 212 (1999); *see also id.* at 224 n.75 (“With elections held virtually every year and sixteen council members, a runoff system would have increased the cost of administering elections substantially.”).

101. *Id.* at 212–13.

102. Letter from James P. Turner, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Samuel F. Maguire, City Attorney, Augusta, Georgia (Mar. 2, 1981). The Department also objected to the adoption of a majority vote requirement in Greenville, North Carolina, noting that “since 1965 only one black candidate has achieved election, and then only by placing sixth when he was first elected with a plurality of the vote.” Letter from John E. Muerta, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to A. Louis Singleton, Esq., Gaylord, Singleton & McNally (Apr. 7, 1980).

minority plaintiffs, Galveston, Texas, agreed to go to a system with six single-member districts and no at-large seats, which the Department precleared.¹⁰³ In 1998, however, Galveston sought to return to a mixed plan. Now that the benchmark was a district election system, the addition of at-large seats, a majority vote rule, and a numbered place requirement was retrogressive in light of the city's continued polarized voting.¹⁰⁴

D. Redistricting Plans

Assessing the racial effects of a redistricting plan presents two distinct quantitative issues. First, do the districts identified by the submitting authority as minority opportunity districts—usually majority-minority districts—actually afford minority voters a reasonable or fair opportunity to elect candidates of their choice? In other words, are they electorally viable? Second, does the plan minimize the number of effective minority opportunity districts? A redistricting plan can minimize the number of minority opportunity districts either by “packing” an unnecessarily high percentage of minority citizens (for example eighty or ninety percent) into a single district, or by fragmenting minority population concentrations so the group's members are dispersed among several white-majority districts.¹⁰⁵

Because African American and Hispanic populations typically contain a higher percentage of persons under the age of eighteen than white or Anglo populations, the proportion of a district's voting-age population belonging to that group is usually lower than its percentage of the total population. And because minority citizens typically register to vote at a lower rate than the majority community, the minority group normally forms a smaller proportion of the registered voters than of the voting-age population. Because minority voters, who are often significantly lower in socio-economic status and educational background, frequently turn out at a lower rate than in the majority community, they often make up a smaller percentage of the turnout than of the registered voters.¹⁰⁶

103. The Department had objected to an initial settlement proposal because the city ignored the plaintiffs' stated preferences for a single-member district plan with no at-large council seats, and its own charter review committee's finding that the at-large seats and numbered places would have a discriminatory effect. Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Gary W. Smith, City Attorney, Galveston, Tex. (Dec. 14, 1992).

104. Letter from Bill Lann Lee, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Barbara E. Roberts, City Attorney, Galveston, Tex. (Dec. 14, 1998).

105. Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in MINORITY VOTE DILUTION, *supra* note 54, at 89–92, 96–99; Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 233–36 (1983).

106. See BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY, 118–22 (1992).

Recognizing those facts, in the 1970s, the federal courts came up with a rule of thumb often dubbed “the 65 percent rule.”¹⁰⁷ As minority registration and turnout rates increased—by the 1990s to a point approaching parity with whites—courts began to approve districts that contained a smaller percentages of minorities. Where a substantial minority of white voters have demonstrated a tendency to support minority candidates, the minority threshold can be lowered accordingly.¹⁰⁸ For these reasons, the Department of Justice and the courts assess district composition on a case-by-case basis.¹⁰⁹

The Department routinely encountered redistricting plans that fragmented minority voting strength. Grenada County, Mississippi, for example, twice adopted objectionable plans the Department viewed as unnecessarily fragmenting black population concentrations and minimizing black voting strength in the city of Grenada.¹¹⁰ Attala County, Mississippi, redrew boundaries to convert a sixty-four percent black district to one with a black population of only fifty-two percent, and

107. *Id.* at 120; *see Kirksey v. Bd. of Supervisors*, 554 F.2d 139, 160 n.2 (5th Cir. 1977) (en banc); *Mississippi v. United States*, 490 F. Supp. 569, 575 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980).

108. *See* Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 10–19 (1993); J. Morgan Kousser, *Beyond Gingles: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 563–67 (1993).

109. *See* GROFMAN, *supra* note 106, at 120.

110. *See* Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Attorney for Bd. Of Supervisors, Grenada County, Miss. (Mar. 30, 1976); Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Attorney for Bd. of Supervisors, Grenada County, Miss. (Aug. 9, 1973); *see also* Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Paul Lyle, Esq., Day, Owen, Lyle, Voss & Owen (Apr. 10, 1986) (objecting to Plainview Independent School District’s electing procedures, as they “needlessly fragment[ed] the concentrated minority population among four of the five districts”); Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to James W. Burgoon, Jr., Esq., Fraiser, Burgoon and Abraham, Leflore County, Miss. (Sept. 6, 1983) (objecting to a Leflore County, Mississippi, plan because its fragmentation of the black community was not only “unnecessary, but it place[d] black voters into districts which lack[ed] a commonality of interest”); Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Luciene C. Gwin, Jr., Esq., Handy, Fitzpatrick, Gwin & Lewis (July 11, 1983) (objecting to the redistricting plan of Adams County, Mississippi, on the grounds that “[i]t was . . . drawn without affording representatives of the black community any opportunity to participate in the redistricting process”); Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., U.S. Dep’t of Justice, Civil Rights Div., to Benjamin E. Griffith, Esq., Jacobs, Griffith, Eddins & Povall (June 13, 1983) (objecting to the redistricting plan of Bolivar County, Mississippi, as “the new plan heighten[ed] the fragmentation of the large black population concentration in the City of Cleveland”); Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to John K. Keys, Esq. (May 23, 1983) (objecting to the reapportionment plan of districts in Covington County, Mississippi, where the “plan fragment[ed] the large black population concentration in the City of Collins, and . . . minimize[d] its voting strength by preventing black citizens there from electing candidates of their choice”); Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Henry L. Crisp, Esquire, Crisp, Oxford & Gatewood (Dec. 17, 1982) (objecting to the redistricting plan for the School District of Sumter County, Georgia, where “[t]he division of the black community by the configuration of the proposed Districts 2 and 4 fragment[ed] the black voting strength for apparently no compelling governmental reason and such fragmentation need not exist in a fairly drawn plan”).

thus, a white voting-age majority.¹¹¹ The plan also divided the predominantly black neighborhoods of the county seat among three districts.¹¹² The Department, therefore, objected as "several factors of the . . . plan would have the effect of unnecessarily diluting the voting strength of the black community."¹¹³ One Louisiana city engaged in both common gerrymandering tactics, concentrating as many African Americans as possible into one entirely black district ("packing") and fragmenting ("cracking") the rest of the city's black population so that none of the other districts contained more than a forty-two percent black population.¹¹⁴

E. Annexations, De-annexations, and Consolidations

Annexations that decrease the percentage of a city's likely voters who belong to a racial minority group necessarily dilute the group's voting strength and thus have the potential for retrogression. Rather than freeze the boundaries of cities that have a legitimate need to expand in order to capture suburban citizens who have higher incomes or other sources of tax revenue, the Department and the federal courts preclear dilutive annexations where the city uses, or agrees to adopt, a system of elections that fairly reflects minority voting strength in the new city.¹¹⁵

In 1971, the Department objected to an annexation by Richmond, Virginia, that increased the city's population by approximately 43,000 people, most of whom were white, thus reducing the black population from a fifty-two percent majority to a forty-two percent minority.¹¹⁶ The Department objected because in "Richmond, where representatives are elected at-large, substantially increasing the number of eligible white voters inevitably tends to dilute the voting strength of black voters."¹¹⁷ The Department would preclear the annexation, however, if the city were to switch from at-large elections to a fair election plan, such as single-member districts.¹¹⁸

111. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to John C. Love, Sr., Attorney for Bd. of Supervisors, Attala County, Miss. (Sept. 3, 1974).

112. *Id.* at 2.

113. *Id.*

114. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Virginia C. Godfrey, Mayor, Many, La. (Apr. 13, 1976).

115. See *City of Richmond v. United States*, 422 U.S. 358, 371 (1975); *City of Petersburg v. United States*, 354 F. Supp. 1021, 1024, 1031 (D.D.C. 1972), *aff'd mem.*, 410 U.S. 962 (1973).

116. Letter from David L. Norman, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to C.B. Mattoz, Jr., City Attorney, Richmond, Va. (May 7, 1971).

117. *Id.* at 1.

118. *Id.* at 2. When city officials met with Attorney General John Mitchell to request a withdrawal of the objection, they enlisted the participation of one of Richmond's leading citizens, Lewis F. Powell, Jr., who soon joined the Supreme Court. Letter from Lewis F. Powell, Jr. to John N. Mitchell (Aug. 9, 1971) (public document, Voting Section, Civil Rights Division, U.S. Department of Justice). The Attorney General did not withdraw the objection and the city subsequently filed a Section 5 declaratory judgment action, seeking judicial preclearance of its annexation. Powell was an Associate Justice by the time the case made its way to the Supreme Court, and as a matter of course, recused

In 1972, the Department objected to another annexation on the same principle as in Richmond, this time by the neighboring city of Petersburg, Virginia. The annexation decreased the city's population from fifty-six to forty-seven percent black, but black leaders generally supported the move in order to increase Petersburg's tax revenue base.¹¹⁹ Recognizing that the effect of the annexation would be to decrease the chances of electing African Americans to the city council, a black council member proposed a change from the existing at-large system to elections from single-member districts, which his colleagues on the council rejected.¹²⁰ The Department refused to preclear the annexation despite its recognition that the city had legitimate economic reasons to justify expanding its boundaries, but agreed to reconsider the objection if Petersburg "were to adopt a fairly drawn system of single member wards."¹²¹ Petersburg then filed a Section 5 declaratory judgment action, but the three-judge panel adopted the Department's approach.¹²² Thereafter, the Richmond-Petersburg models shaped the Department's approach to evaluating annexations.¹²³

VIII. THE SECTION 2 RESULTS TEST

During the 1970s, plaintiffs in Fourteenth Amendment dilution cases often won by documenting a history of racial segregation and discrimination in the jurisdiction, and by showing, due to racially polarized voting, the election system operated in such a way that minority voters did not have a reasonable opportunity

himself.

119. Letter from David L. Norman, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to John S. Davenport, III, Attorney, Mays, Valentine, Davenport & Moore (Feb. 22, 1972).

120. *Id.* at 2.; *see also* *City of Petersburg v. United States*, 354 F. Supp. 1021, 1024, 1027 (D.D.C. 1972) (discussing the reasons and effects for the annexation, as well as the rejection of single-member districts), *aff'd*, 410 U.S. 962 (1973) and 412 U.S. 901 (1973).

121. Objection Letter from Norman to Davenport, *supra* note 119, at 3.

122. 354 F. Supp. at 1031.

123. *See, e.g.*, Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to John S. Davenport, III, Attorney, Mays, Valentine, Davenport & Moore (July 14, 1975) (objecting to the annexation plans submitted by the City of Lynchburg, Virginia, as "commensurate with [*City of Richmond* and *City of Petersburg*] . . . the annexation submitted for review will . . . have a racially dilutive effect on voting in Lynchburg"); Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Harold L. Davenport, Mayor, City of Alabaster, Alabama (July 7, 1975) (asserting that "commensurate with the [court] decisions cited above [the Department] cannot conclude that the major annexations taken together will not have a dilutive effect on voting in Alabaster"); U.S. Dep't of Justice, to J. Howard McEniry, Jr., City Attorney, Bessemer, Ala. (Sept. 20, 1974) ("giv[ing] careful consideration to recent federal court decisions," the Department objected to the city of Bessemer's annexation plans); Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Morris D. Mosen, Corp. Counsel, Charleston, S.C. (Sept. 20, 1974) (objecting to annexations by the City of Charleston, South Carolina, and relying on *City of Richmond* and *City of Petersburg*).

to elect representatives of their choice.¹²⁴ In 1980, however, the Supreme Court ruled in *City of Mobile v. Bolden*,¹²⁵ a challenge to Mobile's use of at-large elections, that under the Fourteenth Amendment plaintiffs must prove that the city adopted or maintained an election method for the purpose of diluting minority voting strength.¹²⁶ Presented with a Supreme Court decision that appeared to contradict congressional intent, a substantial majority in Congress voted to revise Section 2 of the Voting Rights Act to create a statutory means of accomplishing what could no longer be won under the Fourteenth Amendment. Amended Section 2 outlawed election methods that resulted in diluting minority voting strength, without requiring proof of discriminatory intent.¹²⁷

Even so, in a few complex Section 2 lawsuits in the 1980s, evidence of discriminatory intent proved critical to the court's decision, most dramatically in one consolidated Alabama case, *Dillard v. Crenshaw County*.¹²⁸ This complex litigation ultimately led to the elimination of at-large elections in more than 180 counties, municipalities, and school boards throughout Alabama.¹²⁹ The plaintiffs presented historical evidence that showed whenever black voting strength was substantial, state and local officials had a policy of using at-large rather than district elections.¹³⁰ The evidence also showed the state, motivated explicitly by the goal of preventing the election of blacks to office, adopted laws in the 1950s and 1960s that

124. The Supreme Court initially set forth the legal standard in vote-dilution lawsuits in *White v. Regester*, 412 U.S. 755, 765-66 (1973), *vacated*, 422 U.S. 935 (1975) and spelled it out in greater detail in *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd sub nom. E. Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976). See generally James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1 (1982) (discussing the history of minority vote dilution and the Supreme Court's attempt to regulate it by implementing standards for lower courts); Timothy G. O'Rourke, *Constitutional and Statutory Challenges to Local At-Large Elections*, 17 U. RICH. L. REV. 39 (1982) (reviewing the evolution of constitutional challenges to at-large systems and discussing the standards against which these systems are evaluated).

125. 446 U.S. 55 (1980).

126. *Id.* at 66. When the case went to trial a second time under the new intent standard, the trial judge relied on expert testimony by historians in ruling that racial discrimination was clearly a motivating factor in the adoption of the city's at-large system. *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982); see also Peyton McCrary, *History in the Courts: The Significance of City of Mobile v. Bolden*, in MINORITY VOTE DILUTION, *supra* note 54, at 47-63 (summarizing the historical evidence in this and a companion case, *Brown v. Board of School Commissioners*, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff'd*, 706 F.2d 1103 (11th Cir. 1983), *aff'd* 464 U.S. 1005 (1983)).

127. Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 716-17 (1983); see Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in MINORITY VOTE DILUTION, *supra* note 54, 145-63; Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983).

128. 640 F. Supp. 1347 (M.D. Ala. 1986) (granting a preliminary injunction against further use of at-large elections for electing county commissioners in nine defendant jurisdictions).

129. Peyton McCrary et al., *Alabama*, in QUIET REVOLUTION, *supra* note 2, at 53-54, 61-65.

130. Peyton McCrary & J. Gerald Hebert, *Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Cases*, 16 S.U. L. REV. 101, 118-19 (1989).

required the use of anti-single shot devices in all jurisdictions to enhance the dilutive power of at-large elections.¹³¹

Over the next quarter-century, voting rights lawyers successfully brought numerous lawsuits under the new results standard. The Supreme Court made clear in *Thornburg v. Gingles*¹³² that minority plaintiffs could win by showing voting patterns in the community resulted in racial polarization to the degree that minority candidates usually lost and by showing that it would be possible to draw a districting plan providing at least one majority-minority district.¹³³ Thus, after *Thornburg*, many defendants settled before trial and went to single-member districts.¹³⁴ A recent study indicated that “of the 209 [Section 2] lawsuits that ended with a determination of liability, 98 (46.9 percent) originated in jurisdictions covered by Section 5 of the Voting Rights Act.”¹³⁵ Of the 209 liability decisions examined, courts found a Section 2 violation in eighty-eight (42 percent) of them.¹³⁶ In another twenty-nine cases, minority plaintiffs won a preliminary injunction, negotiated a favorable settlement plan, or otherwise achieved a successful outcome.¹³⁷

IX. THE “CLEAR VIOLATION OF SECTION 2” RULE

When Congress created a new statutory means of attacking minority vote dilution, it did not simultaneously revise the language of Section 5.¹³⁸ The legislative history provides evidence that Congress believed the Department should object where the voting change would violate the new Section 2 results standard. According to the 1982 Senate report, “In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so

131. *Id.* at 119–21. For other cases where intent evidence was important during the 1980s, see Peyton McCrary, *Discriminatory Intent: The Continuing Relevance of “Purpose” Evidence in Vote-Dilution Lawsuits*, 28 *How. L.J.* 463 (1985).

132. 478 U.S. 30 (1986).

133. *Id.* at 80.

134. See Chandler Davidson, *The Recent Evolution of Voting Rights Laws Affecting Racial and Language Minorities*, in *QUIET REVOLUTION*, *supra* note 2, at 35.

135. ELLEN KATZ ET AL., *DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982* 8 (2005), available at <http://sitemaker.umich.edu/votingrights/files/finalreport/pdf>.

136. *Id.* In ninety-one lawsuits, forty-four of them in jurisdictions covered by Section 5, courts made a judicial finding of racially polarized voting. *Id.* at 16.

137. *Id.*

138. In *Reno v. Bossier Parish School Board* (*Bossier Parish I*), 520 U.S. 471 (1997), *aff’d*, 528 U.S. 320 (2000), Justice O’Connor, writing for the majority, treated the fact that Congress did not revise Section 5 as dispositive evidence that Congress did not intend preclearance to be denied when a voting change would violate Section 2: “Congress, among other things, renewed § 5 but did so without changing its applicable standard.” *Id.* at 484.

discriminates as to violate section 2.”¹³⁹ Democratic Senator Edward Kennedy and Republican Representative James Sensenbrenner, two key sponsors of the revised statute, each pointed to this language in the Senate report during floor debates, interpreting it to mean that changes that violated Section 2 would now be objectionable under Section 5 as well.¹⁴⁰ Democratic Representative Don Edwards, who chaired the subcommittee charged with drafting the House bill and sponsored the final version of the revised Act, concurred in this view.¹⁴¹ Congressional opponents of the 1982 amendments did not dispute this view.¹⁴²

In 1985, the Department of Justice proposed the first revision of its Section 5 guidelines following the 1982 amendments.¹⁴³ As finally adopted, a new provision required a denial of preclearance where “a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2.”¹⁴⁴ This new test was

139. S. REP. NO. 97-417, at 12 n.31 (1982) as reprinted in 1982 U.S.C.C.A.N 177, 189. *But see Bossier Parish I*, 520 U.S. at 484 (dismissing the significance of this expression of intent from the Senate Report: “We doubt that Congress would depart from the settled interpretation of § 5 and impose a demonstrably greater burden on the jurisdictions covered by § 5 . . . by dropping a footnote in a Senate Report instead of amending the statute itself.”).

140. 128 CONG. REC. 14,292 (1982) (statement of Sen. Kennedy); 128 CONG. REC. 12,934-35 (1982) (statement of Rep. Sensenbrenner). The majority in *Bossier Parish I* ignored all evidence on this issue in the *Congressional Record*. See 520 U.S. 471, 483-84 (1997).

141. 128 CONG. REC. 14,934 (1982) (statement of Rep. Edwards).

142. Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 150-51 (1984). However, two Georgia congressmen from metropolitan Atlanta, Wyche Fowler and Elliott Levitas, asked Chairman Edwards during floor debate—without referring in any way to the revised Section 2—whether Section 5 had been revised in any way in the new bill, and he replied that it had not. *Id.* (citing 128 Cong. Rec. 14,938 (1982) (statement of Rep. Edwards)). The most plausible reading of this colloquy is that Representative Edwards believed he was responding to a question about the language of Section 5 itself, which had not changed, rather than to the standard for implementing Section 5 under the revised Act. As Laughlin McDonald observed, “to the extent that there is a conflict between the Senate Report and the statements of key sponsors of the bill (Senator Kennedy and Representative Sensenbrenner) on the one hand, and the colloquies by Representatives Fowler and Levitas on the other, the former clearly take precedence over the latter.” Laughlin McDonlad, *Racial Fairness—Why Shouldn’t It Apply to Section 5 of the Voting Rights Act?*, 21 STETSON L. REV. 847, 863 (1992).

143. The Department published the proposed revision for comments on May 6, 1985. See Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 50 Fed. Reg. 19,122 (May 6, 1985). Oversight hearings were then held on the proposed guidelines. *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong., (1985) [hereinafter *Oversight Hearings*]. The Subcommittee received comments from 120 persons or organizations, and published the final version at Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 52 Fed. Reg. 490 (Jan. 6, 1987) (codified at 28 C.F.R. § 51).

144. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. at 498. (codified at 28 U.S.C. § 51.55(b)). Criticism in the oversight hearings focused on the Department’s policy that, in applying the new basis for objecting to voting changes, the burden of proof for determining whether the new voting procedure would clearly violate Section 2 lay with the Department, not the submitting jurisdiction. *Oversight Hearings*, *supra* note 143, at 49, 149-53, 167-71. On the other hand, two academic critics, Professors Timothy G. O’Rourke and Katharine I. Butler, contended that the legislative history of the 1982 Act provides an insufficient basis for

relatively short-lived, as only a decade later the Supreme Court determined in *Bossier Parish I* that a denial of preclearance was not appropriate simply on the grounds that the proposed change would clearly violate Section 2.¹⁴⁵ Regardless, the new Section 2 test was rarely the sole basis of an objection. The two principal reasons for objecting to voting changes continued to be retrogressive effect and unconstitutional purpose.¹⁴⁶

X. APPLYING THE PURPOSE REQUIREMENT OF SECTION 5

A. *At-Large Elections*

In the 1980s, the Department based a growing number of objections on the purpose requirement of Section 5. Few covered jurisdictions chose to adopt at-large elections. The most common objections to at-large elections or multi-member districts arose from their use in mixed plans at the local level. The plans were typically not retrogressive but often had a discriminatory purpose. For example, West Baton Rouge Parish used a multi-member district for the city of Port Allen in a mixed plan for its school board in 1982, rejecting nine alternative single-member district plans because each “contained at least one district in the Port Allen area from which blacks would have had a realistic opportunity to elect a representative of their choice.”¹⁴⁷ The county commission in Bladen County, North Carolina, rejected a compromise plan that would have provided African American voters a fair opportunity to elect candidates of their choice. A districting study committee, which the county commission itself had appointed, proposed the compromise, but county officials opted for a plan that “would maintain white political control to the maximum extent possible and thereby minimize the opportunity for effective political participation by black citizens.”¹⁴⁸

Following a vote-dilution lawsuit in which the courts found the city’s at-large

incorporating Section 2 in a Section 5 analysis at all, even with the Department bearing the burden of proof. *Id.* at 35–38, 63, 69–75.

145. *Bossier Parish I*, 520 U.S. 471, 474, 485 (1997), *aff’d*, 528 U.S. 320 (2000).

146. McCrary et al., *End of Preclearance*, *supra* note 65, app. tbls.2 & 3; *see also* Posner, *supra* note 61, at 84 (asserting that in the 1990s, “only one redistricting objection relied exclusively on Section 2”).

147. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to L.C. Lutz, West Baton Rouge Parish Sch. Bd. (Nov. 8, 1982). A second letter declined to withdraw the objection. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to L.C. Lutz, W. Baton Rouge Parish Sch. Bd. (Mar. 14, 1983) (relying for its legal authority on the view of the purpose prong expressed in *City of Richmond v. United States*, 422 U.S. 358, 378–79 (1975); *Beer v. United States*, 425 U.S. 130, 141 (1976); *City of Rome v. United States*, 446 U.S. 156, 172 (1980); and the trial court decision in *Busbee v. Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982), *aff’d*, 459 U.S. 1166 (1983)).

148. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to W. Leslie Johnson, Jr., Esq., Johnson & Johnson (Nov. 2, 1987).

system violative of Section 2,¹⁴⁹ the City of Baytown, Texas, adopted a remedial plan with five single-member districts and four council members elected at-large from numbered posts.¹⁵⁰ The Department objected that, while the plan was not retrogressive, the city acted with a discriminatory purpose in rejecting alternatives proposed by African American and Hispanic spokespersons and, by including at-large seats, "chose the election plan that offers minority voters the least opportunity to . . . elect candidates of their choice."¹⁵¹

B. Redistricting

The growing importance of the purpose prong, which often served as the basis for objections in the area of redistricting, appears to reflect the views of Assistant Attorney General W. Bradford Reynolds, the conservative Republican head of the Civil Rights Division during much of the decade. In objecting to a 1985 redistricting plan in Sunflower County, Mississippi, for example, Reynolds drew on his personal observations of the county seat, Indianola, when traveling through the Mississippi Delta in 1983 with Jesse Jackson.¹⁵² Reynolds believed the district lines unnecessarily divided cohesive black neighborhoods and ignored obvious physical boundaries. The objection letter sent to Sunflower County reflected this view: "The railroad tracks form a natural boundary within Indianola and it is well recognized that this boundary divides neighborhoods as well as communities of interest. Yet in devising the submitted plan, the railroad tracks apparently were ignored as a potential district boundary line."¹⁵³ Nor had the county provided any "nonracial explanation . . . as to why the district boundaries of the submitted plan continue[d] to meander through the streets of the black community in so divisive a manner, particularly in light of the strong opposition of the black community."¹⁵⁴ Applying the Section 5 purpose standard, Reynolds concluded that the redistricting plan "was devised consciously to assure that the black population percentage of any district would not increase appreciably."¹⁵⁵ Purpose continued to be a critical issue in

149. *Campos v. City of Baytown*, 840 F.2d 1240, 1250 (5th Cir. 1988).

150. Letter from James P. Turner, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Randall Strong, City Attorney, Baytown, Tex. (Mar. 20, 1989).

151. *Id.* at 2.

152. RAYMOND WOLTERS, *RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS* 71-73 (1996).

153. Letter from Wm. Bradford Reynolds, Assistant Atty. Gen., Civil Rights Div., U.S. Dep't of Justice, to Tommy McWilliams, Esq., Townsend, McWilliams, & Holladay (June 7, 1985).

154. *Id.* at 2.

155. *Id.* Though many praised Reynolds for his work, some critics "disparaged him as a headstrong ideologue." WOLTERS, *supra* note 152, at 9. One critic, Abigail Thernstrom, criticized Reynolds for enforcing Section 5 so as to maximize minority voting strength, contrary to the requirements of federal law. THERNSTROM, *supra* note 13, at 170-72. Thernstrom particularly emphasized redistricting objections in Barbour County, Alabama, which she thought were unwarranted. *Id.* at 172-79. Yet, like the Sunflower County example cited above, both Barbour County plans involved oddly-shaped districts that fragmented black voting strength. The plans were drawn without

Section 5 redistricting decisions in the 1990s.¹⁵⁶ A redistricting plan for Lauderdale County, Mississippi, “unnecessarily . . . fragment[ed] the concentration of the black community within the City of Meridian into three separate districts,” where only one would have a black majority despite strong opposition from black leaders who presented alternative plans that would divide the county into four districts, and two would have a black majority.¹⁵⁷ The county rejected these alternative plans, and the Department concluded “the county’s rejection of the alternative plans was motivated, in large part, by a desire to maintain districts conducive to the re-election of incumbents and to limit the number of supervisor districts in which black voters would have an equal opportunity to elect a candidate of their choice.”¹⁵⁸

In 1991, Castro County, Texas, adopted a plan that failed to establish even a single district where Hispanic citizens of voting-age constituted a majority, despite the fact that forty-six percent of the county was Hispanic (although a significant proportion of the Hispanic community was made up of non-citizens). The county rejected plans from its minority community that would have established one district where Hispanics of voting-age were in the majority and offered no “nonracial explanation for its failure to adopt a plan which include[d] at least one viable Hispanic district.”¹⁵⁹ The Department objected to the plan, finding that the plan did not meet preclearance requirements.¹⁶⁰ Despite the objection, Castro County used the 1991 plan in a 1992 primary for two of the districts. The county then adopted a new plan that actually decreased the Hispanic percentage in one of the districts

consultation with minority political leaders and with no effort to explain departures from normal districting criteria. Analyzing the objection letters demonstrates that Reynolds applied the Section 5 purpose requirement to redistricting plans in a manner consistent with the case law. *See also* WOLTERS, *supra* note 152, at 9–10.

156. *See* *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). *Garza* reinforced the Department’s interpretation of the purpose standard, as the appellate court upheld the district court’s finding that that county’s redistricting plan, in which incumbents sought to assure their reelection at the expense of minority voters, intentionally dilutive. *Id.* at 771.

157. Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to William E. Ready, County Attorney, Lauderdale County, Miss. (October 7, 1991).

158. *Id.* at 2. For similar purpose objections to county governing bodies, see Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Robert T. Bass, Esq., Allison & Assoc. (June 4, 1993) (objecting to redistricting plans in Cochran County, Texas, where “concerns [were] raised about the nature and extent of minority participation in the county’s redistricting process”), Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Robert R. Horger, Esq., Horger, Barnwell & Reid (July 21, 1992) (objecting to a redistricting plan in Orangeburg County, South Carolina, that “unnecessarily remove[d] black population from existing District 5 in the process of reducing the district’s population deviation”); Letter from James P. Turner, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Virginia Daugherty, Esq., Daugherty & Assoc., McCulloch County, Tex. (Apr. 6, 1992) (objecting to a McCulloch County, Texas redistricting plan where “the proposed plan will continue to deny Hispanic voters an opportunity to elect candidates of their choice”).

159. Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Bob Bass, Esq., Allison & Assoc. (Mar. 30, 1992).

160. *Id.* at 2.

with a Hispanic majority and delayed elections for that district for two years, triggering a second objection.¹⁶¹

C. Annexations and De-annexations

The purpose issue was at the core of the Department's objections to racially selective annexation policies.¹⁶² McClellanville, a predominantly white town in Charleston County, South Carolina, sought to annex an area with mostly white residents in 1974.¹⁶³ The Department learned that largely black neighborhoods adjacent to the town had expressed interest in annexation without success and, concluding that this rejection was because of a racially discriminatory purpose, denied preclearance to the submitted annexation.¹⁶⁴ Since 1965, Grenada, Mississippi, annexed a series of "exclusively white residential areas," but left black neighborhoods in an area "immediately contiguous to the City . . . which is not part of the city but which, as a result of the City's annexation activity . . . [was] surrounded on three sides by the City of Grenada corporate boundaries."¹⁶⁵ The residents of the area expressed a desire to become part of the City of Grenada, and a consulting firm retained by the city under a federal housing grant even recommended annexing at least part of that black population concentration, "to no avail."¹⁶⁶ The Department objected, asserting, "Under *Gomillion v. Lightfoot*, . . . a city can no more exclude black residents from the city by refusing to annex black neighborhoods than it can exclude black residents from the city by evicting or deannexing its black voters."¹⁶⁷

161. See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Robert Bass, Esq. (Oct. 6, 1992). In 1993, Castro County adopted a third plan with essentially the same characteristics, to which the Department once again objected on purpose grounds. See Letter from James P. Turner, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Virginia Daugherty, Esq., Daugherty & Assoc. (May 10, 1993) (relying in part on *Garza*, 918 F.2d at 771). The county filed a Section 5 declaratory action, but the parties entered into settlement negotiations in April 1994. Ultimately, the parties returned to court in a dispute over attorneys fees arising from the Section 5 litigation. See *Castro County v. Crespin*, 101 F.3d 121, 123 (D.C. Cir. 1996).

162. Motomura, *supra* note 105, at 225-28.

163. *Id.* at 225.

164. See Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Phillip A. Middleton, Charleston County, S.C. (May 6, 1974). The Department withdrew its objection "after the town (1) passed a resolution that it would consider future annexation petitions without regard to race, and (2) agreed to inform the Department of Justice of any annexation petitions from black areas adjacent to the town." Motomura, *supra* note 105, at 226 (citing Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Phillip A. Middleton, Charleston County, S.C. (Oct. 21, 1974)).

165. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to W.H. Fedric, City Attorney, Grenada, Miss. (Feb. 5, 1975).

166. *Id.* at 2.

167. *Id.* at 2. By citing *Gomillion*, 364 U.S. 339 (1960), the Department seemed to rely on a constitutional purpose standard. In March, the city submitted additional annexations of predominantly white areas, and the Department again objected. See Letter from J. Stanley Pottinger, Assistant Attorney

Whites in seventy-seven percent black Lowndes County, Alabama, living in an unincorporated area known as Hayneville, decided to incorporate as a new town a few years after the Voting Rights Act eliminated barriers to black registration and voting.¹⁶⁸ Hayneville residents drew the boundaries of the town in such a way as to exclude most of the blacks residing in the unincorporated community.¹⁶⁹ The Department concluded that the change was objectionable, both because it was retrogressive and because “the purpose of the incorporation was to reduce the influence over Hayneville of the majority black Lowndes County electorate and to prevent the possibility of control of the Town of Hayneville by blacks residing within the Town.”¹⁷⁰

In 1980 the Department objected to annexations to the city of Pleasant Grove, Alabama.¹⁷¹ Because the city challenged the objection in court, the facts as to this objection are well documented, and the law as to selective annexations is clear. Pleasant Grove, a virtually all-white city near Birmingham, in industrial Jefferson County, sought preclearance of a series of annexations. Its refusal to annex nearby black population concentrations was part of what the trial court called “an astounding pattern of racial exclusion and discrimination in all phases of Pleasant Grove life.”¹⁷² As a result, the city had remained “an all-white enclave in an

Gen., Civil Rights Div., U.S. Dep’t of Justice, to W.H. Fedric, City Attorney, Grenada, Miss. (Feb. 5, 1975). The Department withdrew both objections on June 25, 1976, when the city agreed to annex the previously excluded black neighborhoods.

168. Letter from Drew S. Days, III, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Frank H. Hawthorne, Attorney, Batch, Bingham, Baker, Hawthorne, Williams & Ward (Dec. 29, 1978) (relying on *Beer v. United States*, 425 U.S. 130 (1976); *City of Richmond v. United States*, 422 U.S. 358 (1975); and *Gomillion*). The Department also objected to the incorporation of the City of Orange Grove in Harrison County, Mississippi, based on evidence that “racially invidious considerations played a significant role both in the decision to create a new city and in determining which areas and which people would be included within the proposed city and, by necessary extension, which voters may participate in a referendum on incorporation.” Letter from Drew S. Days, III, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Walter W. Teel, Esq., Sekul, Hornsby, Wallace & Teel (June 2, 1980). Similarly, the Department objected on purpose grounds to the creation of a new, predominantly white school district within the area governed by the Houston Independent School District in Harris County, Texas. The new district was first proposed shortly after elections in which “minority-backed candidates first gained control of the [existing] board,” which was under a court order “to undertake substantial school desegregation.” Letter from J. Stanly Pottinger, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Joel B. Coolidge, President, Interim Bd. of Tr., Proposed Westheimer Indep. Sch. Dist. (Jan. 13, 1977).

169. Objection Letter from Days to Teel, *supra* note 168, at 2.

170. *Id.*

171. See Letter from Drew S. Days III, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Thomas Crawford, Jr., Esq., Cooper, Mitch & Crawford (Feb. 1, 1980).

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

otherwise racially mixed area of Alabama.”¹⁷³ The annexations at issue provided further evidence of racial discrimination in the city’s annexation policy.¹⁷⁴

The city claimed that there could be no retrogressive effect to its annexation policies because there were no black people in the city, and thus “the annexations did not reduce the proportion of black voters or deny existing black voters representation equivalent to their political strength in the enlarged community.”¹⁷⁵ A majority of the Supreme Court rejected this view, pointing out, “Section 5 looks not only to the present effects of changes, but to their future effects as well.”¹⁷⁶ The Court added that the purpose requirement also applied to “anticipated as well as present circumstances.”¹⁷⁷ At the district court level, the city argued that proof of discriminatory intent without proof of discriminatory effect was insufficient to deny preclearance, but the trial court gave short shrift to that argument.¹⁷⁸ The Supreme Court agreed: “Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent.”¹⁷⁹

Pleasant Grove also argued that the purpose requirement of Section 5 was limited to retrogressive intent. Dissenting, Justice Lewis Powell, joined by Chief Justice William Rehnquist and Justice Sandra Day O’Connor, agreed: “[F]or a city to have a discriminatory purpose within the meaning of the Voting Rights Act, it must intend its action to have a retrogressive effect on the voting rights of blacks.”¹⁸⁰ The majority, however, observed that it had rejected such reasoning since *City of Richmond*.¹⁸¹ In *City of Richmond*, the Court ruled a change motivated by a racially discriminatory purpose “has no legitimacy at all under our

173. *City of Pleasant Grove*, 568 F. Supp. at 1456.

174. The Supreme Court noted that the evidence of intentional discrimination was so strong, that “even if the burden of proving discrimination was on the United States, the [trial] court ‘would have had no difficulty in finding that the annexation policy of Pleasant Grove is, by design, racially-discriminatory in violation of the Voting Rights Act.’” *City of Pleasant Grove*, 479 U.S. at 467 n.7 (quoting *City of Pleasant Grove*, 623 F. Supp. at 788 n.30).

175. *Id.* at 470–71. The dissenters also adopted this view. *Id.* at 475–76 (Powell, J., dissenting); see also THERNSTROM, *supra* note 13, at 156 (“It is difficult to see how black voting rights had been abridged by the boundary change, since Pleasant Grove had no black voters to begin with.”).

176. *City of Pleasant Grove*, 479 U.S. at 471.

177. *Id.* The dissent by Justice Powell rejected this interpretation as “purely speculative.” *Id.* at 472 (Powell, J., dissenting).

178. See *City of Pleasant Grove v. United States*, 623 F. Supp. 782, 788 (D.D.C. 1985) (“[T]he city has wholly failed to carry its burden of establishing that its annexation policy does not have the purpose of denying or abridging the right to vote on account of race or color.”); *City of Pleasant Grove v. United States*, 568 F. Supp. 1455, at 1460 (D.D.C. 1983) (holding that annexations are not entitled to preclearance “if there is a discriminatory purpose irrespective of whether or not there is also a discriminatory effect”).

179. *City of Pleasant Grove v. United States*, 479 U.S. 462, 469 (1987) (quoting *City of Rome v. United States*, 446 U.S. 156, 172 (1980)).

180. *Id.* at 474 (Powell, J., dissenting). For this proposition, Justice Powell relied on his majority opinion in *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983) (discussing *Beer v. United States*, 425 U.S. 130, 141 (1976)), although discriminatory purpose was not an issue in either *Beer* or *Lockhart*.

181. *Id.* at 471 n.11 (majority opinion).

Constitution or under the statute . . . *whatever its actual effect may have been or may be.*”¹⁸²

In the late 1990s, the city of Lamesa, Texas, where Hispanics and African Americans together formed fifty-one percent of the population, de-annexed an area only a year after initially bringing it into the city.¹⁸³ White residents of a particular election district, the placement site of the area’s new low and moderate income housing development, mounted a major effort to block the arrival of “undesirables,” “HUD people,” and “Section 8 people,” who would allegedly bring “criminal activity” to their neighborhood.¹⁸⁴ Because the city bowed to this pressure and de-annexed the development, the Department objected on purpose grounds.¹⁸⁵

XI. THE SPECIAL CASE OF ADDITIONAL JUDGESHIPS

In the 1980s, the Department objected to numerous additional judicial posts created to deal with expanding caseloads, but which employed election procedures that had the potential for diluting minority voting strength. The voting change present in each instance was an increase in the number of judges in multi-judge jurisdictions (variously called districts or circuits).¹⁸⁶ In each instance, the Department examined the increase in judgeships in the context of the method of election used to elect the judges—almost invariably at-large election accompanied by designated post and majority vote requirements.¹⁸⁷

In some instances, however, one or more of these enhancing devices was itself a covered voting change. The first instance arose when a three-judge court in North Carolina enjoined further use of the method of electing certain state trial court judges until the state obtained preclearance.¹⁸⁸ North Carolina elected its superior court judges under numbered seat and staggered term requirements that were not

182. *Id.* (quoting *City of Richmond*, 422 U.S. 358 at 378–79 (1975)) (emphasis added).

183. Letter from Bill Lann Lee, Acting Assoc. Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Robert Gorsline, City Sec’y, Lamesa, Tex. (July 16, 1999).

184. *Id.* at 3.

185. *Id.*

186. The Department followed the reasoning in *Haith v. Martin*, 618 F. Supp. 410, 412–13 (E.D.N.C. 1985), *aff’d*, 477 U.S. 901 (1986). In a later decision, *Clark v. Roemer*, 500 U.S. 646 (1991), the Supreme Court cited to *Haith*, where “[it] issued a summary affirmance of a decision holding that § 5 applied to judges,” as evidence that the election of judges was, in fact, covered by Section 5. *Id.* at 653 (citing *Haith*, 477 U.S. at 901). The Department was also so instructed. See *Brooks v. State Bd. of Elections*, 775 F. Supp. 1470, 1475 (S.D. Ga. 1989) *aff’d mem.*, 498 U.S. 916 (1990). (“The Supreme Court’s summary affirmance of *Haith v. Martin* may well have decided this issue.”).

187. Here the Department followed the approach indicated by *City of Lockhart v. United States*, 460 U.S. 125, 131–32 (1983) (“The possible discriminatory purpose or effect of the new seats, admittedly subject to § 5, cannot be determined in isolation from the ‘preexisting’ elements of the council. Similarly, the numbered post system is an integral part of the new election plan.”); see also *McCain v. Lybrand*, 465 U.S. 236, 255 n.27 (1984) (citing the above passage from *City of Lockhart*).

188. *Haith*, 618 F. Supp. at 414. None of the judgeships had been submitted for Section 5 review.

adopted until after the adoption of the Voting Rights Act and had never been submitted for preclearance.¹⁸⁹ As the Department explained, the use of numbered posts for judges “precludes minority voters from effective use of . . . single-shot voting” and thus “plainly has a retrogressive effect.”¹⁹⁰

A three-judge court in Mississippi subsequently ordered the submission of twenty-four multi-judge state circuit and chancery court judgeships for Section 5 review.¹⁹¹ In the Department’s view, “[t]he change from single-judge to multi-judge districts—in the context of racial bloc voting and the precluded anti-single-shot feature—strongly suggest[ed] a retrogressive effect in black voting strength.”¹⁹² A key factual assumption underlying the Department’s view, which subsequently proved to be incorrect,¹⁹³ was that “[a]t the time that the state came under Section 5 coverage, there was no state constitutional provision or general legislation that required the use of an at-large/numbered place system in multi-judge judicial districts, and the state has not subsequently enacted any such provision.”¹⁹⁴

Mississippi sought alternative preclearance by filing a declaratory judgment action in the District of Columbia.¹⁹⁵ The evidence presented demonstrated that in Mississippi “there have never been multi-judge district elections without numbered posts.”¹⁹⁶ The voting changes at issue thus could not be retrogressive because “there was no opportunity for single-shot voting prior to 1964.”¹⁹⁷ The court granted the Department’s motion for further discovery on the purpose issue.¹⁹⁸ In the meantime, a federal court in Mississippi found that the use of at-large elections and designated posts in various multi-judge chancery and circuit court districts violated Section 2

189. *See id.* at 411 (stating as undisputed fact that before the Section 5 coverage date, November 1, 1964, “candidates for the office of superior court judge in judicial districts having more than one judge were not required to announce for which vacancy he or she was filing nor did any district have staggered terms for judges within the district”). The designated post and staggered term provisions provided by the North Carolina statutes under Section 5 review, in short, required preclearance.

190. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Alex K. Brock, Executive Sec’y-Dir., N.C. State Bd. of Elections (Apr. 11, 1986).

191. *Kirksey v. Allain*, 635 F. Supp. 347, 349–50 (S.D. Miss. 1986).

192. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Stephen J. Kirchmayr, Deputy Attorney Gen., Miss. (July 1, 1986). In a subsequent letter denying the state’s request for reconsideration, Assistant Attorney General W. Bradford Reynolds explained the Department’s initial decision in greater detail and pointed out that the recent decision in *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987), included findings that reinforced the conclusion that the additional judgeships at issue would have a retrogressive effect. *See* Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Stephen J. Kirchmayr, Deputy Attorney Gen., Miss. (Sept. 8, 1987).

193. *See infra* notes 195–98 and accompanying text.

194. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Stephen J. Kirchmayr, Deputy Attorney Gen., Miss. (July 1, 1986).

195. *Mississippi v. United States*, No. 87-3464, 1988 WL 90056 (D.D.C. Aug. 9, 1988).

196. *Id.* at *4.

197. *Id.*

198. *Id.* at *6.

of the Voting Rights Act¹⁹⁹ and set a hearing date to determine the proper remedies, which could include the creation of single-judge sub-districts.²⁰⁰

In *Clark v. Edwards*,²⁰¹ a Louisiana federal court found that the method of electing various judicial posts at-large, by numbered posts, and with a runoff requirement violated Section 2 of the Act. This decision, in turn, led the Department to object to the creation of numerous judgeships. Based in part on the findings in *Clark*, the Department took the position that, in addition to the fact that the changes were retrogressive, they also presented a clear violation of Section 2.²⁰² The state adopted a new plan to remedy the Section 2 violations identified in *Clark* by, among other things, creating additional judgeships elected at-large and by designated post; the Department again refused preclearance, this time basing its objection on the purpose requirement of Section 5.²⁰³

An objection to the addition of numerous trial court judgeships in Georgia also relied on the purpose prong in Section 5. Now that the courts had made clear that the creation of additional judgeships required Section 5 review, the state grudgingly submitted forty-eight superior court judgeships established since 1965. When the state refused to provide the detailed information the Department requested, the Department interposed a technical objection on June 16, 1989.²⁰⁴ The trial court in *Brooks v. State Board of Elections*²⁰⁵ ordered the state to supply the requested information, endorsing the Department's view that the addition of judgeships must

199. *Martin v. Allain*, 658 F. Supp. 1183, at 1204 (S.D. Miss. 1987).

200. *Id.* at 1205; *see also* *Martin v. Mabus*, 700 F. Supp. 327, 332 (S.D. Miss. 1988) ("The Court therefore finds that having single-member sub-districts . . . is the most plausible remedy for the Section 2 violation.").

201. 725 F. Supp. 285, 302 (M.D. La. 1988).

202. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Kenneth C. Delean, Chief Counsel, La. (Sept. 23, 1988). A second objection did not specifically refer to retrogression and clearly relied more heavily on the court's Section 2 findings. Letter from James P. Turner, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Kenneth C. Dejean, Chief Counsel, La. (May 12, 1989).

203. Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Cynthia Y. Rougeou, Assistant Attorney Gen., La. (Sept. 17, 1990). Of course, the Department continued to rely on the fact that the changes would violate Section 2. Two additional objections to new judicial posts were based on both purpose and Section 2 as well. *See* Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Angie R. LaPlace, Assistant Attorney Gen., La. (Sept. 20, 1991); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Cynthia Young Rougeau, Assistant Attorney Gen., La. (Nov. 20, 1990).

204. *See* Letter from James P. Turner, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Carol Atha Cosgrove, Senior Assistant Attorney Gen., Ga. (June 16, 1989).

205. 775 F. Supp. 1470 (S.D. Ga. 1989).

be viewed "in the context of an existing electoral scheme."²⁰⁶ The state complied, submitting an additional ten judgeships. The Department objected to all fifty-eight judges, as they were elected under an at-large system enhanced by numbered posts and a majority vote requirement.²⁰⁷

The purpose prong of Section 5 was also the basis for four objections to additional trial court judgeships in Texas, where judges were elected at-large, by designated post, and pursuant to a majority vote requirement. In each instance the Department noted that numerous federal courts—dealing with legislative rather than judicial offices—had found these election methods racially discriminatory in purpose, effect, or both. Objection letters cited recent legislative hearings in which the method of electing judges was debated, and noted that the hearings revealed a common understanding in Texas that at-large elections, numbered places, and runoffs typically diluted minority voting strength, and that alternative election procedures would permit African American and Latino voters greater opportunity to elect judicial candidates of their choice.²⁰⁸

206. *Id.* at 1479. The *Brooks* court added:

Preclearance occurs only in the context of an existing electoral scheme; the number of judges elected within a particular circuit constitutes part of that scheme. If adding new judicial posts, even where candidates will be elected according to precleared voting procedures, has "a potential for discrimination," then such an addition would be a covered "enactment" under Section 5.

Id. (quoting *Dougherty County v. White*, 439 U.S. 32, 42 (1978)). The court in *Georgia v. Reno*, 881 F. Supp. 7, 10 (D.D.C. 1995), which ultimately precleared all the judgeships at issue, rejected this reasoning, focusing only on the decision to add judges and ignoring the method of electing them.

207. See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Michael J. Bowers, Attorney Gen., Ga. (Apr. 25, 1990). Although enacted in June, 1964, and thus not covered by Section 5, the statewide runoff and numbered place provisions were adopted with a discriminatory purpose, according to information developed by the Department and by the minority plaintiffs in connection with a Section 2 challenge to the statewide majority vote requirement. *Brooks v. Harris*, No. Civ. 90-1001-RCF (N.D. Ga.). By continuously expanding use of these devices every time a new judgeship was created—when alternative methods of electing superior court judges could be enacted by statute—the Department saw Georgia as acting with discriminatory intent. For a detailed account of the historical evidence of discriminatory intent in the adoption of the majority vote requirement, see J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 197-242, 484-87 (1999).

208. See Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Ronlad Kirk, Sec'y of State, Tex. (Aug. 15, 1994); Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Ronald Kirk, Sec'y of State, Tex. (May 31, 1994); Letter from Deval L. Patrick, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to John Hannah, Jr., Sec'y of State, Tex. (May 9, 1994); Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Tom Harrison, Special Assistant for Elections, Tex. Elections Div. (Nov. 5, 1990). The judgeships at issue in the 1990 decision were ruled untimely (and thus the court effectively precleared changes) in *Mexican American Bar Ass'n v. Texas*, 755 F. Supp. 735 (W.D. Tex. 1990). The judgeships at issue in the 1994 decisions were precleared in an unreported two-page per curiam opinion, *Texas v. United States*, No. 94-1529, 1995 WL 769160 (D.D.C. July 10, 1995).

XII. THE IMPACT OF THE SECTION 2 RESULTS TEST

The relationship between the elimination of at-large elections and changes in minority representation in the southern states covered by the Act's preclearance requirement has been the focus of substantial empirical research. The central pattern observed is that the replacement of at-large systems by fairly drawn single-member district plans dramatically increased African American representation.²⁰⁹ The trend was almost as dramatic in jurisdictions that switched from at-large elections to mixed plans including a few at-large seats, except that minority candidates rarely won at-large.²¹⁰ In many cases the level of black representation in 1989 approximated the black percentage of the population in the jurisdiction.²¹¹ Very few African Americans were elected to council seats from white-majority districts.²¹² On the other hand, virtually all black-majority districts elected black council members.²¹³

The research results on black representation are not surprising to those familiar with the evidence of racial polarization produced in the hundreds of vote-dilution

209. See Bernard Grofman & Chandler Davidson, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, in QUIET REVOLUTION, *supra* note 2, at 306.

210. See *id.* at 307.

211. See *id.* at 309. Many of the state case studies in QUIET REVOLUTION, *supra* note 2, present data on cities smaller than 10,000 in population, and some present findings regarding county governing bodies or school boards as well as municipal governments. Similar patterns result regardless of the type of jurisdictions involved. For similar studies presenting comparable findings, see Theodore S. Arrington and Thomas G. Watts, *The Election of Blacks to School Boards in North Carolina*, 44 W. POL. Q. 1099 (1991), and Charles S. Bullock, *Section 2 of the Voting Rights Act, Districting Formats, and the Election of African Americans*, 56 J. OF POL. 1098 (1994).

212. Grofman & Davidson, *supra* note 209, at 309.

213. *Id.* at 310-11. These findings confirm the conventional view among political scientists that at-large elections serve as a significant barrier to minority representation. See, e.g., PEGGY HEILIG & ROBERT J. MUNDT, *YOUR VOICE AT CITY HALL: THE POLITICS, PROCEDURES AND POLICIES OF DISTRICT REPRESENTATION* (1984) (examining whether recent structural shifts to district elections have, in fact, had consequences for local politics, procedures and policy); ALBERT K. KARNIG AND SUSAN WELCH, *BLACK REPRESENTATION AND URBAN POLICY* (1980) (examining black political power, public office, and urban policy); Chandler Davidson & George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. OF POL. 982 (1981) (examining the history and present effects of at-large or multi-member district elections in the context of modern local governments); Richard L. Engstrom & Michael D. McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 AMER. POL. SCI. REV. 344 (1981) (addressing the question "whether electoral arrangements or socioeconomic factors are the major influence on how proportionately blacks are represented"); Clinton B. Jones, *The Impact of Local Election Systems on Black Political Participation*, 11 URBAN AFF. Q. 345 (1976) (suggesting election reforms to increase black representation on city councils); Albert K. Karnig, *Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors*, 12 URB. AFF. Q. 223 (1976) (suggesting that socioeconomic factors are the principle factors in black representation); and Margaret K. Latimer, *Black Political Representation in Southern Cities: Election Systems and Other Causal Variables*, 15 URB. AFF. Q. 65 (1979) (discussing the interplay of election systems and black political inactivity in the South).

lawsuits tried or settled in the last quarter century. No court has ever found a violation in a vote-dilution case absent proof, typically presented through expert statistical analysis, that white voters routinely defeat the minority voters' candidates of choice.²¹⁴ This trend of reliance on expert testimony continues to the present.²¹⁵ In such a context, the only way to provide minority voters with a fair opportunity to elect their preferred representatives is to order a change to district elections or some alternative remedy.

By 1990, there were far fewer at-large systems left in the South. Those remaining were sometimes in jurisdictions where white cross-over voting had resulted in a pattern of significant minority representation, thus making litigation unnecessary.²¹⁶

Recent research indicates that at-large elections still tend to deter the election of minority candidates.²¹⁷ In district election plans, recent studies indicate that majority-minority districts continue to provide the optimal opportunity to elect candidates who are members of racial minority groups to public office but that, depending on the political circumstances in the jurisdiction, it may be possible to

214. For assessments of the evidence presented in expert testimony, see Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, in *CONTROVERSIES*, *supra* note 2, 197-229; McCrary, *Racially Polarized Voting*, *supra* note 82, at 509-11, 514, 517-19, 521. For a contrary view, see THERNSTROM, *supra* note 13, at 243 ("[t]he majority-white county, city, or district in which whites vote as a solid bloc against any minority candidate is now unusual."). When Thernstrom discusses the evidence of racially polarized voting presented in vote-dilution lawsuits, she often gets the facts wrong. See, e.g., Karlan & McCrary, *supra* note 45, at 759 n.53 (demonstrating the factual errors in her discussion of the findings in *Thornburg v. Gingles*).

215. See, e.g., *United States v. Charleston County*, 316 F. Supp. 2d 268 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (4th Cir. 2004) (relying on expert testimony to conclude the use of at-large elections violated Section 2); *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002) (appointing "a technical advisor to assist the court in understanding and utilizing the relevant technology needed to issue an order in the requisite time frame").

216. At first glance, Susan Welch, *The Impact of At-Large Elections on the Representation of Blacks and Hispanics*, 52 J. OF POL. 1050 (1990), appears to contradict this pattern. Welch's study concluded that "the cities with the greatest underrepresentation of blacks have been the ones to shift representational structures." *Id.* at 1073. Welch's sample of cities seems, however, to reflect a selection bias, as her study is "based on a survey of every U.S. city which had a 1984 population of at least 50 thousand and . . . a minimum of 5% black population in 1980." *Id.* at 1053. Particularly in the South, many at-large systems that had diluted minority voting strength in the past have, in many cases as a result of litigation, now shifted to single-member districts or mixed plans. See Davidson & Grofman, *The Effect of Municipal Election Structure on Black Representation in Eight Southern States*, in *QUIET REVOLUTION*, *supra* note 2, at 320-21. Other studies show a continuing pattern of substantially lower minority representation in at-large systems. See Charles S. Bullock III & Susan A. MacManus, *Testing Assumptions of the Totality-of-the Circumstances Test: An Analysis of the Impact of Structures on Black Descriptive Representation*, 21 AMER. POL. Q. 290, 295 (1993); Timothy R. Sass & Stephen L. Mehay, *The Voting Rights Act, District Elections, and the Success of Black Candidates in Municipal Elections*, 38 J. L. & ECON. 367, 368 (1995); Jeffrey S. Zax, *Election Methods and Black and Hispanic City Council Membership*, 71 SOC. SCI. Q. 339, 354 (1990).

217. Tim R. Sass & Bobby J. Pittman, Jr., *The Changing Impact of Electoral Structure on Black Representation in the South, 1970-1996*, 104 PUB. CHOICE 369, 386 (2000).

elect African American candidates, and on some occasions Hispanic candidates with between forty and fifty percent of the voting age population.²¹⁸

XIII. THE CHANGING LEGAL BASIS OF SECTION 5 OBJECTIONS

The Department of Justice has, from the start, precleared the vast majority of voting changes submitted under Section 5. Its power to object to proposed changes has, however, provided substantial protection to minority voters over the years. Understanding the Department's exercise of its power is key to any assessment of the implementation of Section 5.²¹⁹

The most striking pattern in the Department's objection decisions is the consistent increase over time of objections based on the purpose prong of Section 5, and the consistent decline of objections based on retrogression.²²⁰ During the 1970s the Department rarely cited intent in its objection letters. The Department based only nine objections (just two percent) entirely on purpose. The Department based the vast majority of the objections (297, or seventy-seven percent) on retrogression.²²¹ By the 1980s, the Department based eighty-three objections (twenty-five percent) entirely on the intent requirement and only 146 objections (forty-four percent) on the retrogression standard alone. A new basis for objecting was available in the 1980s, when it was possible to object because the proposed change presented a clear violation of the new Section 2 results test.²²² However, the Department only interposed two objections on this basis alone in the 1980s. In the

218. For the most comprehensive analysis of this issue, see Bernard Grofman, Lisa Handley, & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C.L. REV. 1383, 1395–1403 (2001). For another good analysis, see JOSHUA G. BEHR, RACE, ETHNICITY, AND THE POLITICS OF CITY REDISTRICTING: MINORITY-OPPORTUNITY DISTRICTS AND THE ELECTION OF HISPANICS AND BLACKS TO CITY COUNCILS 4, 103–06 (2004).

219. The analysis of the Department's objection decisions in the following paragraphs is based on a forthcoming empirical study: McCrary et al., *End of Preclearance*, *supra* note 65. In this study the authors examined all objection decisions between 1965 and 2004 (as conveyed to covered jurisdictions in 1,037 letters), and coded them as to the legal basis or bases for the objection.

220. See McCrary et al., *End of Preclearance*, *supra* note 65, app. tbl.1.

221. A small number fell into the category of a technical objection, where the jurisdiction failed to supply the information the Department's guidelines required, making a proper assessment of the change impossible. Although always small in number, technical objections were more common in the 1970s (five percent) than in the 1980s (four percent), and disappeared altogether by the 1990s. The need to apply a consistent coding scheme for all letters between 1968 and 1999 necessitated treating all changes as retrogressive if they satisfied the *Beer* standard. Where the letter referred to the dilutive effect of a change that did not make matters worse for minority voters, the study classified the change as dilutive. There were only thirty-four such non-retrogressive but dilutive plans, nine percent of the redistricting objections in the 1970s.

222. See S. REP. NO. 97-417, at 12 n.31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 189 ("In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2."); see also Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as Amended, 52 Fed. Reg. 490 (Jan. 6, 1987) (codified at 28 C.F.R. § 51.55) (withholding preclearance where "a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2.").

1990s, the Department objected on purpose alone in 151 instances (forty-three percent). Retrogression alone was the basis for only seventy-three objections (twenty-one percent), and only six objections relied entirely on Section 2. Objections to redistricting plans followed a similar pattern. Objections based on purpose alone increased from seven (eleven percent) in the 1970s to seventy-five (forty-four percent) during the next decade, and 112 (fifty-eight percent) in the 1990s. Retrogression alone was the basis for thirty-seven redistricting objections (forty percent) in the 1970s, thirty-five objections (twenty-one percent) in the 1980s, and twenty objections (ten percent) in the 1990s. Section 2 concerns provided the basis for only one redistricting objection in 1990s.²²³

XIV. REVERSAL IN THE COURTS

In a series of redistricting decisions, beginning with a 1993 case, *Shaw v. Reno*,²²⁴ a new 5-4 conservative majority on the United States Supreme Court invalidated majority-black or majority-Hispanic congressional districts in several Southern states under a new constitutional standard thus far applied only to the creation of majority-minority districts.²²⁵ Although these were not Section 5 cases, the Court took pains to criticize the Department's implementation of the preclearance requirements of the Act and, in particular, its view of the Section 5 purpose prong.

In striking down a Georgia congressional redistricting plan, the Court stated that race had been "the predominant factor motivating the legislature" in drawing district lines.²²⁶ As the Court saw it, Georgia had succumbed to improper pressure from the Department of Justice, which, in reviewing redistricting plans in the 1990s, had converted the Section 5 purpose standard into a policy of requiring covered

223. The principal difference between redistricting objections and objections as a whole was that a substantially lower proportion of redistricting objections were based on retrogression than was case for objections as a whole. McCrary et al., *End of Preclearance*, *supra* note 65, app. tbls.2, 3.

224. 509 U.S. 630 (1993).

225. See *Bush v. Vera*, 517 U.S. 952 (1996) (applying strict scrutiny to determine Texas's redistricting attempts in three districts unconstitutional and "not justified by a compelling state interest"); *Shaw v. Hunt*, 517 U.S. 899 (1996) (holding a North Carolina redistricting plan in violation of the Equal Protection Clause "because the state's reapportionment scheme is not narrowly tailored to serve a compelling state interest"); *Miller v. Johnson*, 515 U.S. 900 (1995) (holding Georgia's congressional redistricting plan violates the Equal Protection Clause). The same conservative majority also upheld a court-drawn congressional plan in Georgia that decreased the number of black-majority districts from three to one. See *Abrams v. Johnson*, 521 U.S. 74 (1997). The Court rejected white plaintiffs' racial gerrymandering claim and upheld one congressional plan in North Carolina, however, in *Easley v. Cromartie*, 532 U.S. 234, 237 (2001). See TINSLEY E. YARBROUGH, RACE AND REDISTRICTING: THE SHAW-CROMARTIE CASES 3 (2002) ("[T]his book chronicles the politics of majority-minority districting in North Carolina, *Shaw-Cromartie's* journey through the courts, [and] the cases' significant impact on election law . . .").

226. *Miller*, 515 U.S. at 916 ("[T]he legislature subordinated traditional race-neutral districting principles . . . to racial considerations.").

jurisdictions to “maximize” minority voting strength by creating as many majority-minority districts as possible, no matter what the cost to traditional districting principles.²²⁷ The Court reiterated this view a year later in its decision striking down North Carolina’s congressional redistricting plan in *Shaw v. Hunt*.²²⁸ What drove judicial criticism of the Department’s Section 5 policy in the 1990s, it seems, was the way the Department interpreted factual evidence when applying the purpose standard.

The vehicle by which the Court transformed Section 5 policy proved to be its handling of a declaratory judgement action initiated by the school board in Bossier Parish, Louisiana. On January 24, 2000, the Supreme Court, by a narrow 5-4 majority, fundamentally redefined—and weakened—the concept of discriminatory intent under Section 5 in *Reno v. Bossier Parish School Board (Bossier Parish II)*.²²⁹ Under the new standard, a voting change with an unconstitutional racial purpose, no matter how strong the evidence of discriminatory intent, would require preclearance unless the evidence also showed that the change was intended to make matters worse for minority voters than under the status quo—which the Court termed “retrogressive intent.”²³⁰ In the guise of making the definition of purpose under Section 5 congruent with the definition of retrogressive effect, the decision effectively minimized use of Section 5 as a weapon for protecting minority voters from discrimination.

The impact of the Supreme Court’s decision in *Bossier Parish II* was dramatic, as measured by the number of objections interposed by the Department in its wake. Between the Court’s decision on January 24, 2000, and June 25, 2004, the Department interposed only forty-one objections, as compared with 250 objections during a comparable period a decade earlier.²³¹ Moreover, the Department based

227. *Id.* at 924–25 (“Instead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts.”). The Court noted that the Justice Department “disavows having had that policy,” and that it “seems to concede its impropriety.” *Id.* The majority opinion nevertheless relied on “the District Court’s well-documented factual finding.” *Id.* at 925. The District Court opinion is found at *Johnson v. Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994).

228. 517 U.S. 899, 913 (1996) (“It appears that the Justice Department was pursuing in North Carolina the same policy of maximizing the number of majority-black districts that it pursued in Georgia.”).

229. 528 U.S. 320 (2000). The Court’s initial opinion struck down the Department’s “clear violation of Section 2” test but remanded to the lower court certain questions regarding the purpose prong of Section 5 that were ultimately resolved in *Bossier II*. *Reno v. Bossier Parish Sch. Bd. (Bossier Parish I)*, 520 U.S. 471, 476–77, 483, 490 (1997).

230. *Bossier Parish II*, 528 U.S. at 326; *see also id.* at 341 (“In light of the language of § 5 and our prior holding in *Beer*, we hold that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose.”)

231. I am not arguing that there would likely have been 250 objections after January 2000 had *Bossier Parish II* not eliminated the long-standing Section 5 purpose standard. Doubtless the number of potentially objectionable changes would have been somewhat lower than in the 1990s due to changed political circumstances. Where the Democratic Party controlled the legislature, the increased role of minority officeholders in the decision-making process in covered jurisdictions due to earlier successes

virtually all of these objections on a finding of retrogressive effect; at most, two of the forty-one objections were based entirely on the elusive concept of retrogressive intent.

XV. THE ROLE OF THE COURTS IN IMPLEMENTING THE VOTING RIGHTS ACT

The reasons for the success of the Voting Rights Act are easily summarized. First, the statute explicitly gave great authority to the federal courts—and to the Department of Justice acting as a surrogate for the courts—to enforce its provisions. Second, these provisions were straightforward and easily implemented, requiring only changes in voter registration procedures, the conduct of balloting, or the method of election in the affected jurisdictions (all already precisely regulated by state law or local ordinance). Third, for the most part, the courts enforced the Act vigorously along the lines defined by a supportive Supreme Court, even though these complex, fact-intensive lawsuits came to require great quantities of time and effort, often by three-judge panels rather than a simple trial court. Fourth, Congress proved consistently supportive of expanding minority voting rights, endorsing the prohibition on minority vote dilution in 1970, expanding coverage to language minorities in 1975, and establishing a clear statutory results test in 1982. Congressional support reflected the general public acceptance of minority voting rights, where remedies did not require whites (except perhaps incumbent officeholders) to give up individual benefits. Finally, once remedies were in place—typically single-member district plans that gave minority voters a reasonably good chance of electing candidates of their choice (usually at less than their proportion of the voting-age population)—the Court required no further monitoring.

The impact of judicial implementation depends, of course, on the efficacy of the remedies typically ordered by the courts. In the case of voting rights, the success of the Act in the South is usually measured in increased black voter participation and representation. Because racially polarized voting has consistently been the norm in the South, large or white-majority districts rarely elected black voters, but blacks were typically able to win in black-majority districts drawn to satisfy the Voting Rights Act. Once serving in the governing body or in the legislature, however, minority officeholders were successful only to the degree that they were able to participate in winning coalitions, reshaping the agenda to better meet the needs of their constituents. These goals are beyond the scope of the remedies possible under the Act.

Ultimately the continued effectiveness of civil rights policies depends upon the degree to which the case law supports vigorous enforcement. The Supreme Court's opinions in the so-called "racial gerrymandering" or *Shaw* cases, and its decision

in enforcing the Voting Rights Act might have occasioned fewer objectionable changes. On the other hand, black elected officials would likely have had little influence in Republican-controlled legislatures. That said, the gap between forty and 250 is substantial, and likely cannot be explained by these other changes alone.

in *Bossier Parish II* have eroded confidence in the future of minority voting rights.²³² This erosion of confidence is one of the unfortunate consequences of policy implementation through the judicial process.

XVI. CONCLUSION

In sum, the enormous increase in minority electoral participation and representation in the South since 1965 is directly attributable to the effective implementation of the Voting Rights Act. Its success stems from the power given to the courts and to the Department of Justice to conduct searching inquiries into the relationship between race and voter choice at the local and state level, and to assure through legally enforceable decisions that minority voters compete with the majority on a level playing field. Those critics who lament the Act as an unwarrantable intrusion into the political process are now beginning to be quoted approvingly in court decisions hostile to minority voting rights. The critics are right in saying that the Act is intrusive. In light of the continued level of racially polarized voting in most areas of the South, alas, the historical record fails to indicate whether fair elections could have been achieved in the South without it.

232. See Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 289–300, 310–11 (1995–96); McCrary et al., *End of Preclearance*, *supra* note 65; Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L. J. 271, 273–74 (1995).

D · A · W

D E R F N E R
A L T M A N &
W I L B O R N

July 17, 2006

The Honorable Senator Orrin Hatch
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Senator Hatch:

It was a pleasure to appear before the Senate Judiciary Committee on May 17, 2006, to testify about the Voting Rights Act. One of the best parts of testifying was the care and attention you gave to the issues.

You asked each of us to comment on Stuart Taylor's article in the *National Journal* on May 15, 2006. I read the article carefully, and then re-read it. Unfortunately, whatever serious issues Mr. Taylor raises are obscured by his redisposition that it is impossible to give a ready response. Just one example is enough to make my point: his treatment of the *Bossier Parish* cases.

In paragraph 13 of his article, he describes the original purpose of Section 5: "to prevent evasion by the state and local governments with the worst histories of suppressing the black vote." This is a goal he evidently approves.

Yet, eight paragraphs later, he points with obvious distaste to a provision in the pending bill which would reverse the Supreme Court's ruling in the *Bossier Parish* cases. He trivializes the issue by describing the *Bossier Parish* change simply as one the Justice Department "subjectively" found "unfair to minorities," and further dismisses it because minority voters "were no worse off than before."

Well, what was at issue in *Bossier Parish*? Before the Voting Rights Act, no black person had ever been elected to the Parish Council, and that situation remained unchanged into the 1990s, when it was undisputed that Parish Council members drew a new redistricting plan with the fixed purpose of guaranteeing that blacks would continue to be shut out. It is hard to imagine a clearer case of a Parish seeking to *evade* the Act which had enfranchised so many black voters, even though by insuring continuation of a white supremacy Council, the evasion left black voters "no worse off than before."

Senator Hatch
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One can debate whether the Supreme Court correctly interpreted the Act in the *Bossier Parish* case. One might even debate whether the Act should apply to a *Bossier Parish*-type of case of intentional discrimination. Mr. Taylor has done neither of these things. Instead, he has presented a skewed view of the facts that turns his article into propaganda more than analysis.

Again, Senator Hatch, it is always a pleasure to appear before you. Thank you for that opportunity and for the opportunity to comment on Stuart Taylor's article.

With best regards.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Armand Derfner', with a long horizontal flourish extending to the right.

Armand Derfner

AD/sah