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

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

The United States Supreme Court determined in a 5–4 decision, Reno v. Bossier Parish School Board, 528 U.S. 230 (2000), that Section 5's prohibition on the enforcement of electoral changes which have a discriminatory purpose does not apply to electoral changes that were not intended to "retrogress," or make worse, the

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position of minority voters. This interpretation upset a long-standing consensus among executive, legislative, and judicial actors that Section 5 prohibited all changes enacted with an unconstitutional discriminatory purpose, not just those which made minority voters worse off. This Article explains how the Bossier *majority dramatically transformed Section 5 and demonstrates, through an empirical analysis of the Justice Department's Section 5 objection letters, how it significantly weakened the statute's ability to protect minority voting rights. It concludes by arguing that Congress should amend Section 5 in 2007 to supercede the* Bossier *decision.*

INTRODUCTION

In August 2007, several special provisions of the Voting Rights Act of 1965[1]—the "preclearance" requirement in Section 5 of the Act, the authority of the Department of Justice to use federal examiners and observers,

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

and protections for the voting rights of language minorities—will expire, unless extended by congressional action. Of the provisions due to expire in 2007, the most important for the protection of minority voting rights is the preclearance requirement set forth in Section 5.[2] Jurisdictions covered by the preclearance process, mostly in states of the former Confederacy, must obtain federal approval of voting changes, either through a declaratory judgement action before a three-judge panel in the District of Columbia or from the Department of Justice, before these changes become legally enforceable.[3] In order to secure preclearance of desired changes, covered jurisdictions have over the years agreed to remove barriers to registration and voting, as well as to eliminate election structures that dilute minority voting strength.[4] Approval requires proof by the jurisdiction that the change, in the language of the statute, "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[5]

Prior to January 2000, the definition of discriminatory "purpose" under Section 5 had been understood as synonymous with the term's meaning in constitutional cases: a practice designed by a covered jurisdiction to restrict access to registration or voting, or to dilute minority voting strength, in violation of the Fourteenth or Fifteenth Amendments was thought to be prohibited by the purpose requirement of Section 5.[6] For a decade federal courts had treated the assessment of discriminatory effect under Section 5 as equivalent to the measurement of discriminatory effect in a constitutional challenge.[7] However, in a key 1976 decision, *Beer v. United States*,[8] the Supreme Court bifurcated the statutory and

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2. 42 U.S.C. § 1973c (2000).

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

4. Drew S. Days III, *Section 5 and the Role of the Justice Department, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 52, 52–53 (Bernard Grofman & Chandler Davidson eds., 1992). The implementation and impact of Section 5 is assessed by the case studies in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (Chandler Davidson & Bernard Grofman eds., 1994).

5. 42 U.S.C. § 1973c.

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

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

8. 425 U.S. 130 (1976).

constitutional effect standards by announcing that in the Section 5 context, a voting change likely to produce a racially discriminatory effect prohibited by either the Fourteenth or Fifteenth Amendments was entitled to preclearance unless it *would make matters worse* for minority voters than the existing plan, an effect the Court referred to as "retrogression."[9]

On January 24, 2000, the United States Supreme Court, by a narrow 5–4 majority, fundamentally redefined—and weakened—the concept of discriminatory intent under Section 5 in *Reno v. Bossier Parish School Board (Bossier II)*.[10] Under the new standard, a voting change with an unconstitutional racial purpose, no matter how strong the evidence of discriminatory intent, would have to be precleared unless the evidence also showed that the change was intended to make matters worse for minority voters than under the *status quo*—which the Court termed "retrogressive intent."[11] 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.[12]

Determining the impact of this doctrinal change on Section 5 enforcement by the Department of Justice is the central thrust of this Article. The key evidence on which we rely is found in the 996 letters from 1968 through 1999—and the 41 letters after the *Bossier II* decision—in which the Assistant Attorney General for Civil Rights explained the basis for objecting to voting changes. These objection letters, unlike court opinions regarding preclearance, do not set forth the full body of evidence on which the Department relies in making each decision, and

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

10. 528 U.S. 320 (2000) [hereinafter *Bossier II*]. The Court's initial opinion, *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997) [hereinafter *Bossier I*], decided a related issue, discussed below, but remanded to the lower court certain questions regarding the purpose prong of Section 5, which were ultimately resolved in *Bossier II*.

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

12. Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179 (2001) (providing a brief but careful analysis of the Court's *Bossier II* decision); *see also* Alaina C. Beverly, Case Note, *Lowering the Preclearance Hurdle:* Reno v. Bossier Parish School Board, 5 MICH. J. RACE & L. 695 (2000). There are other articles that are less illuminating. *See* Charlotte Marx Harper, *A Promise for Litigation:* Reno v. Bossier Parish School Board, 52 BAYLOR L. REV. 647 (2000); Lindsay Ryan Erickson, Note, *Threading the Needle: Resolving the Impasse Between Equal Protection and Section 5 of the Voting Rights Act*, 54 VAND. L. REV. 2057 (2001); David Harvey, Note, *Section 5 of the Voting Rights Act Does Not Bar Preclearance of a Redistricting Plan Enacted With a Discriminatory But Nonretrogressive Purpose:* Reno v. Bossier Parish Sch. Bd., 39 DUQ. L. REV. 477 (2001).

thus do not provide a basis for evaluating the accuracy of the Department's fact-finding.[13] The letters are, however, the official record of the legal bases asserted for each objection and thus constitute the essential starting point for an analysis of the Department's preclearance policy.[14]

Our analysis reveals that by the 1990s the intent, or purpose, prong of Section 5 had become the dominant basis for objections to discriminatory voting changes. During that decade an astonishing 43 percent of all objections were, according to our assessment, based on discriminatory purpose alone (see *infra* Table 2).[15] Thus, a key issue for Congress in determining how to deal with the preclearance requirement of the Act due to expire in 2007—assuming it seeks to restore the protection of minority voting rights that existed before January 2000—is whether to revise the language of Section 5 so as to restore the long-accepted definition of purpose thrown out by *Bossier II*. We believe that the analysis in the following pages provides critical evidence for the debate over reauthorization and revision of the Voting Rights Act.[16]

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

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

14. Two resourceful studies of Section 5 objection policy have previously utilized these letters as a major resource. Neither, however, has undertaken a comprehensive quantitative analysis of the legal basis asserted by the Department for its decisions. *See* Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189 (1983); Posner, *supra* note 6.

15. Another 19 percent of the Department's objections were based on a combination of discriminatory purpose and retrogressive effect. Arguably this 19 percent would have been interposed even under the new definition of intent imposed by the Supreme Court in *Bossier II*.

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

I. EVOLVING DEFINITIONS OF PURPOSE AND EFFECT

A. *Administrative Review Under Section 5*

During the first three years after adoption of the Act in 1965, the preclearance requirement set forth in Section 5 was rarely invoked.[17] During that time, however, Southern legislatures, faced with the prospect that Black voters might cast a majority of the ballots in some single-member districts, often shifted to at-large election systems, numbered place or runoff requirements, or gerrymandered district lines to minimize the number of Black-majority districts.[18] Active enforcement of Section 5 to deal with such changes awaited the 1969 ruling in *Allen v. State Board of Elections*.[19] In that decision, the Supreme Court determined that all changes affecting voting, including measures with the potential to dilute minority voting strength as well as procedures for registering or casting votes, required preclearance by three-judge trial courts in the District of Columbia or through administrative review by the Department of Justice.[20] When the changes at issue were submitted for preclearance, the Department objected to those that appeared likely to have a discriminatory effect.[21]

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17. Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 578 n.244 (1973).

18. *See, e.g., id.* at 553–55, 572–74; DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 203–06, 310–13 (1978); FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965 34–77 (1990); Peyton McCrary, et al., *Alabama, in* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (Chandler Davidson & Bernard Grofman eds., 1994); LAUGHLIN MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA 131–36 (2003).

19. 393 U.S. 544 (1969).

20. *Id.* at 569. The Court based its decision in *Allen* on its reasoning in the Alabama reapportionment case *Reynolds v. Sims*, 377 U.S. 533, 555 (1964): "[T]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen v. State Bd. of Elections*, 393 U.S. 544, 566 (1969). Abigail Thernstrom has observed that the Mississippi laws at issue in *Allen* were racially discriminatory in both intent and effect. ABIGAIL THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987). "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.

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

Preclearance review by the Department provides a quicker and less expensive alternative to litigation and the Department seeks to function as a "surrogate" for the District of Columbia trial courts.[22] The Attorney General has always delegated responsibility for preclearance decisions to the Assistant Attorney General ("AAG") who heads the Civil Rights Division. Administrative reorganization in 1969 produced a separate section within the Civil Rights Division specializing in voting rights. The new Voting Section provided the factual investigation for preclearance reviews and made detailed recommendations to the AAG for Civil Rights. Prodded by liberal critics in Congress, the Department developed detailed guidelines for enforcing Section 5 that were, in turn, endorsed by the Supreme Court.[23] Other Supreme Court decisions over the next decade expanded the scope of Section 5 and strengthened the Department's enforcement powers.[24]

The Supreme Court, however, agreed to hear arguments and issue opinions in only a few cases. As a result, the District of Columbia trial courts who hear preclearance lawsuits by the jurisdictions played a major role in shaping Section 5 case law. Often, the Supreme Court declined to hear oral argument and summarily affirmed the trial court's decision. Although summary affirmances simply endorse the lower court's decision and not necessarily its reasoning, they are binding precedents for the lower courts and the Department of Justice until contradicted by a future Supreme Court decision.[25]

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

23. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 Fed. Reg. 18,186 (Sept. 10, 1971). The guidelines, which have been revised several times over the years, are found at 28 C.F.R. pt. 51 (2004). The Supreme Court found the regulations "wholly reasonable and consistent with the Act." Georgia v. United States, 411 U.S. 526, 541 (1973); *see* HOWARD BALL ET AL., COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT 66–73, 91–93 (1982) (discussing the development of the procedures for enforcing Section 5); STEVEN F. LAWSON, IN PURSUIT OF POWER: SOUTHERN BLACKS AND ELECTORAL POLITICS, 1965–1982, at 162–178 (1985).

24. *See* Drew S. Days III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, *in* MINORITY VOTE DILUTION 164, 167–80 (Chandler Davidson ed., 1984); John P. MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U. L. REV. 107 (1979).

25. Hicks v. Miranda, 422 U.S. 332, 344 (1975) ("[L]ower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not.'"); *see also* Picou v. Gillum, 813 F.2d 1121 (11th Cir. 1987) ("A summary affirmance by the Supreme Court has binding precedential effect."). On the other hand, the precedential value of a summary affirmance has distinct limits. *See* Anderson v. Celebrezze, 460 U.S. 780, 786 n.5 (1983) ("We have often recognized that the precedential value of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.'"); Mandel v. Bradley, 432 U.S. 173, 176 (1977) ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below [but does] prevent lower courts from

Section 5, like the Fourteenth and Fifteenth Amendments, has both a purpose and an effect prong.[26] The Supreme Court first addressed the legal standard to be applied in assessing the purpose requirement in the context of a municipal annexation case, *City of Richmond v. United States*.[27] The Court emphasized that preclearance should be denied if a voting change were racially motivated so as to violate the Constitution: "An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute."[28] For this reason, the Court remanded the case for an analysis of the purpose issue.[29]

In the City of Richmond case, however, the Court gave an unusual twist to the effect standard where dilutive annexations were concerned. Municipalities facing potential objections to such annexations could obtain preclearance by adopting an election plan that fairly reflected

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coming to conclusions on the precise issues presented and necessarily decided by those actions."); *see also* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 277, 279–85, 333–35 (8th ed. 1993); 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4003 (2d ed. 1996).

26. 42 U.S.C. § 1973c (2000). We use the terms "purpose" and "intent"—and the terms "result" and "effect"—interchangeably here.

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

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

29. *City of Richmond*, 422 U.S. at 378. The change at issue in the purpose analysis on remand was a settlement plan to which the city and the Justice Department had recently agreed. Dissenting Justices Brennan, Marshall, and Douglas would have denied preclearance of the annexation based on the evidence of discriminatory intent as to the original annexation decision, in which the city retained at-large elections.

> [T]he record is replete with statements by Richmond officials that prove beyond question that the predominant (if not the sole) motive and desire of the negotiators of the 1969 settlement was to acquire 44,000 additional white citizens for Richmond, in order to avert a transfer of political control to what was fast becoming a Black population majority.

422 U.S. at 382 (Brennan, J., dissenting); *see* JOHN V. MOESER & RUTLEDGE M. DENNIS, THE POLITICS OF ANNEXATION: OLIGARCHIC POWER IN A SOUTHERN CITY 88–93, 98–102, 107–09 (1982) (additional evidence of racial purpose); *see also* THERNSTROM, *supra* note 20, at 146 (agreeing that "in Richmond fear of Black political control had been the motivating force" behind the annexation).

minority voting strength for the enlarged city, normally a single member district system, by its decision.[30] Otherwise, such cities would likely be condemned to declining tax revenues, as well-off Whites moved to nearby suburbs to escape racial integration.[31] As a result of this decision, departmental objections to annexations often persuaded Southern municipalities to give up at-large elections and switch to single-member district plans.[32]

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

The Court's first major restriction on the scope of the Act was announced in its 1976 decision *Beer v. United States*.[33] The city of New Orleans sought a declaratory judgement preclearing its redistricting plan following the 1970 census. The trial court refused to preclear the plan, on the grounds that it had the effect of diluting minority voting strength as defined by the Supreme Court in the landmark Fourteenth Amendment case *White v. Regester*.[34] The Supreme Court reversed the lower court, however, ruling that the term "effect" has a different meaning under Section 5 than under the Constitution. It determined that, in the preclearance context, discriminatory "effect" was to be defined as "retrogression," a newly-minted term that described changes which place minority voters in a *worse* position than under the status quo.[35] As a result of *Beer*, changes that do not make matters worse for minority voters are entitled to preclearance under the effect prong of Section 5, even where the new method of election appears likely to dilute minority voting

30. *City of Richmond*, 422 U.S. at 370–71.

31. *Id.* at 371.

32. During the years 1975–1980, for example, annexations accounted for the largest single type of voting change to which the Department of Justice objected, and most were withdrawn only when the municipality switched from at-large to single-member district elections. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 65, 69 tbl. 6.4 (1981).

33. 425 U.S. 130 (1976).

34. 412 U.S. 755 (1973); *see* Beer v. United States, 374 F. Supp. 363, 384, 387–90, 393–99, 401–02 (D.D.C. 1974). At that time the constitutional standard was not understood as requiring proof of discriminatory intent. *See* James U. Blacksher & Larry T. Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden: *Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 22–26 (1982); Katherine Inglis Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 883–88 (1982); Timothy G. O'Rourke, *Constitutional and Statutory Challenges to Local At-Large Elections*, 17 U. RICH. L. REV. 39, 51–55 (1982); Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 722–26 (1983).

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

strength or otherwise discriminate, as in voting changes affecting registration or casting a ballot.[36]

Whether or not the *purpose* of the change was racially discriminatory was not before the Court in *Beer*,[37] but it referred to the purpose prong of Section 5 in terms similar to *City of Richmond*: "We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 *unless* the new apportionment itself so discriminates on the basis of race or color *as to violate the Constitution*."[38] The Court's reference to a constitutional violation appears understandable only as a reference to the purpose test in Fourteenth or Fifteenth Amendment cases,[39] and that is the interpretation placed upon this wording by the Supreme Court itself in subsequent preclearance cases.[40]

C. *The Purpose Standard After* Beer

The Supreme Court summarily affirmed *Wilkes County v. United States*, a Georgia case, which exemplifies the purpose standard after *Beer*.[41] The case involved a change from single member districts to at-large elections in the early 1970s for both county commission and school board. Voting patterns were racially polarized and no Black candidates had been elected to either governing body countywide, despite the fact that African Americans made up 43 percent of the population.[42] In *Wilkes County*, the

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36. *See, e.g.*, Motomura, *supra* note 14, at 204 (regarding the application of the retrogression test to individual ballot access).

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

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

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

40. 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*, 479 U.S. at 469, 471 n.11, 472 (1987). Even justices who opposed a strong Voting Rights Act seemed to agree. See, for example, the observation that "it is clear that if the proposed changes would violate the Constitution, Congress could certainly prohibit their implementation." City of Rome v. United States, 446 U.S. 156, 210 (1980)(Rehnquist, J., dissenting).

41. 450 F. Supp. 1171 (D.D.C.), *aff'd mem.*, 439 U.S. 999 (1978).

42. *Wilkes County*, 450 F. Supp. at 1175–77.

trial court applied the constitutional purpose standard as set forth by the Supreme Court in its recent *Arlington Heights* decision.[43]

The starting point for the trial court was the fact that the change to at-large elections followed a substantial increase in minority voter registration after the Voting Rights Act, thus putting continued White control at risk under the single-member district plan.[44] No African Americans had been elected to office, served as Democratic party officials in the one-party county, or been appointed to fill vacancies for elected offices.[45] Nor had any Black citizens been consulted about the decision to adopt an at-large plan. The county claimed that the purpose of the change was solely to satisfy the one person, one vote requirement, but the court found that argument a mere pretext; districts could simply have been equalized in population after the 1970 census instead of shifting to countywide elections.[46] The county failed the *Arlington Heights* purpose test and *Beer*'s retrogression test; thus, its at-large plan was not entitled to preclearance.[47]

How the purpose standard should be applied where the election plan is *not* retrogressive was exemplified by another influential trial court decision summarily affirmed by the Supreme Court, the Georgia congressional redistricting case *Busbee v. Smith*.[48] The case turned on the facts surrounding the fifth congressional district, centered in the capital city of Atlanta. Black civil rights leader Andrew Young had represented the district during the mid-1970s, when Whites were a majority of its voting-age population, but when Young left to head the United Nations delegation in 1977 the district elected a moderate White Democrat, Wyche Fowler. After the 1980 census the legislature increased the Black population percentage in the fifth district to 57 percent, but Whites were still 54

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

44. 450 F. Supp. at 1176.

45. *Id.* at 1174–75.

46. *Id.* at 1175, 1177–78.

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

48. 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983).

percent of the registered voters.[49] Because voting patterns had become more racially polarized in recent years, most observers believed that the Black concentration in the newly configured district was not great enough to provide African American voters an equal opportunity to elect a candidate of their choice.[50]

Applying *Arlington Heights*, the trial court found abundant evidence, both direct and circumstantial, that "[t]he Fifth District was drawn to suppress Black voting strength."[51] For example, a key player in the legislative decision-making process, Joe Mack Wilson, House Reapportionment Committee Chair, complained to fellow legislators that "the Justice Department is trying to make us draw nigger districts and I don't want to draw nigger districts."[52] The trial court also found that Speaker Tom Murphy "purposefully discriminated on the basis of race in selecting the House members of the conference committee where the final redistricting plan was determined," in that he selected White legislators "he knew would adamantly oppose the creation of a congressional district in which Black voters would be able to elect a candidate of their choice," and refused to appoint any Black members to the conference committee.[53]

Because the redistricting plan had a racially discriminatory purpose, it was not entitled to preclearance, even though it was ameliorative rather than retrogressive in effect. As the three-judge court stated, "[s]imply demonstrating that a plan increases Black voting strength does not entitle the State to the declaratory relief it seeks; the State must also demonstrate the absence of discriminatory purpose."[54] The court found the plan objectionable "because State officials successfully implemented a scheme designed to minimize Black voting strength," and as a result the plan was "not free of racially discriminatory purpose."[55]

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49. *Busbee*, 549 F. Supp. at 498. The district to which Young was elected in 1972, thanks in part to an unusual 25 percent White crossover vote, was adopted following a Department of Justice objection to an earlier plan, drawn in 1971 with the goal of preventing the election of an African American to Congress. McDonald, *supra* note 18, at 149–50.

50. Busbee, 549 F. Supp. at 499.

51. *Id.* at 515; *see also* MCDONALD, *supra* note 18, at 168–72 (providing additional evidence of racial purpose).

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

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

54. *Id.* at 516.

55. *Id.* at 518.

D. *The Issue of Retrogressive Intent*

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

> Whether a Congressional reapportionment plan that does not have the purpose of diminishing the existing level of Black voting strength [that is, an *intent to retrogress*] can be deemed to have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act.[56]

By refusing to hear oral argument in *Busbee* and by affirming the opinion of the trial court, the Supreme Court gave observers every reason to believe that the purpose prong of Section 5 was not, as Georgia argued, limited to an intent to make things worse for minority voters, but was instead as broad as the constitutional purpose standard.[57] After all, the Supreme Court had made clear that summary affirmances "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions."[58] Thus, *Busbee* bound the Section 5 trial courts and the Department of Justice when dealing with comparable voting changes to reject the theory of retrogressive intent.

In 1987, the Supreme Court agreed to hear a case where a jurisdiction presented an "intent to retrogress" theory in *City of Pleasant Grove v. United States*.[59] The factual context in this case was unusual. Pleasant

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

57. The purpose prong of Section 5 was also key in the Supreme Court's decision in the Port Arthur, Texas annexation case. *City of Port Arthur*, 459 U.S. 159, *aff'g* 517 F. Supp. 987 (D.D.C. 1981). The City of Port Arthur, Texas had unsuccessfully sought preclearance of a series of annexations and consolidations, agreeing to switch from its at-large system to a series of mixed plans that nevertheless still diluted African American voting strength. 517 F. Supp. at 992–1008. The trial court found that the city's choices of election methods at each stage were made with discriminatory intent. *Id.* at 991, 1011. By the time the city's appeal reached the Supreme Court, the key remaining issue was whether Port Arthur could retain a majority vote requirement for three at-large seats in a mixed election plan adopted in an effort to settle the case. 459 U.S. at 164–65. Because the runoff requirement had initially been adopted with a discriminatory purpose and retained a dilutive effect, the Court decided that the discriminatory impact of the annexations and consolidations had been insufficiently neutralized and was not entitled to preclearance. *Id.* at 161–62; *see also* Blumstein, *supra* note 39, at 688; Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 J.L. & POL. 751, 767–70 (1988).

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

59. 479 U.S. 462 (1987).

Grove, Alabama, a virtually all-White city near Birmingham in industrial Jefferson County, sought preclearance of a series of annexations. Its refusal to annex nearby Black population concentrations was part of what the trial court called "an astounding pattern of racial exclusion and discrimination in all phases of Pleasant Grove life," and as a result, the city had remained an "all-white enclave in an otherwise racially mixed area of Alabama."[60] The annexations at issue provided further evidence of racial discrimination in the city's annexation policy.[61]

The city claimed that there could be no retrogressive effect to its annexation policies because there were no Black people in the city, and thus no one whose voting strength could be worsened.[62] The *Pleasant Grove* majority rejected this view, pointing out that "Section 5 looks not only to the present effects of changes, but to their future effects as well," adding that the purpose requirement also applied to "anticipated as well as present circumstances."[63] The city also argued that proof of discriminatory intent without proof of discriminatory effect was insufficient to deny preclearance. The trial court gave short shrift to that argument.[64] The Supreme Court agreed: "Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent."[65]

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

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

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

62. *Id.* at 470–71. The dissenters also adopted this view. *See id.* at 475–76 (Powell, J., dissenting); *see also* THERNSTROM, *supra* note 20, 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.").

63. 479 U.S. at 471. The dissent by Justice Powell rejected this interpretation as "purely speculative." *Id.* at 472 (Powell, J., dissenting).

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

65. 479 U.S. at 469 (quoting *City of Rome*, 446 U.S. at 172).

retrogressive effect on the voting rights of Blacks."[66] The majority of the Court, however, observed that it had rejected such reasoning since the *City of Richmond* case. A change motivated by a racially discriminatory purpose "has no legitimacy under our Constitution or under the statute," the Court had ruled then, "*whatever its actual effect may have been or may be*."[67] In light of the outcome in *Bossier II* a dozen years later, it is ironic that Justice Scalia joined the majority opinion in *Pleasant Grove*, and thus rejected the retrogressive intent theory in favor of the constitutional purpose standard used in previous Section 5 cases.[68]

E. *The "Clear Violation of Section 2" Rule*

In 1980, the Supreme Court decided *City of Mobile v. Bolden*,[69] a Fourteenth Amendment challenge to that city's use of at-large elections. The Court ruled that plaintiffs must prove not only that the at-large system has a discriminatory effect due to racially polarized voting, but also that it was adopted or maintained for the purpose of diluting minority voting strength.[70] The Court remanded the case, and a companion suit challenging at-large school board elections in Mobile County, for a new trial on the intent question. The plaintiffs prevailed under the intent standard after demonstrating that a racial purpose lay behind shifts to at-large elections in 1876 and 1911.[71]

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

67. *Id.* at 471 n.11 (quoting *City of Richmond*, 422 U.S. at 378–79 (1975)) (emphasis added).

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

69. 446 U.S. 55 (1980).

70. *Id.* at 66–70. Although supported by only a plurality, Justice Potter Stewart's opinion was the prevailing view on the Court. Not only did the opinion require proof of intent, but it appeared to require a more difficult standard for inferring racial purpose through circumstantial evidence. The Fifth Circuit Court of Appeals had anticipated the intent requirement in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978); *Bolden v. City of Mobile*, 571 F.2d 238 (5th Cir. 1978); *Blacks United for Lasting Leadership v. City of Shreveport*, 571 F.2d 248 (5th Cir. 1978); and *Thomasville Branch of NAACP v. Thomas County*, 571 F.2d 257 (5th Cir. 1978). *See* O'Rourke, *supra* note 34 at 56–57.

71. Bolden v. City of Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982); Brown v. Bd. of Sch. Comm'rs, 542 F. Supp. 1078 (S.D. Ala. 1982); *see also* Peyton McCrary, *History in the*

In the view of many observers, the *Mobile* decision was inconsistent with the intent of Congress when it adopted and expanded the Voting Rights Act in 1965, 1970, and 1975. A substantial majority in both houses revised Section 2 of the Voting Rights Act in 1982 to outlaw election methods that result in diluting minority voting strength without requiring a judicial finding of discriminatory intent.[72] In creating a new statutory means of attacking minority vote dilution, Congress cited the "totality of circumstances" test of *White* and *Zimmer* as the evidentiary standard to be used in applying the Section 2 results test. Vote-dilution cases previously decided under the Fourteenth Amendment would henceforth be tried under the new statutory standard.[73]

At that time, Congress did not revise the language of Section 5.[74] The legislative history provides some evidence that Congress believed an objection would be required where the voting change would violate the new Section 2 results standard. According to the 1982 Senate report, "In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2."[75]

Democratic Senator Edward Kennedy and Republican Representative James Sensenbrenner, two key sponsors of the revised statute, each pointed to this language in the Senate Report during floor debates, interpreting it to mean that changes which violated Section 2 would now be objectionable under Section 5 as well.[76] 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

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Courts: The Significance of City of Mobile v. Bolden, *in* MINORITY VOTE DILUTION, 47–63 (Chandler Davidson ed., 1984) (summarizing the testimony in both cases).

72. *See, e.g.*, Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, *in* MINORITY VOTE DILUTION 148–49, 151–63 (Chandler Davidson ed., 1984) (describing the 1982 revisions to Section 2); Parker, *supra* note 34, at 746–64; Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983) (providing the most detailed account of the legislative actions and that led to the passage of the 1982 amendments).

73. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1265 (1989); Blacksher & Menefee, *supra* note 34, at 31–32.

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

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

76. 128 Cong. Rec. S7095 (daily ed. June 18, 1982) (remarks of Sen. Kennedy); *id.* H3841 (June 23, 1982) (remarks of Rep. Sensenbrenner). The majority in *Bossier I* ignores all evidence on this issue in the *Congressional Record*. *See* 520 U.S. 471, 484 (1997).

view.[77] Congressional opponents of the 1982 amendments dispute this view.[78]

In 1985, the Department of Justice proposed the first revision of its Section 5 guidelines following the 1982 amendments.[79] As finally adopted, a new provision required that preclearance be withheld where "a bar to implementation of the change is necessary to prevent a clear violation of amended Section 2."[80] This new test was relatively short-lived; a decade later, the Supreme Court determined in *Bossier I* that preclearance could not be denied simply because the proposed change would clearly violate Section 2.[81] Nor was the new Section 2 test often the sole basis of an objection; the two principal reasons for objecting to voting changes continued to be retrogressive effect and unconstitutional purpose.[82]

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77. 128 Cong. Rec. H3840-41 (June 23, 1982) (remarks of Rep. Edwards).

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

79. A proposed revision was published for comments on May 6, 1985. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 50 Fed. Reg. 19,122 (proposed May 6, 1985). Oversight hearings were then held on the proposed guidelines. *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 99th Cong. (1985) [hereinafter *Oversight Hearings*]. Comments were received from 120 persons or organizations, and the final version was published at 52 Fed. Reg. 486 (Jan. 6, 1987).

80. 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 79, at 49, 149–53, 167–71. On the other hand, two academic critics, Professors Timothy O'Rourke and Katherine Butler, contended that the legislative history of the 1982 Act provided an insufficient basis for incorporating Section 2 in a Section 5 analysis at all, even with the Department bearing the burden of proof. *Id.* at 35–38, 63, 69–75.

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

82. We base this observation on our own quantitative findings presented below. *See also* Posner, *supra* note 6, at 84 (contending, for example, that in the 1990s, "only one [redistricting] objection relied exclusively on Section 2").

II. CHANGING PATTERNS OF PURPOSE AND EFFECT

A. *The Research Design*

The central focus of the empirical research reported in Part II is to assess the legal basis asserted for objections by the Department of Justice between 1965 and the end of 1999.[83] The data we examine are 996 letters interposing objections to voting changes in jurisdictions covered by the preclearance requirements of the Act.[84] Where a single letter included objections to changes affecting more than one governing body (e.g., both school board and county commission in the same jurisdiction, or both state house and state senate redistricting plans), we have treated this as two objections. On the other hand, if a letter itemized objections to several different features of a proposed change (e.g., objections to the use of at-large elections, a numbered post requirement, staggered terms, and a majority vote requirement for a city council), we treated this as a single objection where only a single governing body was involved.[85]

We divided voting changes into five basic groups: 1) ballot access; 2) at-large elections and multi-member districts; 3) enhancing devices; 4) redistrictings; 5) annexations and consolidations (see Table 1).[86] Often, a

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

84. As we noted at the outset, these objection letters, unlike court opinions regarding preclearance, do not set forth the full body of evidence on which the Department relies in making each decision, and thus do not provide a basis for evaluating the accuracy of the Department's fact-finding. We are not attempting to assess the *accuracy* of the Department's decision-making; we merely seek to identify the legal theory on which each objection was based. The objection letters, which typically reflect the involvement of numerous analysts, reviewers, and decision makers, are not always models of clarity in explanation, especially in the early 1970s. Our analysis of the legal basis asserted in each letter is guided by the Department's Section 5 guidelines, the briefs filed by the parties in Section 5 declaratory judgment actions, and by the Section 5 case law discussed in Part I. The coding scheme was initially devised by Dr. McCrary. It was first implemented by Mr. Seaman; Dr. McCrary then reviewed Mr. Seaman's coding decisions; the final decision on each assessment was the responsibility of Dr. McCrary. Our coding decisions were, inevitably, based on textual interpretation. We believe that although knowledgeable observers might disagree occasionally with our coding of individual objections, the patterns we identify are beyond reasonable dispute.

85. We are guided in this process by the "Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965," as listed on the Voting Section's website, *available at* http://www.usdoj.gov/crt/voting/ (last visited Jan. 30, 2006). The observations in this document are objection letters, which sometimes include two or even three governing bodies.

86. We began with a larger number of initial categories, in order to determine whether specific change types displayed unusual patterns over time. Because that proved

letter included objections to more than one type of change, such as a decision to deny preclearance to both at-large elections and the use of numbered posts.[87] When delineating the types of change that most frequently brought objections, the Department focuses on change types rather than decisions to object.[88] Because we are trying to assess the legal basis for objections, the observations in our tables are the number of times the Department interposed an objection, except that where more than one governing body is affected by the denial of preclearance, we count each governing body as a separate observation.[89]

We did not code an objection as one based on purpose unless the letter cited at least some specific evidence of the sort set forth by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Corporation*.[90] Where the letter referred to the exclusion of minority group members from the decision-making process, the refusal to accommodate requests from the minority community, the awareness by decision-makers that the adopted change would have a racially discriminatory effect, the departure from standard decision-making procedures or criteria, or the use of pretextual arguments to justify the change, we took that as

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not to be the case, we aggregated the data for clarity of presentation. For example, requirements for numbered places, runoffs, and staggered terms, as well as changes in the size of the governing body and changes from appointive to elective procedures (or vice versa) were all tallied separately, but were eventually collapsed into the category "enhancing devices." The category "annexations" includes deannexations and consolidations between local jurisdictions. We put into the "ballot access" category all changes related to registration or voting, candidate qualification requirements, or the timing of referenda, primaries, or other elections. The "at-large election" category includes multimember districts, as well as the use of at-large seats, in mixed plans.

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

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

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

90. 429 U.S. 252, 265–66 (1977). In our view, *Arlington Heights* codified the standards employed in previous equal protection cases involving voting, beginning with *Smith v. Paris*, 257 F. Supp. 901 (M.D. Ala. 1966), *modified and aff'd*, 386 F.2d 979 (5th Cir. 1967).

evidence that the objection was based on purpose.[91] This was especially clear where the letter indicated reliance on court decisions based in part on intent.[92]

The "effect" prong of Section 5 was also understood as synonymous with the constitutional effect requirement before 1976, when the Supreme Court distinguished between the constitutional definition of effect and statutory definition of effect under Section 5— defined as retrogressive effect—in *Beer v. United States*.[93] We coded objections as based on a retrogression standard when the *Beer* definition was satisfied, both before and after the Supreme Court decision in that case.[94] Where the letter made clear that the objection was based on the change's discriminatory effect—before *Beer*—but the effect did not appear retrogressive, we coded it as simply an effect objection.[95]

Some changes we viewed as *per se* retrogressive for purposes of this analysis. For example, all changes from single member districts to at-large elections would necessarily be retrogressive, assuming there was evidence of racially polarized voting.[96] Changes from straight at-large elections to a

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91. This is consistent with the Department's approach. *See* 28 C.F.R. § 51.57 (2004); *see also* Posner, *supra* note 6 at 100–01. There is in most objection letters "boilerplate" language setting forth the legal burden of the jurisdiction to show that a change has neither the purpose nor the effect of discriminating on the basis of race. Because such language was included in the vast majority of letters, regardless of the actual basis for the objection, we do not view such language as substantively significant.

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

93. 425 U.S. 130, 140–42 (1976); *see also* 28 C.F.R. § 51.54(a) (2004).

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

95. A special problem arises where there is no clear benchmark for comparing the new plan. *See* 28 C.F.R. § 51.54(b)(4)(2004). As the Department's Section 5 Guidelines indicate:

> Where at the time of submission ... there exists no other lawful practice or procedure for use as a benchmark (e.g., where a newly incorporated college district selects a method of election) the Attorney General's preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of racial or language minority groups.

Id.

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

numbered place or residency district requirement, from a plurality rule to a majority vote requirement, and from concurrent to staggered terms were also treated as retrogressive. Annexations, deannexations, or consolidations were necessarily retrogressive as well, if objectionable, but could be precleared where accompanied by a fairly drawn district election plan.[97]

In the 1980s, after Congress amended Section 2 of the Act to create a statutory results test, the Department revised its guidelines to require objections where the new practice at issue would clearly violate the new results test.[98] Where objection letters specifically used language referring to a "clear violation of Section 2," we identified this as a third type of Section 5 effects test.[99] The Department's letter often provided evidence of racial purpose as well as retrogressive effect or a clear violation of Section 2; where that was true, we coded the objection as having two legal bases (both purpose and effect).

On occasion, voting changes were found objectionable because they would violate the minority language protections of the Act.[100] Finally, some objections were based on the failure of the submitting authority to provide the information necessary to determine whether the change was entitled to preclearance. These were considered technical objections, and the change was often precleared once the jurisdiction supplied the necessary evidence.[101]

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97. 28 C.F.R. § 51.61(c) (2004) (following *City of Richmond*, 422 U.S. 358).

98. Revision of Procedures for Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486 (Jan. 6, 1987) (codified at 28 C.F.R. § 51.55(b)(2) (2004)) (barring implementation of any voting change that would constitute "a clear violation of amended Section 2"); *see also supra* Part I.G. Even before the 1987 revision of the Guidelines, some objections to redistricting plans were based on this reasoning. *See, e.g.*, U.S. Dep't of Justice, Objection Letter to Oktibbeha County, Mississippi (June 17, 1983); U.S. Dep't of Justice, Objection Letter to Amite County, Mississippi (June 6, 1983); U.S. Dep't of Justice, Objection Letter to Copiah County, Mississippi (April 11, 1983).

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

100. 28 C.F.R. § 51.55(a) (2004).

101. 28 C.F.R. §§ 51.40, 51.52(c) (2004).

B. *The Changing Legal Basis of Objections*

To grasp the larger patterns at work in the Department's objection decisions, a few simple quantitative observations are necessary. Table 1 summarizes the types of voting changes to which objections have been interposed, by decade. The percentage of objections for each category was relatively stable over time, except that at-large elections and enhancing devices accounted for a much higher proportion of objectionable changes in the first decade (1968–1979) than subsequently, and objections to districting plans were proportionally lower in the first decade and higher thereafter.[102]

TABLE 1
CHANGE TYPES TO WHICH OBJECTIONS WERE INTERPOSED

Change Type	1970s	%	1980s	%	1990s	%	TOTALS
Annexations	34	7%	47	11%	24	6%	105
At-large	110	22%	57	13%	31	8%	198
Enhancing Devices	182	37%	93	22%	73	18%	348
Districting	86	17%	165	38%	209	52%	460
Ballot Access	77	15%	64	15%	56	14%	197
Other Changes	9	2%	5	1%	9	2%	23
Totals	498	100%	431	100%	402	100%	1331

Note: In this and the following tables, the column headed "1970s" is actually the period 1968–1979, but few objections were interposed until 1970. The number of change types to which objections were interposed is greater than the total number of objections, because numerous objection decisions affected two or more change types.

During the 1970s, at-large elections and enhancing devices together were denied preclearance 292 times, 59 percent of all objectionable changes, but only 86 redistricting plans (17 percent) were the subject of objections (see Table 1). By the 1980s, the picture presented by Table 1 is more mixed: the Department interposed objections to 150 at-large election plans and enhancing devices (35 percent of objectionable changes) and denied preclearance to 165 redistricting plans (38 percent). In the 1990s, at-large elections and enhancing devices were the subject of objections only 104 times, 26 percent of objectionable changes, but the Department denied preclearance to a striking 209 redistricting plans (52 percent)—over half of all changes to which objections were interposed (see Table 1). The increasing proportion of objections due to redistricting plans was, to some extent, a direct consequence of the decline in the

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

number of at-large systems resulting from earlier Departmental objections.

The most striking characteristic of our findings regarding the legal basis of the Department's decisions to object (see Table 2) is the consistent increase over time of objections based on the purpose prong of Section 5, and the consistent decline of objections based on retrogression. During the 1970s the Department rarely cited intent in its objection letters. We identified only 9 objections (Just 2 percent) as based entirely on purpose, and only 22 more (6 percent) were based on a combination of intent and retrogressive effect. The vast majority of the objections (297, or 77 percent) were based on retrogression.[103]

TABLE 2
LEGAL BASES FOR OBJECTION DECISIONS BY DECADE

Legal Bases	1970s	%	1980s	%	1990s	%	Totals
Exclusive Categories							
Intent	9	2%	83	25%	151	43%	243
Dilution	34	9%	--		--		34
Retrogression	297	77%	146	44%	73	21%	516
Technical	17	4%	15	5%	1	0%	33
Section 2	--		2	1%	6	2%	8
Minority Languages	2	1%	2	1%	5	1%	9
Combined Categories							
Intent/Retrogression	22	6%	73	22%	67	19%	162
Intent/Dilution	5	1%	--		--		5
Intent/Section 2	--		6	2%	41	12%	47
Other	--		3	1%	5	1%	8
Totals	386	100%	330	100%	349	100%	1065

The high percentage of objections attributed to the retrogression standard in the 1970s is, to some extent, an artifact of our need to apply a consistent coding scheme for all letters between 1968 and 1999.[104] Based on the need for consistency, we treated all changes as retrogressive if they satisfied the standard set forth in *Beer v. United States*.[105] Where the letter referred to the dilutive effect of a change that did not, however, make

103. A small number fell into the category of a technical objection, where the jurisdiction failed to supply the information required by the Department's guidelines, making a proper assessment of the change impossible. Although always small in number, technical objections were more common in the 1970s and in the 1980s (4 percent), but virtually disappeared by the 1990s.

104. *See supra* note 94.

105. 425 U.S. 130 (1976). Based on our reading of the letters, we think that before *Beer* the Department understood the effect prong of Section 5 to be identical to the constitutional effect standard.

matters worse for minority voters, we classified the change as dilutive.[106] There were only 34 such non-retrogressive but dilutive plans, 9 percent of the redistricting objections in the 1970s.

By the 1980s, 83 objections (25 percent) were based entirely on the intent requirement, and another 73 (22 percent) were seen as both retrogressive and purposefully discriminatory. Only 146 objections (44 percent) relied on the retrogression standard alone. A new basis for objecting was available in the 1980s, when it was possible to object because the proposed change presented a clear violation of the new Section 2 results test. In our judgment, however, the Department only interposed two objections (one percent) on this basis alone in the 1980s, and only 73 letters (22 percent) cited both purpose and Section 2.[107]

In the 1990s, fully 151 objections (43 percent) were based on purpose alone. In contrast, retrogression alone was the basis for only 73 objections (21 percent), and only six objections relied entirely on Section 2. Another 67 objections (19 percent) relied on a combination of purpose and retrogression, and 41 (12 percent) on both purpose and the need to comply with Section 2. Thus, the intent prong was involved in a remarkable 74 percent of all objections in that decade. In contrast, a determination of retrogressive effect was involved in only 40 percent of objections in the 1990s and Section 2 in only 14 percent.

TABLE 3:
LEGAL BASES FOR OBJECTION DECISIONS, REDISTRICTING

Legal Bases	1970s	%	1980s	%	1990s	%	Totals
Exclusive Categories							
Intent	7	11%	75	46%	122	58%	204
Dilution	23	27%	--		--		23
Retrogression	37	40%	35	21%	20	10%	92
Technical	10	12%	9	5%	1	0%	20
Section 2	--		1	1%	1	0%	2
Combined Categories							
Intent/Retrogression	5	7%	40	24%	34	16%	79
Intent/Dilution	2	2%	--		--		2
Intent/Section 2	--		4	2%	30	14%	34
Other	2	2%	--		1	0%	3
Totals	86	101%	164	99%	209	98%	459

Note: Totals do not always equal 100%, due to rounding

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

107. In both the 1980s and 1990s, the content of those letters citing both purpose and Section 2 concerns suggested that the purpose issue was usually the more important concern.

Looking just at objections to redistricting plans, we observe similar patterns (see Table 3). Objections based on purpose alone increased from 7 (11 percent) in the 1970s to 75 (46 percent) during the next decade, and 122 (58 percent) in the 1990s. The intent prong, in combination with retrogression, was involved in only 5 redistricting objections in the 1970s, but increased to 40 objections (24 percent) in the 1980s, while sagging to 33 redistricting objections (16 percent) in the 1990s. Although inconsequential in the 1980s, the combination of intent and Section 2 concerns provided the basis for 30 objections (14 percent) of redistricting objections in the 1990s. The principal difference between redistricting objections and objections as a whole was that a substantially lower proportion of redistricting objections were based on retrogression than was the case for objections as a whole. In the 1970s, only 37 redistricting plans (40 percent) were retrogressive (see Table 3), as compared with 297 (77 percent) for all objections (see Table 2). In the 1980s, 35 redistricting plans were rejected on retrogression grounds (21 percent), but retrogression was the basis for 146 objections (44 percent) for all change types (see Tables 2 and 3). In the 1990s, retrogression provided the basis for 20 redistricting objections (only 10 percent), but 73 (21 percent) for all change types (see Tables 2 and 3).

These results make clear that the likely effect of striking down the Department's authority to object to voting changes when they present a clear violation of Section 2 was inconsequential.[108] On the other hand, the effect of redefining purpose under Section 5 as extending only so far as an "intent to retrogress" was potentially to reduce the number of objections substantially from the level found in the 1990s.[109]

III. HOW THE SUPREME COURT TRANSFORMED SECTION 5

A. *The Bossier Parish Litigation: Procedural History*

The litigation used by the Supreme Court to reinterpret Section 5 case law arose from the Department's objection to a school board redistricting plan in Bossier Parish, Louisiana. Louisiana parishes elect their governing bodies, called police juries, and their parish school boards as well, by districts rather than at-large elections.[110] In the 1980s Bossier

108. *Bossier I*, 520 U.S. at 485.

109. *Bossier II*, 528 U.S. at 328.

110. A police jury is a unit of local Louisiana government similar to a county board of supervisors. *See* O'Quinn v. Manuel, 773 F.2d 605, 606 n.1 (5th Cir. 1985) (discussing La. Rev. Stat. Ann. § 33:1236). In 1968, the Louisiana legislature authorized police juries and school boards to use at-large elections for the first time. Following *Allen*, the Department of Justice objected to both enactments and to numerous efforts by particular parishes

Parish used different election plans for police jury and school board; neither had a single Black-majority district.[111] Although Blacks made up 20 percent of the parish population and 18 percent of its voting age population, the school board had never elected an African American.[112] After the 1990 census, both bodies displayed wide population disparities among their twelve single-member districts and thus required redistricting.[113] The police jury quickly redistricted and secured preclearance of its plan. Although the new plan had no Black-majority districts, this characteristic had also been true of the police jury plan in the 1980s and the change was thus not retrogressive. When the Department precleared the police jury plan, it was not aware of evidence potentially showing an intent to dilute minority voting strength.[114] However, it was aware that, unlike the school board, the police jury had elected—and reelected—a Black candidate under the existing plan.[115]

The school board refused initially to adopt this plan, in part because it did not appear to serve the interests of the school board. The plan was drawn to protect incumbent members of the police jury and would pit two sets of school board incumbents against one another. The police jury plan also reflected that body's functional concerns such as road maintenance and drainage, and would create several open districts.[116] It had an unusually high deviation from population equality, and, as the dissenting justices later pointed out, four districts "failed the standard measure of compactness used by the Board's own cartographer."[117] The school board engaged the same consultant to draw a separate plan, anticipating the likely need to realign precinct boundaries. In the meantime, local Black

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to adopt at-large elections. 393 U.S. 544; DAVID HUNTER, THE SHAMEFUL BLIGHT: THE SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH 148–49, 208–09 (1972). McCrary, *Bringing Equality to Power: How the Federal Courts Transformed the Electoral Structure of Southern Politics, 1960–1990*, 5 U. PA. J. CONST. L. 665, 671–73 (2003) (providing direct evidence that in the 1960s, Louisiana legislators saw at-large elections as a key device for diluting African American voting strength).

111. Bossier Parish Sch. Bd. v. Reno, 907 F. Supp. 434, 437 (D.D.C. 1995).

112. *Id.*

113. *Bossier I*, 520 U.S. at 474.

114. The parties in *Bossier* stipulated that the police jury failed to provide the Department with information then available to the parish, showing that two reasonably compact Black-majority districts could be drawn, and failed to inform the Department that local Black citizens had protested their exclusion from the redistricting process. J.S. at 68a-69a, 76a, 82a-83a, 87a, *Bossier Parish I* (Nos. 95-1455 and 95-1508).

115. 907 F. Supp. at 437. The district included an air force base, whose largely White residents rarely voted in local elections, so that Blacks approached parity with Whites in voter turnout. *Id.*

116. *Bossier II*, 528 U.S. at 346–47 (Souter, J., concurring in part and dissenting in part); *see also Bossier Parish Sch. Bd.*, 907 F. Supp. 458 (Kessler, J., concurring in part and dissenting in part); J.S. at 72a-73a, 102a, 112a, *Bossier I* (Nos. 95-1455 and 95-1508).

117. *Bossier II*, 528 U.S. at 346.

leaders proposed an alternative plan with two Black-majority districts.[118] At that point the school board put aside its reservations and adopted the police jury plan, which it submitted for preclearance.[119] On August 30, 1993, the Department of Justice objected to the plan because the plan was adopted with a discriminatory purpose and posed a clear violation of Section 2.[120]

The school board then filed a Section 5 declaratory judgment action in the District of Columbia.[121] The three-judge panel precleared the plan by a 2–1 majority, with Judge Laurence Silberman writing the opinion of the court.[122] The majority opinion focused on the claim that a plan that clearly violates Section 2 is not entitled to preclearance. The Court forcefully rejected this interpretation of Section 5, treating the Department's view of the Section 2 issue as evidence to support the allegation—by now endorsed by the Supreme Court in *Miller v. Johnson*[123]—that it sought to use Section 5 to maximize Black voting strength.[124] Judge Gladys Kessler dissented, however, asserting that under *Arlington Heights* the evidence in the case "demonstrates convincingly that the Bossier School Board acted with discriminatory purpose."[125] This view was later echoed by the dissenters on the Supreme Court.[126]

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118. *Id.* at 347–48.

119. *Id.* at 349.

120. U.S. Dep't of Justice, Objection to Bossier Parish School Board, Louisiana (Aug. 30, 1993); *see also* U.S. Dep't of Justice, Letter to Bossier Parish School Board, Louisiana (Dec. 20, 1993) (declining to withdraw the objection). Justice Sandra Day O'Connor, writing for the majority in *Bossier I*, observed that the Department's objection letter "asserted that the Board's plan violated § 2 of the Act," relying on 28 C.F.R. 51.55(b)(2). 520 U.S. at 475–76. This seems an incomplete characterization. We read the objection letter as asserting that the school board failed to demonstrate that its redistricting plan was adopted without a racially discriminatory purpose, largely because the letter summarized at some length the background of the board's decision in a manner suggesting an *Arlington Heights* analysis of intent, and merely noted in a single sentence—a sentence that could be characterized as "boilerplate" language in the Department's objection letters—that the new plan also presented a clear violation of Section 2.

121. Black leaders from Bossier Parish, represented by the Lawyers' Committee for Civil Rights Under Law, intervened in the lawsuit as defendants. *Bossier Parish Sch. Bd.*, 907 F. Supp. at 436.

122. *Id.* at 450.

123. 515 U.S. 900 (1995).

124. *Bossier Parish Sch. Bd.*, 907 F. Supp. at 440–41, 444–45, 449–50. Judge Silberman associated the Department's alleged "maximization" policy with its application of Section 2, not the purpose prong of Section 5.

125. *Id.* at 454 (Kessler, J., concurring in part and dissenting in part) (pointing out that the majority never even cited *Arlington Heights*). The majority viewed the intent evidence quite differently, in part because it treated much of the factual evidence presented by the defendants as part of its purpose case as relevant only to the Section 2 analysis. *Id.* at 445, 447–49.

126. In his dissenting opinion, Justice Souter observed that, under the traditional Section 5 purpose analysis, the evidence regarding the redistricting plan for the Bossier

Although on appeal the Supreme Court vacated the lower court decision and remanded for reconsideration, it agreed with the lower court's view of the effects prong.[127] Writing for a 5–4 majority, Justice Sandra Day O'Connor announced that preclearance could not be denied to a voting change on the ground that the new system would violate Section 2.[128] In considering the purpose prong of Section 5, however, Justice O'Connor introduced a theory not previously advanced by the school board and not considered by the trial court—the assertion by the dissenters in *City of Pleasant Grove v. United States*[129] that under Section 5 a purpose inquiry is restricted to the question of retrogressive intent; that is, whether the change was designed not merely to discriminate against minority voters but to make matters worse for them.[130]

On this issue Bossier Parish took the same view of the purpose prong as the United States and private intervenors.[131] In fact, at oral argument the school board's veteran attorney, Michael Carvin, explicitly rejected the suggestion that, as one justice put it, "the only purpose that is relevant under Section 5 is purpose to cause retrogression, as distinct from purpose to discriminate by effecting a purposeful dilution."[132] Carvin's response was: "Oh, no. No, not at all. I think that decision, the Court's

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Parish School Board "disqualifies it from § 5 preclearance." *Bossier II*, 528 U.S. at 356–57 (Souter, J., dissenting). "There is no reasonable doubt on this record that the Board chose the Police Jury plan for no other reason than to squelch requests to adopt the NAACP plan or any other plan reflecting minority voting strength." *Id.*

127. *Bossier I*, 520 U.S. at 474.

128. *Id.* at 485.

129. 479 U.S. 462.

130. *Bossier I*, 520 U.S. at 479.

131. *See* Brief of Appellee Bossier Parish at 10, *Bossier I* (Nos. 95-1455 & 95-1508) ("[T]his Court, in just the past two Terms, has already squarely rejected the notion that a Section 5 objection can be premised on any grounds other than an invidious purpose or retrogressive effect."), *available at* 1996 WL 531765; *see also Bossier I*, 520 U.S. at 479 (noting that the Court has "squarely held that a Section 5 objection was warranted *only if* a redistricting change is retrogressive *or has a discriminatory purpose sufficient to violate the Constitution*") (emphases added); Brief of Federal Appellant at 35, *Bossier I* (Nos. 98-405 and 98-406) ("Preclearance should be denied to a voting change when it is known that the change will result in the unlawful dilution of minority voting strength, regardless of whether the change was instituted for a discriminatory purpose or had a retrogressive effect."), *available at* 1996 WL 439256. In fact, the "retrogressive intent" argument that the five-justice majority found so persuasive in *Bossier II* was advanced only in a petition to file a late amicus curiae brief on behalf of several covered counties in Texas in *Bossier I*. *See* Motion for Counties to File Brief Amicus Curiae at 3, *Bossier I* (Nos. 98-405 and 98-406) (arguing that Section 5 is limited "to only those circumstances in which the purpose or effect of the change is to cause a retrogression in the electoral position of minority voters"), *available at* 1997 WL 143493.

132. *See* Oral Argument at 30, *Bossier I* (Nos. 95-1455, 95-1508), *available at* 1996 WL 718469.

decision in Richmond and Pleasant Grove has already decided that issue."[133]

Despite the fact that no previous court had ever restricted the Section 5 purpose requirement in this way, the conservative majority in *Bossier I* remanded the case in order for the trial court to consider whether the evidence it had previously excluded was relevant to determining whether the Bossier Parish school board acted with an "intent to retrogress" in adopting its redistricting plan.[134] As Justice O'Connor ominously put it, "we leave open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent."[135]

B. *The Legal Gymnastics*[136] *of* Bossier II

When the case returned to the Supreme Court on appeal, Justice Antonin Scalia, writing for the same five-justice majority, answered Justice O'Connor's question with an emphatic "No": "In light of the language of § 5 and our prior holding in *Beer*, we hold that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose."[137]

Explaining how the conservative majority reached this remarkable conclusion, which appears to us at odds with all previous court interpretations of Section 5 since the inception of the Voting Rights Act, requires careful attention to Justice Scalia's language, the language of Section 5 of the Act, the language of the *Beer* decision, and the context within which each of the above was penned.

1. Misapplying Legislative History

Justice Scalia began with the key language in Section 5: a covered jurisdiction has the burden of proving that the proposed change "does not have the purpose and will not have the effect of denying or abridging the

133. *Id.* at 30–31. As Carvin pointed out, since the parties stipulated that the plan was not retrogressive, "you can obviously assume that they didn't have the purpose to retrogress," and had the purpose issue been restricted to intent to retrogress, the district court's decision "would have been a one-paragraph opinion." *Id.* at 31.

134. *Bossier I*, 520 U.S. at 486.

135. *Id.* Justice O'Connor added that the lower court was to determine as well whether the school board acted with a "nonretrogressive, but nevertheless discriminatory, 'purpose,'" and whether such evidence was "relevant" to a Section 5 analysis. *Id.*

136. *See Bossier II*, 528 U.S. at 371 (Souter, J., dissenting) (using the term "gymnastic" to characterize the majority's effort to reconcile its opinion in *Bossier II* with the majority opinion in *City of Pleasant Grove*, 479 U.S. 462).

137. *Id.* at 341.

right to vote on account of race or color."[138] Much of his analysis hinged on the definitions given to the words "purpose" and "effect" in this sentence, as well as to the meaning of the phrase "denying or abridging the right to vote." The starting point for Justice Scalia's analysis of the text was, however, the definition attached to the word "effect" in *Beer.*

> Reasoning that § 5 must be read in light of its purpose of "insur[ing] that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," we held [in *Beer*] that "a legislative reapportionment that enhances the position of racial minorities ... can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of Section 5."[139]

If the term "effect" means retrogression, as the *Beer* majority had determined in 1976, then in Justice Scalia's view the definition of "purpose" under Section 5 must also be tied to the concept of retrogression because "we refuse to adopt a construction that would attribute different meanings to the same phrase ["denying or abridging"] in the same sentence, depending on which object it is modifying."[140] Under this reading the burden of the covered jurisdiction is to prove that: 1) the change will not have a retrogressive effect; and 2) the change was not adopted with the intent of achieving a retrogressive effect.

Justice Scalia's interpretation of the text of Section 5 hinges upon a word—retrogression—that does not appear in the text of the statute at all, but was coined by the *Beer* majority based on its reading of a congressional committee report.[141] This is an odd approach for a Justice who professes to disdain legislative history and "object[s] to [its] use ... on principle,"[142] and who believes that the Court should generally ignore legislative history, except in the rare situation where the statutory text is

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138. *Id.* at 328 (quoting 42 U.S.C. § 1973c).

139. *Id.* at 329 (quoting *Beer*, 425 U.S. at 141).

140. *Id.* (relying on *Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983), which declined to give different meanings to the phrase "other than" when it modified "banks" and "common carriers" in the same clause). "Justice Scalia determines what statutory text means by presuming authorship by an ideal drafter who meets proper standards of style and grammar," points out legal scholar William D. Popkin, and "his resort to internal context in statutory interpretation has very little to do with how people ordinarily use the language." Popkin, *An "Internal" Critique of Justice Scalia's Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1143 (1992).

141. H.R. Rep. No. 94-106, at 60 (1975).

142. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 31 (Amy Gutmann ed., 1997).

absurd on its face.[143] Justice Scalia has strenuously dissented from the use of legislative committee reports as valid evidence in interpreting statutes,[144] and has even gone so far as to write separate concurring opinions with the sole purpose of disavowing or disparaging legislative history relied upon by the majority.[145]

The *Beer* majority's use of legislative history—on which Justice Scalia relies in *Bossier II*—illustrates the sort of behavior that ordinarily triggers Justice Scalia's disdain. The Court relied for its assessment of congressional intent on a passage from the 1975 House Report,[146] a characterization of the purpose of Section 5 reprinted verbatim from a little-known 1972 oversight committee report evaluating the preclearance review of Mississippi's voter reregistration program.[147] In the introduction to the 1972 oversight report we are cautioned that "[t]he subcommittee has given detailed consideration to the administration and enforcement of the Voting Rights Act in Mississippi during 1971 when 26 counties in Mississippi undertook to reregister voters," and as a result "[t]he observations and conclusions contained within this report are based upon *and limited to* that study."[148] To us, this appears a slim basis for an assessment of legislative intent in 1965, or later, as neither this 1972 subcommittee nor any congressional committee in 1975 ever made a systematic investigation of the legislative history of Section 5 as originally adopted or revised.

The idea that the 1965 Congress saw the preclearance requirement as limited to retrogression strikes critics as thoroughly counterintuitive. As Justice Breyer pointed out in dissenting from Justice Scalia's *Bossier II* analysis, there were some jurisdictions in 1965 where "historical discrimination had left the number of Black voters at close to zero," and as a result

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143. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 651, n.116 (1990) (collecting cases where Justice Scalia has objected to the use of legislative history).

144. *See, e.g.*, Bank One Chi. N.A., v. Midwest Bank & Trust, 516 U.S. 264, 279–80 (1995) (Scalia, J., concurring in part and dissenting in part); Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (stating that Court should not have consulted legislative history once it concluded that statute was unambiguous and unequivocal because "that is not merely a waste of research time and ink; it is a false and disruptive lesson in the law"); Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring) ("Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."). Scalia's disdain for committee reports predates his appointment to the Supreme Court. *See* Hirschey v. FERC, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring in the judgment).

145. *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L. Q. 351, 365 (1994) (noting "Justice Scalia's practice of refusing to join any part of another Justice's opinion that relies on legislative history").

146. H.R. Rep. No. 94-106, at 60 (1975).

147. *Enforcement of the Voting Rights Act of 1965 in Mississippi: Hearing Before the Civil Rights Oversight Subcomm. of the House Comm. on the Judiciary*, 92nd Cong. 14 (1972).

148. *Id.* at iii (emphasis added).

"retrogression would have proved virtually impossible where § 5 was needed most."[149] As an example he pointed to Forrest County, Mississippi, where as of 1962 only one percent of the Black voting-age population was registered to vote, due to the discriminatory application of the state's registration requirements.[150] When the Fifth Circuit Court of Appeals enjoined the registrar from discriminatory processing of registration applications, Justice Breyer observed,[151] the state legislature enacted a "good moral character requirement," which the Supreme Court characterized as "an open invitation to abuse at the hands of voting officials."[152] As Justice Breyer wryly noted, this change "would result in *maintaining*—though *not*, in light of the absence of Blacks from the Forrest County voting rolls, in *increasing*—white political supremacy,"[153] and thus, under the majority's reading of the Section 5 purpose requirement, an intentionally discriminatory change would have been entitled to preclearance.

Both Justice Stevens and Justice Breyer emphasized that it was not necessary to overrule *Beer* to retain the meaning attached to the Section 5 purpose requirement for the past quarter century.[154] Justice Stevens would have deferred to the reading placed upon the language of the statute by the Department of Justice, in which the term "purpose" refers, quite simply, to the constitutional standard:

> The reading above makes clear that there is no necessary tension between the *Beer* majority's interpretation of the word "effect" in § 5 and the Department's consistent interpretation of the word "purpose." For even if retrogression is an acceptable standard for identifying prohibited effects, that assumption does not justify an interpretation of the word "purpose" that is

149. *Bossier II*, 528 U.S. at 374 (Breyer, J., dissenting).

150. *Id.* at 374–75 (relying on *United States v. Mississippi*, 229 F. Supp. 925, 994, n.86 (S.D. Miss. 1964) (dissenting opinion), *rev'd*, 380 U.S. 128 (1965), and *United States v. Lynd*, 301 F.2d 818, 821 (5th Cir. 1972)).

151. *Id.* at 375 (citing *Lynd*, 301 F.2d at 821).

152. *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966)). To Justice Breyer:

> [i]t seems obvious, then, that if Mississippi had enacted its 'moral character' requirement in 1966 (after enactment of the Voting Rights Act), a court applying § 5 would have found 'the purpose . . . of denying or abridging the right to vote on account of race,' even if Mississippi had intended to permit, say, 0.4%, rather than 0.3%, of the Black voting age population of Forrest County to register.

Id. at 376.

153. *Id.* at 375.

154. *Id.* at 373–74.

> at war with both controlling precedent and the plain meaning of the statutory text.[155]

On the other hand, if *Beer* were wrongly decided, and thus the novelty of defining discriminatory effect as limited to retrogression were not an issue, then the conflicted syntax that troubled Justice Scalia in *Bossier II*[156] would not arise. Justice Souter, a staunch advocate of *stare decisis* in interpreting statutory language—"when statutory language is construed it should stay construed"—flatly declared that "*Beer* was wrongly decided."[157] "The Court was mistaken in *Beer* when it restricted the effect prong of § 5 to retrogression, and the Court is even more wrong today when it limits the clear text of § 5 to the corresponding retrogressive purpose."[158]

2. Misinterpreting the Purpose Prong

In our view, another major problem with Justice Scalia's interpretation of the Section 5 purpose requirement is its handling of the language from *Beer* that could only be referring to a second prong of Section 5–the "purpose" prong plainly stated in the text of the statute. An ameliorative change, according to *Beer*, "cannot violate § 5 *unless* the new apportionment itself so discriminates on the basis of race or color *as to violate the Constitution*."[159] The United States argued in *Bossier II* that the phrasing of this "unless" clause clearly meant that the purpose requirement under Section 5 was the same as the intent standard under the Fourteenth Amendment.[160] Justice Scalia rejected this view as "a most implausible

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155. *Id.* (Stevens, J., dissenting).

156. *Id.* at 329.

157. *See id.* at 362–63 (Souter, J., dissenting). As Justice Souter notes in his dissent:

> Although I adhere to the strong policy of respecting precedent in statutory interpretation and so would not reexamine *Beer*, that policy does not demand that recognized error be compounded indefinitely, and the Court's prior mistake about the meaning of the effects requirement of § 5 should not be expanded by an even more erroneous interpretation of the scope of the section's purpose prong.

Id. at 342.

158. *Id.* at 342; *see also id.* at 363 (Souter, J., dissenting) ("But it is another thing entirely to ignore error in extending discredited reasoning to previously unspoiled statutory provisions . . . [as] the Court does in extending *Beer* from § 5 effects to § 5 purpose.").

159. 425 U.S. 130, 141 (1976) (emphasis added). Substantially the same wording is used elsewhere in the decision: "It is possible that a legislative reapportionment could be a substantial improvement over its predecessor in terms of lessening racial discrimination, and yet nonetheless continue so to discriminate on the basis of race or color as to be unconstitutional." *Id.* at 141 n.14.

160. *See, e.g.*, Brief for the Federal Appellant at 28–32, *Bossier II* (Nos. 98-405 and 98-406); Reply Brief of the Federal Appellant at 6–8, *Bossier II* (Nos. 98-405 and 98-406).

interpretation" on the grounds that "at the time *Beer* was decided, it had not been established that discriminatory purpose as well as discriminatory effect was necessary for a constitutional violation."[161] He pointed out that the Court had not yet decided *Washington v. Davis*,[162] where the Court ruled that evidence of discriminatory effect, without proof of discriminatory intent, is insufficient to prove a constitutional violation.[163] *Beer*, Justice Scalia contended, cannot be interpreted as "anticipating (Without argument) that later holding."[164]

In short, Justice Scalia contended that the *Beer* majority had understood the constitutional standard for evaluating vote dilution to be the standard set forth in *White v. Regester*,[165] which he characterized as a simple effects test not requiring proof of discriminatory intent.[166] That interpretation seems to us to contradict the Court's view of this issue three years earlier in *Bossier I*.[167] As Justice O'Connor put it in 1997, even if one assumes that the standard for proving a constitutional violation at the time *Beer* was decided was a simple dilutive effect test, "it is no longer valid today because the applicable statutory and constitutional standards have changed .... Since 1980, a plaintiff bringing a constitutional vote dilution challenge, whether under the Fourteenth or Fifteenth Amendment, has been required to establish that the State or political subdivision acted with a discriminatory purpose."[168]

Under this view, even if the "unless" clause in *Beer* did *not* refer to discriminatory purpose in 1976, it had to be construed as requiring evi-

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161. *Bossier II*, 528 U.S. at 337. "If the statement in *Beer* had meant what appellants suggest,"—that is, referring to a Section 5 purpose requirement identical to the purpose standard under the Equal Protection clause—it would "have been gutting *Beer's* holding," because under the appellants' interpretation "a showing of discriminatory but nonretrogressive effect *would* have been a constitutional violation and *would*, despite the holding of *Beer*, have sufficed to deny preclearance." *Id.* Contrary to Justice Scalia's characterization, the appellants actually argued that the "unless" clause in *Beer* referred to discriminatory but nonretrogressive *purpose*, not *dilutive effect*. *Id.*

162. 426 U.S. 229 (1976).

163. *Id. Davis* was decided less than three months later, however, at the end of the term.

164. *Bossier II*, 528 U.S. at 337.

165. 412 U.S. 755 (1973).

166. *Bossier II*, 528 U.S. at 337. The Court could hardly have intended its reference to a constitutional violation to mean that a voting change that was dilutive in effect under *White v. Regester*—but not retrogressive—would be objectionable under Section 5. In announcing the retrogression test, the *Beer* majority made clear that the dilutive effect standard was inapplicable in the Section 5 context.

167. *Bossier I*, 520 U.S at 481 (rejecting argument in Brief for Federal Appellant at 36, *Bossier I* (Nos. 98-405 and 98-406), that the constitutional standard at the time *Beer* was decided was the effect standard set forth in *White v. Regester*).

168. *Id.* at 481–82 (citing *City of Mobile*, 446 U.S. 55, and *Arlington Heights*, 429 U.S. 252).

dence of discriminatory intent by 1980, when the Supreme Court decided *City of Mobile v. Bolden.*[169]

3. Misinterpreting *City of Richmond*

Justice Scalia conceded that the Supreme Court in *City of Richmond* "did give the purpose prong of § 5 a broader meaning than the effect prong,"[170] but dismissed the significance of this fact on the grounds that annexations are different from other voting changes.[171] He argued that effect was defined in such a way in the annexation context that the reduction of Black voting strength in the city from 52 percent to 42 percent was not to be interpreted as violating Section 5: "[t]o hold otherwise would be either to forbid all such annexations" or to permanently *over-represent* African Americans in the enlarged city.[172] "We refused, however, to impose a similar limitation on § 5's purpose prong," he added. "Preclearance could be denied when the jurisdiction was acting with the purpose of effecting a percentage reduction in the Black population, even though it could not be denied when the jurisdiction's action merely had that effect."[173]

Here Justice Scalia characterized the purpose at issue in *City of Richmond* as *retrogressive intent.*[174] In factual terms, Richmond's purpose could be described—accurately—as seeking to reduce the Black voting age population in the city under the existing at-large system, but the Court did not characterize the purpose issue under Section 5 as retrogressive intent when deciding the case in 1975.[175] It was another dozen years before the concept of retrogressive intent was first articulated by the Supreme Court—in a dissenting opinion that was soundly rejected by a six

169. 446 U.S. 55 (1980).

170. *Bossier II*, 528 U.S. at 330.

171. *Id.*

172. *Id.* (quoting *City of Richmond*, 422 U.S. at 371). Nowhere does Justice Scalia mention that preclearance of this reduction in Black voting strength was *contingent* on adoption of an election plan in the enlarged city that fairly reflected Black voting strength within the new city borders. *City of Richmond*, 422 U.S. at 371–72. We view this contingency as a critical aspect of the Court's reasoning in annexation cases.

173. *Id.* (citing *City of Richmond*, 422 U.S. at 378–79).

174. *Id.* at 331 ("The approved *effect* of the redistricting in *Richmond*, and the hypothetically disapproved *purpose, were both retrogressive.* We found it necessary to make an exception to normal retrogressive-*effect* principles, but not to normal retrogressive-*purpose* principles, in order to permit routine annexation.") (emphasis added).

175. Even the concept of retrogressive effect did not exist until a year later when *Beer* was decided. Recall Justice Scalia's observation in another context that one cannot assume that the Supreme Court in *City of Richmond* was "anticipating (Without argument) that later holding" in *Beer. See Bossier II*, 528 U.S. at 337.

to three vote, including that of Justice Scalia himself—in *City of Pleasant Grove*.[176]

Instead, the majority in *City of Richmond* quite explicitly characterized the Section 5 purpose standard as a constitutional purpose standard, and the Court emphasized that this standard extended *beyond annexations* to include other voting changes:

> An official action, whether an annexation *or otherwise*, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute.[177]

In light of the Court's explicit statement that its holding was not limited to annexations, we cannot agree with Justice Scalia's dismissal of the *Richmond* Court's characterization of the Section 5 purpose standard as reflecting "nothing more than an *ex necessitate* limitation upon the effect prong in the particular context of annexation."[178]

4. Misconstruing Vote Denial

Even more problematic is the handling of vote denial in *Bossier II*. After dismissing the Court's long-standing view that the "unless" clause in *Beer* referred to discriminatory purpose, Justice Scalia offered a novel explanation of its meaning:

> A much more plausible explanation of the statement is that it referred to a constitutional violation *other than* vote dilution—and, more specifically, a violation consisting of a "denial" of the right to vote rather than an "abridgement."[179]

It is difficult to see how a clause that specifically deals with "an ameliorative new legislative apportionment"[180] could possibly be viewed as referring to vote denial, which was not even an issue in the litigation, rather than vote dilution, which was the case's central focus.

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176. 479 U.S. 462 (1987). In his dissenting opinion in *Pleasant Grove*, Justice Powell contended that for a jurisdiction to have a discriminatory purpose under Section 5 "it must intend its action to have a retrogressive effect on the voting rights of Blacks." *Id.* at 474. This view had the support of only two other justices, however; the majority, including Justice Scalia, denied preclearance under the purpose prong of Section 5. *Id.* at 463.

177. 422 U.S. 358, 378–79 (1975) (emphasis added). The Court cited *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960), as sufficient justification for the authority of Congress to impose such a purpose prong under Section 5.

178. *Bossier II*, 528 U.S. at 330–31.

179. Id. at 337–38.

180. 425 U.S. 130, 141 (1976) ("We conclude, therefore, that such an ameliorative new legislative apportionment cannot violate § 5 *unless* the new apportionment itself so discriminates on the basis of race or color *as to violate the Constitution*.").

The retrogressive effect standard has consistently been understood, since its creation in *Beer*, to apply to vote denial as well as abridgement.[181] For this reason it would be logical to assume that—if the purpose prong of Section 5 is restricted to retrogressive intent when assessing changes with a dilutive potential, as the Court said in *Bossier II*—then it would have the same definition when assessing changes with a potential for vote denial.[182] Justice Scalia conceded that "in the context of denial claims, no less than in the context of abridgement claims, the antibacksliding rationale for § 5 (and its effect of avoiding preservation of an even worse status quo) suggests that retrogression should again be the criterion."[183] He asserted nevertheless that "arguably in that context the word 'deny' (unlike the word 'abridge') does not import a comparison with the status quo,"[184] as in the concept of retrogression under Section 5. As a result, he observes, implausibly we think: "our holding today does not extend to violations consisting of an outright 'denial' of an individual's right to vote, as opposed to an 'abridgement' as in dilution cases."[185] This implies, although the Court did not expressly hold, that purpose means one thing under Section 5 when reviewing ballot access changes and quite another when reviewing changes in election methods or redistricting plans.[186]

5. Minimizing the Purpose Requirement

The boldest stroke in Justice Scalia's interpretation of the disputed wording in *Beer* is his dismissal of its significance, despite its quarter century of application, on the ground that it is dictum, and thus not binding precedent.[187]

> In any event, it is entirely clear that the statement in *Beer* was pure dictum. The Government had made no contention that the proposed reapportionment at issue was unconstitutional.

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181. *See, e.g.*, Motomura, *supra* note 14, at 204–05.

182. *Bossier II*, 528 U.S. at 338.

183. *Id.*

184. *Id.*

185. *Id.* at 338 n.6.

186. Of course, such a reading would be at odds with Justice Scalia's goal of promoting textual clarity by assigning the same meaning to the words "purpose" and "effect" in Section 5.

187. In fact, Justice Scalia has often explained away language from prior decisions that he disagrees with by labeling it as dictum. *See, e.g.*, Sattazahn v. Pennsylvania, 537 U.S. 101, 113–14 (2002) (The statement [in *Scott v. United States*, 437 U.S. 82 (1978)] upon which the dissent relies . . . was nothing more than dictum."); Mickens v. Taylor, 535 U.S. 162, 170 n.3 (2002) ("To the extent the '*mandates* a reversal' statement [in *Wood v. Georgia*, 450 U.S. 261 (1981)] goes beyond the assertion of mere jurisdiction to reverse, it is dictum."); Kyllo v. United States, 533 U.S. 27, 38 n.5 (2001) (describing a footnote in *California v. Ciraolo*, 476 U.S. 207 (1996), as "second-hand dictum").

> And though we have quoted the dictum in subsequent cases, we have never actually applied it to deny preclearance.[188]

Appellants in *Bossier II* had argued that defining the Section 5 purpose standard as retrogressive intent would restrict its application to rare instances in which covered jurisdictions adopted a change with the intention of making minority voters worse off than under the status quo, but were unsuccessful in accomplishing that goal.[189]

> Nothing in the text, legislative history, or decisions of this Court construing Section 5 suggests that the purpose prong has such a trivial reach, limited to the case of the incompetent retrogressor.[190]

Justice Scalia admitted that such instances of "malevolent incompetence" would be rare, but "it [the "incompetent retrogressor" exception] is enough to justify the separate existence of the purpose prong in the statute."[191]

Justice Scalia readily admitted that, as appellants had contended, "our reading of § 5 would require the District Court or Attorney General to preclear proposed voting changes with a discriminatory effect or purpose, or even with both."[192]

> That strikes appellants as an inconceivable prospect only because they refuse to accept the limited meaning that we have said preclearance has in the vote-dilution context. It does *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore ... must be attacked through the normal means of a § 2 action.[193]

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188. *Bossier II*, 528 U.S. at 338 (citations omitted). We find this claim difficult to square with the application of the purpose standard after *Beer* by the Court itself (*supra* text accompanying note 40), and by the lower courts. For example, in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd mem.*, 459 U.S. 1166 (1983), the Supreme Court summarily affirmed a lower court judgment that relied entirely on the *Beer* "dictum" to find a discriminatory (though nonretrogressive) purpose in the adoption of a Georgia congressional redistricting plan.

189. Reply Brief for the Federal Appellant at 9, *Bossier I* (Nos. 98-405 and 98-406).

190. *Id.*

191. *Bossier II*, 528 U.S. at 331–32. Justice Scalia also asserted that there would be additional instances in which the retrogressive intent standard would present a harder threshold for jurisdictions to meet than the retrogressive effect standard—a view we find improbable. *Id.*

192. *Id.* at 335.

193. *Id.* "As we have repeatedly noted," writes Justice Scalia, "in vote-dilution cases § 5 prevents nothing but backsliding, and preclearance under § 5 affirms nothing but the absence of backsliding." *Id.*

To give the purpose prong the expansive reading advocated by the United States, warned Justice Scalia, would "exacerbate the 'substantial' federalism costs that the preclearance procedure already exacts,"[194] and could well raise "concerns about § 5's constitutionality."[195]

We have always understood the "federalism costs" of Section 5 to be the requirement that *all* voting changes must secure federal approval before being enforced, together with the fact that in a preclearance review the burden of proof shifts to the submitting jurisdiction. The Supreme Court determined in 1966 that these federalism costs were justified by the substantial record of racial discrimination placed before the Congress when it adopted the Voting Rights Act.[196] We doubt that defining the statutory meaning of purpose as identical to its meaning under the Fourteenth or Fifteenth Amendments would increase the federalism costs of Section 5 beyond the level approved by the Supreme Court four decades ago, or lead a fair-minded Court to find Section 5 unconstitutional.[197]

IV. IN THE WAKE OF *BOSSIER II*

A. *The Pattern of Objections*

The impact of the Supreme Court's decision in *Bossier II* was dramatic, as measured by the number of objections interposed by the Department in its wake. Since the Court's decision on January 24, 2000, the Department interposed only 41 objections, as compared with 250 objections during a comparable period a decade earlier.[198] Moreover, virtually all of these objections were based on a finding of retrogressive

194. *Id.* at 336 (quoting *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999)).

195. *Id.* (citing *Miller*, 515 U.S. at 926–27).

196. *South Carolina v. Katzenbach*, 383 U.S. 301.

197. Of course, the record developed by the Congress when considering reauthorization or revision of Section 5 will necessarily be a much different record that in 1965. Whether the record of more recent voting changes continues to justify the preclearance requirement will be an issue in likely court challenges after 2007. *See, e.g.*, Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENVER U. L. REV. 225 (2003).

198. The comparable period would be from Jan. 26, 1990, to June 25, 1994. We are not arguing that there would likely have been approximately 250 objections after January, 2000, had *Bossier II* not eliminated the long-standing Section 5 purpose standard. Doubtless the number of potentially objectionable changes would have been somewhat lower than in the 1990s due to changed political circumstances. Where the Democratic Party controlled the legislature, the increased role of minority officeholders in the decision-making process in covered jurisdictions, due to earlier successes in enforcing the Voting Rights Act, might have occasioned fewer objectionable changes. On the other hand, Black elected officials would likely have had little influence in Republican-controlled legislatures. That said, the gap between 40 and 250 is substantial, and likely cannot be explained by these other changes alone.

effect; only two of the 41 objections were based entirely on the elusive concept of retrogressive intent.

TABLE 4:
LEGAL BASES FOR OBJECTIONS SINCE BOSSIER II

Change Type	Retrogressive Intent	%	Retrogressive Effect	%	Both	%	Totals
Annexations	1	50%	1	4%	1	8%	3
At-large	0		2	7%	1	8%	3
Enhancing Devices	0		6	21%	0		6
Districting	1	50%	15	54%	10	77%	26
Other	0		4	14%	1	8%	5
Totals	2	100%	28	100%	13	101%	43

Note: Totals do not always equal 100 percent, due to rounding.

One of the two objections based on retrogressive intent involved an annexation in the town of North, South Carolina, that would have added only two White people to the town's voting age population. There was evidence, however, that "a large number of Black persons" living just outside the town's borders had unsuccessfully sought annexation.[199] Granting the requested annexation would have swung the town from a White to a Black population majority. Town officials had routinely assisted Whites in complying with annexation requirements but made no effort to disseminate information about annexation procedures to nearby Black applicants. "The test for determining whether or not a jurisdiction made racially selective annexations," wrote the Department, "is whether the annexation policies and standards applied to white areas are different than those applied to minority areas."[200]

The other objection based only on retrogressive intent involved a redistricting plan for Cumberland County, Virginia. There was a small reduction in the Black percentage of the voting age population in the county's one Black-majority district, but the change was only from 55.7 to 55.2 percent, leaving the district still arguably viable for minority-preferred candidates. However, the county apparently went to great lengths to reduce the Black proportion in the district because, as the Department put it, "given the demographics in the area, it was virtually impossible to devise an illustrative plan which did not increase the dis-

199. U.S. Dep't of Justice, Objection Letter to City of North, Orangeburg County, South Carolina (Sept. 16, 2003).

200. *Id.* The Department relied on both *Bossier II*, 528 U.S. at 339–41, and *City of Pleasant Grove*, 479 U.S. 462, in interposing the objection, and noted that town officials had frequently failed to supply requested information.

trict's Black population percentage."[201] The areas moved out of the old district were, moreover, those Black neighborhoods "from which the Black-preferred candidate in District 3 drew substantial support in the 1995 and 1999 elections," leading the Department to conclude that the plan reflected a retrogressive intent.[202]

One objection was based on the concept of future retrogression. The city of Charleston, South Carolina, reduced the number of Black-majority districts from six to five (out of 12 in the benchmark plan), but the Department recognized that as a result of demographic changes in the city this was necessary to meet one-person, one-vote requirements, and was thus preclearable. One of the city's Black-majority districts, however, had been combined with a new, up-scale residential development on Daniel Island, part of a neighboring county annexed to the city some years earlier. The city conceded that the development "will have mostly white residents in the future," so that in a few years the district would no longer afford African American voters an opportunity to elect candidates of their choice.[203]

Most objections involved straightforward cases of retrogression. In roughly a third of the 41 objections in Table 4 the Department also concluded, following an *Arlington Heights* analysis, that the submitting jurisdiction intended to make matters worse for minority voters. Of course, in those instances the change would not have been legally enforceable even without the purpose finding.

B. *Erosion of the Retrogression Standard:* Georgia v. Ashcroft

On June 26, 2003, the Supreme Court announced yet another significant change in the standard for preclearing voting changes in the redistricting case *Georgia v. Ashcroft*.[204] Before this decision, written by Justice O'Connor for a five-person majority, analysis of redistricting plans under the retrogressive effect standard focused on a change's impact on

201. U.S. Dep't of Justice, Objection Letter to Cumberland County, Virginia (July 9, 2002).

202. *Id.*

203. U.S. Dep't of Justice, Objection Letter to City of Charleston, Charleston County, South Carolina (Oct. 12, 2001). Once again, the Department relied on *Bossier II* and *Pleasant Grove* in its decision. *Id.*

204. 539 U.S. 461 (2003). Professor Pamela Karlan writes that the decision presents "a profound transformation in what 'effective exercise of the electoral franchise' means." Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 30 (2004). We largely agree with Professor Karlan's incisive analysis of the decision's ambiguities, but we are less confident about predicting its transformative impact.

the opportunity of minority voters to elect their preferred candidates.[205] In *Georgia*, however, the Court parted company with that precedent, emphasizing that "the power to influence the political process is not limited to winning elections,"[206] and that "a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice."[207] In this new scheme of things, states are now permitted to choose varying combinations of: 1) the traditional "safe" majority-minority districts; 2) what Justice O'Connor called "coalitional" districts; or 3) somewhat nebulously defined "influence" districts.[208]

As in the past, the first option, maintaining the same proportion of safe majority-minority districts in which "it is highly likely that minority voters will be able to elect the candidate of their choice" would entitle a jurisdiction to preclearance.[209] Under the second option, a state could now "choose to create a greater number of districts in which it is likely—although perhaps not as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice."[210] In such coalitional districts, minority voters combine to form a functional majority with "white voters who are willing to form interracial political coalitions in support of minority candidates."[211] One recent court designated this sort of district a "crossover" district.[212]

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205. This focus stemmed from the command in *Allen*, 393 U.S. at 569, to protect minority voters from changes with the potential to "nullify their ability to elect the candidate of their choice."

206. *Georgia v. Ashcroft*, 539 U.S. at 482 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 99 (1986) (O'Connor, J., concurring)).

207. *Id.* at 480.

208. *Id.* at 480–82.

209. *Id.* at 480.

210. *Id.* Here Justice O'Connor cited a law review article by Richard H. Pildes, who referred to this sort of district as "coalitional." Richard H. Pildes, *Is Voting-Rights Law Now At War With Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1522 (2002) (distinguishing between "safe" districts, in which "a majority of the voting-age population is made up of minority voters," and coalitional districts in which minority voters combine to form a functional majority with "white voters who are willing to form interracial political coalitions in support of minority candidates").

211. *See* Pildes, *supra* note 210, at 1522. For more than a decade some voting rights experts have treated such coalitional districts as a viable alternative to majority-minority districts where the empirical evidence demonstrates a realistic opportunity for the election of candidates preferred by minority voters. *See, e.g.*, Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 4, 10–18 (1993) ("The test is not achievement of an arbitrary level of minority population, but the realistic potential of minority voters to elect candidates of their choice."); *see also id.* at 14 (referring to "functional-majority" districts where "coalition voting provides minorities a realistic potential to elect candidates of their choice, despite the lack of a numerical population majority"); J. Morgan Kousser, *Beyond* Gingles*: Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 563–69 (1993).

212. Meza v. Galvin, 322 F. Supp. 2d 52, 63 (D. Mass. 2004) (defining a crossover district as one "in which minority groups constitute under 50% of the relevant population

Coalitional or crossover districts, like the traditional majority-minority districts, permit minority voters to elect candidates of their choice. By spreading minority voters across a larger number of districts, coalition districts offer the possibility of greater substantive representation—the election of a larger number of representatives who are responsive to the views of minority voters—but by increasing the need for crossover votes that approach also, Justice O'Connor recognized, carries an increased "risk that the minority group's preferred candidate might lose."[213] Despite that risk, all nine justices agreed that coalition districts provided an acceptable alternative to safe districts, where justified by the observed level of crossover voting.[214]

The third choice, the use of "influence" districts, presents minority voters only with the opportunity to play some indeterminate role in the election. Justice O'Connor's characterization of influence districts was extremely vague: "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."[215] The Seventh Circuit Court of Appeals put it somewhat more clearly: influence districts are those "in which a minority group has enough political heft to exert significant influence on the choice of the candidate though not enough to determine that choice."[216] It is not clear, on the other hand, how coalition and influence districts should be "weighted"— in comparison either to each other or to safe districts— when measuring retrogression. "Being part of a winning coalition in which a sufficient number of white voters support a candidate sponsored by the Black community may be quite different from having some less direct effect on election outcomes."[217]

Unlike a coalitional district, neither courts nor political scientists have developed clear measures of what constitutes an influence district.[218] Professor Pamela Karlan quite properly emphasizes that "the concentration of Black voters necessary to create safe, coalitional, or influence

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in the proposed district but with the help of non-minority crossover votes have the ability to elect preferred officials").

213. *Georgia*, 539 U.S. at 481.

214. *Id.* at 480–81, 492.

215. *Id.* at 482; *see also* Rodriguez v. Pataki, 308 F. Supp. 2d 346, 375–76 (S.D.N.Y.) (distinguishing between "coalition or "crossover" districts and influence districts), *aff'd mem.*, 73 U.S.L.W. 3315 (2004); Hall v. Virginia, 276 F. Supp. 2d 528, 533–34 (E.D. Va. 2003) (same), *aff'd*, 385 F.3d 421 (4th Cir. 2004).

216. Barnett v. City of Chicago, 141 F.3d 699, 703 (7th Cir. 1998) (reserving the question of influence districts).

217. Karlan, *supra* note 204, at 32 ("The Court seemed to treat coalitional and influence districts as fungible, but they are decidedly not the same.") (internal citation omitted).

218. Pildes, *supra* note 210, at 1539 ("The concept of influence is nebulous and difficult to quantify.")

districts will depend on the degree of racial bloc voting."[219] Only where White crossover voting is sufficient to provide minority voters opportunity to elect candidates of choice, for example, are coalitional districts feasible. For this reason, "the validity of the Court's entire analysis depends on the relative absence of racial bloc voting within a covered jurisdiction."[220]

In the past, the Supreme Court had left open the question of whether the right of minority voters to coalition or crossover districts—but *not* mere influence districts—is protected as a vote-dilution claim under Section 2 of the Voting Rights Act.[221] While leaving the question open, however, the Court noted in *Voinovich v. Quilter*[222] that in order to provide a right to such districts, "the first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated."[223] The lower courts have uniformly rejected both coalition and influence district claims.[224] Thus, the majority in *Georgia v. Ashcroft* created an option for covered jurisdictions seeking preclearance of redistricting plans which the federal courts, in practice, routinely deny minority plaintiffs in Section 2 litigation.

As Justice O'Connor put it, borrowing the language of political scientists, the Court in *Georgia v. Ashcroft* sought to expand the choice of jurisdictions seeking preclearance of redistricting plans to include not

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219. Karlan, *supra* note 204, at 34.

220. *Id.* Notably, Justice O'Connor's opinion never discussed the levels of polarized voting in particular Georgia senate districts; thus, "it was impossible to tell whether any of those districts was in fact a coalitional or influence district." *Id.* at 35.

221. Voinovich v. Quilter, 507 U.S. 146, 150 (1993) (using the term "influence districts" for "districts in which Black voters would not constitute a majority but in which they could, with the help of a predictable number of cross-over votes from white voters, elect their candidates of choice"—in other words, "coalition" or "crossover" districts). Also leaving open this possibility were *Gingles*, 478 U.S. 30, 46–47 nn.11–12 (1986), *Growe v. Emison*, 507 U.S. 25, 41 n.5 (1993), and *Johnson v. De Grandy*, 512 U.S. 997, 1009 (1994).

222. 507 U.S. 146.

223. *Id.* at 158.

224. Numerous appellate courts have rejected influence district claims. *See, e.g.*, Cousins v. Sundquist, 145 F.3d 818, 828 (6th Cir. 1998) ("[W]e would reverse any decision to allow such a claim to proceed since we do not feel that an 'influence' claim is permitted under the Voting Rights Act."); McNeil v. Springfield Park Dist., 851 F.2d 937, 947 (7th Cir. 1988) ("[W]e cannot consider claims that . . . districts merely impair plaintiffs' ability to influence elections."). Both coalition and influence districts have also consistently been rejected as options for satisfying the first prong of the *Gingles* test. *See, e.g.*, Valdespino v. Alamo Heights Indep. Sch. Dist., 168 F.3d 848, 851–53 (5th Cir. 1999); Negron v. City of Miami Beach, 113 F.3d 1563, 1569 (11th Cir. 1997); Romero v. City of Pomona, 883 F.2d 1418, 1424 n.7 (9th Cir. 1989); *Rodriguez*, 308 F. Supp. at 375–76, 378, 383; *Hall*, 276 F. Supp. 2d at 534–36. *But see* Metts v. Murphy, 363 F.3d 8, 11–12 (1st Cir. 2004) (en banc) (vacating a lower court decision that dismissed a coalitional district claim in a Section 2 lawsuit and remanding for further proceedings).

only the traditional "descriptive representation"—an equal opportunity to elect the preferred candidates of minority voters—but also "substantive representation"—an equal opportunity to elect "representatives sympathetic to the interests of minority voters."[225] This distinction stems not from legal precedents but from a substantial social science literature cited by Justice O'Connor.[226]

The studies cited by the Court focus on the question of substantive representation of minority interests in Congress, using roll call votes on numerous bills, arrayed along what amounts to a liberalism-conservatism scale, and treating the position of minority voters on issues measured in national opinion polls as a proxy for the substantive interests of minority voters. The principal findings of these studies are that the substantive representation in Congress of both African American and (non-Cuban) Hispanic voters is best advanced by the election of Democrats—whether White or Black, Anglo or Latino—and that something like a 40 percent minority voting-age population is a necessary threshold for electing such candidates.[227]

Without specifically mentioning the analysis of roll call votes, Justice O'Connor emphasized that "the very purpose of voting is to delegate to chosen representatives the power to make and pass laws," and that preclearance reviews should "examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts."[228] Under this approach, such an investigation

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225. *Georgia v. Ashcroft*, 539 U.S. at 483. As the decision notes:

> Indeed, the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable. . . . The State may choose, consistent with § 5, that it is better to risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters.

Id.

226. *Id.* at 482–83.

227. Among the studies cited by Justice O'Connor, those providing the most probative evidence are Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress*, 90 AM. POL. SCI. REV. 794 (1996), and David Lublin, *Racial Redistricting and African American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress"*, 93 AM. POL. SCI. REV. 183 (1999). *But see* CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 56–58, 211–16 (1993). The most thorough and careful investigation of the substantive representation issue is DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS (1997). If this sort of evidence is what the *Georgia v. Ashcroft* decision anticipated, then preclearance reviews of redistricting plans will for the first time need to examine legislative roll call votes in order to determine which legislators were generally responsive to the interests of minority voters.

228. *Georgia v. Ashcroft*, 539 U.S. at 483.

would in most cases begin with the issue of which party controlled the legislative body, because from that determination flows the choice of committee chairmanships, control over the legislative agenda, and ability to secure passage of legislation.[229] "Maintaining or increasing legislative positions of power for minority voters' representatives of choice, while not dispositive by itself, can show the lack of retrogressive effect under § 5."[230] Thus, the courts and the Department will now have to examine a host of governance issues arising within the legislative process and having little directly to do with the electoral process.[231]

Whether the representatives elected from majority-minority districts in the benchmark plan supported or opposed the new plan was to Justice O'Connor "significant, though not dispositive," not just in regard to the purpose of the plan but also in regard to assessing retrogressive effect.[232] The majority opinion treated these officeholders as knowledgeable observers of the political process whose view of "whether the proposed change will decrease minority voters' effective exercise of the electoral franchise" is entitled to deference.[233] Under this new standard, in short,

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229. *Id.* at 483–84 ("A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to shake hands on a deal.") In Georgia, as in most states, the party which provided the most leadership opportunities for representatives elected by minority voters, was the Democratic Party. Karlan, *supra* note 204, at 26, 33. Thus under this new view of retrogression, evidence that a plan maintained or enhanced the chances that Democrats would control the state senate would presumably enhance the likelihood of preclearance.

230. *Georgia v. Ashcroft*, 539 U.S. at 484.

231. This aspect of the Court's analysis, as Professor Karlan points out, "stands in some tension with its decision in *Presley v. Etowah County Commission*[, 502 U.S. 491 (1992)]." Karlan, *supra* note 204, at 34. In that case, the Court held that "[c]hanges which affect only the distribution of power among officials are not subject to section 5 because such changes have no direct relation to, or impact on, voting." 502 U.S. at 506. After Etowah County had agreed to shift from at-large to district elections, the county commission stripped the commissioner elected from the new Black-majority district of traditional powers of his office. Presley v. Etowah County Comm'n, 869 F. Supp. 1555, 1573 (M.D. Ala. 1994). As a technical matter, *Presley* dealt only with defining the scope of voting changes covered by Section 5—not with defining the evidence that is relevant in assessing retrogression, as in *Georgia v. Ashcroft*. Yet if changes that decrease the power of minority legislators within a governing body need not even be submitted for preclearance, we agree with Professor Karlan that it "seems perverse to treat maintaining or increasing such power as evidence of nonretrogression." Karlan, *supra* note 204, at 34.

232. *Georgia v. Ashcroft*, 539 U.S. at 484.

233. *See id.* Of course, sometimes those minority legislators are overconfident. As Karlan writes:

> The senate majority leader, Charles Walker, who had expressed confidence that the reduction in Black population and voting strength in his district would not affect minority voting strength—his district went from being roughly 63 percent in voting age population with a Black voter-registration majority to being just slightly over 50 percent in voting age population and

minority legislators play a key role. Whether the party to which they belong is able to control a legislative majority, whether their party is generally responsive to the positions they take on particular roll calls, and whether or not they favor the proposed plan have become issues on which a preclearance decision can turn.[234]

In short, the majority decision in *Georgia v. Ashcroft* makes the standard by which retrogression is to be determined much more ambiguous than before, especially in its license to utilize influence districts. By giving covered jurisdictions two different approaches from which to choose, Justice O'Connor's new standard may arguably have made it easier to secure preclearance for redistricting plans. Yet this should not be viewed as a foregone conclusion. When the trial court began to consider the case on remand, it proved necessary to reopen discovery on a host of evidentiary issues.[235]

We cannot agree with the assertion of one recent commentator that *Georgia v. Ashcroft* was "the most important voting-rights decision in a generation."[236] The full implications of the opinion will likely become clear only when the Department and the trial courts wrestle with the new issues it poses and determine what sorts of evidence are necessary to meet the new standard.[237] This is not likely to happen in the near future,

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minority Black in voter registration—was defeated by a white Republican in a racially polarized election.

Karlan, *supra* note 204, at 29.

234. Professor Karlan points out that "the Court's analysis essentially equates the interests of minority voters with the interests of incumbent minority politicians, completely ignoring the presence of any conflict in interest between them," such as the propensity of incumbent legislators to "redraw district lines to render themselves less vulnerable to robust political competition, thereby elevating their own interest in reelection over voters' interests." Karlan, *supra* note 204, at 33.

235. *See, e.g., Georgia v. Ashcroft*, C.A. No. 1:01 CV 02111 (D.D.C. Jan. 7, 2004) (discovery order) (setting forth requirements for designation of experts, production of data required by experts, and deadlines for expert reports). Trial was initially scheduled for May, 2004, but the case became moot when a three-judge court in Georgia found that a similar plan (the plan corrected to secure preclearance and used in the 2002 elections) violated the one-person, one-vote principle. Larios v. Cox, 300 F. Supp. 2d 1320, 1338 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004).

236. Richard H. Pildes, *Less Power, More Influence*, N.Y. TIMES, Aug. 2, 2003, at A23 (*cited in The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 469, 470 (2003)). We quite agree, however, with Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2381 (2003)(commenting that in the Georgia case "[t]he Court accordingly relies on a far more malleable conception of retrogression than it espoused in the Bossier Parish cases").

237. In a very shrewd Note, Meghann E. Donahue estimates how, under the Department's guidelines for administering Section 5, the Court's command to examine the "totality of the circumstances" is likely to be implemented. Meghann E. Donahue, Note, *The Reports of My Death Are Greatly Exaggerated: Administering Section 5 of the Voting Rights*

because the Court's decision came near the end of the redistricting cycle, so that few local and no statewide redistricting plans are left unprecleared. Furthermore the decision likely affects only the review of redistricting plans—not all voting changes. As our analysis has shown, the *Bossier II* decision had a far more profound and demonstrable impact on the enforcement of Section 5.

CONCLUSION

Because *Bossier II* was the most transformative decision regarding Section 5 of the Voting Rights Act since the 1976 opinion in *Beer v. United States*, the story we have told in the preceding pages focuses on that decision, the changes it wrought in Section 5 case law, and its impact on enforcement of the preclearance requirement by the Department of Justice. We began by describing the evolution of the standards for preclearance review set forth in each of the significant Section 5 declaratory judgment cases. We also illustrated in some detail the legal basis on which the Department of Justice objected to voting changes of all types, and provided a systematic quantitative analysis of how the legal bases for objections evolved over time.

Our principal finding was that by the 1990s, the purpose prong of Section 5 had become the dominant legal basis for objections.[238] Almost half (45 percent) of all objections were based on purpose alone. If we include objections based both on purpose and retrogressive effect, and those based both on purpose and Section 2, the Department's finding of discriminatory purpose was present in 78 percent of all decisions to interpose objections in the decade preceding *Bossier II*. Looking only at redistricting plans, the pattern is even more stark. Purpose alone accounted for 58 percent of all objections in the 1990s, another 17 percent were based both on purpose and retrogressive effect, and another 14 percent were based on both purpose and Section 2. That means that a purpose finding was present in an astonishing 89 percent of all redistricting objections in that decade.[239]

In short, the jurisprudential change likely to have the greatest impact on the incidence of objections by the late 1990s was to eliminate the purpose prong of Section 5. That is, in effect, what the majority opinion in *Bossier II* accomplished. By overturning the long-standing view that the purpose standard under Section 5 was identical to the purpose test in a

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Act after Georgia v. Ashcroft, 104 COLUM. L. REV. 1651, 1671–85 (2004). We find her assessment plausible.

238. *See infra* Table 2.

239. Retrogressive effect was by far the most numerous basis for objections in the 1970s (72 percent) and still numerous in the 1980s (45 percent), but had shrunk to only 20 percent of all objections by the 1990s. Objections based only on the "clear violation of Section 2" rule were trivial in number throughout.

Fourteenth Amendment challenge, in favor of the long-dismissed view that under Section 5 the purpose test was limited to whether the jurisdiction had a retrogressive intent, the majority in *Bossier II* guaranteed that the number of objections would be very substantially reduced.

When Congress turns its attention to deciding the future of Section 5, which is set to expire in 2007 if not extended, there will doubtless be calls for amendments to narrow (or increase) its scope, to narrow (or increase) its geographical coverage, and the like. Whatever changes Congress makes should, of course, be designed in light of the evidence as to the current threats facing minority voters. For the cause of minority voting rights, we believe there can be no more important change than to restore the traditional purpose requirement that guided enforcement of the preclearance requirement for the quarter century preceding *Bossier II*. The Court's decision in that case turned in many respects on what Justice Scalia saw as the garbled syntax of Section 5—syntax that had left the Supreme Court untroubled for 35 years. It does not seem too much to ask Congress to revise the provision's language so as to make clear that the purpose standard under Section 5 is identical to the way in which discriminatory purpose is assessed in Fourteenth Amendment cases.