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A Good Fix but Not the Cure - Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006

David H. Harris

Trish Hardy

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A GOOD FIX BUT NOT THE CURE — FANNIE LOU HAMER, ROSA PARKS, AND CORETTA SCOTT KING VOTING RIGHTS ACT REAUTHORIZATION AND AMENDMENTS ACT OF 2006

DAVID H. HARRIS, JR.*

AND

TRISH HARDY**

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* J.D. 1981, University of North Carolina at Chapel Hill. Managing Partner, Harris Smith Law Group, PLLC in Durham, North Carolina. Visiting Professor of Law at the School of Law at North Carolina Central University. Formerly a trial attorney in the Voting Section of the United States Department of Justice, Civil Rights Division.

** J.D. 2007, North Carolina Central University School of Law. Senior Editor for the North Carolina Central Law Journal. Research Assistant to Professor David Harris.

I. INTRODUCTION***

The *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* (H.R. 9)¹ was enacted on July 27, 2006. H.R. 9 extends Section 5 and Section 203 of the Voting Rights Act of 1965 (VRA) for an additional 25 years. In addition to reauthorizing Section 5 and other VRA provisions that were scheduled to expire in 2006, and making additional necessary changes in the VRA, H.R. 9 amended Section 5 to correct problems created by Supreme Court decisions in *Reno v. Bossier Parish II*² and *Georgia v. Ashcroft*.³ The amendments are intended to restore “the original purpose of section 5.”⁴ In enacting H.R. 9, Congress noted that

[t]he effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued Congress’ original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act.⁵

After providing some background information on Section 5⁶ and the reauthorization process, this article will discuss the problems created by the Supreme Court decisions in *Bossier Parish II* and *Ashcroft*. Thereafter, this article will discuss the Section 5 clarification provisions in H.R. 9⁷ intended to eliminate the negative impact of *Bossier Parish II* and *Ashcroft*. Finally, this article will discuss whether these “clarifications” will hold and how the reauthorization process and clarification might impact renewed litigation to invalidate

*** This article is the second in a series on Section 5 of the Voting Rights Act of 1965. The first article, *Georgia Photo Id Requirement: Proof Positive Of The Need To Extend Section 5*, 28 N.C. Cent. L.J. 172 (2006), provides more complete information on the mechanics of Section 5 enforcement.

1. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. *See also*, Fannie Lou Hamer, Rosa Parks, And Coretta Scott King Voting Rights Act Reauthorization And Amendments Act of 2006, Report To Accompany H.R. 9, Committee on the Judiciary, House Report 109-478 (May 22, 2006) [hereinafter *House Report*]; Fannie Lou Hamer, Rosa Parks, And Coretta Scott King Voting Rights Act Reauthorization And Amendments Act of 2006, Report To together with Additional Views To Accompany S. 2703, The Committee on the Judiciary, Senate Report 109-295 (July 26, 2006) [hereinafter *Senate Report*].

2. *Reno v. Bossier Parish School Bd.* (*Bossier Parish II*), 528 U.S. 320 (2000).

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

4. *Fannie Lou Hamer, Rosa Parks, And Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part I)*, Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 1 (May 4, 2006) [hereinafter *May 4, 2006 Hearing*] (statement of Hon. Steve Chabot, Chairman, Subcomm. on the Constitution).

5. § 2(b)(6), 120 Stat. at 578 (emphasis added).

6. For additional background information on Section 5, see David H. Harris, Jr., *Georgia Photo Id Requirement: Proof Positive Of The Need To Extend Section 5*, 28 N.C. Cent. L.J. 172 (2006).

7. Pub. L. No. 109-246, 120 Stat. 577.

Section 5. This article will not discuss the improvements in protections for language minorities and federal observers, which are very significant.

II. THE UNMET PROMISE THAT SECTION 5 ATTEMPTS TO CURE

The Fifteenth Amendment to the United States Constitution,⁸ ratified in 1870, was intended to grant the right to vote to former slaves, and their progeny, by prohibiting the federal, state, and local governments from denying or abridging the right to vote on the basis of race or former state involuntary servitude.⁹ History's painful lesson has shown that mere adoption of the Fifteenth Amendment has not worked.¹⁰ Contemporary history teaches us that even with numerous statutes on the books to enforce the Fifteenth Amendment, including the VRA, resistance to universal, non-racist, suffrage continues and is intensifying.¹¹

Exasperated with nearly 100 years of overt efforts by states, especially Southern states, to ignore the command of the Fifteenth Amendment by continuing to block black voters from the ballot box, and/or ensuring that their votes were not counted or did not carry the same weight as those of white voters,¹² Congress, especially in the face of bloodletting shown on national television, was forced to act.

On March 7, 1965, about 600 Black men and women and a few young children attempted to peacefully march from Selma, Alabama, to Montgomery, to the State capitol, to dramatize to the world that people of color wanted to register to vote; and the world watched as we were met with nightsticks, bullwhips, we were trampled by horses, and tear gas. Eight days after what became known as Bloody Sunday, President Johnson spoke to a joint session of Congress. He condemned the violence in Selma and called on Congress to enact the Voting Rights Act.¹³

8. U.S. CONST. amend. XV, §§ 1, 2.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

9. *Id.*

10. See David H. Harris, Jr., *supra* note 6 (discussing the adoption of the government issued only photo ID requirement as a prerequisite to voting).

11. *Id.*

12. See, e.g., *May 4, 2006 Hearing, supra* note 4; *House Report, supra* note 1; *Senate Report, supra* note 1.

13. *Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose Vol. I: Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2 (2006) [hereinafter *History, Scope, and Purpose*] (statement of Rep. John Lewis from the State of Ga.).

The above-described incident and other incidents of violence inflicted against blacks citizens who sought to register and vote were a national disgrace seen around the world.

A major factor leading to the enactment of the VRA was frustration with the fact that when individual litigation successfully ended one discriminatory practice, "local authorities circumvented court orders by implementing new procedures with the same discriminatory result."¹⁴ Piecemeal litigation was not meeting the goal.¹⁵ In his statement to the House of Representatives in support of H.R. 9, Representative Sensenbrenner, Chairman of the Committee on the Judiciary, stated, "The Voting Rights Act was enacted in 1965 to address our country's ignoble history of racial discrimination and to ensure that the rights enunciated in the Constitution became a *practical reality for all Americans*."¹⁶

Congress enacted the VRA¹⁷ pursuant to its enforcement powers granted to it under Section 2 of the Fifteenth Amendment. Section 2 empowers Congress to enforce the Amendment "by appropriate legislation."¹⁸

The sentinel innovation in the VRA, and the one most hated by Southern states, is Section 5.¹⁹ Section 5 requires states and jurisdictions with the most egregious histories of racial voter discrimination, identified pursuant to a formula postulated in Section 4²⁰ of the VRA and implementing regulations²¹ ("covered jurisdictions"), to *first* seek and obtain approval before implementing *any* new qualification or prerequisite to voting, or standard, practice or procedure with respect to voting ("voting change").²² Approval can only be acquired by a declaratory judgment issued by a three-judge panel of the United States District Court for the District of Columbia²³ or from the Attorney General pursuant to the administrative preclearance procedures of the United States Department of Justice (DOJ).²⁴ If a declaratory judgment action is filed, the DOJ will litigate the declaratory action and either support or oppose the court's approval of the voting change

14. *Id.* at 78 (statement of Anita Earls, Dir. of Advocacy, Ctr. for Civil Rights).

15. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

16. Press Release, U.S. H. of Rep. Comm. on the Judiciary, Sensenbrenner House Floor Statement on Voting Rights Act Extension (July 13, 2006), <http://judiciary.house.gov/printshop.aspx?Section=110>).

17. 42 U.S.C. §§ 1973-1973p (2006).

18. U.S. CONST. amend. XV, § 2; *Katzenbach*, 383 U.S. at 325.

19. 42 U.S.C. § 1973c.

20. *Id.* § 1973b(b).

21. 28 C.F.R. Pt. 51 (2006).

22. 42 U.S.C. § 1973c; *History, Scope, and Purpose*, *supra* note 13, at 9 (testimony of Bradley J. Schlozman, Acting Asst. Att'y Gen., Civil Rights Div., Dep't of Justice).

23. 42 U.S.C. § 1973c.

24. *Id.*; 28 C.F.R. § 51.10.

at issue.²⁵ The voting change does not become effective unless and until judicial or administrative approval is secured.²⁶ The DOJ is also empowered to seek injunctive relief to block implementation of any voting change that has not been precleared pursuant to Section 5.²⁷

There are sixteen states covered under Section 5.²⁸ Nine states are covered in whole: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia;²⁹ however, ten counties in Virginia have been allowed to “bail out” of Section 5 coverage.³⁰ Seven states are covered in part: California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota.³¹

Most requests for Section 5 approval are submitted for preclearance to the Attorney General to save time and expense.³² The Voting Section of the Civil Rights Division of the DOJ is delegated authority to review these submissions.³³ The Voting Section receives 4,000 to 6,000 submissions each year.³⁴ Since the VRA was enacted in 1965, the DOJ has received 121,000 Section 5 submissions.³⁵ Out of the 121,000 submissions, the Attorney General has objected to just over 14,000.³⁶ Nevertheless, in the last ten years there have been only thirty-seven objections.³⁷

Section 5 is a sore point with covered jurisdictions as they perceive it as an intrusion into their rights as state and local governments – the federalism argument.³⁸ Other jurisdictions argue that continued existence of Section 5 punishes them for past “sins” that they no longer commit.³⁹ Both arguments are disingenuous. Section 5 was originally

25. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, SECTION 4 OF THE VOTING RIGHTS ACT, http://www.usdoj.gov/crt/voting/misc/sec_4.htm; 42 U.S.C. § 1973c; *History, Scope, and Purpose*, *supra* note 13, at 9 (testimony of Bradley J. Schlozman, Acting Asst. Att'y Gen., Civil Rights Div., Dep't of Justice).

26. 28 C.F.R. § 51.10; *History, Scope, and Purpose*, *supra* note 13, at 9 (testimony of Bradley J. Schlozman, Acting Asst. Att'y Gen., Civil Rights Div., Dep't of Justice).

27. 28 C.F.R. § 51.62.

28. 28 C.F.R. app. pt. 51.

29. *Id.*

30. *Id.*

31. *Id.*

32. *History, Scope, and Purpose*, *supra* note 13, at 9 (testimony of Bradley J. Schlozman, Acting Asst. Att'y Gen., Civil Rights Div., Dep't of Justice).

33. 28 C.F.R. § 51.3.

34. *History, Scope, and Purpose*, *supra* note 13, at 9 (testimony of Bradley J. Schlozman, Acting Asst. Att'y Gen., Civil Rights Div., Dep't of Justice).

35. *Id.* at 10.

36. *Id.*

37. *Id.* at 9.

38. *See, e.g., Miller v. Johnson*, 515 U.S. 900 (1995).

39. *See, e.g., Northwest Austin Municipal Utility District Number One v. Gonzales*, No. 1:06-cv-01384-PLF (D.D.C. filed Aug. 4, 2006) (action seeking, *inter alia*, declaratory judgment declaring Section 5 unconstitutional as an overextension of Congress's enforcement power to remedy past violations of the Fifteenth Amendment).

intended to be temporary—five years.⁴⁰ However, Congress, after extensive hearings and data collection, has found it necessary to reauthorize and expand Section 5 and other “temporary provisions” of the VRA in 1970, 1975, 1982, 1992 (with respect to language assistance), and now in 2006.⁴¹

The adjudicative authority given to the DOJ pursuant to Section 5 is perhaps the most extensive delegation of judicial authority given to a federal department. Pursuant to Section 5, the DOJ “steps into the shoes” of the United States District Court for the District of Columbia.⁴² There is no appeal from a DOJ decision granting or denying preclearance⁴³; however, if preclearance is denied the jurisdiction is free to file a subsequent declaratory judgment action with the United States District Court for the District of Columbia.⁴⁴ This delegation of judicial authority to the DOJ has prevented countless illegal changes in voting procedures and practices, forestalling the necessity of filing actions pursuant to Section 2. The most important result is that Section 5 has forced covered jurisdictions to work with the DOJ in a cooperative manner to ensure compliance with the VRA, which they now do mostly routinely. Today, most covered jurisdictions work very willingly with the DOJ, providing requested information and agreeing to minor adjustments, to ensure preclearance and protection of the voters. Hence the reason for the lower number of objections in recent years.

Despite the clear success of the VRA, particularly Section 5, many covered jurisdictions continue to oppose the dictates of the Fifteenth Amendment and the VRA, as is shown by the continuing number of the DOJ objections, continuing litigation, and first hand accounts noted in congressional testimony.⁴⁵ As a result of this continued resistance to following the Constitution, Section 5 has been renewed in 1970, 1975, 1982, and most recently in 2006, despite the fact that it was intended to be temporary.⁴⁶

Prior to introducing H.R. 9 and its companion Senate Bill S. 2703, the House Committee on the Judiciary, Subcommittee on the Constitution, held ten oversight hearings between October 18, 2005 and May

40. *Senate Report*, *supra* note 1.

41. *Id.*

42. 28 C.F.R. § 51.10 (2006).

43. 28 C.F.R. § 51.49.

44. 28 C.F.R. § 51.11.

45. *Senate Report*, *supra* note 1, at pp. 12-15.

46. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

4, 2006, to examine the effectiveness of Sections 5 and 203,⁴⁷ which were scheduled to expire on August 6, 2007, according to their last reauthorization in 1982.⁴⁸ During the course of the oversight hearings, the Subcommittee heard from thirty-nine witnesses, who included state and local elected officials, scholars, attorneys, and other representatives from the voting and civil rights communities.⁴⁹ Additionally, the Subcommittee received written testimony from the DOJ, other interested governmental and non-governmental organizations, and private citizens. In total, the Subcommittee assembled over 12,000 pages of testimony, documentary evidence, and appendices from over sixty groups and individuals, including several members of Congress. In addition to the extensive testimony, the Subcommittee requested, received, and incorporated into its hearing record two comprehensive reports compiled by non-governmental organizations⁵⁰ that possessed expertise in voting rights litigation.⁵¹ These reports extensively documented: (1) the extent of discrimination against minorities in voting which continues to occur; and (2) the continuing need for the provisions of the VRA set to expire. The Subcommittee also requested, received, and incorporated reports from eleven of the sixteen states covered in whole or in part under Section 4 documenting the extent of discrimination occurring in those states over the last twenty-five years.⁵² Those reports also describe the impact that the VRA has had on protecting racial and language minority citizens from discriminatory voting techniques in those jurisdictions.⁵³

What the Subcommittee found was overwhelming: that not only was it necessary to extend once again the provisions of the VRA that were intended to be temporary, but it was also necessary to “fix” provisions of Section 5 to clear up erroneous interpretations by the Supreme Court,⁵⁴ particularly those announced in *Ashcroft* and *Bossier Parish II*.⁵⁵

On May 3, 2006, after the House Subcommittee submitted its findings to the Senate Committee on the Judiciary,⁵⁶ the House and Sen-

47. House Committee on the Judiciary, Subcommittee on the Constitution, Hearing transcripts available at <http://judiciary.house.gov>.

48. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

49. *Id.*

50. See, e.g., The National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005 (2006) available at www.votingrightsact.org/report/finalreport.pdf (last visited Apr. 2, 2006).

51. *Id.*

52. *Id.*

53. *Id.*

54. *House Report*, *supra* note 1.

55. *Senate Report*, *supra* note 1.

56. *Id.*

ate introduced identical proposals to renew and amend the VRA,⁵⁷ titled *The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*.⁵⁸ After introduction, the Senate Committee on the Judiciary held eight Committee and Subcommittee hearings.⁵⁹

Congressional findings in the final statute noted, *inter alia*, that vestiges of discrimination in voting continue to exist as demonstrated by *second generation barriers* constructed to prevent minority⁶⁰ voters from fully participating in the electoral process . . . the evidence before Congress reveals that 40 years has not been a sufficient amount of time to eliminate the vestiges of discrimination following nearly 100 years of disregard for the dictates of the 15th amendment and to ensure that the right of all citizens to vote is protected as guaranteed by the Constitution . . . [and] [t]he record compiled by Congress demonstrates that, without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.⁶¹

The congressional findings are sad, but true. Covered jurisdictions still try old and new mechanisms to circumvent the Constitution. Further, covered jurisdictions continue to attack Section 5's constitutionality.⁶² The Supreme Court has, to date, continued to uphold the broad and uncommon exercise of congressional power embodied in Section 5, despite the burden it places on the states and municipalities, on the basis articulated by the Supreme Court in *Katzenbach v. South Carolina*.⁶³ While "[s]tates 'have broad powers to determine the conditions under which the right of suffrage may be exercised[.]' . . . such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."⁶⁴ The Supreme

57. *Id.*

58. *Id.*

59. *Id.*

60. For purposes of this article, use of the term "minority" is intended to refer to racial minorities (people of color) and language minorities (persons with limited English proficiency), who are registered to vote or eligible to be registered to vote and who are the intended beneficiaries of the Voting Rights Act.

61. Fannie Lou Hamer, Rosa Parks, And Coretta Scott King Voting Rights Act Reauthorization And Amendments Act Of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (emphasis added).

62. See, e.g., *Northwest Austin Municipal Utility District Number One v. Gonzales*, No. 1:06-cv-01384-PLF (D.D.C. filed Aug. 4, 2006) (action seeking, *inter alia*, declaratory judgment declaring Section 5 unconstitutional as an overextension of Congress' enforcement power to remedy past violations of the Fifteenth Amendment).

63. *History, Scope, and Purpose*, *supra* note 13, at 4 (2005) (statement of Hon. Steve Chabot, Chairman, Subcomm. on the Constitution).

64. *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)).

Court noted that Congress was well within its constitutional authority to enact a broad-ranging statute with broad remedies, to ensure that the states adhered to the command issued by the Fifteenth Amendment.⁶⁵

Sadly, since *Katzenbach*, the Supreme Court has issued a number of ill-conceived decisions that have weakened the effectiveness of the VRA and the Attorney General's ability to enforce it, particularly Section 5. More disconcerting is recent dicta by several justices that, in effect, have invited covered jurisdictions to seek a partial overruling of *Katzenbach* to declare Section 5 unconstitutional.⁶⁶

The House Judiciary Committee, in a vote of 33 to 1, approved H.R. 9.⁶⁷ The House approved the legislation by a 390 to 33 margin,⁶⁸ and the Senate approved S. 2703 by a vote of 98 to 0.⁶⁹ On July 27, 2006, President Bush signed into law *The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006*.⁷⁰

III. RETROGRESSION GONE WILD – *RENO V. BOSSIER PARISH II*

In attempting to fix the problem created by the Supreme Court decision in *Bossier Parish II*, Congress only managed to repair part of the problem – the problem of the retrogression rule remains.

A. Origin and Impact of the Retrogression Rule

Simply defined, the Retrogression Rule requires the district court⁷¹ and the DOJ to limit the “effect” analysis under Section 5 to whether the proposed voting change makes minority voters worse off than they had been before the change, with respect to their opportunity to exercise the electoral franchise effectively, *irrespective of whether the prior voting practice or procedure was itself a violation of the VRA*.⁷² This rule is not found in the text of the VRA. It is an unreasonable extra-

65. *Id.*

66. *See infra* Section V.

67. Press Release, U.S. H.R. Comm. on the Judiciary, Committee Overwhelmingly Approves Voting Rights Act Extension (May 10, 2006) <http://judiciary.house.gov/media/pdfs/VRAcmtpass51006.pdf>.

68. Press Release, U.S. H.R. Comm. on the Judiciary, House Overwhelmingly Approves Sensenbrenner's Bipartisan Voting Rights Act Extension Legislation (July 13, 2006) <http://judiciary.house.gov/media/pdfs/VRAHousepass71306.pdf>.

69. Charles Babington, *Voting Rights Act Extension Passes In Senate, 98 to 0*, N.Y. TIMES, July 21, 2006, at A1.

70. Hamil R. Harris and Michael Abramowitz, *Bush Signs Voting Rights Act Extension; President Vows to Build on 'Legal Equality' Won in Civil Rights Era*, THE WASHINGTON POST, July 28, 2006, at A3.

71. Hereinafter, unless otherwise noted, references to “district court” shall refer to the three-judge District Court of the United States District Court for the District of Columbia.

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

polation of the “effects” test which has made Section 5 analysis unnecessarily elaborate and has partially defeated the purpose of Section 5 – to save minority voters the trouble and expense of Section 2 litigation to fix an old problem. It is also particularly odd given the fact that retrogression is not used in any other statute in which Congress imposed an effects or impact test.

During 1975-76, and until enactment of H.R. 9, Section 5 required covered jurisdictions seeking a declaratory judgment or administrative preclearance⁷³ to affirmatively prove that the proposed voting change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in [various sections of the VRA].”⁷⁴ While Congress clearly intended for the “effects” test to be utilized in Section 5 determinations, the Supreme Court decisions in *Beer*⁷⁵ and *Bossier Parish II*, discussed below, turned congressional intent on its head.

In 1975, in *City of Richmond v. United States*,⁷⁶ the Supreme Court held that a change with no unlawful effect should still be denied preclearance if it was adopted for a discriminatory purpose.⁷⁷ “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.”⁷⁸ *City of Richmond* made sense. The next major decision makes no sense.

In 1976, the Supreme Court, in *Beer v. United States*, held that the Section 5 “effects” test required a showing of “retrogression.”⁷⁹ The issue in *Beer* was reapportionment of New Orleans’s councilmanic districts.⁸⁰ In reversing the district court and upholding the plan, the Supreme Court in *Beer* found that “[t]he language of [Section 5] clearly provides that it applies only to *proposed changes* in voting procedures. ‘[D]iscriminatory practices . . . instituted prior to November 1964 . . . are not subject to the requirement of preclearance [under Section 5].’”⁸¹ Put another way, the Court found that the purpose of Section 5 “has always been to insure that no voting-procedure changes would be

73. The DOJ regulations define “preclearance” as either the obtaining of the declaratory judgment described in Section 5, to the failure of the Attorney General to interpose an objection pursuant to Section 5, or to the withdrawal of an objection by the Attorney General. 28 C.F.R. § 51.2 (2006).

74. 42 U.S.C. § 1973c(a) (2006) (emphasis added).

75. *Beer*, 425 U.S. 130 (1976).

76. *City of Richmond v. United States*, 422 U.S. 358 (1975).

77. *Id.*

78. *Id.* at 378.

79. *Beer*, 425 U.S. 130 (1976).

80. *Id.*

81. *Id.* at 138 (emphasis added).

made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise.”⁸²

Justice Marshall, dissenting in *Beer*, correctly noted that the Court’s decision retreated from 10 years of jurisprudence that read Section 5 “expansively so as ‘to give the Act the broadest possible scope’ and to reach ‘any state enactment which altered the election law of a covered State in even a minor way.’”⁸³ Justice Marshall opined that the majority “produces a convoluted construction of the statute that transforms the single question suggested by [Section 5] into three questions, and then provides precious little guidance in answering any of them.”⁸⁴

Under the Court’s reading of [Section 5], we cannot reach the abridgment question unless we have first determined that a proposed redistricting plan would “lead to a retrogression in the position of racial minorities . . . in comparison to their position under the existing plan. The Court’s conclusion that [Section 5] demands this preliminary inquiry is simply wrong; it finds no support in the language of the statute and disservices the legislative purposes behind [Section 5].

Implicitly admitting as much, the Court adds another question, this one to be asked if the proposed plan is not “retrogressive”: whether “the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution.” This addition does much in theory, at least to salvage the Court’s test, since our decisions make clear that the proper test of abridgment under [Section 5] is essentially the constitutional inquiry.⁸⁵

Justice Marshall was correct in more ways than one. By finding that Section 5 only prohibits “retrogression” in considering the “effect” of a voting change, (making minority voters worse off than they had been before the change with respect to their opportunity to exercise the electoral franchise effectively, irrespective of whether the original voting practice or procedure was a violation of the VRA), the Court handcuffed the DOJ and the district court in analyzing the effect of a proposed voting change in light of the current practice. This convoluted process is now embodied in the Section 5 implementing regulations.⁸⁶

The impact of the *Beer* holding is staggering. A previously discriminatory system could withstand Section 5 scrutiny just because it existed before Section 4 coverage or simply because it was previously

82. *Id.* at 141 (emphasis added).

83. *Id.* at 145 (Marshall, J., dissenting) (quoting *Allen v. State Board of Elections*, 393 U.S. 544, 567, 566 (1969)).

84. *Id.*

85. *Id.* at 146.

86. 28 C.F.R. Pt. 51 (2006).

approved by the DOJ or the district court, even if the previous approval was erroneous.

The government-issued only photo identification requirement adopted by Georgia in 2005 is an excellent example of this point.⁸⁷ Under this requirement, registered voters must present a government-issued photo identification as the sole allowable prerequisite to being permitted to vote in-person.⁸⁸ After Georgia adopted the requirement and the DOJ precleared it,⁸⁹ a lawsuit was filed challenging the requirement.⁹⁰ The United States District Court for the Northern District of Georgia issued a preliminary injunction blocking utilization of the photo identification requirement.⁹¹ During the pendency of the litigation, the Georgia General Assembly adopted revisions to the Georgia photo identification requirement.⁹² The revisions could only be compared to the previously precleared government-issued only photo identification requirement, rather than the whole picture of its constitutional impact. In effect, the DOJ could not correct its earlier mistake. The DOJ precleared the revision.⁹³ The court permitted plaintiffs to amend their complaint in light of the precleared revision.⁹⁴ The federal action is currently stayed, with the injunction still in effect, pending resolution of a similar state action.⁹⁵ Two lawsuits and a lot of wasted resources were made necessary by the DOJ's failure to block the rule in the first place and, because of *Beer*, its inability to correct its mistake. This litigation demonstrates how the

87. Act of Apr. 22, 2005, 2005 Ga. Laws act 53, § 59 (codified as amended at GA. CODE ANN. § 21-2-417 (2005)).

88. *Id.*

89. Preclearance Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep't. of Justice, to Thurbert Baker, Attorney General, State of Georgia (Aug. 26, 2005) (in State's Brief in Opposition to Plaintiff's Motion for Preliminary Injunction, Ex. 3, Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005)).

90. Common Cause/Georgia, et al. v. Billups, et al, No. 05-0201 (N.D. Ga. filed Sep. 19, 2005).

91. Common Cause/Georgia v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005) (order granting preliminary injunction and holding that the statute imposed an undue burden on voting and constituted a poll tax).

92. Act of Jan. 26, 2006, 2006 Ga. Laws act 432, § 2 (codified as amended at GA. CODE ANN. § 21-2-417 (2006)).

93. Preclearance Letter from John Tanner, Chief, Voting Section, Civil Rights Division, U.S. Dep't. of Justice, to Thurbert Baker, Attorney General, State of Georgia (April 21, 2006) (attached to Notice of Section 5 Preclearance of Act No. 432 (S.B. 84), Common Cause/Georgia v. Billups, No. 05-0201 (N.D. Ga. filed Apr. 21, 2006)).

94. Common Cause/Georgia v. Billups, No. 05-0201 (N.D. Ga. filed Mar. 20, 2006 (Order Staying Action Pending DOJ Review and Allowing Plaintiffs' Motion to Amend Complaint if DOJ Grants Preclearance); Common Cause/Georgia v. Billups, No. 05-0201 (N.D. Ga. filed Apr. 26, 2006) (second amended complaint)).

95. Common Cause/Georgia v. Billups, No. 05-0201 (N.D. Ga. Sept. 28, 2006) (order granting Motion to Stay Proceedings pending Resolution of Appeal of the Superior Court of Fulton County's Declaratory Judgment and Permanent Injunction to the Georgia Supreme Court and Stays all proceedings in this case).

decision in *Beer* forces plaintiffs to seek remedy under Section 2 or other statutory or constitutional basis to eliminate an existing discriminatory voting practice or procedure that could otherwise be corrected through Section 5.

The Court in *Beer*, however, held that absence of retrogression would not prevent an objection based on *intentional* discrimination that would violate the Constitution.⁹⁶ Even this rule did not last forever.

B. *Bossier Parish II* Extreme on the Retrogression Rule

For many years, the Justice Department relied on *Beer*'s statement of the purpose test to deny preclearance to any changes that reflected intentional racial discrimination, but the Supreme Court's decision in *Bossier Parish II*⁹⁷ changed all this. Bossier Parish, a jurisdiction in Louisiana covered by Section 5 of the VRA, is governed by a twelve-member Police Jury.⁹⁸ In the early 1990's, the Police Jury redrew its electoral districts.⁹⁹ The plan it adopted, like the plan then in effect, contained no majority-black districts, although blacks made up approximately twenty percent of the parish's population.¹⁰⁰ The Police Jury submitted its new districting plan to the Attorney General for preclearance, and the plan was precleared.¹⁰¹

Likewise, the Bossier Parish School Board decided to redraw its districts after the 1990 census.¹⁰² The president of the local chapter of the National Association for the Advancement of Colored People (NAACP) proposed that the Board adopt a plan with majority-black districts.¹⁰³ However, the Board rejected that plan and adopted the identical plan approved by the Police Jury.¹⁰⁴ The Board submitted the same redistricting plan that the Police Jury submitted to the Attorney General for preclearance, but the Attorney General objected to the Board's plan asserting that the plan proposed by the NAACP demonstrated that there were enough black residents to constitute a majority in two single-member districts.¹⁰⁵ After the Attorney General denied the Board's request for reconsideration, it filed an action for declaratory judgment seeking approval of the 1992 plan in the

96. *Beer v. United States*, 425 U.S. 130, 142 (1976).

97. *Reno v. Bossier Parish School Bd. (Bossier Parish II)*, 528 U.S. 320 (2000).

98. *Reno v. Bossier Parish School Bd. (Bossier Parish I)*, 520 U.S. 471, 474 (1997).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

United States District Court for the District of Columbia. The district court granted preclearance.¹⁰⁶

During its first trip to the Supreme Court, *Bossier Parish I*, the Court agreed with the district court that a proposed voting change cannot be denied preclearance simply because it violated Section 2, but disagreed with the proposition that *all* evidence of a dilutive (but nonretrogressive) effect forbidden by Section 2 was irrelevant to whether the Board enacted the plan with a retrogressive purpose forbidden by Section 5.¹⁰⁷ Because some language in the district court's opinion left the Supreme Court uncertain as to whether the district court had in fact applied that proposition in its decision, the Supreme Court vacated and remanded for further proceedings as to the Board's purpose in adopting the 1992 plan.¹⁰⁸ The Supreme Court left open the additional question "whether the [Section 5] purpose inquiry ever extends beyond the search for retrogressive intent."¹⁰⁹ That is a different read from *Beer*. The existence of such a purpose, and its relevance to Section 5, were issues to be decided on remand.¹¹⁰

On remand the district court upheld the plan.¹¹¹ On appeal of the district court's subsequent decision, *Bossier Parish II*, appellants (DOJ and intervenors) argued that although the Board's plan would have no retrogressive effect because it did not worsen the position of minority voters, the plan still violated Section 5 because Section 5 prohibits preclearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose.¹¹² There was even testimony that two school board members acknowledged that the redistricting plan reflected opposition to black representation of a black majority district.¹¹³

However, the Supreme Court, in a shocking and debilitating decision, held that the language of Section 5 leads to the conclusion that the "purpose" prong of Section 5 covers only retrogressive dilution, and Section 5 does not prohibit preclearance of redistricting plans enacted with a discriminatory but nonretrogressive purpose.¹¹⁴ Noting that in *Beer* the Court held that a plan has a prohibited "effect" only if

106. *Id.*

107. *Id.*

108. *Id.*

109. *Reno v. Bossier Parish School Bd. (Bossier Parish II)*, 528 U.S. 320, 321 (2000).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*; *Voting Rights Act: Section 5 – Preclearance Standards: Hearing Before the Subcomm. On the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 20 (2006) [hereinafter *Preclearance Standards Hearing*] (statement of Brenda Wright, Managing Attorney at the National Voting Rights Institute).

114. *Reno v. Bossier Parish School Bd. (Bossier Parish II)*, 528 U.S. 320 (2000).

it is retrogressive, the Court went further to hold that Section 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.¹¹⁵ So goes the intent exception in *Beer*.

The Supreme Court's decision in *Bossier Parish II* has received a lot of criticism. The impact of the Supreme Court's decision on the strength of the VRA was addressed during the Congressional hearings on the renewal of Section 5. The major concern raised was that the Supreme Court's decision weakened the ability of Section 5 to prevent districts from enacting discriminatory voting practices. "I think that *Bossier* is indeed like a cancer, eating away at the Voting Rights Act."¹¹⁶

One criticism of *Bossier Parish II* was that the Supreme Court's decision misconstrued the meaning of the discriminatory purpose test.¹¹⁷ As a result, the Court's decision drained the "purpose" test of any practical meaning in the preclearance process.¹¹⁸ "The plain meaning of the word 'purpose' encompasses any and all discriminatory purposes, not merely a purpose to cause retrogression."¹¹⁹ However, if the purpose prong only covers a "retrogressive" purpose, a jurisdiction that never had minority representation on its elected body could continue to adopt new redistricting plans, intentionally designed to freeze out minority voting strength, and Section 5 would provide no protection.¹²⁰

[T]he section 5 purpose test now only applies if, per chance, a jurisdiction were to intend to cause a retrogression in minorities' electoral opportunity, but somehow messes up and adopts a change that, in fact, is not retrogressive. This is highly unlikely to occur, and in fact, in the nearly 5 years since *Bossier Parish* was decided, the Justice Department has reviewed approximately 76,000 voting changes and no such incompetent retrogressor has appeared.¹²¹

Giving an example of the negative impact that *Bossier Parish II* had on Section 5, Brenda Wright, managing attorney at the National Vot-

115. *Id.*

116. *Preclearance Standards Hearing*, *supra* note 113, at 64 (statement of Robert C. Scott, Member, House Subcomm. on the Constitution).

117. *Id.* at 16, 26 (statement of Mark A. Posner, Adjunct Professor, American University, Washington College of Law) (statement of Brenda Wright, Managing Attorney, National Voting Rights Institute).

118. *Id.* at 26 (statement of Brenda Wright, Managing Attorney, National Voting Rights Institute).

119. *Id.* at 16 (statement of Mark A. Posner, Adjunct Professor, American University, Washington College of Law).

120. *Id.* at 19 (statement of Brenda Wright, Managing Attorney, National Voting Rights Institute).

121. *Id.* at 7 (statement of Mark A. Posner, Adjunct Professor, American University, Washington College of Law).

ing Rights Institute, used the Georgia Congressional election of 1986 as an example in her testimony.

If [the Supreme Court's interpretation of the purpose prong] had been applied during the first 35 years of [S]ection 5's history, Congressman John Lewis of Georgia probably would not have won election to the U.S. Congress in 1986. In the early 1980s, Georgia enacted a discriminatory congressional redistricting plan that fragmented the Black population in the Atlanta area. The Georgia legislator who headed the redistricting committee openly declared his opposition to drawing so-called Negro districts, except that he did not use the word 'Negro;' he used the racial epithet. Because of the clear evidence of racism behind the plan, the Justice Department objected even though the plan was not retrogressive. Georgia then redrew the district and the result was that Congressman Lewis was able to win election. But under the *Bossier Parish* decision, the Department of Justice would have been obliged to approve Georgia's original discriminatory plan.¹²²

Similarly, Jerome Gray, the state field director of the Alabama Democratic Conference, cited *Dillard v. Crenshaw* as an example of what could happen to minority representation under the *Bossier Parish II* standard.¹²³ In *Dillard*, in a number of jurisdictions throughout Alabama, school boards, city councils, and county commissions were sued.¹²⁴ Before the *Dillard v. Crenshaw* lawsuit, none of those governing bodies had black representation.¹²⁵ Consent decrees were issued in many of those cases to convert to single-member districts.¹²⁶ However, in about three dozen of those cases, the consent decrees were not codified.¹²⁷ If the *Bossier Parish II* standard was applied, all of those places where there was no black representation would stand to lose representation.¹²⁸

Another problem cited in congressional testimony with *Bossier Parish II* was that it undercuts the ability of the Justice Department and the District Court for the District of Columbia to employ Section 5 to block the implementation of discriminatory changes.¹²⁹ The decline in the number of Section 5 objections based solely on discriminatory intent since the Court's decision is an example of the impact that *Boss-*

122. *Id.* at 25-26 (statement of Brenda Wright, Managing Attorney, National Voting Rights Institute).

123. *Id.* at 54-55 (statement of Jerome A. Gray, State Field Director, Alabama Democratic Conference).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 7 (statement of Mark A. Posner, Adjunct Professor, American University, Washington College of Law).

ier Parish II has had on the effectiveness of Section 5.¹³⁰ In the 1980s and 1990s, before the *Bossier Parish II* decision, over 200 Section 5 objections were based solely on racially discriminatory intent.¹³¹ By contrast, in the first four- and-a-half years after the *Bossier Parish II* decision, only two objections were based solely on intent.¹³²

In short, in *Bossier Parish II*, the Supreme Court took the illogic of *Beer* to a ridiculous extreme.

IV. GEORGIA V. ASHCROFT – ATTACK ON MAJORITY MINORITY DISTRICTS

Prior to 2003, voting changes submitted under Section 5 were evaluated under the retrogressive standard, as set forth in the 1976 case of *Beer v. United States*, which ensures that “the ability of minority voters to participate in the political process and to elect candidates of choice is not diminished by the voting change.”¹³³ The *Beer* decision defined retrogression as a failure to preserve the ability of minority voters to elect candidates of their choice.¹³⁴ This touchstone, relatively clear “ability to elect” standard, was ratified when the Congress extended Section 5 in 1982 and was consistently applied by the courts and the DOJ for more than a quarter century.¹³⁵

This was the standard until 2003, when the Supreme Court deviated from the “straightforward retrogressive application” in *Ashcroft*¹³⁶ and replaced it with a more “amorphous approach.”¹³⁷ Upholding Georgia’s state senate redistricting plan, the Supreme Court, in a 5 to 4 decision, determined that a retrogression analysis requires a “totality of the circumstances” evaluation, not just the “comparative ability of minorities to elect candidates of their choice,” when determining whether a plan is retrogressive under Section 5.¹³⁸

130. *Id.*

131. *Id.* at 27 (statement of Brenda Wright, Managing Attorney, National Voting Rights Institute).

132. *Id.*

133. *Voting Rights Act: The Judicial Evolution of the Retrogression Standard: Hearing on H.R. 9 Before the House Comm. on the Judiciary*, 109th Cong. 2 (2006) [hereinafter *Retrogression Standard Hearing*] (statement of Steve Chabot, Chairman, House Comm. on the Constitution).

134. *Retrogression Standard Hearing*, *supra* note 133, at 4 (statement of John Conyers, Jr., Member, House Comm. on the Constitution, and Ranking Member, House Comm. on the Judiciary).

135. *Id.* at 4-5 (statement of John Conyers, Jr., Member, House Comm. on the Constitution, and Ranking Member, House Comm. on the Judiciary).

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

137. *Retrogression Standard Hearing*, *supra* note 133, at 5 (statement of Melvin L. Watt, Member, House Comm. on the Constitution).

138. *Ashcroft*, 539 U.S. at 482.

The “totality of the circumstances” test was adopted by Congress in Section 2 cases in its 1982 amendments to the VRA to address problems created by a line of Supreme Court decisions that overruled previous precedent that discriminatory effect was just as actionable under Section 2 as discriminatory intent.¹³⁹ There is no way that the Court can with a straight face use totally different analyses in Section 5 (retrogression) and Section 2 (totality of the circumstances) cases, while at the same time using a Section 2 analysis to restrict the effectiveness of Section 5. That, however, is what the Court did in *Ashcroft*. Justice O’Connor described the perversion of retrogression as follows:

In order to maximize the electoral success of a minority group, a State may choose to create a certain number of ‘safe’ districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice Alternatively, a State may choose to create a greater number of districts in which it is likely – although perhaps not quite as likely as under the benchmark plan – that minority voters will be able to elect candidates of their choice.¹⁴⁰

The *Ashcroft* decision had real and immediate retrogressive effects. For example, in the 44th Georgia House of Representatives district, Billy McKinney, a long-time incumbent black legislator saw the voting strength of black voters reduced by approximately seventeen percentage points as a result of the precleared plan. In the next Democratic primary, he faced a relatively unknown white challenger and was defeated.¹⁴¹

In Congressional testimony, several criticisms of the *Ashcroft* decision were given. Ted Shaw noted that one problem with *Ashcroft* is that it permits tangible minority gains to be sacrificed.¹⁴² Reviewing Justice O’Connor’s dictum, Ted Shaw noted that the Court’s decision “permits a jurisdiction to choose among different theories of representation and introduces a substantial uncertainty for minority communities into a statute that was specifically intended to block persistent and shifting efforts to limit the effectiveness of minority political participation.”¹⁴³

Tyrone Brooks, member of the Georgia General Assembly, testified that people have asked him what new strategies and schemes states

139. See *Thornburg v. Gingles*, 478 U.S. 30 (1986) for a full discussion of the 1982 amendments to Section 2. See also, *House Report*, *supra* note 1.

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

141. *Retrogression Standard Hearing*, *supra* note 133, at 31 (statement of Anne Lewis, Att’y, Strickland Brockington Lewis LLP).

142. *Id.* at 13 (statement of Theodore M. Shaw, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.).

143. *Retrogression Standard Hearing*, *supra* note 133, at 13 (statement of Theodore M. Shaw, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.).

would come up with to suppress the minority vote. Brooks opined that “[m]y state [Georgia] didn’t bother to come up with anything new, but reenacted one of the most blatant measures adopted after Reconstruction to suppress the black vote – the poll tax”¹⁴⁴—referring to the Georgia photo identification requirement and its required fees.¹⁴⁵ Representative Brooks added that “there was no evidence whatever presented to the legislature of the need for a photo identification requirement for in-person voting.”¹⁴⁶ Yet, as noted above, the DOJ, relying in part on *Ashcroft*, precleared the requirement.¹⁴⁷ Moreover, Brooks testified that eliminating majority black districts in Georgia would drastically lower the chances of black officials being elected to office.

As a long time member of the Georgia legislature and current chair of the Georgia Association of Black Elected Officials, I can confidently say that if we abolished the majority black districts for the state legislature, we would do away with most of the black legislators. The same would be true of black elected officials at the county and local levels.¹⁴⁸

The Court’s opinion has been criticized for allowing states to turn black and other minority voters into second-class voters who can influence the election of white candidates, but who cannot elect their preferred candidates, including candidates of their own race.¹⁴⁹ “If you ask any voter whether that voter wants the ability to be able to influence who may be sitting at the table when legislation is made, as opposed to the ability to actually have a voice in choosing who’s going to be at the table, I think the latter is a clear choice.”¹⁵⁰ Brooks stated that “the ability to influence the election of candidates is not an acceptable substitute for the ability to elect.”¹⁵¹ Ted Shaw testified that the problem with the *Ashcroft* decision is that it moves away from the

144. *Id.* at 38 (statement of The Honorable Tyrone L. Brooks, Sr., Member, Georgia General Assembly).

145. See the Georgia Photo identification statute discussed above, *supra* note 87.

146. *Retrogression Standard Hearing*, *supra* note 133, at 38 (statement of Tyrone L. Brooks, Sr., Member, Georgia General Assemb. and President, Georgia Association of Black Elected Officials).

147. See *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

148. *Retrogression Standard Hearing*, *supra* note 133, at 39 (statement of Tyrone L. Brooks, Sr., Member, Georgia General Assemb. and President, Georgia Association of Black Elected Officials).

149. *Id.* at 49 (testimony of Laughlin McDonald, Director, Voting Rights Project, American Civil Liberties Union, FND).

150. *Id.* at 57 (testimony of Theodore M. Shaw, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.).

151. *Id.* at 40 (statement of Tyrone L. Brooks, Sr., Member, Georgia General Assembly. and President, Georgia Association of Black Elected Officials).

goal of pursuing full participation in the political process by racial minority groups.¹⁵²

The lack of electoral success of black candidates in majority-white legislative districts in Georgia is an example of the inability of blacks to exercise the franchise effectively in so-called “influence districts.”¹⁵³ As of 2002, all of the ten blacks elected to the state senate in Georgia were elected from districts with populations that were fifty-four to sixty-six percent black. Of the thirty-seven blacks elected to the state house, thirty-four were elected from majority-black districts. Two of the three who were elected from majority-white districts were long-term incumbents in districts where the percentage of black voters were in excess of forty-five percent and the third was elected from a three-seat district, meaning that every voter could elect three members to the house.¹⁵⁴

Congressman Watt agreed with the *Ashcroft* Court that Section 5 does not prevent jurisdictions from reducing super majority minority voting age population percentages from that in a benchmark plan.¹⁵⁵ However, Congressman Watt, along with some of the other witnesses, argued that the Court’s decision replaces a clear standard with an unclear standard. “Where the majority in *Ashcroft* strayed, however, losing four justices in the process, was in its failure to enunciate an articulable standard under which the opportunities to elect are preserved.”¹⁵⁶

The Court held that “[i]n assessing the comparative weight of these influence districts, it is important to consider ‘the likelihood that candidates elected without decisive minority support would be willing to take the minority’s interest into account.’” This type of inquiry is criticized as being extremely subjective and focusing on incumbents rather than voters.¹⁵⁷

Ashcroft invites and shields vote dilution.¹⁵⁸ Before *Ashcroft*, Sections 2 and 5 were safeguards against voter dilution. However, these safeguards have been compromised as a result of the *Ashcroft* decision because “the minority influence theory . . . is frequently nothing

152. *Id.* at 58 (testimony of Theodore M. Shaw, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.).

153. *Id.* at 49 (testimony of Laughlin McDonald, Director, Voting Rights Project, American Civil Liberties Union, FND).

154. *Id.*

155. *Id.* at 5 (testimony of Melvin L. Watt, Member, House Comm. on the Constitution).

156. *Id.*

157. *Id.* at 35 (testimony of Anne Lewis, Attorney, Strickland Brockington Lewis LLP).

158. *Id.* at 13 (testimony of Theodore M. Shaw, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.).

more than a guise for diluting minority voting strength.”¹⁵⁹ For example, the white members of the Georgia legislature opposed the creation of a majority-black congressional district in 1981 on the grounds that it would diminish minority influence. The state legislature said it would cause white flight and the disruption of harmonious working relationships between the races. The three-judge court said that the so-called diminution of minority influence was actually a pretext, and that the refusal of the state legislature to create a majority-black district in the Atlanta metropolitan area was “the product of purposeful racial discrimination.”¹⁶⁰ There is concern that the technique of spreading minority voters among more districts, which dilutes the collective power of their votes, is likely to increase as a result of the endorsement of the so-called “influence districts” in the *Ashcroft* opinion.¹⁶¹

Another problem with the Court’s decision is that an influence-based Section 5 standard is difficult to administer.¹⁶² Ted Shaw suggested that the Court’s decision leaves more questions unanswered than answered.¹⁶³ One of the main questions that *Ashcroft* leaves unanswered is “how does the DOJ or court establish a metric that indicates how much ‘influence’ must be gained to trade off against a reduction in the ability-to-elect?”¹⁶⁴

V. THE FIX

H.R. 9 amended Section 5 to read as follows, with underlining indicating added text and strikethrough indicating deleted text:

- (a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with re-

159. *Id.* at 54 (testimony of Laughlin McDonald, Director, Voting Rights Project, American Civil Liberties Union, FND).

160. *Id.*

161. *Id.* at 5 (testimony of Melvin L. Watt, Member, House Comm. on the Constitution).

162. *Id.* at 13 (testimony of Theodore M. Shaw, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.).

163. *Id.* at 25.

164. *Id.* at 26.

spect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure ~~does not have the purpose and will not have the effect~~ neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their

preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term "purpose" in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.¹⁶⁵

A. *Reno v. Bossier Parish II*

H.R. 9 modified Section 5 to restore the pre-*Bossier Parish II* discriminatory purpose standard. The new subsection (c) to Section 5 added reads as follows: "The term 'purpose' in subsections (a) and (b) of this section shall include *any* discriminatory purpose."¹⁶⁶ Debo Adegbile, Associate Director of Litigation of the NAACP Legal Defense and Educational Fund, Inc., testified, "[t]his modification would allow the DOJ, or the reviewing three-judge panel, to interpose objections or deny declaratory judgments in situations where sufficient evidence of discriminatory intent exists such that the submitting jurisdiction cannot meet its Section 5 burden."¹⁶⁷

Moreover, the modification to Section 5 accomplishes another important goal. *Bossier Parish II* is founded on the Court's interpretation of the statutory language.¹⁶⁸ Likewise, in *Bossier Parish I* the Court used Congress's failure to clarify Section 5's statutory language to justify its decision that the effects prong was limited to "retrogressive" effects.¹⁶⁹ "The modification to Section 5 in H.R. 9 is intended to avoid any implication that Congress ratified the *Bossier II* ruling by aligning the purpose prong with constitutional standards."¹⁷⁰

This is an important fix to Section 5. However, the *Beer* standard of retrogression remains. It was unfortunate that the retrogression doctrine was not removed in 1982 or 2006. From this author's conversations with those who worked on reauthorization and changes to Section 5, they noted the composition of Congress and the reality of making a tactical decision as to what battles are winnable when Section 5 was set to expire in 2007. This fact is exacerbated by the fact that Congress did not eliminate the *Beer* analysis in its 1982 amendments. For now, we are stuck with the *Beer* analysis and the convoluted DOJ regulations incorporating the *Beer* analysis. This is by no means to devalue the importance of eliminating the *Bossier Parish II*

165. 42 U.S.C. § 1973c, as amended by Pub. L. No. 109-246, 120 Stat. 577 (2006).

166. 42 U.S.C. § 1973c(c) (emphasis added).

167. *May 4, 2006 Hearing, supra* note 4, at 45 (testimony of Debo P. Adegbile, Associate Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.).

168. *Id.*

169. *Id.*

170. *Id.*

problem—it is imperative. It is sad, however, that Congress did not go further and eliminate the *Beer* analysis so that the DOJ, the District court and community activists could use Section 5 instead of resorting to more costly Section 2 litigation.

B. *Georgia v. Ashcroft*

Likewise, H.R. 9's modification to Section 5 corrects "the unwarranted shift in statutory interpretation" as a result of the *Ashcroft* decision by restoring the ability to *elect* standard.¹⁷¹ H.R. 9 added new subsections (b) and (d) to Section 5 that read as follows:

(b) Any voting qualification or prerequisite to voting, or standard, or practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees section forth in section 1973b(f)(2), to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.¹⁷²

This amendment should eliminate the "totality of the circumstances" excuse to dilute minority voter strength out of the Section 5 analysis and require the non-approval of dilution plans.

C. Section 203 Improvements

Section 203 requires non-English voting materials be provided to assist citizens in certain jurisdictions where at least five percent of the voting age population consists of a single-language, limited English proficient minority or where at least 10,000 voting-age citizens are limited English-proficient.¹⁷³ H.R. 9 extends the VRA's minority language requirements for a period of twenty-five years.¹⁷⁴

VI. THE COMING ATTACK ON THE CONSTITUTIONALITY OF SECTION 5

There are two distressing lessons of 1982 and 2006: (1) the VRA, especially the temporary provisions such as Section 5, are very much still needed to stop recalcitrant states and jurisdictions from their continuing attempts to disenfranchise racial and language minorities; and

171. *Id.* at 49.

172. 42 U.S.C. §§ 1973c(b) and (d) (2006) (emphasis added).

173. 42 U.S.C. § 1973aa-1a(b)(2)(A).

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

(2) court opposition to the VRA will continue requiring Congress to take steps to fix messes created by the Supreme Court.

On the second point there is much to worry about. Since *Katzenbach*,¹⁷⁵ when the Supreme Court, *inter alia*, upheld the constitutionality of Sections 4 and 5 of the VRA, and *Miller v. Johnson*¹⁷⁶ when Section 5 was reaffirmed, the composition of the Supreme Court has changed and several sitting justices have hinted their belief that Section 5's constitutionality is suspect – in a real sense, they have invited a constitutional attack on Section 5 as an unwarranted intrusion on state rights.¹⁷⁷ Justice Scalia alluded to constitutional concerns,¹⁷⁸ as has Justice Thomas.¹⁷⁹

The invitation has been accepted. *Northwest Austin Municipal Utility District Number One v. Gonzales*, attacking the constitutionality of Section 5, is scheduled to be heard before a three-judge panel of the District Court for the District of Columbia later in 2007.¹⁸⁰ The district court's decision, in either direction, can be appealed directly to the Supreme Court which by statute is required to hear the case.

Bossier Parish II and *Ashcroft* were decided by a vote of 5 to 4. A 5 to 4 vote destroying Section 5 is extremely likely. It is likely but non-sensical. While the Court in recent years has been holding Congress's feet to the fire to find a constitutional basis for its legislation, what clearer basis exists than Section 2 of the Fifteenth Amendment? Also, the extensive findings by the House and Senate Judiciary Committees showing to an absolute certainty the continued need for Section 5 should be more than enough to show that Congress has "done its homework." Yet, given the clear hostility to voting rights and civil rights by so many justices on the Court, the picture does not look good.

175. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

176. *Miller v. Johnson*, 515 U.S. 900 (1995).

177. See *Northwest Austin Municipal Utility District Number One v. Gonzales*, No. 06-01384-PLF (D.D.C. filed Aug. 4, 2006).

178. In *Reno v. Bossier Parish II*, Justice Scalia wrote:

In sum, by suggesting that § 5 extends to discriminatory but nonretrogressive vote-dilutive purposes, appellants ask us to do what we declined to do in *Bossier Parish I*: to blur the distinction between § 2 and § 5 by "shifting the focus of § 5 from nonretrogression to vote dilution, and . . . changing the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." Such a reading would also exacerbate the "substantial" federalism costs that the preclearance procedure already exacts, perhaps to the extent of raising concerns about § 5's constitutionality. Most importantly, however, in light of our holding in *Beer*, appellants' reading finds no support in the language of § 5.

Reno v. Bossier Parish II, 528 U.S. 320, 336 (2000) (internal citations omitted).

179. *Id.* at 341 (Thomas, J., concurring).

180. *Northwest Austin Mun. Util. Dist. No. One v. Gonzales*, No. 1:06-cv-01384-PLF (D.D.C. filed Aug. 4, 2006) (scheduling order entered December 1, 2006).

VII. CONCLUSION

“[C]an you define for me, Mr. Shaw, your vision for what the, I’ll say, the optimum circumstances might be where we could sit here one day . . . and say, ‘[w]e don’t need the Voting Rights Act any more; America is now assimilated and we are all one people’?”¹⁸¹

When we no longer . . . face[] the phenomenon of racially-polarized voting, in which consistently . . . the candidates of choice of the minority community will lose in a majority-White district, then I think we can lay down parts, if not more than parts, of the Voting Rights Act. . . . [B]ut we’re clearly not there now.¹⁸²

To Ted Shaw’s eloquent statement, I would add “read the newspapers . . . this will not happen in our lifetimes.”

H.R. 9’s passage was a great victory for minority voters. It could have gone further. Perhaps it could not go further given the looming “concerns” expressed by Justices of the Supreme Court. Litigation to attack, again, the constitutionality was inevitable. It is a type of forum shopping and plaintiff shopping. With the passage of time and changes on the bench, try again. The only issue at this point is whether there is a 5 to 4 vote in favor of minority voters or against.

It is clear that Section 5 is a powerful take-away from certain states. However, Article VI of the Constitution (the Supremacy Clause) overrules local egos. At the end of the day, if states do not want to be under Section 5, they should try obeying the Constitution in the first place.

181. *Retrogression Standard Hearing*, *supra* note 133, at 58 (statement of Steve King, Member, Subcommittee on the Constitution).

182. *Id.* (statement of Theodore M. Shaw, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.).