VOTING RIGHTS ACT: THE JUDICIAL EVOLUTION OF THE RETROGRESSION STANDARD

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BEFORE THE

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VOTING RIGHTS ACT: THE JUDICIAL EVOLUTION OF THE RETROGRESSION STANDARD

WEDNESDAY, NOVEMBER 9, 2005

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

The Subcommittee met, pursuant to notice, at 2:03 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order.

I'd like to thank the witness panel for being here, and the Members. We'll have a number of Members coming here shortly.

We understand that we're going to have votes here sometime relatively soon, so we're going to try to get started as quickly as possible and as on time as possible.

We want to welcome and thank everyone for being here this afternoon. This is the Subcommittee on the Constitution. I'm Steve Chabot, the Chairman of the Committee.

It's the seventh in a series of hearings on the Voting Rights Act that's been held, and the fourth examining section 5 and the preclearance requirements the section imposes on covered States and counties. Section 5 is one of several temporary provisions set to expire in 2007 if Congress does not act to reauthorize.

This afternoon, we will continue our examination of recent Supreme Court decisions. In particular, we'll focus on the impact that these cases have had on section 5's ability to protect minority voting rights.

I'd like to thank our very distinguished panel of witnesses for being here today. I know that this is a topic of interest to many, and look forward to today's discussion.

Congress enacted section 5 in response to efforts by certain covered States and counties to undermine advances made by minorities in seeking equal treatment under the law. Section 5 prevents covered jurisdictions from enacting any voting or election change until it has been precleared by the Department of Justice or by the U.S. District Court for the District of Columbia.

To successfully preclear a change, a covered jurisdiction must establish that the change "does not have the purpose and will not have the effect of denying or abridging a citizen's right to vote on account of race, color, or language minority status."

As we've discussed in prior hearings, voting changes submitted under section 5 are evaluated under the retrogressive standard, as set forth in the 1976 case *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."

This was the standard until 2003, when the Supreme Court deviated from the straightforward retrogressive application in *Georgia v. Ashcroft*. Upholding the State of Georgia's state senate redistricting plan, the U.S. Supreme Court determined that a retrogression analysis requires a "totality of the circumstances" evaluation, including examining a number of factors; not just the "comparative ability of minorities to elect candidates of their choice," when determining whether a plan is retrogressive under section 5.

Subsequent attempts to administer *Georgia*'s retrogressive analysis have proven to be inconsistent. Moreover, the *Georgia* decision raises questions as to what voting and election changes Congress intended section 5 to prohibit.

This hearing will continue to focus on the purpose of section 5; specifically, the impact of the 2003 *Georgia v. Ashcroft* decision on minority voters and the enforcement of section 5 by the Department of Justice and the U.S. District Court.

Again, we will look forward to the panel's testimony this afternoon and the questioning that we'll have an opportunity to do.

That concludes my statement. I'll now yield to the gentleman from New York, the Ranking Member of this Committee, Mr. Nadler.

Mr. NADLER. The Honorable Ranking Member of the full Committee, the gentleman from Michigan, first.

Mr. CHABOT. Okay. Without objection, the distinguished Ranking Member of the full Judiciary Committee, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you, Chairman Chabot. I'm so happy that we have these four witnesses here. And I agree with you that this is a very important discussion that we're embarking upon.

Georgia v. Ashcroft: can it be made workable? In the Texas congressional redistricting plan, we packed in four and we dismantled four influence districts. We tried this. And now the people that are behind the plan are holding up the Voting Rights Act of 1965, of all things, to justify what they did.

Now, what happened in the *Georgia* case is that it was remanded before we could get it ended. This other *Georgia* case came in, and they held everything that they were doing moot until then. And so we ended up with an independent finding.

And so what I'm here to suggest to you is that we're tossing around the standard way we've looked at this question, with opportunity districts, versus the new way that we're looking at it, with influence districts. And we're going to have to come to some conclusion here.

And your contribution to this discussion is going to be very important, because we've seen what happened in Texas; we've seen what's happened in Georgia. We realize there was some untimely procedural intervention that prevented *Ashcroft*, the *Ashcroft* case, from coming to a full resolution.

So we want you to be giving us the advantage of your thinking about the future of the Voting Rights Act of 1965, not from hindsight, but where we're going in the future. And that's what we've got to examine here today.

There are those who think that we can work out a compromise on this. There are others who tell me that we've got to—that this is the fork in the road; that we've got to come together and try to decide which way we go. And so I'm hopeful that your thinking and discussions on this will help lead us into a result that will stand the historic test of time.

Does anybody want me to yield to them? Mr. Scott? Oh, unless everybody is going to take their own time. Then I'll turn my time back in. I thank you very much, Mr. Nadler and Mr. Chabot, for allowing me to go first.

Mr. CHABOT. Thank you very much, Mr. Conyers. We appreciate your statement. Mr. Nadler, did you want to make a statement?

Mr. NADLER. Yes, thank you, Mr. Chairman. Mr. Chairman, I want to join you in welcoming our distinguished panel of witnesses. I look forward to their important testimony.

The question of retrogression, especially as raised in *Georgia v. Ashcroft*, is of paramount importance. It goes to the heart of how we measure the ability of voters to express their will at the polls in a meaningful and effective manner.

The Supreme Court's decision has met with a great deal of criticism. Ultimately, Congress must decide on language that will in some concrete manner provide minority voters with the tools they need to extract from voting officials in the Federal Government a meaningful result.

Applying a retrogression standard is, in the final analysis, a very fact-based exercise. Generalities will be of little help if we cannot provide clear guidance that will protect voters from being deprived of the ability to have their voices heard and to affect the outcome of elections.

It is my hope that today's witnesses can give us some concrete guidance as to how the *Georgia v. Ashcroft* decision has been applied, what its limitations and consequences have been, and how in a really practical sense Congress should deal with the problem of devising a meaningful retrogression analysis.

I look forward to the testimony. I yield back the balance of my time. And I must add, unofficially, I am delighted to see a sign here that says "Representative Brooks." I recall a time when Representative Brooks was Chairman of this Committee—not perhaps the same Representative Brooks. Thank you, Mr. Chairman.

Mr. CHABOT. Thank you very much. The gentleman from Virginia, Mr. Scott, is recognized.

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman. Mr. Chairman, American's long and deliberate misadventure with segregation was ended by many things, including the civil rights movement sparked by Rosa Parks. But nothing dismantled the "Jim Crow" South and created true opportunities for equal political participation more than the Voting Rights Act of 1965.

By tearing down barriers to equal opportunity for minorities at the ballot box, the Act removed the essential political mechanism that maintained the legal structure of segregation. As the Supreme

Court has said, the equal right to vote is fundamental because it is "preservative of all rights."

Mr. Chairman, the genius of the Voting Rights Act is not only that it abolished literacy tests and other schemes which had been used to deny Blacks and other minorities the right to vote, it also prohibited—under section 5 of the Act, it prohibited the jurisdictions with a history of discrimination from implementing new voting practices without first having those practices precleared by Federal officials.

This important provision eliminated the incentive that covered jurisdictions would have from coming up with new schemes to dilute minority voting strength, and benefitting from their illegal activity while the victims file lawsuits or go through the legal process. Sometimes that takes many years; sometimes those groups, the victims, can never come up with the funds necessary to vindicate their rights.

More than 10 years after the passage of the Voting Rights Act, the Supreme Court has interpreted "discriminatory effect" to mean retrogression and that the minority community is made worse off by the change.

The *Beer* decision, *Beer v. U.S.*, went further, to define retrogression as a failure to preserve the ability of minority voters to elect candidates of their choice. This standard was ratified when the Congress extended section 5 in 1982, and was consistently applied by the courts and the Department of Justice for more than a quarter century.

Recent cases have raised questions about exactly what the standard is now, and so several questions need to be addressed. And one is whether or not you can trade a district where the minority community has an ability to elect a candidate for influence districts where they do not have the ability to elect candidates. And another is, if you slightly dilute a district's minority population, but it still has the ability to elect, can you consider the establishment of influence districts?

Mr. Chairman, I look forward to the testimony of our witnesses. Section 5 and other expiring provisions are essential to ensuring fairness in our political process and equal opportunity for minorities in American politics. And so I think it's essential that we strengthen section 5 and clarify its meaning, so that we do not go backwards in enforcement of minority voting rights.

So I look forward to the testimony, and thank you, Mr. Chairman. And before I yield back, I would yield to the gentleman from Michigan.

Mr. CONYERS. Thanks for a great statement, Mr. Scott. The question of whether the elimination of influence districts could serve as the grounds for a section 5 objection is a very important one. It seems to follow from *Georgia v. Ashcroft*.

We've seen that very situation in the Texas congressional redistricting plan that, according to one of our witnesses, eliminated four minority influence districts to create a district that elected an Hispanic candidate who did not have the support of Latino voters. Thank you.

Mr. SCOTT OF VIRGINIA. Yield back.

Mr. CHABOT. Okay. The gentleman yields back.

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

Mr. WATT. Thank you, Mr. Chairman. And today is the seventh hearing on the Voting Rights Act. And as I have at all of the hearings that I've attended, I want to start by thanking Chairman Chabot and, in his absence, thanking Chairman Sensenbrenner for convening this hearing and for a commitment to building the kind of record that we need going forward to sustain whatever extensions we do to the Voting Rights Act.

In addition to examining the purpose, effect, and continuing need for the expiring provisions of the Voting Rights Act, the reauthorization process also demands that we analyze judicial interpretations of the Act that may have undermined the essential purpose and effectiveness of the Act's provisions.

So today we focus on the impact recent Supreme Court decisions have had on section 5 and the obligation of covered jurisdictions to demonstrate that changes in voting policies and practices will not deny or abridge a citizen's right to vote on account of their race, color, or language minority status.

In 1976, the Supreme Court decided the *Beer v. U.S.* case, decided that an election change should not be precleared under section 5 if "the ability of the minority groups to elect their choices to office is diminished." After *Beer*, the Supreme Court and the Department of Justice defined "retrogression" in the context of section 5 as a change in voting or election practices that resulted in an adverse effect or a backsliding in the opportunities of a minority group to elect the candidate of their choice.

This touchstone, relatively clear "ability to elect" standard was accepted without modification by Congress in 1982, when Congress amended section 2 and extended section 5 for 25 additional years. In 2003, the Supreme Court deviated from the recognized retrogression standard, and replaced it with a more amorphous approach in determining whether a redistricting plan made minority voters worse off.

Although there are parts of the Court's decision for which there is widespread support, the Court's suggestion that the effective exercise of the franchise can be achieved by spreading minority voters over a greater and greater number of districts to enhance their influence has raised some important concerns.

Nine justices agreed, as do I, that section 5 does not prohibit the reduction of super majority minority voting age population percentages from that in a benchmark plan. Where the majority in *Georgia v. 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.

To the extent that *Georgia v. Ashcroft* depreciates the role of minority groups' ability to elect plays in the retrogression analysis, it invites the potential for an erosion of the protections embodied by section 5. To paraphrase one professor, Professor Pam Karlin, there is a retrogression of the retrogression standard when you do that.

The ability to elect has always been the cornerstone of section 5, and should remain. Of course, the devil is in the details. And that's what we've got all these excellent witnesses here for today: to give us the details on how we ought to be addressing what I think we

all agree have been some missteps on the part of the Supreme Court in playing out what the Congress' intent was. But I think there's general agreement—or there seems to have been in prior hearings—on that proposition.

The more important question is: how do we correct them in the renewal or extension process, going forward? And we need to be very careful about that. And I couldn't think of a more elite and distinguished and deserving and qualified panel of witnesses than the ones we have today, to tell us how to navigate those waters going forward.

I yield back, and thank the gentleman again for holding the hearing.

Mr. CHABOT. I thank the gentleman.

I'd also like to recognize three additional Members of the House who are not actually Members of this Committee, but nonetheless are very active and distinguished Members that I would like to ask unanimous consent that the three Members be able to fully participate in the hearing today, both to make opening statements, should they choose to do so, and also question the witnesses. And without objection, so ordered.

And I'd like to first recognize—and all three gentlemen happen to be from the State of Georgia. I'd first like to recognize Mr. Lewis, who of course is an inspiration to so many Members of the House, because he is one person who lived and shed blood during these years that we're discussing and marched in the front lines of the Civil Rights Movement. And so we have much to learn from him. And so I would recognize him for the purpose of making an opening statement.

Mr. LEWIS OF GEORGIA. Well, thank you very much, Mr. Chairman, for allowing this non-Member of this Committee to be here. And thank you for your kind words.

I'm delighted to see such a wonderful panel; three members of this panel being from the State of Georgia, from my district. And it's good to see you. You're so well qualified to testify and speak on *Georgia v. Ashcroft*. Good to see Ted Shaw.

I've said in the past, and I'll say it again today, Mr. Chairman, I would like to maybe submit a statement for the record.

Mr. CHABOT. Without objection, so ordered.

Mr. LEWIS OF GEORGIA. The Voting Rights Act, and section 5, was good in 1965, is good in '05, and I think it's still good in years to come. Some of you may notice from *Georgia v. Ashcroft* that so many people have used my statement—there was an affidavit, I then testified in the Court—have used it in a number of occasions and taken it out of context. I still believe we made a lot of progress. We've come a distance. But we still have a great distance to go.

I will be eager to listen to what each one of you has to say, because the right to vote and the right to be able to fully participate in the election process and to have an opportunity to select a candidate of your choice, to have influence, I think is precious. It's almost sacred.

And I want to commend each and every one of you for all the hard work that you all have done over the years to bring us to where we are. Some of you have been in this field for a long time, for years. So I welcome you.

Thank you, Mr. Chairman. I yield back.

Mr. CHABOT. Thank you very much.

The gentleman from Georgia, Mr. Scott, is also recognized for the purpose of making an opening statement. I would once again note that his attendance during the course of these hearings has been pretty extraordinary for a non-Member of this Committee. So thank you very much for your interest.

Mr. SCOTT OF GEORGIA. Thank you very much, Mr. Chairman. And again, it's a delight to be here. And I thank you for your courtesies, and the entire Committee.

This is indeed a very extraordinary day. It's so good to see all of our home people from Georgia here. Representative Tyrone Brooks, we served in the legislature together there, in the House and the Senate, for over a quarter of a century together; been through many battles, and certainly through the reapportionment battles of 1980, 1990, 2000. And as a result of all of that, the history books are clear that, without any question, Georgia is indeed the poster child for the greatest reaffirmation of need for the Voting Rights Act of any State in this Nation.

And to you, Mr. McDonald, it's so good to see you. And your reputation certainly precedes you in all that you have done, all the sterling legal leadership you've provided in each of these cases in Georgia. This Committee is certainly in for a treat, and we're proud to have you and Ms. Anne Lewis. You represented those plaintiffs for each of the cases, all the way stretching back to the early '90's—I think 1991, as well, and all of those. And certainly to you, Mr. Shaw; I don't want to leave you out. But I'm sure that we're glad to have you.

This is very important, because *Georgia v. Ashcroft*, I think, really presents to us an excellent opportunity to show why we definitely need to have section 5 extended, and all of the parts extended.

This whole issue with the case of *Georgia v. Ashcroft* shows clearly this schizophrenic, dichotomized mindset that this Nation has historically had in terms of extending voting rights, and then taking them back. It sort of starts out right from the foundation of this country, when we had those very eloquent words that, "We hold these truths to be self evident, that all men are created equal," and "...endowed by their Creator with certain inalienable rights; among these, life, liberty, and the pursuit of happiness." At the same time, that individual that wrote those magnificent words owned slaves; was the father of slaves.

We come on down to the year of 1870, when men and women of color sat right here in Congress; were given that right to vote and participate. Then it was snatched away. We even had the 15th amendment to come and to say nothing would abridge that right—race, creed, or color, or servitude. And still, it was snatched away.

And not until—largely through the works of John Lewis and Martin Luther King and Rosa Parks and all of those—we were able to get the 1965 Voting Rights Act—a hundred years, over 200 years since we were founded. And here we are today, just 40 years later after the Voting Rights Act.

Even with the threat of this Act not being renewed, presents the height of hypocrisy of our country; especially when we have men

and women dying on the battle fields of Iraq to bring democracy there; and we have these efforts to overturn the one basic legislative instrument we have that guarantees and enforces our rights here.

So I'm looking forward to this. It's set very, very strongly. And let us hope that we will be able to overturn this influence district phenomenon, and make sure we make plain the purposeful intent of discrimination, which we need to have made today, the strength of the Constitution that stands behind this Act; and then how we can practically excise *Georgia v. Ashcroft* out of the law, so that we can get the Voting Rights Act back and section 5 back, without this great threat to it inside of it.

I look forward to the discussion. Thank you very much, Mr. Chairman.

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

The gentleman from Georgia, Mr. Bishop, is recognized for 5 minutes.

Mr. BISHOP. Thank you very much, Mr. Chairman. I, too, would like to thank you for holding this hearing, and certainly for allowing me, as a non-Member, to join this distinguished panel.

I'd like to join my colleagues in welcoming my friends of longstanding: my former colleague, Representative Tyrone Brooks, who has been a friend of longstanding; Mr. Teddy Shaw, with whom I've been affiliated with the NAACP Legal Defense and Education Fund for many, many years; Ms. Lewis; and of course, Mr. McDonald, who I've had occasion to have a relationship with, both personally and professionally, in these reapportionment battles that we've been involved in over the years.

I, of course, served in the State senate on the Reapportionment Committee, and of course we collaborated a great deal, and of course I was involved when I was in the State House for 14 years in three or four redistricting battles there. And of course, one of them resulted in, of course, my being able to come to this body.

And so I certainly welcome you, and I'm delighted that you are here, because all of you are certainly experts in this field and have a great deal to bring.

I am particularly interested in this because four of our colleagues—I should say, seven of our colleagues from Georgia, on the other side of the aisle, have made it a point that in the debate on extension of the Voting Rights Act this year they intend to do one of two things: to either repeal section 5, which requires extensive oversight; or to have section 5 extended to all 50 States.

I feel very strongly against either and both of those proposals. I can see very well that being—Reconstruction revisited, if the Justice Department no longer has to oversee and has to review and preclear, or Federal courts preclear, the actions of the State legislatures of the covered jurisdictions.

Particularly, I'm brought to mind the picture ID bill that passed in the last session of the Georgia general assembly, which was approved by the Justice Department, only to be, fortunately, enjoined in its application by the United States Circuit Court of Appeals.

I'd like to know at some point during your testimony if you could touch on the legal principles and the legal peril that the constitutionality of the Voting Rights would face in the event that the law,

section 5, is extended to all 50 States; and also, what you portend the effect would be if section 5 were not extended at all, if it were repealed; what you, based on your experience, would believe would be the outcomes.

Thank you for coming, and I look forward to your sharing your advice, your counsel, your wisdom with this Committee as a part of the record of these hearings, which will be a part of the records of this Congress, so that we can, hopefully, be enlightened as we face this very, very important and significant issue.

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

I might note that there are votes on the floor, but what we're going to do is finish up opening statements here. And we've been joined by two additional colleagues: the gentleman from Arizona, Mr. Franks, who I understand is not going to make an opening statement at this time; and the gentleman from Iowa, Mr. King, who will. So the gentleman from Iowa is recognized for 5 minutes—or less, whatever he takes up.

Mr. KING. Hopefully, less, Mr. Chairman. I thank you for recognizing me, and I thank all the panelists and look forward to your testimony subsequent to our vote.

And as I listen to the opening statements here, a number of things come to mind. And one of them is, as I look at some of the language here and some of this case law and some of the opinions, that I'm a very strong believer in individual rights, and I've never believed that there was such a thing as group rights in this country; and that we ought to do everything we can to protect the sovereign rights of every individual in America; and in fact, that the people themselves are sovereign.

In the end, we're the ones, as the voices of the people, that should make the decision on whether in fact we have voting districts that represent the voices of Americans, or whether we don't.

And I come from a State that has a unique approach to this, in Iowa. And we have had for a long time a redistricting law in Iowa that requires that three non-partisan people go behind into a room, close the doors, and draw districts in Iowa that are compact, contiguous, and balanced in population as possible. And if they draw that district and it can be challenged by the language, we can then vote that down. If we vote it down a second time, then it goes to the courts, and the judges then write the district.

Well, I think what happened in Ohio last night was an opinion that—I have come to the conclusion in Iowa that nobody really wants the judges to write the districts in America.

And I'll say another thing is that it's really not possible to find three non-partisan people, anywhere in America. So I don't know how you end up with a qualification that lets us get maybe where we'd like to go with this, because we're all built in with inherent biases of one kind or another. And so, you know, I listen to this with great interest.

Another point that I would bring up is that, under the *Beer* decision, no voting procedure changes would be made that would lead to retrogression in positioning of racial minorities with respect to their effective exercise of the electoral franchise. That presumes that there are groups in America who have more than their fair share of representation. Should the progression of voting rights not

end in some point some retrogression, one would logically think that there would be a point when minorities had more leverage, as well. And would that mean then that the *Beers* [sic] case would still stand? Or where do we get this point of balance?

When do we finally say: America is where we need to go; we are assimilated; we're all one people; we love each other; we work together; and we don't see each other in the eyes of being a member of a group, but instead individual Americans with individual sovereignty; and the people the sovereign?

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you. Would the gentleman yield for a moment, while he still has 30 seconds? The gentleman referred to the vote in Ohio last night. I would just note that the plan that failed by 70 to 30—70 percent of the people voted against it; 30 for it—would have been what the gentleman indicated: two retired judges would pick three other people, and they would pick the district lines.

There was a sense of this same thing that the Governor of California, Governor Schwarzenegger, failed at passing out in California last night, as well. So it was a trend last night, at least in two of the two States that it was up in.

We have a series of three votes, it's my understanding, on the floor. So we will go into recess at this time. And I'd ask Members to come back as quickly as we can, and we'll begin right after the three votes. And if you'll bear with us, we're probably looking at a half hour or so before we'll be back. We're in recess.

[Recess, 2:37 p.m.-3:17 p.m.]

Mr. CHABOT. The Committee will come back to order.

Members will be arriving as they get back from the votes on the floor. Without objection, all Members will have 5 legislative days to submit additional materials for the record.

And I'd now like to introduce our very distinguished panel of witnesses here this afternoon. Our first witness will be Mr. Theodore Shaw. Mr. Shaw currently serves as the Director-Counsel and President of the NAACP Legal Defense and Educational Fund. Mr. Shaw joined the NAACP in 1982, directing LDF's education docket and litigating school desegregation, capital punishment, and other civil rights cases throughout the country.

In 1987, he established LDF's Western Regional Office in Los Angeles, and served as the Western Regional Counsel. In 1990, Mr. Shaw left LDF to join the University of Michigan Law School faculty, where he taught constitutional law, civil procedure, and civil rights. During that time, Mr. Shaw played a key role in establishing the law school's admission policy.

Mr. Shaw rejoined LDF as Associate Director-Counsel in 1993. In 2003, Mr. Shaw was the lead counsel in a coalition that represented African-American and Latino student intervenors in the University of Michigan undergraduate affirmative action case, *Gratz, et al. v. Bollinger, et al.*, in which the Supreme Court held in favor of diversity as a compelling State interest. Mr. Shaw also serves as an adjunct professor of law at Columbia Law School. We welcome you here this afternoon, Mr. Shaw.

Our second witness will be Ms. Anne Lewis. Ms. Lewis currently serves as a partner at the Georgia law firm Strickland Brockington

Lewis LLP, where her practice focuses on regulatory matters involving public utilities before the Georgia Public Utility Commission.

In addition, Ms. Lewis represents clients in various public policy and legislative matters, including redistricting. During the 2000 redistricting cycle, Ms. Lewis, together with her partner Frank Strickland, represented four intervenors in the State of Georgia's section 5 preclearance case, *Georgia v. Ashcroft*.

Ms. Lewis also represented the plaintiffs in the Fulton County School Board redistricting case, *Markham v. Fulton County School Board;* and served as counsel to former Speaker Newt Gingrich and Congressman John Lewis, amicus curiae in the 1990 Georgia redistricting case, *Johnson v. Miller*.

Ms. Lewis is a certified mediator, and is a volunteer with Hands on Atlanta and a truancy intervention program. And we welcome you here this afternoon, Ms. Lewis.

Our third witness will be Georgia State Representative Tyrone Brooks. Congressman Brooks currently represents the 47th District in the State of Georgia, as well as serves as the President of the Georgia Association of Black Elected Officials.

Mr. Brooks has a long and distinguished career as a civil and human rights activist, beginning his career at the Southern Christian Leadership Conference, SCLC, where he worked as a volunteer and was eventually hired by Dr. Martin Luther King, Jr.

During his 19 years at the SCLC, Representative Brooks held several positions, including National Communications Director, National Field Director, and Special Assistant to the President; and served under three very distinguished Presidents, Dr. Martin Luther King, Jr., the late Rev. Ralph Abernathy, and Dr. Joseph E. Lowery.

Representative Brooks has continued his efforts in the State legislature, where he advocates for legislation ending discrimination, racism, illiteracy, and injustice. Representative Brooks was co-author of the "max black plan," used to create more majority-Black districts, which resulted in the election of 3 African-Americans to Congress and 44 to seats in the general assembly.

Representative Brooks is a member of the Georgia Black Legislative Caucus, and is co-founder of the Coalition for the People's Agenda. He is also active in many other organizations dedicated to equality and justice. We welcome you this afternoon, Mr. Brooks.

And our fourth and final witness will be Mr. Laughlin McDonald, current Director of the ACLU Voting Rights Project. As Director, Mr. McDonald has played a leading role in eradicating discriminatory election practices and protecting the progress made by racial minorities in voting since the passage of the original Voting Rights Act back in 1965.

In 1972, Mr. McDonald joined the Southern Regional office of the ACLU as Executive Director, and won some of the most precedent-setting cases, including those that secured the "one person, one vote" principle, established the right of women to serve on juries, and ended discriminatory at-large elections.

Prior to his work at the ACLU, Mr. McDonald served on the faculty of the University of North Carolina Law School and in private practice. We welcome you back again, Mr. McDonald.

For those of you who may not have testified before the Committee, I'll just familiarize you with the 5-minute rule. You have 5 minutes to testify. We have a lighting system. There are two boxes there in front of you. For 4 minutes, the green light will be on; 1 minute, it will be yellow, and let you know that it's time to wrap up; but when the red light comes on, your time is up. And we'd appreciate your trying to stay within that time frame as much as possible.

I would also encourage my colleagues, who are also limited by the 5-minute rule, to try to keep as close to the 5 minutes as we can, because we have another hearing on the Voting Rights Act that's been scheduled for 4. We'll probably have to push that back a little bit, but we have another distinguished panel to testify. We don't want to keep them waiting too long. So if we can stay within the 5 minutes, that would be much appreciated.

It's also the practice of this Committee to swear in witnesses prior to their testimony, so we'd ask you all to please stand and raise your right hands.

[Witnesses sworn.]

Mr. CHABOT. Thank you. Each witness has indicated in the affirmative.

We're now ready to hear from the panel. And Mr. Shaw, if you're ready, we'll hear you for 5 minutes. And you'll have to turn on the mike there. Thank you very much.

TESTIMONY OF THEODORE M. SHAW, PRESIDENT AND DIRECTOR-COUNSEL, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Mr. SHAW. Thank you, Mr. Chairman. Members of the Committee and distinguished Representatives, counsel, as President and Director-Counsel of the NAACP Legal Defense and Educational Fund, I welcome the opportunity to testify before the Committee regarding the judicial interpretation of the retrogression standard as it relates to the renewal of section 5 of the Voting Rights Act.

The Voting Rights Act is widely regarded as one of the greatest achievements in the Civil Rights Movement. It reflects Congress' meaningful and lasting embrace of equal protection of the law and equal political opportunity.

The context for the current renewal debate is one in which LDF's perspective reveals two truths that shape the current debate: First, we must recognize that we've made a great deal of progress, a lot of change for the better, since 1965, due in large part to the existence of strong, effective civil rights laws, such as the Voting Rights Act. Second—and LDF's experience bears this out—any accurate description of the situation within covered jurisdictions illustrates that in significant respects, a great deal remains to be done, if we are to achieve the political equality to which the Reconstruction constitutional amendments unequivocally commit us.

The ability for minority communities to elect candidates of their choice has been at the core of the Voting Rights Act. Typically, a section 5 assessment of the ability to elect occurs in the context characterized by, one, the national preference for single-member electoral districts and, two, the continued existence of racially-po-

larized voting patterns—and that's really key; I will underscore that, and come back to that, if need be, again and again in the few minutes I have—and three, the persistent efforts to dilute minority votes by depriving their communities of the benefits of fairly drawn redistricting plans.

Against this backdrop, and in the wake of the Supreme Court's reconceptualization of section 5 preclearance in *Georgia v. Ashcroft*, I wish to direct the remainder of my remarks to explaining several of the reasons why Congress should act to restore protection for the ability of minority voters to elect candidates of their choice as a touchstone of retrogression analysis.

Let me turn then to judicial development of the retrogression standard, *Beer v. U.S.*, and then talk about *Georgia v. Ashcroft*. In *Beer v. United States*, the Supreme Court held that section 5 required the denial of preclearance to changes in voting practices and procedures if "the ability of minority groups to elect their choices to office is diminished." The relatively clear standard established in *Beer*, accepted without modification by Congress when it amended section 2 and extended section 5 in 1982, was significantly weakened by *Georgia v. Ashcroft* in 2003.

According to the Supreme Court's majority opinion, as compared to the benchmark 1997 plan, the post-2000 Census enactment "unpacked" the most heavily concentrated majority-minority districts in the benchmark plan and created a number of new "influence" districts.

The three-judge court found the plan to be retrogressive. The Supreme Court reversed, in an opinion by Justice O'Connor which reconceptualized the test to allow jurisdictions to choose to protect the ability to elect or, in the alternative, to pursue an increase in minority influence by dispersing voters, even if existing opportunities to elect are sacrificed.

We believe that there is a need for clarification of the retrogression standard. There are several reasons that Congress ought to engage in this clarification and restore the emphasis on protecting minority voters' ability to elect.

One is that *Georgia v. Ashcroft* permits tangible minority gains to be sacrificed. Contrary to the purpose of section 5, the new retrogression standard allows a jurisdiction to decide whether it will protect hard-won gains and opportunities to elect. It 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.

The benefit of minority communities choosing the candidates who represent them is clear to those communities, as it was to any other community. And the Nation's commitment to representative democracy is at issue.

Two, we believe that *Georgia v. Ashcroft* invites and shields vote dilution. "Cracking" and "unpacking" could be a problem; but clearly, this invites the "cracking of minority districts." We believe the standard is difficult to administer. We don't know what "influence districts" really mean. And we also believe that it undermines the section 5 benchmark analysis.

My testimony is more full, and addresses this and it's submitted in writing. Five minutes doesn't allow me to talk about this issue in all the detail. I hope that we can do so in some questions and answers.

At bottom, Mr. Chairman and Members of the Committee, I think that we have to remember that section 5 is—it was a standard that we could administer, under Beer. And we need to restore—not only extend, but restore—the Voting Rights Act and section 5 to full strength. I invite questions.

[The prepared statement of Mr. Shaw follows:]

PREPARED STATEMENT OF THEODORE M. SHAW

Testimony of Theodore M. Shaw
President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc.

Before the House Judiciary Committee's Subcommittee on the Constitution

Voting Rights Act Renewal Oversight Hearing on the Judicial Evolution of the Retrogression Standard

November 9, 2005
2 PM

2141 Rayburn House Office Building

Introduction

Good afternoon Chairman Chabot, Representatives Nadler, Conyers, Watt, Scott, and other distinguished members of the Committee. As President and Director-Counsel of the NAACP Legal Defense & Educational Fund, Inc. ("LDF"), I welcome the opportunity testify before the Committee regarding the judicial interpretation of the retrogression standard as it relates to the renewal of Section 5 of the Voting Rights Act ("VRA"). Passage, renewal and enforcement of the VRA have been, and continue to be, of critical importance to LDF as part of our efforts to vindicate the voting rights of African Americans and other racial and language minorities.

The Voting Rights Act is widely regarded as one of the greatest achievements of the Civil Rights Movement; it reflects Congress's meaningful and lasting embrace of Equal Protection of the law and equal political opportunity. Of course, Congressional activity in the voting rights arena has always been shaped by the experience of citizens who have made considerable sacrifices in order to ensure that our nation remains true to our high democratic principles. Accordingly, these hearings represent the latest installment in our ongoing national discussion about the value of political inclusion, the principle upon which the VRA rests.

The Context for the Current Renewal Debate

From LDF's perspective, there are two truths that shape the current VRA renewal debate. First, we must recognize that a great deal has changed for the better since 1965. Second – and LDF's experience bears this out – any accurate description of the situation within covered jurisdictions illustrates that, in significant respects, a great deal remains to be done if we are to achieve the political equality to which the Reconstruction Constitutional Amendments unequivocally commit us. It is important that Congress take full measure of both of these truths during the VRA renewal debate. The VRA and its expiring enforcement provisions have been the primary catalysts for dramatic increases in minority political participation, minority representation in elected bodies at the local, state and federal levels, and for the reductions in barriers to access to the political process for African Americans,[1]

[1] The VRA in general, and the expiring enforcement provisions in particular, serve to protect African-American political access and empowerment, and these effects can be traced throughout the decades. The trend illustrates both the effectiveness of the Act and ongoing need for its protections. *See e.g.*, *Department of Justice Objection Letter*, State of North Carolina, March 18, 1971 (objection to use of literacy test for voter registration purposes); *Department of Justice Objection Letter*, State of Georgia, March 24, 1972 (prohibited State Senate and House redistricting plan); *Department of Justice Objection Letter*, Waller County, Texas, July 27, 1976 (objection to redistricting plan of County Commissioner and Justice precincts); *Department of Justice Objection Letter*, Perry County, Alabama, September 25, 1981(objection to the purging of registration and reidentification of voters); *Department of Justice Objection Letter*, Robeson County, North Carolina, September 21, 1984 (objection elimination of polling place in Smiths Township); *Department of Justice Objection Letter*, Bacon County, Georgia, June 11, 1984 (objection to method of electing Board of Commissioners from at-large residency districts); *Department of Justice Objection Letter*, Hemingway, South Carolina, July 22, 1994 (objection to annexation of town); *Department of Justice Objection Letter*, Kilmichael, Mississippi, December 11, 2001 (objection to cancellation of the June 5, 2001, general election); *Department of Justice Objection Letter*, Waller County, Texas, June 21, 2002 (objection to 2001 redistricting plans for the commissioners court, justice of the peace and constable districts), *Department of Justice*

Latinos,[2] Asian Americans, and Native Americans.[3] Section 5, the language access provisions

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Objection Letter, Delhi, Louisiana, April 25, 2005 (objection to 2003 redistricting plan for the Town of Delhi in Richland Parish, Louisiana which would eliminate one of the four wards in which minorities, based on their voter registration levels, had the ability to exercise the franchise effectively).

[2] The historical record illustrates that Latinos in regions throughout the county have been beneficiaries of the VRA. *See e.g., Department of Justice Objection Letter*, Nueces County, Texas, January 26, 1976 (objection to redistricting of State Representative Districts in Nueces County, Texas); *Department of Justice Objection Letter*, Burleson City, Texas, June 5, 1981 (objection to reduction of polling places from 13 to 1 in "areas which are centers of [Black and Latino] population); *Department of Justice Objection Letter*, Coconino County, Arizona, November 4, 1991 (objection to voter registration challenge procedures based upon mail questionnaire and purge practices); *Department of Justice Objection Letter*, Bronx, Kings, and New York Counties, New York, July 19, 1991 (objection to the 1991 districting plan that would pack Latino voters in Brooklyn at the expense of Latino voters in adjacent Bushwick and Cypress Hills districts "causing the Hispanic electorate to be unfairly underrepresented on the city council."); *Department of Justice Objection Letter*, City of Hansford, California, April 5, 1993 (objection to residential annexations in Kings County, California which would have decreased the city's Latino population from 35.9% to 29.4%); *Department of Justice Objection Letter*, Collier, Hardee, Hendry, Hillsborough, and Monroe Counties, Florida, August 14, 1998 (objection to additional state requirements for the absentee voting certificate, absentee balloting, and a corresponding criminal penalty, in part because of the burden to Latino voters in covered counties requiring Spanish language translation). Moreover, federal observers have been deployed in a number of elections since the 1992 amendments to Section 203 because of concerns regarding treatment of Latino voters, including deployments to Kings and New York, and Bronx Counties in 2001 and in Queens County, New York in 2004.

[3] More recent application of the VRA has seen the Act's provisions employed to address barriers to Asian American and Native American political empowerment. *See e.g., Department of Justice Objection Letter*, Tripp and Todd Counties, South Dakota, October 26, 1978 (objection to commissioner precinct redistricting plan that would draw a district in which Native Americans were "substantially underrepresented" in comparison to two predominantly white districts."); *Department of Justice Objection Letter*, City of New York – Kings and New York Counties, New York, August 9, 1993 (objection to proposed city and city school district Chinese language voter information program that failed to target 50% of Chinese-speaking voting age population of Kings and New York Counties). In 2004, the first Vietnamese American, Huber Vo, was elected to the state legislature in Houston, Texas within 2 years of the requirement that Harris County provide Vietnamese language assistance in compliance with Section 203 of the Voting Rights Act.

and federal observer provisions of the VRA serve as important checks on both familiar and also new methods of disfranchisement and vote dilution. Discriminatory vote denial has yielded to "second generation" attempts to dilute or weaken the impact of minority votes. The power of the VRA's expiring enforcement provisions is in their ability to correct seemingly large and small distortions of the political process, and thus positively impact multiple racial and language minority groups in diverse regions across the nation. Section 5's use in changing circumstances, its success in promoting inclusion and preventing backsliding, as well as its deterrent effect over many decades illuminate the extent to which the VRA has been the Nation's most effective mechanism for protecting minority voting rights. There is thus no inconsistency in embracing the progress that the VRA has, in large part, made possible while recognizing that its deterrent effect and enforcement protections continue to be vital safeguards.

Various threats to minority voters – including surprise polling place changes,[4] exclusionary use of at-large voting methods,[5] dilutive annexations,[6] or language access non-compliance[7] – can have a significant adverse impact on political participation, and the creation and protection of opportunities for minority communities to have the ability to elect candidates of their choice have been at the core of the VRA. The centrality of the ability-to-elect concept flows directly from: (1) the national preference for single-member electoral districts principally based upon geographic considerations; (2) the continued existence of racially polarized voting patterns; and (3) persistent efforts to dilute minority votes by

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[4] For example, in Bexar County, Texas in 2003, county officials sought to undermine Latino voting strength by failing to place polling places near those communities during a special election where a Constitutional amendment was on the ballot. Using the special provisions of the VRA, Latino advocates were able to obtain expedited relief from the local district court that prevented the Latino voters from being silenced in the election.

[5] *See e.g., Department of Justice Objection Letter*, City of Freeport, Texas, August 12, 2002 (objection to change in method of electing city council members from single member to at large districts, explaining that "under [the single-member district method imposed by litigation settlement] minority voters have demonstrated the ability to elect candidates of choice in at least two districts. . .")

[6] *See supra* note 1, *Department of Justice Objection Letter*, Hemingway, South Carolina, July 22, 1994 (objection to annexation of town).

[7] *See supra* note 3, *Department of Justice Objection Letter*, City of New York – Kings and New York Counties, New York, August 9, 1993 (objection to proposed city and city school district Chinese language program that failed to target 50% of Chinese-speaking voting age population of Kings and New York Counties). As recently as 2002, Cook County, Illinois purchased a voting system that used punch-cards with "voter error notification" capabilities that was incapable of notifying Spanish-speaking voters of problems with their ballots. Only by virtue of a lawsuit and a negotiated consent decree on behalf of Latino voters did the county agree to increase the number of Spanish-speaking poll workers and implement new training, monitoring, and hotline procedures.

depriving minority communities of the benefits of fairly drawn redistricting plans. Against this backdrop, in the wake of the Supreme Court's reconceptualization of the Section 5 preclearance standard in *Georgia v. Ashcroft,* 539 U.S. 461 (2003), I wish to direct the remainder of my remarks to explaining several of the reasons why Congress should act to restore protection for the ability of minority voters to elect candidates of their choice as the touchstone of the retrogression analysis.

Judicial Development of the Retrogression Standard: Beer v. U.S. to Georgia v. Ashcroft

In *Beer v. United States*, the Supreme Court held that Section 5 required denial of preclearance to changes in voting practices or procedures if "the ability of minority groups . . . to elect their choices to office is . . . diminished." 425 U.S. 130, 141 (1976)(quoting the House Report on extension of the Voting Rights Act in 1972). The relatively clear standard established in *Beer*, accepted without modification by Congress when it amended Section 2 and extended Section 5 in 1982, was significantly altered in *Georgia v. Ashcroft*, 539 U.S. 461 (2003).[8]

Georgia v. Ashcroft involved the question of whether the 2001 districting plan for the Georgia State Senate was entitled to preclearance under Section 5. According to the Supreme Court majority opinion, as compared to the benchmark 1997 plan, the post-2000 Census enactment "'unpacked' the most heavily concentrated majority-minority districts in

[8] The Supreme Court's pair of *Bossier* decisions also unreasonably limit the effectiveness of Section 5, but those precedents were addressed in prior testimony before the Committee.

the benchmark plan, and created a number of new influence districts." *Georgia v. Ashcroft,* 539 U.S. at 470.

Georgia opted for a declaratory judgment suit before a three-judge court in the District of Columbia to seek preclearance. The Department of Justice objected because three state Senate districts from which African-American legislators had been elected were reduced from 60.58%, 55.43% and 62.45% Black Voting-Age Population (BVAP) percentages, respectively, to just above 50% each.

Two judges of the district court, observing that racially polarized voting continued to characterize elections in these districts, and predicting, in light of the evidence presented, that the percentage of white voters who would "cross over" to vote for black candidates was insufficient to preserve the preexisting opportunity of minority voters to elect their candidates of choice, denied preclearance.[9] They wrote that the changes would "diminish African American voting strength in these districts" and that the state had "failed to present any. . . evidence" that gains in other areas of the state would offset this retrogression.[10]

The Supreme Court reversed, in an opinion by Justice O'Connor, which described the issue 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. . . .

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[9] *Georgia v. Ashcroft,* 195 F. Supp. 2d 25, 94 (D.D.C. 2002).

[10] *Id.* at 88.

> 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.

Georgia v. Ashcroft, 539 U.S. 461, 480 (2003).

The opinion further suggests that "[i]n addition to the comparative ability of a minority group to elect a candidate of its choice, . . . a court must examine whether a new plan adds or subtracts 'influence districts' – where 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." *Id.* at 482. The opinion is imprecise and inconsistent in its definition and conception of what degree of influence preserves minority citizens' "effective exercise of the electoral franchise." *Id.* at 479 (quoting *Beer*).[11]

Although the majority opinion in *Georgia v. Ashcroft* provides 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,'" *id.* at 482, it provides no meaningful standards for defining an acceptable level of "influence" that should properly be taken into account in the preclearance decision, either for three-judge courts in the District of Columbia or – more crucially – for the Department of Justice.

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[11] At various points the majority suggests that BVAP's between 25-30% or 30-50% may satisfy its notion of influence. *Georgia v. Ashcroft*, 539 U.S. at 487. However, at other points the Court suggests that districts above 20% may be sufficient. *Id.* at 489.

The majority opinion also proposes a more far reaching analysis in order to test the ability to participate in the political process, noting that:

> one other method of assessing the minority group's opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts. . . . 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.

539 U.S. at 483-84.

The Need for Clarification of the Retrogression Standard

There are at least five reasons why Congress should clarify the retrogression standard to restore the emphasis on protecting minority voters' ability-to-elect.

(1) Georgia v. Ashcroft Permits Tangible Minority Gains to be Sacrificed

Contrary to the purposes of Section 5, the new retrogression standard allows a jurisdiction to decide whether or not it will protect hard-won minority political gains and opportunities to elect candidates of their choosing. Because *Georgia v. Ashcroft* permits a jurisdiction to choose among different theories of minority political representation, 539 U.S. 461, 483 (2003), it introduces a substantial element of uncertainty for minority communities into a statutory scheme that was specifically intended to block persistent and shifting efforts to limit the effectiveness of minority political participation. The benefit to minority communities of choosing the candidates who will represent them is as clear to those communities as it is to every other community. A decision which permits the

reconceptualization of minority representation every redistricting cycle will certainly yield some results that are at odds with the original purposes of Section 5 and the interests of minority communities.

(2) Georgia v. Ashcroft Invites and Shields Vote Dilution

Before the VRA was passed, and continuing to the present day, "cracking" or "fragmenting" geographically compact minority voting communities have been preferred methods for undermining the effectiveness of minority votes.[12] Prior to *Georgia v. Ashcroft,* the VRA, and Sections 2 and 5 in particular, stood as major safeguards against these practices. Because spreading minority voters among more districts dilutes the collective power of their votes, this technique remains a desirable goal for many and its use is likely to increase as a result of the endorsement of so-called "influence districts" in the *Georgia v. Ashcroft* opinion.

In approving such "influence," the *Georgia v. Ashcroft* opinion reached well beyond the facts presented in the case to offer sanctuary even to those who intentionally seek to dilute minority voter strength, provided they cloak their conduct in the pretext of pursuing more "influence" for minority voters.

While packing can pose a separate and real harm to cohesive minority voters by limiting the reach of their votes to an area smaller than needed to preserve "ability-to-elect,"

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[12] *See Gomillion v. Lightfoot,* 364 U.S. 339 (1960)(infamous Tuskegee gerrymander). *See also, Department of Justice Objection Letter*, Tangipahoa Parish, Louisiana, October 6, 2003 (2003 parish redistricting plan that proposed to eliminate one of two black majority districts).

a fair reading of the *Georgia v. Ashcroft* opinion suggests that it invites covered jurisdictions to adopt new rhetoric that the Supreme Court endorses to veil their dilutive intentions.

(3) *An Influence-based Section 5 Standard is Difficult to Administer*

During a recent Oversight Hearing before this Committee, all four witnesses on the panel (two called by Republican members and two by Democratic members), two experienced voting litigators, and two social scientists who have served as expert witnesses in several voting cases, testified, in substance, that they were skeptical that a workable standard of minority voters' "influence" exists, or could be devised and implemented. In contrast to the ability-to-elect standard that controlled the retrogression determinations of the Department of Justice and three-judge courts sitting in Section 5 matters for a quarter century, measuring "influence" is inherently and necessarily amorphous. Analysis of election returns sheds light on levels of racial bloc voting and the existence of realistic opportunity to elect. But that is not the case with "influence."

The opinion suggests more questions than it answers. How is "influence" effectively measured within DOJ's sixty-day administrative window? Does one look to roll call votes? Do those votes need to be on issues that have a discernible race element or just a discernible position preferred by minority group members? Is it enough if candidates for office campaign in minority communities? Must influence be consistently in evidence or is occasional influence sufficient?

But even if we assume that one can meaningfully measure influence, contrary to the cogent arguments that Justice Souter lays out in his dissent, *Georgia v. Ashcroft,* 539 U.S. at 495 ("[t]he Court's 'influence' is simply not functional in the political and judicial worlds."), how does the Department of Justice or a court establish a metric that indicates how much "influence" must be gained to trade off against a reduction in the ability-to-elect? Although the Supreme Court has very recently recognized that a standard without coherence makes little sense, *see Vieth v. Jubilier,* 541 U.S. 267 (2004), in *Georgia v. Ashcroft* it has invited incoherence where there had been coherent settled law. In these circumstances it is very likely that a level of indeterminacy, if not inconsistency, will undermine the effectiveness of Section 5 enforcement.

(4) Georgia v. Ashcroft Undermines the Section 5 Benchmark Analysis

As I have explained, the breadth of the decision and dictum in *Georgia v. Ashcroft* may result in tradeoffs that actually worsen the position of minority voters. The case arose at a time when minority voters in Georgia tended to align predominantly with one political party, which obscured the fact that in the long term, pursuing partisan interests for reasons of political expediency may adversely affect minority voters' political strength should such partisan links weaken and shift, as they historically have done. For this reason, submerging the minority protection principles of Section 5 in favor of assuming a sustained identity between minority and partisan interests is contrary to the VRA's original goals.

The effects of this course can be permanently harmful to minority voters because any partisan deal negotiated and approved under *Georgia v. Ashcroft* establishes the new benchmark against which subsequent voting changes are measured — whether or not the deal pays off in the way forecast for minority voters. In this way, the result of the decision could be that minority voters' interests are sacrificed over the short and long term.

(5) Minority Voters' Interests Should Not Depend on any Single Officeholder

The aspect of the majority opinion that makes the existence of positions of leadership within legislatures that are held by minority incumbents a key feature of the retrogression analysis is both troubling and inconsistent with other aspects of the decision. Reductions in minority voter percentages in the benchmark districts of minority legislators who have attained positions of "legislative leadership, influence, and power" put those very legislators, and their potential successors, at an increased risk of not being reelected. Moreover, the Court does not explain how to enforce the expectation that minority legislators who are reelected will continue in such positions of "leadership, influence, and power."[13]

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[13] For example, if the Department of Justice preclears a plan based in part upon the assumption that minority officials elected in benchmark majority-minority districts will continue to serve in specific leadership positions, but that expectation does not come to pass, what remedy, if any, would be available? Preclearance by the Attorney General, once granted, cannot be reviewed or withdrawn by a court. *E.g.*, *Morris v. Gressette*, 432 U.S. 491 (1977). And it is far from clear that a Section 5 court has authority to consider such an issue. The Supreme Court has held that "Changes which affect only the distribution of power among [elected] officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." *Presley v. Etowah County Commission*, 502 U.S. 491, 506 (1992).

Conclusion

Unless the renewed Section 5 makes clear Congress' intent to negate or limit the rather amorphous, ill-defined, and theoretical portions of the majority opinion in *Georgia v. Ashcroft* by restoring ability-to-elect as the touchstone of Section 5, it will be far too easy for states and localities to justify preclearance by pointing to small increases in minority voting age population in so-called "influence" districts with 20%-minority voting populations, and to titled positions that may or may not carry significant authority for the individuals in them. Although the flexibility to allow reductions in minority percentages in majority-minority benchmark districts can be justified consistent with a properly construed Section 5, those reductions should be limited by the rule that opportunities to elect must be preserved.

As a practical matter, even prior to *Georgia v. Ashcroft*, DOJ's application of the Section 5 standard did not bar reductions in minority voting population. Indeed, DOJ did not object to all reductions in the proposed plan at issue in *Georgia v. Ashcroft*, but only to reductions in three Senate districts where plaintiffs failed to show that the opportunity to elect would remain. *See* 195 F. Supp. 2d 25, 56-62, 93-95 (D.D.C. 2002).

Decades of experience strongly suggest that in racially polarized environments – common in covered jurisdictions – minority communities that are within the range of "influence" contemplated in *Georgia v. Ashcroft* can be completely disregarded by hostile officeholders. There was no need for the Supreme Court to erode the minority opportunity

to elect candidates of choice standard that had brought fairness, consistency, and protection to minority communities. In light of the history and purposes of Section 5, an amorphous, ill-defined standard is a particularly poor substitute.

Mr. CHABOT. Okay. Thank you very much. All the written statements will be made part of the record. And if you don't get into everything during the question period, we'll probably get into those items. You may not have had time. Thank you very much for your testimony.

Ms. Lewis, you're recognized for 5 minutes.

TESTIMONY OF ANNE W. LEWIS, ATTORNEY, STRICKLAND BROCKINGTON LEWIS LLP

Ms. LEWIS. Thank you, Mr. Chairman and Members of the Committee. I appreciate this opportunity to provide testimony regarding the important issue of the renewal of section 5 of the Voting Rights Act. I believe that it's imperative that that section be renewed, and that it is also imperative that in renewing that section Congress give great consideration to a revision of the *Ashcroft* test, so that we go back to the former standard of judging whether or not there was retrogression.

My practice is primarily devoted to redistricting, and that's my experience with respect to section 5 generally. During the 1990's, I represented a group of citizens in a redistricting case called *Jones v. Miller*. And then I did have the distinct pleasure of, along with my co-counsel, representing Congressman Lewis and Former Speaker Newt Gingrich, in the case of *Abrams v. Johnson*.

In the 2000 redistricting cycle, I served as counsel for four minority citizens, two Democrats and two Republicans, in the case of *Georgia v. Ashcroft*. In that case, the voters we represented opposed the congressional plans and the State legislative redistricting plans, on the ground that the plans were all retrogressive.

The district court precleared the congressional and state house plans, but denied preclearance of the State senate plan. As you know, the Supreme Court reversed and remanded and sent back the case to the district court, and in the process redefined "retrogression" and added an additional method by which a jurisdiction might prove there was no retrogressive effect with respect to minority voting rights.

While the district court was in the process of attempting to apply the Supreme Court's instructions—which, I will suggest to you, would be basically impossible to do—we were also litigating the case of *Larios v. Cox* in Georgia, in which we represented a group of 29 Georgia voters who contended that the State legislative and congressional plans violated the constitutional guarantee of one person, one vote.

Because we were ultimately successful in that case with respect to the State and legislative redistricting plans, and the senate plan at issue in *Ashcroft* was one of those plans, the *Ashcroft* district court decided that the case was moot. And so ultimately, that district court never applied the standard that had been issued by the Supreme Court.

In my testimony, I have described the evolution of the judicial interpretation of section 5 through the years since the last renewal of the Voting Rights Act. I want to focus in my remaining couple of minutes on the fact that in the *Ashcroft* case, the Court agreed with the State's new theory that a jurisdiction could show that, in addition to the traditional form of retrogression which asked the

question, "Is the minority community still able to elect the candidate of choice?", retrogression, or a lack thereof, could also be proven by answering the question, "Is the minority group's opportunity to participate in the political process diminished?"

I'll suggest to you that, both from the perspective of an attorney practicing in this area and, more importantly, from the perspective of a voting rights issue, this standard is impossible to apply.

First, the Supreme Court asks, in determining whether or not a minority group had the opportunity to participate in the political process, one might examine factors including the likelihood that candidates selected without decisive minority support would be willing to take minority groups' interests into account; and the question of whether it's 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. I suggest to you that would be almost impossible to apply and to prove with respect to section 5.

In looking at the issue of influence districts, the Court also concluded that a section 5 reviewer might look at "the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts," and also whether the representatives elected from the very districts created and protected by the Voting Rights Act supported the redistricting plan.

Well, as you all know, there is a measure of support for legislative acts that varies; and the motivation varies for that support. And so I think, again, that would be a very subjective inquiry, and impossible to apply, and detrimental to the very purpose of section 5.

I think that, in addition to the fact that it's difficult to apply those, what came from *Ashcroft* was that a very real diminishment of voting rights, minority voting rights, was seen in the very next elections. In the 44th Georgia House of Representatives District, Billy McKinney, a longtime incumbent, lost to a relatively unknown White challenger in the primary. Similarly, in a senate district which we had challenged in the *Ashcroft* case, there was the senate majority leader who was defeated by a White challenger in a highly polarized election.

I firmly believe that section 5 remains an important component of election law, and should be renewed in some form. However, the alternative test announced in *Ashcroft* should be eliminated. From a practical perspective, it's impossible to apply; and from a voting rights perspective, it's a disaster. Thank you.

[The prepared statement of Ms. Lewis follows:]

PREPARED STATEMENT OF ANNE W. LEWIS

Mr. Chairman and members of the committee, thank you for this opportunity to provide testimony regarding the very important issue of renewal of certain sections of the Voting Rights Act. While I recognize that the question of renewal extends to Section 5, 6 and 8, my focus today is on Section 5 and to some extent its interplay with Section 2, as my experience with the Voting Rights Act has involved those two Sections primarily, in the context of redistricting. In my testimony, I would like to cover four areas. First, I will provide a short description of the important role the Voting Rights Act has served in bringing about increased fairness in the composition of election districts at every level of government in Georgia, and hopefully dispel a

couple of pernicious myths that have developed regarding the Act's enforcement. Second, I will address the Supreme Court's decision in *Ashcroft* and why the holding in this case threatens to result in districts that are less fair for minority voters. Third, I will discuss why a failure to renew Section 5 will result in election districts at most levels of government that will not only be less fair for minorities, but for most other segments of our electorate is well. Fourth and finally, I will touch on the need to consider which jurisdictions and what conduct is covered by Section 5.

By way of background, I am an attorney in Atlanta, Georgia with the law firm of Strickland Brockington Lewis LLP. During the 1990s redistricting cycle, I was one of the attorneys representing a group of citizens in the case called *Jones v. Miller.* In that case, the citizens sought court intervention in the redistricting process when the State of Georgia's 1991 redistricting plans were not precleared. Later in that decade, I served as one of the attorneys to former speaker Newt Gingrich and Congressman John Lewis in the case of *Abrams v. Johnson,* which later became known as *Johnson v. Miller.* In that case, my co-counsel and I had the distinct and rather rare privilege of representing both Congressman Gingrich and Congressman Lewis.

In the 2000 redistricting cycle, I served as one of the counsel for four minority citizens—two Republicans and two Democrats—in the case of *Georgia v. Ashcroft,* in which the State of Georgia sought Section 5 preclearance from the District Court for the District of Columbia. The voters we represented opposed Georgia's Congressional and state legislative redistricting plans on the ground that the plans were retrogressive. The District Court precleared the Congressional and state House plans but denied preclearance of the state Senateq plan. As you know, the case went to the Supreme Court and was reversed and remanded. In essence, the Supreme Court added an additional method by which a jurisdiction might prove there was no retrogression with respect to minority voting rights. Although retrogression had always been measured by whether the new redistricting plan so decreased minority voting strength in majority-minority districts that the plan resulted in a backsliding in minority voting rights, in *Ashcroft,* the Supreme Court determined that retrogression might also be measured by whether, despite the decrease in minority voting strength in majority-minority districts, there were additional "influence" or "coalitional" districts formed sufficient to compensate for the losses in minority voting strength in majority-minority districts. In reversing and remanding, the Supreme Court directed the District Court to consider whether the State, although not meeting the traditional test of retrogression, had, in fact, met the new test.

While the District Court was in the process of attempting to apply the Supreme Court's instructions—including whether to hold a new trial, what new discovery was required, what new evidence would be allowed and the like—we were litigating the case of *Larios v. Co*x in Georgia, in which we represented a group of 29 voters who contended that the state legislative and Congressional plans violated the constitutional guarantee of one person, one vote. We were ultimately successful on the state legislative plans, and they were redrawn by the federal court; that decision was summarily affirmed by the Supreme Court. Subsequently, the District Court in *Ashcroft* dismissed that case, and so it never applied the new Section 5 test of *Ashcroft.* As I will discuss later, it is both a mystery to me as to how that test would have been applied and how it would not ultimately result in a retrogression in minority voting rights—the very evil that Section 5 is designed to remedy.

While *Ashcroft* muddies the Section 5 waters, I firmly believe that Section 5 remains an important component of election law and should be renewed in some form. In the two decades since the Voting Rights Act was last amended and renewed in 1982, a revolution has occurred in American election law that has resulted in representation that more accurately reflects the composition of the American electorate than any previous time in our history. The Voting Rights Act has been an important factor in that progress and remains necessary today.

A. THE ROLE OF THE VOTING RIGHTS ACT IN BRINGING ABOUT FAIR DISTRICTS AND THE ROLE OF THE DEPARTMENT OF JUSTICE IN ADMINISTERING SECTION 5

In 1982, when the Voting Rights Act was last amended and renewed, America's congressional and legislative districts, as well as those in many of its local jurisdictions, were gerrymandered in a fashion that denied fair representation to most African-Americans and other ethnic minorities; oddly enough, the same gerrymandering tactics denied fair representation to a majority of white (non-Hispanic) voters. These gerrymanders would have been permanent, absent a case-by-case judicial remedy or a broad-scale legislative remedy. In amending the Voting Rights Act in 1982, Congress provided that legislative remedy.

By 1994, little more than a decade later, African-Americans and Hispanics in Congress had more than doubled, with almost all of these representatives coming from majority-minority districts. Those districts were drawn for one reason: because the Voting Rights Act required them to be.

However, the extension and application of the Voting Rights Act has not simply made election districts fairer for minority voters. The Act has also made the election districts fairer for *all* voters. For instance, the current national congressional map more accurately reflects the votes cast for Congress than any congressional map in the last four decades. Likewise, the Georgia legislative map more accurately reflects the votes cast for the Georgia General Assembly than any map in the last three decades. Drawing fair districts for minority voters has a complementary effect of making it more difficult to gerrymander other voters. When the drawing of majority-minority districts is coupled with other neutral districting criteria, such as a strict one-person one-vote requirement and geographic compactness, gerrymandering becomes much more difficult.

Despite the great strides that have been made under the Voting Rights Act, particularly those that have resulted from the application of Section 5, the need for the Section remains, as the political will to gerrymander minority communities is still prevalent in most of the jurisdictions covered by Section 5, and, perhaps, in some jurisdictions that are not currently covered by Section 5 but should be. Perhaps the reason for the gerrymandering has changed to some degree, in that gerrymandering minority communities may be less the result of racial animus than the result of a political effort to help incumbents retain their power. However, the effect is the same—a lessening of voting strength in minority communities as incumbents try to hold onto power.

As Judge Kozinski noted in *Garza vs. County of Los Angeles,* "the record before us strongly suggests that political gerrymandering tends to strengthen the grip of incumbents at the expense of emerging minority communities. Where, as here, the record shows that ethnic or racial communities were split to assure a safe seat for an incumbent, there is a strong inference—indeed a presumption—that this was a result of intentional discrimination." Judge Kozinski drew an analogy to housing discrimination to illustrate his point that whether the action was motivated by racial animus or not, the intent was still to discriminate against minorities. His example: "Assume you are an Anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings towards minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood."

While the positive results that have come from Section 5 cannot be doubted, critics have alleged that the increase in majority-minority districts that occurred in the 1990 round of redistricting occurred were not the natural result of the application of Section 5 but resulted from an improper application of the Section by the Department of Justice. Those critics contend that the increase in majority-minority districts occurred because the Department of Justice (1) incorporated Section 2 into the Section 5 analysis and (2) adopted a commensurate policy of proportional representation or minority maximization. Neither of these allegations is true. During the 1990 redistricting cycle the Department of Justice issued only *one* objection letter based on the incorporation of Section 2 into the Section 5 analysis. That objection letter was issued to the Bossier Parish school board, and the error was corrected by the Supreme Court in *Bossier I.*

Instead, the overwhelming majority of objection letters issued during the 1990 redistricting cycle was directed at violations of the purpose prong of Section 5 and cited the *Garza* case. *Garza* required that during the redistricting process, the jurisdiction had been made aware that the redistricting map ultimately adopted would discriminate against a minority community. Opponents had to take the criteria enunciated by the jurisdiction and construct an alternative redistricting map which (1) had a lower population deviation than the plan's, (2) better met the jurisdiction's stated criteria and (3) created an additional majority-minority district(s). Discriminatory intent could be shown by eliminating any excuse for not drawing the majority-minority district (other than the protection of non-Hispanic white incumbents).

Jurisdictions therefore were faced with a choice: they could subordinate the personal political demands of their white incumbents, adhere strictly to stated criteria and construct a geographically compact majority-minority district or they could abandon their stated criteria and draw a geographically tortured configuration of

the majority-minority district in an effort to ameliorate the negative political effects on non-Hispanic white incumbents. Most jurisdictions, including Georgia, unfortunately chose the latter.

As a result, advocates for minority voters, as well as other participants in the redistricting process, could then use the stated criteria, or, often, the absence of any criteria, to determine if the construction of even more majority-minority districts was possible. Typically, such was possible, and the plans would not be precleared. In trying to remedy the situation, a jurisdiction would draw even more majority-minority districts but would still typically draw unnecessarily tortured configurations of the majority-minority districts in order to minimize the negative political effects on non-Hispanic white incumbents.

Once the gerrymandering tool of refusing to draw naturally occurring geographically compact majority-minority districts was eliminated by the enforcement of the Voting Rights Act, more cartographically obvious methods had to be employed to draw more majority-minority districts. In his dissent in the first *Shaw* decision, Justice Stevens correctly noted that the bizarre shapes of the districts were caused by *political* gerrymandering and not by racial gerrymandering.

The state House and Senate plans produced by the special master in the Georgia one person, one vote case—*Larios*—illustrate that the convoluted and bizarre shapes previously employed in Georgia's congressional and legislative redistricting maps were completely unnecessary in order to draw majority-minority districts. The special master's map did not retrogress, either in the number of majority-minority districts or the minority voting strength in those districts. However, these districts were far more compact than the districts that had been used in Georgia since 1992, while still complying with traditional redistricting criteria. As a result, the special master's map offers the protection of the Voting Rights Act while, at the same time, more accurately reflects the political preferences of all of the voters than any map of the Georgia General Assembly in the past 30 years.

B. THE ASHCROFT DECISION: WHAT DOES IT MEAN FOR THE CONTINUED VITALITY OF SECTION 5?

Although the Supreme Court in *Bossier II* ultimately disagreed with the application of the *Garza* standard because the Court decided that Section 5 purpose prong is different from the "purpose" of the 14th Amendment, as it is limited to "retrogressive" intent, *i.e.,* discriminatory intent vs. retrogressive intent. Although after *Bossier II,* it did not appear that our clients prove the required "retrogressive purpose" without proving the requisite effect, clearly they could have shown the discriminatory intent described by Judge Kozinski in *Garza* in the 2002 redistricting map for the Georgia General Asssembly. Through a combination of a reduction of minority voting strength in existing majority-minority districts, multimember districts, and bizarrely drawn districts, non-Hispanic white Democrats attempted to maintain their control over the Georgia General Assembly at the expense of minority voters and Georgia's Republican voters. This was the basic motivation that caused the General Assembly to produce the redistricting plans that were litigated in *Georgia v. Ashcroft.*

Although proving intent alone would not be sufficient, we did not suspect that we would have difficulty proving the requisite effect under existing case law—until the Supreme Court changed the definition of retrogression and the effects test in *Ashcroft*. As noted previously, we represented a bipartisan group of four minority citizens who intervened in that case. Our principal argument was that the Voting Rights Act was not intended to protect the *incumbents* of any political party or, for that matter, the incumbents of any particular race. Instead, the purpose of the Voting Rights Act is to protect the rights of *voters* in minority racial and language communities, who have historically been denied the opportunity to elect candidates of their choice. By reducing the minority voting strength in existing majority-minority districts to a level at which the minority community no longer constituted majority in those districts or to a level at which the minority community was barely a majority, there was clearly an effect of backsliding or retrogression in the rights of minority voters to elect candidates of their choice. This occurred in two basic ways. First, the most immediate and identifiable way: the minority voting strength in the districts was so significantly reduced that the minority candidate of choice would lose.

The other is a type of retrogression that is more subtle and more dangerous. By judging retrogression primarily from the perspective of whether the incumbent in the majority-minority district thinks the district is satisfactory, the focus is on the incumbent's desires, rather than the rights of the voters. Minority incumbents share many of the same institutional and financial benefits of incumbency that non-minority incumbents do. That fact allows minority incumbents to win reelection in dis-

tricts with lower minority voting strength than would be insufficient to elect any other minority candidate of choice once the incumbent leaves office. While such districts might be sufficient for minority incumbents, they fail to protect minority voters who will be left in the same situation that existed prior to 1982 once the incumbent leaves.

Oddly enough, when the four minority voters we represented attempted to intervene, the State vigorously objected to their participation in the case. The State argued that the Department of Justice would adequately protect our clients' interests, and therefore, they had no place in the case. We responded that it certainly seemed that minority voters would have an interest in the Section 5 preclearance of redistricting plans and that had the State not taken the rare route of litigation to obtain preclearance, we would have had the right to file objection letters with the Department of Justice. If the State's position were to be adopted, then a Section 5 jurisdiction could simply squelch any minority opposition to Section 5 preclearance by filing a declaratory judgment action in the District Court for the District of Columbia and leave minority voters out in the cold. While the District Court struggled somewhat with the issue of intervention, the Supreme Court did not. In its appeal, the State again raised the question of whether minority voters should be allowed to intervene. The Supreme Court devoted one paragraph of its opinion to state unequivocally that such intervention was appropriate.

The rest of the Supreme Court's opinion is much more dramatic, as it changed both the definition of retrogression and the effects test. After the District Court precleared the House and Congressional plans but refused to preclear the Senate plan, the State appealed to the Supreme Court. By a five to four margin, the Court agreed with the State's new theory that a jurisdiction could show that there had been no retrogression in one of two ways. The first is the traditional method of maintaining both the number of majority-minority districts as well as effective minority voting strength in those districts, with the relevant question being, "Is the minority community still able to elect a candidate of choice?"

The second is a new method whereby the number of majority-minority districts is reduced and the minority voting strength in other majority-minority districts is also reduced, with the relevant question being, "Is the "minority group's opportunity to participate in the political process" diminished?" The Court concluded that there were several measuring sticks for answering that question, all of them, in my opinion, extremely vague and, in practice, impossible to apply.

The first measuring stick focuses on whether additional "influence" or "coalitional" districts are created in which the minority community may or may not be capable of electing a candidate of choice but can play a "role" in the electoral process. The Court concluded: "Thus, a court must examine whether a new plan adds or subtracts "influence districts"—where 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." *Georgia v. Ashcroft,* 539 U.S. 461, 482 (2003). To determine whether there was such a role, the Court offered that one might examine various vague factors, including:

- "the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account;" and
- whether 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."

Ashcroft, 539 U.S. at 482–83.

In addition to examining influence districts, the Court also concluded that Section 5 reviewer might look at "the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts" and "whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan." *Ashcroft,* 539 U.S. at 483–84.

In addition to the fact that any of those inquiries are extremely subjective and appear to focus on incumbents rather than voters, the more distressing fact is that the

decision of the *Ashcroft* court had real and immediate retrogressive effects. In the 44th Georgia House of Representatives district, Billy McKinney, a long-time incumbent African-American legislator and the father of one of your colleagues, Congresswoman Cynthia McKinney, saw his African-American voting strength in the precleared plan reduced by approximately 17 percentage points. In the next Democratic primary, he faced a white challenger, a relative unknown, and was defeated.

Similarly, in a Senate district in Augusta, the minority voting strength was reduced to a level at which it was doubtful that minority voters still constituted a majority of the actual electorate in the district and could re-elect the African-American Senator; we objected to the district in the *Ashcroft* case on those very grounds. The Department of Justice did not. Subsequently, the Senator, who was the *Majority Leader* in the Georgia Senate, lost his seat to a white challenger in a highly racially polarized election.

Because the 2002 legislative map was only used for one election and all of the African-American incumbents in the weaker minority districts ran for reelection, there was no opportunity to see actual retrogressive effects due to retirement of minority incumbents as I described earlier. However, the immediate loss of minority incumbents to white challengers as a *direct* result of the decision in *Ashcroft* indicates that if the Supreme Court's interpretation of Congressional intent with respect to Section 5 is allowed to continue without modification, then I believe we will see a steady reduction of African-American officeholders at all levels of American government as current African-American incumbents retire from office.

With respect to the Congressional Districts, the voters we represented objected to the plan; the Department of Justice did not. Two highly racially polarized elections conducted in the congressional districts—which were constructed in a manner similar to many of the districts in the state legislative plans—illustrate the factual fallacy of the *Ashcroft* decision. The 12th Congressional District was touted by the State as a district which could be won by an African-American, despite the fact that it was not a majority-minority district. In 2002, the African-American candidate was defeated by a white candidate in the general election in a racially polarized contest. In 2004, in that same district, an African-American candidate was defeated by white candidate in the primary.

In 2002, Congresswoman Cynthia McKinney saw the minority voting strength in her district diminished. She was defeated in one of the most highly racially polarized elections in Georgia history, even though her opponent in the Democratic primary was also an African-American.

C. WHY FAIR REDISTRICTING REQUIRES RENEWAL OF SECTION 5

The goal of fair redistricting, and indeed of fair elections in general, should be that the political distribution of the representatives is within acceptable margins, approximately similar to the political preferences expressed by the voters in the election. These representatives can and should be elected from geographically compact communities of interest, including minority racial and language communities of interest. Minority racial and language communities have historically been ignored or worse actively fractured in order to prevent these communities from electing candidates of choice. For far too long it has been falsely asserted that majority-minority districts and geographically compact districts that accurately reflect the jurisdiction's various communities of interest are antithetical. The redistricting plan of the special master in the *Larios* case illustrates that this is not true. In fact, providing fair representation to minority racial and language communities is complementary and a critical part of producing a fair redistricting plan.

The 2002 redistricting maps in Georgia prove what will happen if Section 5 of the Voting Rights Act is not renewed and the *Ashcroft* decision not modified. Minority racial and language communities will be fractured in order to protect white incumbents. The slices may be small at first but it will be a death by a thousand cuts. A few minority officeholders will be defeated, even more will retire and not be replaced. This loss of officeholders will make it even more difficult to prevent further fracturing of minority racial and language communities, which will result in an ultimate downward spiral that minimizes the number of minority officeholders at all levels of American government. To allow this result is particularly unacceptable when one realizes that preventing it—as illustrated in the plans of the special master in the *Larios* case—does not have to and should not conflict with the other basic precepts of fair redistricting.

D. WHAT SHOULD THE SCOPE OF SECTION 5 RENEWAL BE?

While I do not pretend to have an answer to the question what the scope of renewal should be, I think, as I am sure that you have discussed at length, that the two important issues are which jurisdictions should be covered and what conduct should be covered. I believe that it is clearly the case that since the measuring time of November 1, 1964, the jurisdictions that should be covered may have changed. One concept is to renew only those that are covered, another is to cover all jurisdictions and a third is to reevaluate what constitutes a jurisdiction that should be covered. Only covering those that are covered now ignores the fact that times have

changed. Some still probably need to be covered, others probably do not. Covering all jurisdictions raises constitutional questions concerning Congress' power to intrude so drastically upon states' rights without a demonstrated need for the same. Re-evaluating the jurisdictions that should be covered is the best and, naturally, the most onerous solution.

An easier question is what should be covered. While no one would debate that redistricting decisions should be covered, it seems less plausible that a decision to move a polling place in a voting precinct from one public building to another or to hold a special election when one is required should be the subject of preclearance.

I would like to thank the committee for its consideration of my comments. I will attempt to answer your questions, and I would request, given the constraints on time, that I be allowed to revise and extend my remarks where appropriate.

Mr. CHABOT. Thank you very much.

Representative Brooks, you're recognized for 5 minutes.

TESTIMONY OF THE HONORABLE TYRONE L. BROOKS, SR., MEMBER, GEORGIA GENERAL ASSEMBLY, AND PRESIDENT, GEORGIA ASSOCIATION OF BLACK ELECTED OFFICIALS

Mr. BROOKS. Thank you, Mr. Chairman. And certainly, we want to thank Chairman Sensenbrenner for the invitation to appear today to offer some advice as to how you should proceed in addressing the issue of section 5 and renewal of the Voting Rights Act.

You do have my written testimony, so I will not belabor you with going through that. I will point out that in my testimony I do mention one of my colleagues, Representative Bob Holmes, who preceded me in the House, along with David Scott and Sanford Bishop, my colleagues from Georgia.

I will say to you that my life has been one of working in civil rights and voting rights, and the introduction that you gave me indicated that. But I want to say to you today that as we come back to this great, august body to talk about saving the Voting Rights Act in some respect, we have to remember that in this country where African-Americans may comprise between 12 and 15 percent of the U.S. population, we're still less than 2 percent of the body politic. And in my home State of Georgia, where we are 30 percent of the population, we comprise less than 6 percent of the body politic, in terms of elected officials.

So that tells you that we need these protections afforded to us under section 5. As long as we live in a society where we have racially-polarized voting, it is imperative that we have the protections of section 5.

In my State of Georgia, where we've made an awful lot of progress, we continue to make progress, without those protections, we know that we will have retrogression and dilution.

I'm just happy to know, as we come today as a panel, that there is great sentiment among you to consider our testimony. But I want to say to you that, as last week, Congressman Conyers, as we funeralized and memorialized Rosa Parks for her great contributions and touching off the modern-day Civil Rights revolution, the greatest tribute we could pay to Rosa Parks is to extend the Voting Rights Act. Because she was not sitting down just to be on the front of the bus; she was sitting down to vote. She had tried to register to vote on numerous occasions in Montgomery, and been denied. So when she sat down on the front of the bus, it was a message to America, "I want to cast a ballot. I want to be a registered voter."

So as we come today before you as a panel, hopefully, at the end of the day, you will understand the importance of extending the Voting Rights Act and section 5. The most important law that this Congress has ever adopted, since our Nation was founded, since the Emancipation Proclamation, is the 1965 Voting Rights Act.

Section 5 is the meat of the act. We need those protections. We must have those protections, unless we want America to live in a society where we would have a legal apartheid in our political system. We can't go back. We must go forward.

So my testimony today will speak to the issue of Ashcroft and Georgia. But also, it will speak to the need for us to be sensitive to the idea of inclusion in the body politic, by allowing for the creation of majority-Black districts. We have to have that protection. Influence districts can never be the substitute for majority-Black districts, can never be.

So at the end of the day, we hope and pray that this Committee will understand the importance of extension, but also the protections afforded to us under section 5. Thank you, Mr. Chairman.

[The prepared statement of Mr. Brooks follows:]

PREPARED STATEMENT OF THE HONORABLE TYRONE L. BROOKS, SR.

I want to thank the committee for giving me an opportunity to express my views on the important issues facing the Congress as it considers extending the special provisions of the Voting Rights Act scheduled to expire in 2007. As a 25 year member of the Georgia legislature (House District 63) that passed the redistricting plans that were the subject of the *Georgia v. Ashcroft* litigation, I am especially pleased to address and try to clear up some misconceptions about the role of the black legislative caucus in the enactment of those plans.

Much progress has indeed been made in recent time in minority voting rights and office holding in my state, and in the South, but it has been made in large measure *because of* the existence of Section 5 and the other provisions of the Voting Rights Act. Had there been no federal intervention in the voting and redistricting process, it is unlikely that most southern states would have ceased their practices of denying and diluting the black vote. The fact that Section 5 has been so successful is one of the arguments in favor of its extension, not its demise.

As important, the temptation for manipulation of the law in ways that will disadvantage minority voters is as great and irresistible today as it was in 1982, when Congress last extended Section 5. Removal of the federal oversight that Section 5 provides would doubtlessly result in a significant erosion in minority voting rights. That is evident, I think, from the fact that Georgia has received a total of 80 objections under Section 5 since the last extension of the preclearance requirement. A list of the state's Section 5 objections is attached.

And just this year, the state enacted a photo ID requirement for voting in person that will without doubt deter or prevent a disproportionate number of minorities from voting, as well as the elderly and the disabled. It is not only difficult for many people to get a photo ID, but it costs $20 and is in essence a fee for voting. Fortunately, the federal court recently issued an injunction prohibiting use of the photo ID requirement, which it said was in the nature of a poll tax.

Many people have asked me, "what new strategies and schemes do you think the states will come up with to suppress the minority vote?" My state 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. I want to add that there was no evidence whatever presented to the legislature of the need for a photo ID requirement for in-person voting.

The arguments that the state recently made in the Supreme Court in *Georgia v. Ashcroft* are also very disturbing. They demonstrate a continuing disdain for the Voting Rights Act and a willingness to disregard the interests of minority voters. The state argued that Section 5 as applied by the federal court was unconstitutional. It said the retrogression standard of Section 5 should be abolished, that majority black districts were no longer needed, and that minorities should never be allowed to participate in the preclearance process.

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. The argument that the state made in its *Ashcroft* brief failed to take into account how extensive racial bloc voting is, and that when a district is changed from majority black to majority white it depresses the level of black political activity. The enthusiasm, the spirit, the sense that blacks have a chance are all diminished. A formerly majority black district, particularly one without a black incumbent, would have a different voting pattern after it became majority white. Abolishing majority black districts would cause a significant reduction in the number of black office holders. The state's advocacy of such a position is, alone, a compelling reason for extending Section 5.

The most notable exception to the pattern of blacks losing in majority white districts, and which the state relied upon in its *Ashcroft* brief, have been judicial elections. Judicial elections, however, are unique in that they are subject to considerable control by the bar and the political leadership of the state. Candidates are essentially preselected through appointment by the governor to vacant positions upon the recommendation of a judicial nominating committee dominated by the bar. The chosen candidate then runs in the ensuing election with all the advantages of incumbency. Judicial elections are low key, low interest contests in which voters tend to defer to the choices that have previously been made. Robert Benham, elected to the court of appeals in 1984 and the state supreme court in 1990, and Clarence Cooper, elected to the court of appeals in 1990, were preselected in this manner.

Benham received special treatment in other ways. The governor felt they could sell Benham in the white community, with the support of the bar and the Democratic leadership, because nobody knew he was black. The plan was to get out the vote in the black community in the traditional way, but to ignore race in the white community. Benham's picture could appear only on brochures distributed in the black community and there could be no endorsements of Benham by Maynard Jackson, Julian Bond, Jesse Jackson, or anybody in the civil rights community. The ability of preselected blacks to win low key judicial elections does not, however, translate into the ability of blacks to elect candidates of their choices in majority white state house and senate districts.

Georgia argued strenuously that its 2002 senate plan could not be deemed to dilute minority voting strength because black legislators supported the plan. But the support of the plan by black legislators should not be confused with their support of the state's arguments in the Supreme Court that majority black districts could be abolished, or that the retrogression standard should be abandoned, or that minority "influence" could be a substitute for the ability to elect.

Most of the members of the Legislative Black Caucus voted for the senate plan as a way of maintaining Democratic control of the legislature and holding onto committee chairs, and because any reductions made in their own districts did not compromise their reelection or the ability of minority voters to elect candidates of their choice. The overriding goals of the Democrats were to protect incumbents and increase the number of Democratic seats by not wasting the black votes in existing majority black districts. And while black caucus members agreed to the population reductions, they would never have agreed to the abolition of majority black districts. Black caucus member Bob Holmes, who has served in the Georgia house almost as long as I have, has said that "No one would have gone for that. There would not have been a black vote for that."

Notably, the black civil rights leadership of the state, including NAACP, Southern Christian Leadership Conference, RAINBOW/PUSH, Concerned Black Clergy, Georgia Association of Black Elected Officials, Georgia Coalition of Black Women, and Georgia Coalition for the Peoples' Agenda, filed an amicus brief in the Supreme Court urging it to affirm the decision of the lower court rejecting the state's senate redistricting plan. They asked the Court to reject the state's arguments for repeal of the retrogression standard, the abolition of majority-minority districts, and excluding minorities from the preclearance process.

Most tellingly, black members of the legislature who had voted for the state's plan gave their full support to the filing of the amicus brief and said that it was the correct position for the civil rights community to take. I made a statement at the time that:

> We fully supported the filing of the amicus brief by the civil rights groups. We voted for the state's plan for political reasons, but we were appalled by the arguments the state made in its brief in *Georgia v. Ashcroft.* There is no question that abolishing the majority black districts would turn the clock

back. The preservation of the majority black districts is critical to minority office holding and minority political participation. As its president, I can speak for the Georgia Association of Black Officials and say that we strongly disagreed with the state's arguments in the Supreme Court.

I would urge this committee to support legislation restoring the protection lost under Section 5 as a result of the *Georgia v. Ashcroft* decision, by making clear that the retrogression standard of Section 5 protects the ability of minority voters to elect representatives of their choice. The ability to influence the election of candidates is not an acceptable substitute for the ability to elect. I also want to echo the sentiments of my colleagues that *Georgia v. Ashcroft* provides an extremely vague and difficult standard to administer.

ATTACHMENT

Section 5 Objection Determinations in Georgia

(1982 – present)

State (81-1438)	Act Nos. 4, 3, and 5 (1981)--Senate, House and Congressional redistricting	2-11-82 Declaratory judgment denied as to Act No. 5 in Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982), aff'd mem. 459 U.S. 1166 (1983)
DeKalb County (81-1425)	Restriction of neighborhood voter registration drives to even-numbered years and requirement that written preclearance be received	3-5-82
Adel (Cook Cty.) (81-1387)	Act No. 855 (H.B. No. 1553 (1976))--charter amendments; Ordinance No. 81-5--annexation; 21 annexations	6-29-82 Withdrawn 8-11-83 following change in method of election
Dougherty County (82-1785)	Redistricting (commissioner districts)	7-12-82
Glynn County (82-1842)	Redistricting (commissioner districts)	7-12-82
State (82-1835)	H.B. 1 EX., 1982 Extra Session Part II--proposed schedule for the conduct of 1982 Congressional elections	8-12-82
Brunswick (81-1458, 82-1837) and Glynn Cty. (81-1460 & 82-1838)	Charter for the consolidation of Glynn County and the City of Brunswick; 6:1 method of election and districting plan; procedures for referendum election (single referendum)	8-16-82
McDonough (Henry Cty.) (82-1875)	Redistricting	11-22-82
Bibb County School District (82-1690)	Act No. 1185 (H.B. No. 1918 (1982))--redistricting (board of education)	11-26-82
Sumter County School District (82-1952)	Redistricting	12-17-82
Kingsland (Camden Cty.) (7X-0076)	Numbered positions	1-3-83

Taylor County School District (82-1954)	Act No. 283 (H.B. No. 566 (1975))--method of election (board of education); redistricting decrease from 9 to 5 board members	8-19-83
Sumter County School District (83-1972)	Redistricting	9-6-83
Baldwin County School District (83-1554)	Act No. 1275, S.B. No. 614 (1972)--at-large elections	9-19-83
College Park (Clayton and Fulton Ctys.) (83-1656)	Redistricting (councilmanic districts)	12-12-83
Brunswick (Glynn Cty.) (83-1774)	Procedures for referendum election on consolidation (use of only county registration list)	2-21-84
Bacon County (83-1547; 83-1549)	Act No. 204 (H.B. No. 243 (1963))--method of election--single-member districts to at-large with residency districts	6-11-84
Bacon County (83-1544; 83-1546)	Act No. 470 (H.B. No. 786 (1983))--at-large elections; Act No. 1177 (H.B. No. 1901 (1982))--at-large elections	6-11-84
Thomas County (83-1986)	Act No. 27 (H.B. No. 762 (1983))--method of election--at-large to single-member districts; districting plan (commissioners)	7-23-84
Newnan (Coweta Cty.) (84-2106)	Act No. 640 (S.B. No. 505 (1984))--method of electing the city council from at-large to single-member districts with two at-large seats; increases the number of councilmembers from four to six; districting plan	8-31-84
McDonough (Henry Cty.)(84-2348)	Districting (councilmanic districts)	12-3-84
Griffin (Spalding Cty.) (85-2440)	Method of election--from at large to 4:1; districting plan (board of commissioners)	9-25-85
Lyons (Toombs Cty.) (85-2475)	Act No. 76 (H.B. No. 327 (1985))--method of election; districting plan	11-29-85
Forsyth (Monroe Cty.) (85-2383; 85-2388; 85-2380-2381)	Majority vote requirement; numbered positions; 10 annexations	12-17-85 Objection to annexations withdrawn 7-8-88

Lamar County (85-2316)	Act No. 513 (H.B. No. 1048 (1985))--method of election--four single-member districts and one at-large; majority vote requirement; increase in the number of county commissioners--from three to five; decrease in the terms of office--from six to four-year, staggered terms; implementation schedule; districting plan	3-18-86
Jesup (Wayne Cty.) (85-2526)	1968--numbered positions; majority vote; 1985--method of election; districting plan	3-28-86
Quitman (Brooks Cty.) (85-2047)	Method of election--from at-large to two multimember districts and one at-large position; majority vote requirement; districting plan	4-28-86
Wrens (Jefferson Cty.) (86-2974)	Majority vote requirement and the numbered posts for the election of mayor and city commission	10-20-86
Forsyth (Monroe Cty.) (87-2543)	Thirteen annexations	3-3-87 Withdrawn 7-8-88
Macon (Bibb and Jones Ctys.) (84-1966)	Deannexation (Act No. 590, S.B. No. 298 (1984))	4-24-87
Augusta (Richmond Cty.) (87-2594, 87-2595, 87-2596)	Eight annexations	7-27-87 Withdrawn 7-15-88 upon change in method of election
Rome (Floyd Cty.) (87-2336)	Act No. 240 (1987)--staggered terms and schedule for implementing staggered terms	8-11-87
Waycross (Pierce & Ware Ctys.) (87-2691)	Act No. 414 (1987)--increase in number of city commissioners from five to six, direct election of mayor by majority vote for four-year term, change in powers, duties, and authority of mayor, implementation schedule, March 8, 1988, special mayoral election	2-16-88
Lumber City (Telfair Cty.) (88-3383-3384)	Act No. 650 (1973)--majority vote requirement for the election of the mayor and council and a runoff election procedure and date, and to the provisions of the January 8, 1988, ordinance, insofar as they codify the majority vote requirement and designated posts	7-8-88
Augusta	Date selected for conducting consolidation	7-15-88

(Richmond Cty.) (88-3312) and Richmond County (88-3326)	referenda elections	
Augusta (Richmond Cty.) (88-3313) and Richmond County (88-3329)	Consolidation of the City of Augusta and Richmond County, Georgia (Act No. 934 (1988)) and the attendant repeal of the city charter for the City of Augusta (Act No. 938 (1988))	5-30-89
State (88-2560-2561)	Establishment 48 additional superior court judgeships, the specification of the date on which the first full term of office commenced for each new judgeship, and the establishment of two superior court circuits and district attorney positions to serve those circuits	6-16-89 Withdrawn 4-25-90 as to the two additional superior court circuits and the district attorney positions to serve those circuits.
Lumber City (Telfair Cty.) (89-2200-2201)	Majority vote for mayor; majority vote, numbered posts and staggered terms for at-large council positions	11-13-89
State (90-2185, 90-3077)	Establishment of ten additional superior court judgeships and the specification of the date on which the first full term of office commenced for each new judgeship	4-25-90 Declaratory judgment granted in Georgia v. Reno, 881 F. Supp. 7 (D.D.C. 1995)
Georgia Military College District (Baldwin Cty.) (90-2210)	Act No. 1155, S.B. No. 623 (1990)--which provides for a change from an elected board (six members elected from single-member districts in the City of Milledgeville and the mayor of Milledgeville, who is elected at large) to a statewide board of twelve members appointed by the governor	3-11-91
East Dublin (Laurens Cty.) (90-2776)	Numbered posts and a majority vote requirement for the at-large council positions	4-26-91
State (91-1051)	Act Nos. 25 and 27 (1991), which provide respectively for the establishment of an additional superior judgeship in the Atlanta and Eastern Judicial Circuits, and specify the date on which the first full term of office for each new judgeship commences	6-7-91
Elberton (Elbert Cty.) (90-2527)	Annexation embodied in Ordinance No. 951 (1989) and the apportioning of the annexed area to single-member election districts	7-2-91

Monroe (Walton Cty.) (90-4602)	Majority vote requirement for city offices	7-3-91 Deemed precleared upon failure to object to controlling provision in 1968 Georgia State Election Code City of Monroe v. United States (11/17/97)
Hinesville (Liberty Cty.) (90-2784)	Adoption of a majority vote reqirement for the election of the mayor	7-15-91
Athens-Clarke County (91-1258)	Act No. 28 (1990), which provides for an additional State Court judgeship, the creation of the State Court clerk's position, and the specification of the dates on which the relevant terms of the offices begin in the context of an at-large method of election with a majority vote requirement, and with anti-single-shot provisions in the judgeship elections	10-1-91 Withdrawn 10-23-95
State (91-3556; 91-3557 and 91-3558)	1991 redistricting plans for Georgia State House, Senate and Congressional districts	1-21-92
Sparta (Hancock Cty.) (91-2166)	Adoption of numbered positions for city council elections	2-4-92
State (89-2268)	Reduce the minimum number of permanent satellite voter registration locations to be established by certain counties, and eliminate the requirement for Saturday registration hours for satellite voter registration locations in the period outside the six months preceding the close of registration for November general elections in even-numbered years	2-11-92
State (92-1035; 92-0712 and 92-0713)	1992 redistricting plans for Georgia State House, Senate and Congressional districts	3-20-92
State (92-1440)	Second 1992 redistricting plan for the Georgia State House	3-29-92
Effingham County (92-1162)	Act No. 608 (1992), which provides for a change in the method of selecting the chairperson from appointment among the commissioners to election from the county at	7-20-92

	large; expansion of the number of officials on the board of county commissioners from five to six; an increase in the term of the chairperson from a one-year to a four-year term; and the increase in the compensation for the chairperson	
Union City (Fulton Cty.) (92-2037)	Annexation embodied in Ordinance No. 92-5	10-23-92 Withdrawn 8-9-93
Johnson County (92-3863)	Relocation of the polling place for the Wrightsville precinct from the county courthouse to the American Legion	10-28-92
Griffin (Spalding Cty.) (92-3226)	1992 redistricting plan	11-30-92
Conyers (Rockdale Cty.) (92-4776)	32 residential annexations	2-16-93 Withdrawn 9-23-93 upon change in method of election
Twiggs County (93-0701)	Procedures for conducting the March 16, 1993, special tax referendum	3-12-93
Butler (Taylor Cty.) (88-3378; 92-3058)	Majority vote requirement and runoff provision for mayor	6-25-93
Randolph County (93-0299-0300)	1993 redistricting plan for the board of commissioners; 1993 districting plan and qualifications to serve in office for the board of education	6-28-93
Millen (Jenkins Cty.) (93-2161)	Implementation schedule	8-2-93
Baldwin County (93-2097)	Method of selecting magistrate: nonpartisan elections with majority vote requirement	8-13-93
Clay County School District (93-2816)	Qualifications to serve in office for the board of education (minimum education requirement)	10-12-93
Early County School District (93-1830)	Qualifications to serve in office for the board of education (minimum education requirement)	10-15-93
Monroe (Walton Cty.) (93-1647)	Method of election and districting plan	10-22-93
McIntyre (Wilkinson Cty.) (93-1432)	Majority vote requirement in elections to fill a town council vacancy	11-9-93

LaGrange (Troup Cty.) (93-1248; 93-1372 and 93-3303)	Method of election: 4 single-member districts and two at large	12-13-93
Waynesboro (Burke Cty.) (88-2659)	Majority vote requirement for mayor	5-23-94
State (94-1595)	Act No. 774 (1994), which provides for a 45 percent plurality requirement in partisan and nonpartisan general elections	8-29-94 Withdrawn 9-11-95
Fayette County (94-2005 and 94-3614)	Act No. 1129 (1994), which provides for the creation of a state court, establishes four-year terms for an elected judge and solicitor (non-partisan judicial election), candidate qualifications including residency requirements, compensation for elected positions, an implementation schedule, and designates the clerk of the Superior Court the clerk for the State Court	9-16-94 Withdrawn 10-23-95
LaGrange (Troup Cty.) (94-2267)	Act No. 652 (1994), which provides for an increase in the number of city councilmembers from six to seven, a change in the method of electing the city council from at large to four single-member districts, two "super" districts, and one at-large position	10-11-94
State (94-2672)	Voter purge procedures proposed by Act No. 1207 (1994), which provided for mailing a registration confirmation notice to any voter that does not vote or otherwise have "contact" with the state's election administration system for a three-year period	10-24-94
Decatur County (94-2499)	Establishment of an elected chairperson, the increase in the number of county commissioners and the change in the method of election	11-29-94
Macon (Bibb and Jones Ctys.) (94-4188)	Redistricting plan	12-20-94
Fulton County (94-4447)	Act No. 731 (1994)--addition of a ninth state court judgeship, four-year term of office, and implementation schedule	1-24-95 Withdrawn 10-23-95
Jenkins County	Polling place (District 1)	3-20-95

(94-2260)		
State (95-3656)	1995 Georgia State House and Senate redistricting plans	3-15-96 Withdrawn 10-15-96
Webster County School District (98-1663) (pdf)	Redistricting plan	1-11-00
Tignall (Wilkes Cty.) (99-2122) (pdf)	Proposed addition of numbered posts, staggered terms and a majority vote requirement to the method of electing councilmembers	3-17-00
Ashburn (Turner Cty.) (94-4606) (pdf)	Adoption of numbered posts and majority-vote requirement	10-1-01
Putnam County (2002-2987) (pdf)	2001 redistricting plan	8-9-02
Putnam County School District (2002-2988) (2002-2987) (pdf)	2001 redistricting plan	8-9-02
Albany (Dougherty Cty.) (2001-1955) (pdf)	2001 redistricting plan	9-23-02
Marion County School District (2002-2643) (pdf)	2002 redistricting plan	10-15-02

Mr. CHABOT. Thank you very much, Representative Brooks. And before we get to our last witness, you mentioned Rosa Parks and the reauthorization of the Voting Rights Act. At the funeral in Detroit—where I think just about every Member of this Committee was present, at least that's present here now—that came up again and again by many of the very distinguished speakers at the funeral, how important it was that the Voting Rights Act be reauthorized.

Now, there is some, I would say, misinformation that the right to vote is going away after 2 years if this isn't reauthorized. There are only sections of this that need to be reauthorized. It's not the entire—some of those things are permanent, of course; although these things here are very important, as well.

But I just did want to acknowledge that what you're saying, we heard time and again at Rosa Parks' funeral last week.

Mr. McDonald, you're recognized for 5 minutes.

TESTIMONY OF LAUGHLIN McDONALD, DIRECTOR, VOTING RIGHTS PROJECT, AMERICAN CIVIL LIBERTIES UNION, FND.

Mr. MCDONALD. Chairman Chabot and Members of the Committee, it's indeed a pleasure to appear before you, before so many colleagues and friends.

I agree with what some of the prior—all of the prior panel members have said, that the opinion of the majority in *Georgia v. Ashcroft* introduces new and vague and difficult to apply and contradictory standards. According to the Court, the ability to elect is important, it's integral; but a court must now also consider the ability to influence and elect so-called "sympathetic representatives."

The Court took a standard that was intelligible, easy to apply; and it's turned it into something that's subjective, abstract, and impressionistic.

The danger in the Court's opinion is that it will allow 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. And that's a result, I think, that the Voting Rights Act should not allow to exist.

The inability of Blacks to exercise the franchise effectively in so-called "influence districts" is apparent, I think, from the lack of electoral success of Black candidates in majority-White legislative districts in Georgia. As of 2002, of the ten Blacks elected to the State senate in Georgia, every single one was elected from a majority-Black district. And the districts, by the way, had populations of 54 to 66 percent Black.

And of the 37 Blacks elected to the State House, 34 were elected from majority-Black districts. And of the three who were elected from majority-White districts, two were long-term incumbents whose Black percentages were in excess of 45 percent, and the third was elected from a three-seat district; every voter could elect three members to the House.

I'd also want to comment that the brief which the State of Georgia filed in the Supreme Court in *Georgia v. Ashcroft* I think is a present-day example of the willingness of one of the States that's

covered by section 5 to manipulate the law to diminish the protection afforded to racial minorities.

You should read the brief, because it resurrects the language that some White elected officials in the State had historically used to denounce the Voting Rights Act. In the brief filed in 2003, the State says that section 5 is an extraordinary transgression of the normal prerogatives of the States; that State legislatures were "stripped of their authority to change electoral laws in any regard until they first attained Federal sanction"; the statute was "extraordinarily harsh, and intrudes upon the basic principles of federalism." And the Court even made the argument that section 5, as construed by the three-judge court, was "unconstitutional."

Now, the rhetoric is one thing, but the arguments that the State advanced on the merits I think were far more hostile to minority voting rights even than its rhetoric was. Because one of the State's principal arguments was that the retrogression standard of section 5 should be abolished altogether, in favor of what it said was a coin toss—50–50 chance of winning or losing—standard. Well, by definition, if that were the standard that was adopted, you'd do away with half—or more than half—of the Black elected officials.

And the State also made the extraordinary argument, directly contrary to case law and to the intent of Congress when it extended the Voting Rights Act, that racial minorities—the very group for whose protection section 5 was enacted—should never be allowed to participate in the preclearance process.

The minority influence theory, moreover, is frequently nothing more than a guise for diluting minority voting strength. The White members of the Georgia legislature, for example, opposed the creation of a majority-Black congressional district in 1981, on the grounds that it would diminish minority influence. It would cause, it said, White flight and the disruption of harmonious working relationships between the races.

Well, 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."

Well, I would close by saying that because the decision in *Georgia v. Ashcroft* runs counter to the intent of Congress, it is crucial that Congress utilize the reauthorization process as an opportunity to restore the protection of section 5 and to clarify the retrogression standard as articulated in *Georgia v. Ashcroft*. Thank you very much.

[The prepared statement of Mr. McDonald follows:]

PREPARED STATEMENT OF LAUGHLIN MCDONALD

Chairman Chabot, Ranking member Nadler and Members of the Constitution Subcommittee:

I am pleased to appear before you today and appreciate the opportunity to share my views on the need for Congress to restore the protection of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, eroded by the decision in *Georgia v. Ashcroft,* 539 U.S. 461 (2003).

As you know, Section 5 of the Voting Rights Act requires certain jurisdictions with a history of racial discrimination in voting to obtain preclearance from the U.S. Department of Justice or the U.S. District Court in D.C. before they can implement any changes to their voting practices or procedures. To obtain preclearance, jurisdic-

tions must prove that the proposed voting change is not retrogressive, *i.e.* does not have a discriminatory purpose and will not have the effect of denying or abridging a person's right to vote because of their race or color or membership in a language minority group.[1]

Prior to the decision in *Georgia v. Ashcroft,* 539 U.S. 461 (2003), the Supreme Court in *Beer v. United States,* 425 U.S. 130 (1976) held that the failure to preserve the ability of minority voters to elect candidates of their choice is retrogressive and that such voting changes are objectionable under δ5 of the Voting Rights Act. This standard was also ratified when Congress extended Section 5 in 1982.

The *Georgia v. Ashcroft* decision, however, represents a significant departure from the retrogression standards applied in Beer and other voting rights cases. The Court created a new standard for retrogression and allows states to relegate minority voters into second-class voters, who can "influence" the election of white candidates, but who cannot amass the political power necessary to elect a candidate of their choice who they believe will represent their interests.

The Decision of the District Court

Georgia v. Ashcroft was an action instituted by the State of Georgia in the District Court for the District of Columbia seeking preclearance under Section 5 of its congressional, senate, and house redistricting plans based on the 2000 census. The district court precleared the congressional and house plans, but objected to three of the districts in the senate plan because "the State has failed to demonstrate by a preponderance of the evidence that the reapportionment plan . . . will not have a retrogressive effect." *Georgia v. Ashcroft,* 195 F. Supp. 2d 25, 94 (D.D.C. 2002). Although blacks were a majority of the voting age population (VAP) in all three senate districts, the district court concluded that the state failed to carry its burden of proof that the reductions in BVAP from the benchmark plan would not "decrease minority voters' opportunities to elect candidates of choice." *Id.* at 89. The standard for retrogression applied by the district court was the one articulated by the Court in *Beer v. United States,* 425 U.S. 130, 141 (1976). In *Beer,* quoting the legislative history of the 1975 extension of the Voting Rights Act, the Court held that the standard under Section 5 is "whether the ability of minority groups to participate in the political process and to elect their choices to office is *augmented, diminished, or not affected* by the change affecting voting." 425 U.S. at 141 (emphasis in original). The state enacted a remedial senate plan, which was precleared by the district court, and appealed the decision on the merits to the Supreme Court.

The State's Brief in the Supreme Court

The brief filed by the state of Georgia in *Georgia v. Ashcroft* **provides a dramatic, present day example of the continued willingness of one of the states covered by Section 5 to manipulate the laws to diminish the protections afforded racial minorities.** The state's brief resorted to the kind of rhetoric that it had used countless times in the past to denounce the Voting Rights Act.

In April 1965, Carl Sanders, the governor of Georgia, wrote to president Lyndon Johnson urging defeat of the pending voting rights bill. He argued that states had exclusive power to prescribe voter qualifications, and that the abolition of literacy tests in the southern states and the federal registrar system was "an extreme measure . . . not even attempted during the vengeful days of the Reconstruction Period." LBJ Library, LE/HU 2–7, Box 70, p. 2.

In 1970, in testimony before the U.S. Senateq, Georgia's governor Lester Maddox railed against the Voting Rights Act as an "outrageous piece of legislation," that was "illegal, unconstitutional and ungodly and un-American and wrong against the good people in this country." Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, Ninety-first Congress, First and Second Sessions, on S. 818, S. 24556, S. 2507, and Title IV of S. 2029, Bills to Amend the Voting Rights Act of 1965, July 9, 10, 11, and 30, 1969, February 18, 19, 24, 25, and 26, 1970, p. 342.

The state essentially boycotted the 1975 congressional hearings on extension of the Voting Rights Act, but Georgia Attorney General Arthur Bolton advised Senator John Tunney in a terse letter that "in a number of litigated cases my position with respect to the law in this matter is well established, and I do not at this time have anything further to add in this matter." Extension of the Voting Rights Act, Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, Ninety-fourth Congress, First Session, on S. 407, S. 903, S. 1297, S. 1409, and S. 1443, April 8, 9, 10, 22, 29, 30, and May 1, 1975, Arthur Bolton to Sen. John Tunney. In one of the cases referred to by Bolton, the state

[1] 1 42 U.S.C. δ1973c.

argued that the Voting Rights Act was unconstitutional. *See Georgia v. United States,* 411 U.S. 526, 530 (1973).

When Congress considered extension of the Voting Rights Act in 1981–1982, one of those who testified in opposition was Freeman Leverett, a former state assistant attorney general. He proudly recalled that he had argued on behalf of Georgia in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), that the Voting Rights Act was unconstitutional and renewed his attack on the act. Disparaging the civil rights movement, he said the Voting Rights Act had been passed in 1965 "to appease the surging mob in the street," and that Section 5 should be repealed because "there is no longer any justification for it at all." Voting Rights Act, Hearings before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, Ninety-seventh Congress, Second Session, on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112, Bills to Amend the Voting Rights Act of 1965, January 27, 28, February 1, 2, 4, 11, 12, 25, and March 1, 1982, pp. 942, 950.

In its brief in *Georgia v. Ashcroft,* the state continued its tradition of bashing the Voting Rights Act. It argued that Section 5 "is an extraordinary transgression of the normal prerogatives of the states." State legislatures were "stripped of their authority to change electoral laws in any regard until they first obtain federal sanction." The statute was "extraordinarily harsh," and "intrudes upon basic principles of federalism." As construed by the three-judge court, the state said, the statute was "unconstitutional." Brief of Appellant State of Georgia, pp. 28, 31, 40–1. But the arguments the state advanced on the merits were far more hostile to minority voting rights even than its anti-Voting Rights Act rhetoric.

One of the state's principle arguments was that the retrogression standard of Section 5 should be abolished in favor of a coin toss, or an "equal opportunity" to elect, standard based on Section 2 of the Voting Rights, 42 U.S.C. § 1973, which it defined as "a 50–50 chance of electing a candidate of choice." *Georgia v. Ashcroft,* 195 F.Supp.2d at 66.[2] The state also made the extraordinary argument, and in contrast to well established law, that minorities, the very group for whose protection Section 5 was enacted, should never be allowed to participate in the preclearance process.

Had the state's proposed coin toss standard been adopted, it would have had a severe negative impact upon minority voting strength. A 50–50 chance to win is also a 50–50 chance to lose. If the state were allowed under Section 5 to adopt a plan providing minority voters with only a 50–50 chance of electing candidates of their choice in the existing majority black districts, the number of blacks elected to the Georgia legislature would by definition be cut essentially in half, or reduced even further.

The Decision of the Supreme Court

The majority opinion of the Supreme Court in *Georgia v. Ashcroft* is the proverbial mixed bag. As an initial matter, the Court rejected two of the anti-Voting Rights Act arguments made by the state, *i.e.,* that private parties should never be allowed to intervene in preclearance actions, and that the retrogression standard of Section 5 should be replaced with the "equal opportunity" standard of Section 2. According to the majority: "Private parties may intervene in Section5 actions assuming they meet the requirements of Rule 24, and the District Court did not abuse its discretion in granting the motion to intervene in this case." 539 U.S. at 477. The Court further held that: "Instead of showing that the Senate plan is nondilutive under Section 2, Georgia must prove that its plan is nonretrogressive under Section 5." *Id.* at 479.

The Court, however, vacated the decision of the three-judge court denying preclearance to the three senate districts because, in its view, the district court "did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts." 539 U.S. at 490. The Court held that while this factor "is an important one in the Section 5 retrogression inquiry," and "remains an integral feature in any Section 5 analysis," it "cannot be dispositive or exclusive." *Id.* at 480, 484, 486. The Court held that other factors which in its view the three-judge court should have considered included: "whether a new plan adds or subtracts 'influence districts'—where 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;" and whether a plan achieves "greater overall representation of a minority group by increasing the number of representatives sympathetic to the interest of minority voters." *Id.* at 482–83.

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[2] Section 2 is a permanent, nationwide prohibition on the use of any voting practice "which results in a denial or abridgment of the right to vote on account of race or color [or membership in a language minority]."

The Court held "that Georgia likely met its burden of showing nonretrogression," but concluded that: "We leave it for the District Court to determine whether Georgia has indeed met its burden of proof." 539 U.S. at 487, 489. But before the district court could reconsider and decide the case on remand, a local three-judge court invalidated the senate plan on one person, one vote grounds, *Larios v. Cox,* 300 F.Supp.2d 1320 (N.D.Ga. 2004), *aff'd* 124 S. Ct. 2806 (2004), and implemented a court ordered plan. *Larios v. Cox,* 314 F.Supp.2d 1357 (N.D.Ga. 2004). As a consequence, the preclearance of the three senate districts at issue in *Georgia v. Ashcroft* was rendered moot.

The Dissent

The dissent in *Georgia v. Ashcroft,* relying upon *Beer,* argued that Section 5 means "that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change." 539 U.S. at 494. The dissenters also argued that the majority's "new understanding" of Section 5 failed "to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the Section 5 touchstone." *Id.* at 495.

Problems with the Majority Decision

The opinion of the majority introduced new, vague and difficult to apply, and contradictory standards. According to the Court, the ability to elect is "important" and "integral," but a court must now also consider the ability to "influence" and elect "sympathetic" representatives. The Court took a standard that focused on the ability to elect candidates of choice, that was understood and applied, and turned it into something subjective, abstract, and impressionistic. The danger of the Court's opinion is that it may allow 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. That is a result Section5 was enacted to avoid. As the Court held in *Beer,* "the purpose of § 5 has always been to insure 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." 425 U.S. at 141.

The inability of blacks to exercise the franchise effectively in so-called influence districts is apparent from the lack of electoral success of black candidates in majority white districts. As of 2002, of the ten blacks elected to the state senate in Georgia, all were elected from majority black districts (54% to 66% black population). Of the 37 blacks elected to the state house, 34 were elected from majority black districts. Of the three who were elected from majority white districts, two were incumbents. The third was elected from a three-seat district. *2003 House of Representatives, Lost & Found Directory.*

The Expert Testimony in Georgia v. Ashcroft

Despite the lack of success of black candidates in majority white districts, critics of the extension of Section 5 have argued, erroneously, that the evidence in *Georgia v. Ashcroft*—specifically the testimony of the state's expert Dr. David Epstein—showed that black voters have an equal opportunity to elect candidates of their choice in districts with a black voting age population as low as 44%. To the contrary, the three-judge court concluded that Dr. Epstein's analysis was "entirely inadequate" to assess the impact of the state's plan on the ability of minorities to elect candidates of their choice and was "all but irrelevant." *Georgia v. Ashcroft,* 195 F.Supp.2d at 81.

Among the defects found by the court in Dr. Epstein's analysis were (a) his erroneous reliance solely on statewide, as opposed to region or district specific, data, (b) his failure to acknowledge the range of statistical variation in his estimates of the black percent needed to provide an equal opportunity to elect, (c) his use of analyses that were marred by errors in "coding" that affected his conclusion, and (d) his use of a method of analysis (probit analysis) that failed to account for variations in levels of racial polarization. 195 F.Supp.2d at 66, 81, 88.

Dr. Epstein also failed to take into account the "chilling" effect upon black political participation, and the "warming" effect upon white political participation, caused by the transformation of a majority black district into a majority white district. Once a district is perceived as no longer being majority black, black candidacies and black turnout are diminished, or "chilled," while white candidacies and white turnout are enhanced, or "warmed." *See Colleton County v. McConnell,* 201 F.Supp.2d 618 (D.S.C. 2002), Supplemental Report of Prof. James W. Loewen, p. 2 ("[s]ocial scientists call the political impact of believing that one's racial or ethnic group has little hope to elect the candidate of its choice the 'chilling effect'"). A formerly majority black district, particularly one without a black incumbent, would not

be expected to "perform" in the same way after being transformed into a majority white district.

Dr. Epstein presented a similar "equal opportunity" analysis in *Colleton County v. McConnell,* and it was also rejected by the three-judge court. Citing the pervasive racially polarized voting that existed throughout South Carolina, the court concluded that "in order to give minority voters an equal opportunity to elect a minority candidate of choice . . . a majority-minority or very near majority-minority black voting age population in each district remains a minimum requirement." 201 F.Supp.2d at 643.

The three-judge court in *Georgia v. Ashcroft* further found that the United States "produced credible evidence that suggests the existence of highly racially polarized voting in the proposed districts." *Id.* at 88. That evidence included the analysis of Dr. Richard Engstrom which, unlike the analysis of Dr. Epstein, "clearly described racially polarized voting patterns" in the three senate districts in question. 195 F.Supp.2d. at 69. The Supreme Court did not disturb these findings of the lower court on appeal.

Minority Influence As a Pretext for Vote Dilution

Minority influence theory, moreover, is frequently nothing more than a guise for diluting minority voting strength. White members of the Georgia legislature, for example, opposed the creation of a majority black congressional district in 1981 on the grounds that black political influence would be diminished by "resegregation," "white flight," and the disruption of the "harmonious working relationship between the races." *Busbee v. Smith,* 549 F. Supp. 494, 507 (D.D.C. 1982). The three-judge court, in denying Section 5 preclearance of the state's congressional plan, found that these reasons were pretextual and that the legislature's insistence on fragmenting the minority population in the Atlanta metropolitan area was "the product of purposeful racial discrimination." *Id.* at 517.

Julian Bond, a state senator at that time, introduced a bill at the beginning of the legislative session creating a fifth district that was 69% black. The Bond plan had the support of two white members of the senate, Thomas Allgood, the Democratic majority leader from Augusta, and Republican Paul Coverdell. *Busbee v. Smith,* Deposition of Thomas Allgood, p. 15–6. In large measure as a result of their endorsement, the final plan adopted by the senate contained a 69% black fifth district.

The house, however, rejected the senate plan. The speaker of the house, Tom Murphy, was opposed as a matter of principle to creating a majority black congressional district. "I was concerned," he said, "that . . . we were gerrymandering a district to create a black district where a black would certainly be elected." *Busbee v. Smith,* 549 F. Supp. at 520. According to the District of Columbia court, Murphy "refused to appoint black persons to the conference committee [to resolve the dispute between the house and senate] solely because they might support a plan which would allow black voters, in one district, an opportunity to elect a candidate of their choice." *Id.* at 510, 520. Joe Mack Wilson, the chair of the house reapportionment committee, and the person who dominated the redistricting process in the lower chamber, was of a similar mind and advised his colleagues on numerous occasions that "I don't want to draw nigger districts." Id. at 501.

After the defeat of the Bond plan in the house, the fragile coalition in the senate in support of the plan broke down. Several senators approached Allgood and said, "I don't want to have to go home and explain why I was the leader in getting a black elected to the United States Congress." Allgood acknowledged that it would put a senator in a "controversial position in many areas of [Georgia]" to be perceived as having supported a black congressional district. He finally told his colleagues to vote "the way they wanted to, without any obligations to me or to my position," and "I knew at that point the House plan would pass." *Busbee v. Smith,* Deposition of Thomas Allgood, pp. 42–5.

Based upon the racial statements of members of the legislature, as well as the absence of a legitimate, nonracial reason for adoption of the plan, the conscious minimizing of black voting strength, and historical discrimination, the District of Columbia court concluded that the state's submission had a discriminatory purpose and violated Section 5. The court also held that the legislature had applied different standards depending on whether a community was black or white. Noting the inconsistent treatment of the predominantly white North Georgia mountain counties and metropolitan Atlanta, the court found that "the divergent utilization of the 'community of interest' standard is indicative of racially discriminatory intent." 549 F. Supp. at 517.

As for Joe Mack Wilson, the court made an express finding that "Representative Joe Mack Wilson is a racist." 549 F. Supp. at 500. The Supreme Court affirmed the decision on appeal. *Busbee v. Smith,* 549 U.S. 1166 (1983).

Forced yet again by the Voting Rights Act to construct a racially fair plan, the general assembly in a special session enacted an apportionment for the fifth district with a black population exceeding 65%. The plan was approved by the court. John Lewis, one of the leaders of the Civil Rights Movement, was elected from the fifth district in 1986 and has served in Congress ever since.

The Shaw/Miller Decisions

The fallacy of the notion that influence can be a substitute for the ability to elect is apparent from the *Shaw /Miller* cases, which were brought by whites who were redistricted into majority black districts. Rather than relishing the fact that they could "play a substantial, if not decisive, role in the electoral process," and perhaps could achieve "greater overall representation . . . by increasing the number of representatives sympathetic to the[ir] interest," they argued that placing them in white "influence," *i.e.,* majority black, districts was unconstitutional, and the Supreme Court agreed. *See, e.g., Miller v. Johnson,* 515 U.S. 900, 919–20 (1995). In addition, if "influence" were all that it is said to be, whites would be clamoring to be a minority in as many districts as possible. Most white voters would reject such a notion.

Clarifying Georgia v. Ashcroft

Because the decision in *Georgia v. Ashcroft* runs counter to the intent of the Voting Rights Act, it is important that members of Congress utilize the reauthorization process as an opportunity to restore the protection of Section 5 and clarify the retrogression standards as articulated in *Georgia v. Ashcroft.* Any efforts to address this issue should provide that any diminution of the ability of a minority group to elect a candidate of its choice would constitute retrogression under Section 5.

Thank you very much.

Mr. CHABOT. Thank you very much. I would like to thank the entire panel for staying within the 5-minute rule so well. So thank you very much for that.

I now recognize myself for 5 minutes. And I'm going to, again, try to encourage Members to keep within the 5 minutes. And I will apply that to myself, as well, because we do have another hearing after this.

I'll address this to all the panel members, and we can just go down the line here. And you all touched upon this, obviously, during your testimony; but would you tell us again why Congress should be so concerned about the 2003 Supreme Court case of *Georgia v. Ashcroft*, and how it has impacted minority voters and their ability to elect candidates of their choice? Mr. Shaw, we'll start with you, if we can.

Mr. SHAW. Thank you, Mr. Chairman. The *Georgia v. Ashcroft* decision is a substantial weakening of section 5's standard of review in the preclearance process. What it does is move away from the goal of full participation, of pursuing full participation in the political process for racial minority groups. What it does is substitute "influence," which is ill defined, vaguely defined, for the ability to represent—or rather, to elect representatives of choice.

That's not a close call, in our view at the Legal Defense Fund. And it invites dilution. It invites the attempts to spread minority voters out under the guise of saying that they can have "influence." But in the scenario where there is racially-polarized voting—and that's the touchstone here, that's a key—it means that they will not be able to elect representatives of their choice consistently. And that is a step backwards.

That's what *Georgia v. Ashcroft* did. That's what it threatens. And we believe that if we're going to see a restoration of the Voting

Rights Act's full strength, and of section 5's full strength, we have to undo *Georgia v. Ashcroft*.

Mr. CHABOT. Okay. Thank you very much. Ms. Lewis, is there anything you would like to add to that, or expound upon?

Ms. LEWIS. Well, I agree with Mr. Shaw. I think, also, that what we saw in *Georgia v. Ashcroft* —I think Mr. McDonald alluded to it—was that the ability to elect a candidate of choice was reduced to a 50–50 chance. Except that really it was reduced to a 44–56 chance, because the State's expert testified that at 44 percent Black voting-age population, it was an equal opportunity to elect a candidate of choice.

And so I think that in *Georgia v. Ashcroft*, we don't have a refutation of that by the Supreme Court. And in fact, when the Supreme Court reversed and remanded to the district court, the Supreme Court ordered the district court essentially to take up the case and look at it. But if you read the opinion, I think it's pretty clear what the district court was supposed to do. It was supposed to preclear that plan.

And I think that in the context of section 5, that *Ashcroft* is definitely a dangerous decision. And I think that one of the perhaps unnoticed portions of *Georgia v. Ashcroft*, that Mr. McDonald also alluded to, is there was a concerted effort to keep out minority voice in the process. Our clients—four minority citizens; two Republicans, two Democrats—wanted to participate in the *Ashcroft* case; as they would have been able to do had the case been administratively precleared. But the State fought us at least ten times on that issue.

So I think that I agree with Mr. Shaw. And I also think that you see a tremendous reduction in minority voting.

Mr. CHABOT. Thank you. Representative Brooks, anything you'd like to add to that?

Mr. BROOKS. Well, Mr. Chairman, I do concur with my colleagues. You know, from 1965 through every renewal or reauthorization, drawing majority-Black districts was our goal, and having a majority-Black district was the standard.

When *Ashcroft* became the law, then obviously we move away from that standard. So that influence districts, less-than-majority-Black districts, could be drawn. That will reduce our numbers in the body politic. We will see a reduction not only in Georgia, but across America, in covered States, if we allow this to stand.

That's why it's very, very important for Congress to say, "We're going to maintain the full enforcement of section 5 as we go forward with reauthorization."

Mr. CHABOT. Thank you. I've got 27 seconds left, Mr. McDonald.

Mr. MCDONALD. I would just say that the impact of *Georgia v. Ashcroft* has not been great, for the reason that most of the redistricting after 2000 has already taken place. But how to treat *Georgia v. Ashcroft* is left up to the individual covered jurisdictions. And some could continue to draw districts that provide an equal opportunity to elect, but the real danger is that they will not; that they will draw so-called "influence districts," which will minimize the ability of minorities to elect candidates of choice. And that's the very real danger.

Mr. CHABOT. Thank you very much. And my time has expired.

The distinguished Ranking Member of the full Committee, Mr. Conyers, is recognized for 5 minutes.

Mr. CONYERS. Thank you. I'm so happy to see everybody here. What we're considering is whether influence districts, which some consider as a dilution process, and opportunity districts, which is a concentration of African-American voters, probably 60 percent or more, should both be allowed.

And so my question to you, Mr. McDonald, is should we allow both of them to be allowed in moving forward with this new legislation that will be coming out from the 2005 hearings on the Voting Rights Act?

Mr. MCDONALD. Representative Conyers, I think that there really are three kinds of districts that people talk about. One is the district that provides minorities an equal chance to elect representatives of their choice. And the second is a so-called "coalition district," in which minorities are not a majority of the population in the district, but they nonetheless retain the ability to coalesce, or to vote as a block, either with another minority group or with White crossover voters, to elect a candidate of their choice.

And I think if you destroy either one of those kinds of districts, that ought to violate the retrogression standard of section 5.

Then people also talk about so-called "influence districts." But I must say, I think that is a somewhat amorphous and not a very meaningful term. For example, there was a political scientist, a woman named Lisa Handley, who did a study several years ago to try to determine the influence that a given percent of minority voters would have in a district. And I think everybody assumes that the relationship is a linear one: that the more minorities you have in a district, the more responsive and sympathetic the elected officials will be to the concerns of the minority.

But what she discovered was that there actually was a curvilinear relationship. Where there were very few minorities in the district, the elected officials were relatively responsive; because the minorities were no threat. But as the minority population increased, there was a perceived threat from the minority and the elected officials were actually less sympathetic; until you reached a point where the minority group had an ability to elect candidates of choice, and then you saw that there was responsiveness. So I think that influence really is not this linear pattern.

Mr. CONYERS. Mr. Shaw, do you think we should be considering how we tweak or modify *Georgia v. Ashcroft*? And do you agree with the assessment of Mr. McDonald?

Mr. SHAW. I think that, to the extent that *Georgia v. Ashcroft* has substituted, or opened the door to substituting, an influence district standard for the opportunity to elect representatives of choice, that Congress ought to restore the Beer standard of retrogression. And we should not be stepping away from the opportunity to elect representatives of choice.

I think it's a simple question. If you ask any voter does that voter want 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. They want an opportunity to elect representatives that they believe will represent their interests.

Mr. CONYERS. Well, gentlemen, remember now, the former majority leader in Texas in the Texas congressional plan relied on the majority districts. They said, "We're packing this in. This is good for you." Well, we ended up realizing it was bad for us. Right, Mr. McDonald?

Mr. MCDONALD. I'm certainly not in favor of packing, Representative Conyers. That's a traditional form of diluting the minority vote.

Mr. CONYERS. Is it, Mr. Shaw?

Mr. SHAW. Well, clearly, packing and cracking can be problematic. It's a very factually intensive analysis that has to be done in each instance. So you can see attempts to discriminate by packing and over-packing majority-minority districts; but you can also see an attempt to dilute voting strength.

I think all of us who do voting rights litigation know that there are two forms of discrimination that may be in play here. And I'm also not naive. There is a partisan aspect of what the Committee Members may be considering.

We at the Legal Defense Fund, a 501(c)(3) organization, we have to think about the Voting Rights Act, which is focused on voters and on protecting minority voters. And that's a little bit of a different focus; although I understand where those two things sometimes meet. But our interest is in preserving the Voting Rights Act and section 5 as a strong protection against discrimination, whether it's packing or cracking. And what *Georgia v. Ashcroft* does is open a door to cracking, dilution.

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

The gentleman from Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. And you know, as I listen to this testimony, it's many days of this by this point, and I appreciate the passion that comes to the table. I had an interesting conversation with Mr. Watt on the way over to vote, and I would reflect that we see this from two different viewpoints.

And one of them is all the things we can do from an affirmative standpoint. Some believe that that helps the assimilation process and diminishes the resistance, the racism that has been there in the past. And at some point, we need to get to that situation where we can say, "We've arrived."

How do we define—can 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, you and I, look at each other, and say, "We don't need the Voting Rights Act any more; America is now assimilated and we are all one people"? Would you have a definition for that?

Mr. SHAW. Congressman King, I appreciate the question, and understand the sincerity of the question. I answer the question this way. When we no longer have, or face, the phenomenon of racially-polarized voting, in which consistently minority candidates—or rather, 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.

Believe me, Mr. Congressman, nobody would like to get to the point where we no longer have the need for these protections more than those who are protected by these statutes. And it's nice to

wish that we could get there, and want to get there; but we're clearly not there now.

Our testimony and my testimony includes a footnote which cites instances of section 5 review and the necessity of section 5 review for decades now, right on up to the present. So we still need the act.

Mr. KING. Mr. Shaw, I received some good news in my e-mail. Actually, it was at 11:07 last night, after the polls closed across this country, at least closed in Iowa. And I'll just read it to you directly. "I wanted to let you know that I received a call this evening from the Dallas County auditor, and Isaiah McGee was the top vote-getter in Waukee City Council race. There were three open seats, so the top three vote-getters out of five candidates were elected. Voters could vote for up to three candidates. Out of 1,365 voters that voted in the election, Isaiah pulled 1,015 votes." And I would submit he may have been the only African-American that voted in that election.

So I mean, that doesn't prove anything across this Nation from an empirical standpoint, but I want to tell you that I believe that there are a lot of very successful islands here. And there are other things involved. We focus on race in this discussion, but I also know that partisan politics are another big part of this.

And I direct my question to Representative Brooks on that. You've seen the polarization because of party. And we know polls say that 90 percent of African-Americans vote for the Democrat candidate, roughly speaking, across this country. It seems to me that you have to factor in the partisan politics in any analysis of any discrimination or any difficulty of getting representation in the body politic. Representative Brooks?

Mr. BROOKS. Well, to some extent, you do. The reality of competition between the parties is a reality that we will face for many, many years in this republic that we live in, as long as we have democratic elections.

But riding on the plane up this morning, I received a call from the Mayor of Millersville, Georgia, the Honorable Floyd Griffin, who is a four-star general and who came out of Vietnam; worked with Colin Powell here at the Pentagon; went back home; became mayor; served in the State senate two terms. He said, "I lost." And he said, "The reason I lost is because I couldn't get enough White crossover votes to be reelected."

Also, we discovered that over in Cuthbert, Georgia, Willy Martin, the Mayor of Cuthbert, lost. Over in Richland, Georgia, Olin Falk lost, who worked for former Senator Sam Nunn. And they all say, "We couldn't get enough crossover votes from the White community." So racially-polarized voting is a reality. Those are municipal, non-partisan races; not Democrat-Republican, but non-partisan——

Mr. KING. But don't we know, Representative Brooks, that we've got a pretty good idea of the political philosophy of those candidates? And often there's a partisan undercurrent to that election?

Mr. BROOKS. Probably so.

Mr. KING. And could you speak, though, to the partisan races? Say, for example, if you were a Black candidate running in a Republican race, how difficult would it be to get the Black crossover

to come from the Democrat Party to come vote for you as a Republican?

Mr. BROOKS. Well, if I——

Mr. CHABOT. The gentleman's time has expired. But the gentleman can answer the question.

Mr. BROOKS. If I could get the Republican Party to return to the philosophy of Lincoln and Eisenhower, maybe we'd have a better chance.

But let me tell you, Andrew Young, one of the most popular African-Americans in America, known around the world, who lives in Georgia, lives in my neighborhood, wanted to become Governor of Georgia. In 1990, he ran, and lost. And he said, "The only reason I lost is because I couldn't get enough White crossover votes." Everybody loves Andrew Young. You know, he wanted to become a U.S. Senator last year. He decided, after testing the waters, that he couldn't get enough crossover votes.

So the reality of racially-polarized voting is real. And that's why it's so imperative that you understand—even though you're from Iowa; you're not a covered State—we have to have the full protection of section 5, in order to create opportunities to elect candidates of choice; be they Republican or Democrat, Black or White.

Mr. KING. Mr. Chairman, I should ask for an opportunity for rebuttal, but I'll just yield back. Thank you.

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

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

Mr. SCOTT OF VIRGINIA. Thank you, Mr. Chairman. Representative Brooks, one of the compelling reasons to extend section 5 is that it eliminates the advantage people might have by implementing—by passing an illegal plan and then benefitting from it until such time as it can get thrown out. And one of the real problems is that, even if you get it thrown out, the person who benefitted from the illegal plan gets to run in the legal plan, but as an incumbent.

As a veteran legislator, can you say whether or not an incumbent generally has an advantage in an election?

Mr. BROOKS. Absolutely. Incumbency is a powerful weapon to have. When you're running for reelection, it allows you to compete and raise funds at a higher level than those who are challenging you. Incumbency carries name recognition, seniority. So, it certainly does; no doubt about it.

Mr. SCOTT OF VIRGINIA. Thank you. Now, when you talk about the ability to elect a minority candidate, is there any bright-line number that applies all over the country, or even all over Georgia? Or do you have to look at each district individually to determine the voting patterns in that district, to determine whether or not a minority candidate would reasonably have an ability—a minority community would have a reasonable ability to elect a candidate of its choice?

Mr. BROOKS. Well, Congressman Scott, I think that when you look at Georgia, since we're talking about *Ashcroft*, you look at the history of Georgia, which has had some of the most regressive laws over the years: poll taxes, literacy tests, the county unit system, at-large voting, resistance to change. My home State; born there. You

have to look at the fact that racially-polarized voting is probably more severe in the State of Georgia than any State in the Union.

Mr. SCOTT OF VIRGINIA. Yes, but I mean, looking at the district, do you have to look at the individual district, or is it something that can apply over the State?

Mr. BROOKS. You have to look at demographic makeup. You have to look at racial makeup. You have to look at who's running, who has the ability to compete. You have to look at a lot of factors.

Mr. SCOTT OF VIRGINIA. And you would have to apply those factors to the specific district?

Mr. BROOKS. I think you would. But in general, you have to have a standard. And till 1965, through every reauthorization, we basically had a standard. Majority-Black district was the standard.

Mr. SCOTT OF VIRGINIA. Well, in some areas, a simple majority would be enough for the minority community to elect a candidate of its choice. In other districts, you would need more than just 51 percent; is that right?

Mr. BROOKS. You would need—you would look at the voting——

Mr. SCOTT OF VIRGINIA. In that district?

Mr. BROOKS. Yes. You would look at voter registration. You would look at Black voting strength——

Mr. SCOTT OF VIRGINIA. But I'm talking—in that district.

Mr. BROOKS. In that district.

Mr. SCOTT OF VIRGINIA. Okay. Now, in your testimony, you quote Representative Holmes, who said that the Black Caucus members would not have supported the district if it had actually abolished majority-Black districts; is that right?

Mr. BROOKS. That's correct.

Mr. SCOTT OF VIRGINIA. Does anybody on the panel agree that we ought to allow—however you consider the influence; a coalition, anything—whether or not you ought to eliminate existing minority-majority districts?

Mr. BROOKS. I do not.

Mr. SCOTT OF VIRGINIA. Anybody?

[No response.]

Mr. SCOTT OF VIRGINIA. Okay. Now, Mr. Shaw, you indicated in your testimony a difference between influence and coalition districts.

Mr. SHAW. Well, I'm not—yes, it's in my testimony, the written testimony.

Mr. SCOTT OF VIRGINIA. In your written testimony.

Mr. SHAW. Yes. Yes.

Mr. SCOTT OF VIRGINIA. Can the coalition—influence is hard to pin down.

Mr. SHAW. Yes.

Mr. SCOTT OF VIRGINIA. Can you mechanically determine whether or not—with some degree of accuracy, whether or not a district is in fact a coalition district, by voting pattern? Is that something that is a workable standard?

Mr. SHAW. Well, I think, Congressman, that, again, it's a factually intensive question. And we have to look at the district, the degree of polarization in elections in that district.

Mr. SCOTT OF VIRGINIA. But it's a standard you can work with. Now, you're not going to trade a majority-Black district or an op-

portunity—where you have a real opportunity for a coalition district. We've agreed on that. In the abstract, if all you've got in the area is a possibility for a coalition district, and you have a coalition district, should that district be able to be protected under the Voting Rights Act? Can you crack a coalition district and create two districts where you go from coalition to nothing?

Mr. SHAW. It's a hypothetical question that I can't answer with any specificity. I think that the answer to the question of whether I would trade a majority-Black district for a coalition district is——

Mr. SCOTT OF VIRGINIA. We know the answer to that is "No."

Mr. SHAW. Well, I think, Congressman, the question is whether you get an opportunity to elect representatives of your choice.

Mr. SCOTT OF VIRGINIA. Right. Right. That's fine. Now, if the choice is——

Mr. CHABOT. The gentleman's time has expired. Would you like an additional minute?

Mr. SCOTT OF VIRGINIA. Yes, please.

Mr. CHABOT. The gentleman is recognized for an additional minute.

Mr. SCOTT OF VIRGINIA. If the choice is coalition district or no coalition district—you're in an area where you can't do a majority-Black district, but you can put together a coalition district where you can routinely elect a candidate of choice, but you've got to form coalitions to do it—should that district be protected under the Voting Rights Act?

Mr. SHAW. I believe it should be.

Mr. SCOTT OF VIRGINIA. Okay. And if you have the opportunity to create a majority-minority district where you have a reasonable opportunity to elect a candidate of your choice—in the *Georgia* case, several of the legislators agreed to have their percentage reduced a little bit to create nearby coalition districts. Should that be legal? Maintaining the opportunity district.

Mr. SHAW. Yes.

Mr. SCOTT OF VIRGINIA. You should be able to consider whether or not they are coalition districts?

Mr. SHAW. I believe that should be legal.

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

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

The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. Well, thank you. And I thank our panelists.

I want to tell you that I love Justice O'Connor. I had a nice lunch with her where the members of the Supreme Court eat lunch. And she will probably be retired by the time we deal with the next set of Voting Rights Act cases; at least in the redistricting cycle.

Much as I love her, I have to tell you I'm amazed at the hair-splitting she can do in some of her written opinions. It brings the nano-science of hair-splitting to new levels. And I think that the *Georgia v. Ashcroft* case is an example of that, in which she really threw out the old retrogression standards as we knew them.

She did things like say that retrogression inquiries should include the opportunity to participate in the political process. Well, that's only partially true. It's section 2 that deals with the opportunity to register and to actually vote. Section 5 guarantees a

meaningful vote, where the opportunity to elect a candidate of your choice matters.

And she basically says that we can substitute now a certain number of coalition or influence districts, or even other considerations, in her opinion, that are added. How many people do you have, for example, that are minorities in leadership positions or in chairmanship positions?

And the point of that is that under her "totality of the circumstances" test—some of you were very kind: you said that that was a subjective standard. And what I said in the last hearing is that it is totally unintelligible, not only by the next Supreme Court who has to follow *Georgia v. Ashcroft*, but if you happen to be involved in the Justice Department or a lower Federal court, or if you happen to be drawing new district lines or deciding on an annexation case or any other policy-making decision, there is absolutely no standard whatsoever.

So if section 5, in my view, is to have any meaning, we are going to have to decide here in Congress what it means. And it's going to have to be consistent with the Constitution, the 14th amendment, and other concerns.

Mr. Shaw, I really appreciated your written testimony. You point out the five major problems; the fact that under *Georgia v. Ashcroft* tangible minority gains can be sacrificed, point one. Point two: invites vote dilution.

Ashcroft invites the very thing that happened in Florida for 100 years. When we had between 14 and 17 percent African-American voting-age population, we didn't have one single Black Congressperson elected since Reconstruction was over. Very similar to other Southern States.

And yet, *Ashcroft* invites that, on the theory that you can influence the outcome of an election. I don't know what "influence" means. She says voters sympathetic to minority causes. Well, if you were able to decide, in a Democratic primary in the early '60's, if you were a Black American in Alabama, whether you wanted George Wallace or "Big Jim" Folsom to be elected governor, I guess you had a chance to influence that election. I don't know what "influence" means.

And then she talks about sympathy to minority interests. By the time their careers were over, at least on the face of it, people like George Wallace and Strom Thurmond actually genuinely appeared to show some sympathy. But I don't know how a judge is supposed to interpret who has sympathy and who does not have sympathy, and at what point in their career they may or may not have sympathy.

So I guess my question is this, for the attorneys here, Mr. Shaw and Ms. Lewis: given the *Georgia v. Ashcroft* standard, if I were deciding whether to do an annexation where section 5 retrogression principles would be implicated, or a redistricting process, for example, would you take my case, assuming you were a for-profit lawyer and needed to make a profit, and give me a money-back guarantee if we had any complex issues—influence versus coalition versus minority-majority districts? Are you confident enough that the standards we have here give you any reasonable guidance whatsoever to advise clients that have to make policy decisions at this level?

Mr. Shaw, I really appreciated your written brief, so I will invite you first to express your level of confidence, if you can rely on the unintelligible—it was my word—standard in *Georgia v. Ashcroft*.

Mr. SHAW. Well, thank you, Congressman. First, I hope that my testimony was not opaque—or rather, oblique. I hope that you understand that we could—I agree with your statement that there's a lack of a standard and clarity here. And if I were asked to take the case that you put to me, I would not be confident that there would be a standard that is intelligible.

So my short answer is that I agree with you. And that's why we're saying that we need to restore the pre-*Georgia v. Ashcroft* standard of retrogression, defined in *Beer*.

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

Mr. FEENEY. Mr. Chairman, with the permission of the Committee, I also asked Ms. Shaw [sic]. She's got some—Ms. Lewis. She's got some experience in this regard.

Mr. CHABOT. Yes. Ms. Lewis, you can respond.

Ms. LEWIS. And I'll give a very short answer. I would not give you a money-back guarantee on that. I think that any plan, redistricting plan, whether it's a city council plan up to a State legislative or congressional plan, from here on out, is a very difficult process and involves years of work; which means tons of fees, and no guarantee.

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

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

Mr. WATT. Thank you, Mr. Chairman. I'm glad to see my friend, Mr. King, stayed today, so we can have our dialogue on the record; rather than off the record. And I was listening intently to his example from Iowa. And I would just say to him publicly that it would be interesting to see what the outcome of that race would have been, if it had been a single-Member, Black-on-White race; rather than a multi-Member district.

A number of us—Lani Guinier was at the front of that, until people started shooting her down—have been strong advocates of multi-member districts, for the very reason that you are talking about. It is clear that in a lot of situations we've made enough progress that White people will cast one of three votes for a Black candidate. That makes them feel good. You know, it's a sign of progress.

But if they are brought to the choice between casting a vote for a Black candidate or a White candidate, racially-polarized voting sets in very quickly, and you don't get the result that you just described in the example you're talking about.

I even introduced a bill—until I gave up on it because I couldn't get any support for it—to make it possible for States to go back to multi-member congressional districts. There's nothing in the law that prohibits multi-member congressional districts. It is Federal statutory law that says there must be single-member congressional districts.

I think we could deal with a lot of racially-polarized voting issues if we had multi-member congressional districts. We could create more influence districts if we had multi-member districts. And, you know, elections might cost more, and that would be a disincentive

to do it—and I recognize that—because you'd be running in larger geographic areas.

But, you know, we've explored this in so many different ways. And it's great to be able to create a dialogue with my friend, who understands it. And I want to associate myself fully—I told you this going across the street—with the comments of Ted Shaw. There's nobody in America who would love to be at this point where we have a color-blind society and no need for the Voting Rights Act than minorities. I guarantee you.

But in the meantime, between now and the time we get there to that desired goal, we can't just bury our heads in the sand and say, "Let time take care of this and take its course." You know, because there's too much to be lost in that meantime while we're waiting on that to happen. We didn't have the right to vote, and we could have said, well, attitudes were changing, so let's just wait while attitudes change, and we don't need a Voting Rights Act. So, enough—enough already.

Let me, Mr. McDonald, ask you if you can talk a little bit more about this distinction between coalition districts and influence districts, so that we have a better understanding of what that distinction is.

Mr. MCDONALD. Well, I would define a coalition district as one that's not majority-minority, but in which the minority can join another block of voters, another minority group or White crossover voters, to elect a candidate of choice.

Mr. WATT. That's kind of like the district that I represent in North Carolina.

Mr. MCDONALD. Yes.

Mr. WATT. That's what you're talking about?

Mr. MCDONALD. Yes.

Mr. WATT. Not a majority-Black district, but it's a coalition district because I can form coalitions with——

Mr. MCDONALD. White voters——

Mr. WATT. Yes.

Mr. MCDONALD. —or Hispanic voters.

Mr. WATT. Right.

Mr. MCDONALD. And whether or not the right to have a coalition district is protected by the Voting Rights Act is a matter that has not been determined. The U.S. Supreme Court has assumed, but expressly without deciding, that you could bring a section 2 challenge, even if the minority group cannot be a majority in a single-member district, if you could show that the minority could coalesce with another group and create a coalition district.

And I think on four occasions the Supreme Court has assumed that, but has not decided it. And the lower Federal courts are split on that issue. There are some that say you cannot bring a claim for a coalition district; that the *Gingles* standard requires you to show that the minority can be a majority in one or more single-member districts. But there are other decisions that say that you can bring a claim where you can draw a coalition district.

And I agree with Mr. Shaw that you ought to be able to do that, under section 2 of the Voting Rights Act, and that section 5 of the Voting Rights Act ought to protect minority voters from the destruction of one of those coalition districts.

Mr. WATT. Mr. Chairman, I know my time is up, but the second part of that question was: contrast that to influence districts.

Mr. MCDONALD. Well, an influence district, I think, is one in which the minority doesn't have the ability to coalesce with other groups and elect candidates of choice.

And I don't think that concept of influence really has very much meaning. I mean, I cited this political science study that said that it actually has a negative meaning; that if you have a substantial minority population, it often makes the White elected officials even more hostile to the interests of the minority voters, because they see them more as a threat. I mean, I think that's the sad reality.

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

The Chair would extend the same privilege to the gentleman from Georgia on this side of the aisle, Mr. Westmoreland, who is also from Georgia, to ask questions for 5 minutes, as the Chair has already indicated he would extend that opportunity to the Members on this side. So the gentleman from Georgia is recognized for 5 minutes.

Mr. WESTMORELAND. Thank you, Mr. Chairman. And let me say that, Ms. Lewis, Mr. Brooks, and Mr. McDonald, it's good to see you. And Mr. Shaw, I just don't know you, but I know that the other three really believe in the Voting Rights Act and standing up for people regardless of their race or political affiliation.

Mr. McDonald, you read something from the brief, I believe, that was filed in the *Ashcroft* case. Do you know who wrote that brief?

Mr. MCDONALD. Well, it was signed by the attorney general of the State, but my deep suspicion is that the special counsel that they hired actually wrote it. But I haven't talked to——

Mr. WESTMORELAND. But that attorney general would be Thurbert Baker?

Mr. MCDONALD. That is correct.

Mr. WESTMORELAND. And he is an African-American.

Mr. MCDONALD. That is correct.

Mr. WESTMORELAND. Okay. And Mr. Shaw, you made an interesting comment. You said those who are protected don't want to be protected. We all agree with that. We don't think there needs to be any protection. And especially, those people who are under this protection don't want to feel like there's a need for it. Is that correct?

Mr. SHAW. Well, I want to be clear. I wasn't saying that those who are protected don't want to be protected. I was saying that I think that they would welcome——

Mr. WESTMORELAND. Right, they would rather not be——

Mr. SHAW. —the commonality that they wouldn't have to be protected.

Mr. WESTMORELAND. Right. That's correct. Right. Thank you. Do you think that the very people who are protected under the Voting Rights Act should be allowed to get out from under that protection if it's their choice?

And let me tell you where I'm going with that. And my friend, Mr. Brooks, which I served with for 12 years and has been my friend—I was on the Georgia Reapportionment Committee, and I was there doing the cases. And I listened to all the arguments. And I was there when *Ashcroft* came through. I presented some maps

that gave African-Americans more representation in the State of Georgia than the Democratic map. Mr. Brooks voted against that map that I presented. He voted for the map that *Ashcroft* upheld.

So I guess if somebody's going to steal your bicycle, and stealing is a crime, you can say, "Well, it's okay if Billy steals my bicycle; but if Bobby steals my bicycle, it's not right."

And if you look at polarized voting in Georgia—ask David Scott, my good friend over there, or Sanford Bishop. Thurbert Baker has won the attorney general's seat twice, statewide; Leah Sears on the supreme court; Michael Thurmond, labor commissioner; Willy Charlton, from Haralson County, a Black Republican elected in a majority-White district; Melvin Everson just won a special election in Gwinnett County in a majority-White district. Champ Walker, on the other hand, an African-American, was beat by Max Burns in 2002, because people felt Max Burns was a better candidate, although other Black candidates actually won in that district.

And so we're a very candidate-driven State, I think. And I know that Mr. Brooks has talked about polarized voting. Would you say that all of Georgia is a polarized voting State, Mr. Brooks?

Mr. BROOKS. I think that, Lynn, Mr. Congressman, my friend——

Mr. WESTMORELAND. Thank you.

Mr. BROOKS. Racially-polarized voting is a reality in Georgia. I do think there are aberrations to what we call the electability of African-Americans statewide. And you do recall that Leah Sears was appointed to the bench first. Thurbert Baker was appointed attorney general. Robert Benham was appointed. Most judges get appointed first, and then run as incumbents. And they have the incumbency with them, they have money with them, and they run. Those are not the kind of intensified races, as a U.S. Senate race, or a Governor's race, that you would find the kind of polarization.

Now, let me say to you, I know we've made an awful lot of progress in my home State of Georgia. We've made an awful lot of progress. But we have not made sufficient progress to the extent that I would ever want Georgia to be removed from the protection of section 5.

We're headed in the right direction. I think we're making progress, but I do not believe we can ever say—in any very near future, where we could say we don't need the protection of section 5.

I think that what we're debating here now, as you go through the process of reauthorization, we're debating whether or not section 5 needs to remain intact and we need to overturn *Ashcroft*. I think what you would find in the State of Georgia is that there are some candidates who can and who will win, when they have the opportunity to raise the money, get known, build up the support. They may be Black; they may be White. They may run in majority-Black districts, or White-majority districts.

But I can tell you this. African-Americans stand a better chance of winning in majority-Black districts, based on the political makeup of our State today, than in majority-White districts.

Willy Charlton—a fine man, I've known him for years, deputy sheriff in Haralson County. Mr. Everson, I don't know very well, in Gwinnett County. But I would tell you that if we remove section

5 and all of the protections it affords us, our numbers will drop across Georgia and across the South. There's no doubt in my mind. But we are making progress.

Mr. WESTMORELAND. Could I just ask one follow-up question?

Mr. CHABOT. The gentleman's time has expired. The gentleman is given an additional minute.

Mr. WESTMORELAND. Thank you.

Mr. CHABOT. Including the answer, if possible.

Mr. WESTMORELAND. Okay. Mr. Brooks, one last question. Do you think if—well, we sat on the reapportionment committee together. Was there ever a number that came up that was a number of influence, what percentage might be an influence district? And do you think that *Ashcroft* helps or hurts the Voting Rights Act?

Mr. BROOKS. Well, I think *Ashcroft* is a detriment. I think *Ashcroft* is a dangerous precedent. I think this Congress has to override *Ashcroft*. And I think we've got to move forward for the restoration of section 5 in all of its aspects as we've known it since 1965.

Now, as I voted for the maps that you talked about earlier, your maps were broad. And it was more partisan politics than anything else. It was more partisan politics than anything else. So I think when you bring up your map, and you look at the map that was floated by Governor Barnes and the Democratic leadership, we were making political decisions at that time. We were in no way saying that we did not want the full protections of section 5 of the Voting Rights Act.

Mr. CHABOT. The gentleman's time has expired. I don't know if he wants to respond to the partisan politics remark or not.

Mr. WESTMORELAND. Well, I promise you, if you can say that the map you voted for was not partisan politics, and my map was, then——

Mr. BROOKS. I think it was partisan on both sides. Yes, for sure.

Mr. WESTMORELAND. Well, I disagree. But thank you, though.

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

The gentleman from Georgia, Mr. Lewis, is recognized for 5 minutes.

Mr. LEWIS OF GEORGIA. Thank you very much, Mr. Chairman. I think during the exchange, Mr. Brooks, one of the questions that I wanted to ask you—and I wanted you to be very candid and very open with us and with the Committee—that would you agree that the *Georgia v. Ashcroft* is the result of cold, down-home, partisan politics?

Mr. BROOKS. Yes.

Mr. LEWIS OF GEORGIA. Okay. You know, Mr. Brooks, there has been a great reliance on my testimony and the testimony of other Black elected officials in *Georgia v. Ashcroft*. I think Justice O'Connor cited my testimony.

Mr. BROOKS. She did.

Mr. LEWIS OF GEORGIA. Does this new standard in *Georgia v. Ashcroft* give too much deference to State officials? What are the dangers of this standard? And maybe Mr. McDonald would like to respond to it.

Mr. MCDONALD. Well, it does. It allows the States to make a judgment that they can destroy the districts that provide minority

voters an opportunity to elect candidates of choice in favor of some nebulous, difficult to quantify or apply standard.

And I don't have much doubt, Congressman Lewis, given the anti-Voting Rights Act rhetoric in the State's brief in *Georgia v. Ashcroft*, the positions that it took on the merits, that you could destroy all the majority-minority districts, consistent with its view of what section 5 would provide, I think it would have a devastating impact on minority voting strength.

Mr. LEWIS OF GEORGIA. If you had an opportunity—and you have an opportunity—to tell this Committee in extending or renewing section 5, would you like to see any changes?

Mr. MCDONALD. Well, there's a coalition of civil rights groups that supports an extension, and they also support strengthening or restoring the Voting Rights Act to its former strength in several areas.

And one of them is to deal with *Georgia v. Ashcroft*. The other is to deal with the *Bossier II* decision, which provided a retrogressive purpose standard for section 5 which I think is utterly indefensible. It would have—if that had been the standard in effect in 1980, then that congressional district that the legislature drew purposefully, to keep from drawing a majority-Black district in the Atlanta area, would have been precleared, presumably.

And then I think that the Supreme Court has ruled that in successful voting rights cases plaintiffs are not entitled to recover attorneys' fees. That really makes it almost impossible for minority communities to bring voting rights lawsuits, because they don't have the ability to hire lawyers, they don't have the ability to pay for experts. And in a typical voting rights case, you need probably three experts: a demographer, to draw plans; a statistician, to analyze voting patterns; and a political scientist or historian, to talk about what, you know, the present-day impact of race is in a jurisdiction.

So somebody's got to eat that expense. And it just makes it much more difficult for the minority community to implement the Voting Rights Act. And I would suggest that's a positive thing that Congress ought to look at and address.

Mr. LEWIS OF GEORGIA. I think each member of the panel would agree that, say, in Georgia, and maybe in some of the other covered States and political subdivisions, we have made some progress. You would agree?

Mr. MCDONALD. Yes.

Ms. LEWIS. Yes.

Mr. LEWIS OF GEORGIA. But we have not created what we used to call in the movement "the beloved community," or a truly interracial democracy. We may not see it in our lifetime. So there may be a need for section 5 and other sections in the Voting Rights Act for generations yet to come.

I would like to have some just maybe statements about what do you see, our path down the road? Can we take a long, hard look? Because there's some people saying, "Get rid of the Voting Rights Act, get rid of section 5, make it nationwide." I'd like to have your feelings about that.

Mr. MCDONALD. Well, Congressman Lewis, can I respond to that? You know, I've asked myself that question, and more of late

than before, you know: when will we get beyond the issue of race? And I must say, I'm constantly reminded of the words of the great modern, contemporary, American poet, Bob Dylan, who asks himself those very questions, you know, in "Blowin' in the Wind":

"How many years can a mountain exist before it's washed in the sea?"

"And how many times can a man turn his head and pretend that he just doesn't see?"

"The answer my friend, is blowin' in the wind."

And I must say, if Bob Dylan doesn't know the answer, I don't presume to know it. [Laughter.]

But I am an optimist. But I also know that we're stuck with our basic humanity; you know, our ego, our biases, our lack of knowledge, and our ambitions. And I think that what we must do as a nation is to have strong laws that provide for equal rights for all of our citizens, and they must be effectively enforced by the courts.

Mr. LEWIS OF GEORGIA. I appreciate it.

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

Mr. LEWIS OF GEORGIA. Thank you, Mr. Chairman.

Mr. CHABOT. Thank you. And the gentleman has now succeeded in getting Bob Dylan in the Congressional Record here. [Laughter.]

It may be a first. I'm not sure.

The gentleman from Georgia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT OF GEORGIA. Thank you very much, Mr. Chairman. I'd like to focus, if I may, on what it's going to take for us to excise *Georgia v. Ashcroft* out of the law. I mean, that is our purpose here. And I believe, in order to do that, we need to establish a record at this hearing of purposeful discrimination.

Because it is clear that our efforts are going to be held up in courts; there's going to be pleas of unconstitutionality. And before these hearings, I wasn't as concerned about the viability and the continuation of the Voting Rights Act; but I certainly am now. I think that the Voting Rights Act, especially section 5, is severely threatened.

And probably, the most cancerous part of it is this *Ashcroft* decision. Because if we're able to change that retrogression standard from *Beer* to influence, we could see a chilling effect and an unraveling of the progress of African-Americans in the political scheme of things.

And I, too, wish that day would come. I know the answer is blowing in the wind. But maybe we can do a little bit of help to get a hurricane behind that wind, so that we can get an answer.

But I do believe this, and this is what I want to ask each of you. We have to show purposeful discrimination. We have to be able to show that *Ashcroft* and *Georgia* has an intent of discrimination; that it does in effect violate either parts of the 14th amendment or the 15th amendment; and specifically, the 15th amendment.

In other words, it must show that *Ashcroft* intended to discriminate, there was purposeful discrimination in there, and it does in fact abridge and deny the ability for African-Americans to vote, or for citizens to vote, on the base of race or color; and in the case of the 15th amendment, the addition was, and also servitude or slavery.

So with that in mind, I'd like to ask—first, let me ask you, because I think, Representative Brooks, you really need to clarify for the record what's going to come up, as a reason of why in the world can we show that this had racial intent, when the Georgia Black legislators voted for that plan.

I was there. You were there. Westmoreland was there, Congressman Westmoreland was there. I mean, we were all very much active in that part. And it's very much important, I believe, for us to understand and dissect that the Black legislators' vote for this was not an endorsement or support of the State's position in their argument against the Supreme Court.

Mr. BROOKS. Absolutely.

Mr. SCOTT OF GEORGIA. It was a political reality of the situation, and did not diminish—and our support of that was not to support an influence district away from a majority district.

But you were very instrumental in that. And I'd like to get your comments on the record to show that that vote by the Black legislators was in no way condoning this sliding scale of retrogression.

Mr. BROOKS. Well, you've stated it very well. You've stated it very well. We made a political decision to vote for maps that would shave off percentages of African-American districts, so that we could create opportunities to elect Democrats. It was a political decision.

Our voting for those maps were in no way an endorsement of retrogression or dilution. We wanted to maintain the premise of having majority-Black districts going forward, but we saw a political opportunity that was before us. And of course, as you recall, our former Governor Barnes, and others in the Democratic Party, we made a decision, Majority Leader Charles Walker from Augusta and others. We decided that we would take this chance.

But as I've said over and over, even in the case that Laughlin filed on our behalf, I am quoted as saying this was a political decision that we made, but this was not an endorsement of dilution or retrogression. This was an aberration in the old political scheme.

This is not to say that we would go forward and ever consider across-the-board, carte blanche, drawing minority districts and shaving off percentages that would put African-Americans in those majority districts at risk. We wanted to maintain majority-Black districts going forward.

Mr. SCOTT OF GEORGIA. Thank you very much, Mr. Brooks.

My time is short, but Mr. McDonald, can you pinpoint and give us your own opinion that *Georgia v. Ashcroft* had purposeful discrimination intent?

Mr. MCDONALD. Well, we filed an amicus brief on behalf of GABEO, of which Tyrone Brooks is the President, and others, and we never raised that argument. But I think that you're absolutely right that the civil rights community and others in Congress who want to, you know, strengthen and extend the Voting Rights Act, must establish a record of the need to do so.

And I think that it is clearly possible to do that. I mean, the office that I'm involved in alone, since 1982, since the last extension, has been involved in some 300 lawsuits, voting rights lawsuits. And we're in the process now of summarizing all of those, so that we can make a report to give to the Committee and Congress.

And I must say, I'm really sort of—I had almost forgotten, you know, how the pattern of purposeful discrimination is evident in my review of all of these cases. I think that we plainly will be able to do that.

Mr. CHABOT. The gentleman's time has expired. The Chair would recognize—excuse me.

Mr. SCOTT OF GEORGIA. I just wanted to get one more point in that I think would help us——

Mr. CHABOT. Go ahead.

Mr. SCOTT OF GEORGIA. —establish facts, from Mr. Shaw.

And I think that you established a pattern here. In your opposition to it, in your statement, you said that—you gave four counts: the national preference for single-member electoral districts, principally based upon geographic consideration; the continued existence of racially-polarized voting patterns; the persistent effort to dilute minority votes by depriving the minority communities of the benefit of fairly-drawn redistricting plans; and that you had stated that you wished to direct the remainder of your remarks to explaining several reasons why Congress should act to restore protection for the abilities of minority voters to elect candidates of their choice as a touchstone of the retrogression analysis.

Would you say that the *Ashcroft* plan denied that ability, and therefore did abridge, on the base of race or color, the ability of that community to elect a person of their choice?

Mr. SHAW. I think *Georgia v. Ashcroft* opened the door to that, and I also think it's very important to add that. I think that while we have to lay a record here for the need of the extension of the Voting Rights Act, that all Congress has to do—and I don't mean to in any way diminish the task—but all Congress has to do with respect to section 5 is to restore *Beer*.

I don't think you were suggesting that we need to introduce an intent standard with respect to retrogression. I think you're just talking about going back to what *Beer* said; which was retrogression was prohibited.

Mr. SCOTT OF GEORGIA. Right. But I am saying that those who would be in opposition to this will take it to court, will probably move to the Supreme Court. We all know what is happening with the Supreme Court. It's getting a more restrictive manner.

Mr. SHAW. Yes. Yes, sir.

Mr. SCOTT OF GEORGIA. And I think that, wherever we can, we must understand that that's going to be the case. And we have to specifically show where *Ashcroft*, *Georgia v. Ashcroft*, does impact, run square into——

Mr. SHAW. Yes, sir.

Mr. SCOTT OF GEORGIA. —that 15th amendment.

Mr. SHAW. I agree, sir.

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

The Chair would recognize himself for just a point of clarification. Mr. Brooks, I just wanted to follow up on one of your statements.

The Voting Rights Act—the purpose of the Voting Rights Act, was to protect people, specifically African-Americans, in this country from being discriminated against in their ability to vote. Now, you stated before, to paraphrase what you said, something along

the lines that you all had made a partisan decision to basically protect Democratic districts, or the Democratic Party. And do you believe that that's an appropriate use of the Voting Rights Act?

Mr. BROOKS. No, I do not. I do believe that in the context of the political environment in which we all serve—whether you're in Congress or whether you're in a general assembly or a county commission or a city council—from time to time, you have to make tough political decisions.

And what we had before us during the last reapportionment in Georgia was a plan that would afford those of us who happened to be Democrats, the Democratic Party, an opportunity to elect more Democrats. We took a chance, voting for a plan that really, in my opinion, was not really in the best interests of what the Voting Rights Act stands for and what we fought for; what John Lewis and I and Hosea Williams and others marched across the Edmund Pettus Bridge for.

So it was a political decision. But in hindsight, it was the wrong decision as it relates to upholding what the Voting Rights Act was intended for.

Mr. CHABOT. I thank you.

I think the gentleman from New York, Mr. Nadler, had a question?

Mr. NADLER. Yes. Thank you, Mr. Chairman. Since I was on the floor on the motion to instruct on the Patriot Act, I missed most of the testimony, which is why I haven't been taking my normal turn of asking 5 minutes of questions. But I do want to ask Representative Brooks a question, based on the statement that you made a moment ago with regard to this political decision on that Georgia reapportionment.

Is your testimony—or maybe it's not your testimony. Is your belief—you said that you made a—you and others, I presume—made a political decision to vote for a plan because you thought it was better for political reasons, etcetera, etcetera; even though on Voting Rights Act grounds, you might have had a problem with it. That's essentially what you said, right?

Mr. BROOKS. It was a political decision.

Mr. NADLER. Okay. You made a political decision for political reasons that you thought politically the right thing to do was "X," even though you thought on voting rights grounds it might be "Y," something might be better.

Mr. BROOKS. Well, when we were making that decision, the issue of retrogression, dilution, maintaining section 5, was not even on the table. It was a matter of plans before us.

Mr. NADLER. I understand.

Mr. BROOKS. Plans that would help either party.

Mr. NADLER. Okay. Now, my question is——

Mr. BROOKS. The Democratic or the Republican Party.

Mr. NADLER. My question is, do you believe that the Voting Rights Act should be amended to prohibit you from making that decision if it came up again? In other words, do you think that, whether that decision was right or wrong in retrospect, it should be illegal?

Mr. BROOKS. I do believe this. I do believe that those of us, particularly African-Americans, who are the beneficiaries of the Voting Rights Act——

Mr. NADLER. I'm sorry?

Mr. BROOKS. I do believe this, that those of us who happen to be African-Americans and minorities who are chief beneficiaries of the Voting Rights Act—because I wouldn't be sitting here as a legislator, talking to you, were it not for the Voting Rights Act; my colleagues wouldn't be in Congress, were it not for the voting—I think we have to be very, very sensitive, going forward, as we make these political decisions, that we do not ever send the wrong messages, as it relates to the protections afforded us under 2 and 5 of the Voting Rights Act. I mean, we have to be very sensitive and very careful.

Mr. NADLER. Of course. Of course, and I——

Mr. BROOKS. This is a lesson for us.

Mr. NADLER. I certainly would agree with you. But the question I'm trying to get is, do you think that the Voting Rights Act should be amended so that that decision would not be discretionary with a very sensitive legislator, but the decision that you made would be prohibited? And I'd like to ask each of the members that question.

Mr. BROOKS. Not at the expense of the full protections of section 5, no, I do not.

Mr. NADLER. Okay, and the other members of the panel?

Mr. MCDONALD. I would just underscore that the plan that Tyrone voted for did not destroy any of the majority-Black districts.

Mr. NADLER. Any of the what?

Mr. MCDONALD. Any of the majority-Black districts. The three senate districts that were denied preclearance, the three-judge court simply ruled that the State had not carried its burden of showing that the reductions——

Mr. NADLER. So you do not believe that we should amend the law to make that illegal?

Mr. MCDONALD. To make what illegal, Congressman?

Mr. NADLER. Voting for that plan.

Mr. MCDONALD. Well, my own feeling is that the Supreme Court ought to do its duty and establish standards for partisan gerrymandering. I mean, we had the *Davis v. Bandemer* decision, in which the Court for the first time said that you stated a claim. But there is no decision that I'm aware of that has ever ultimately struck down a plan on the grounds that it was a partisan gerrymander.

Mr. NADLER. You're misunderstanding my question. I'm not asking you if it should be illegal because it was partisan. I'm asking if you think that, given the impact it did or didn't have on retrogression, or whatever the implications were—which I'm not really that familiar with because I didn't hear most of it—that that should be—it was obviously a legal decision to vote for that plan. Should we amend the Voting Rights Act so that what that plan did would be illegal under the new Voting Rights Act?

Mr. MCDONALD. Because it was driven by partisanship?

Mr. NADLER. No, not because of that. Because of whatever problems or concerns that we have, or that you had, with regard to the

Voting Rights Act implications, because it took some districts below 50 percent.

Mr. MCDONALD. I thought the decision of the three-judge court was entirely proper; that even though it didn't destroy any majority-Black district, that it simply found that the State had not carried its burden of showing that there was no retrogression, that the reductions would not interfere with the ability of Blacks to elect representatives of its choice. And I think that was an entirely appropriate decision.

Mr. NADLER. Ms. Lewis——

Mr. CHABOT. The Chair would just make a point. I'm not sure how much time you're going to use, but we didn't put you on the clock——

Mr. NADLER. I just wanted to get an answer from Ms. Lewis, Mr. Chair, on the same question.

Mr. CHABOT. If they could make it relatively quick. We've got another hearing at 4. So if we could make the brief responses, the Chair would appreciate it.

Mr. NADLER. I see.

Ms. LEWIS. Well, I can make my response very brief. I think, although I don't have the answer for you in how you would prohibit that problem from occurring again, I think in reauthorizing section 5, you have to focus on minority voters' rights, versus the preferences of incumbents.

And I think in Georgia the problem came down to exactly that. In fact, one of the incumbents, who thought that lowering his district to 51 percent Black voting-age population was just fine for him—he had been there a long time; he was the majority leader in the State senate; he wouldn't get beaten. That was an error in two respects: one, he did get beaten; and two, it doesn't look out for the next person coming along, which should be the focus of the minority voting.

Mr. NADLER. I was told he was running when he was under criminal indictment. That may affect his judgment somewhat.

Ms. LEWIS. Well, no, he actually won when the indictment came out.

Mr. NADLER. Mr. Shaw?

Mr. SHAW. Well, I agree, with respect to drawing a distinction between incumbents and Black voters. That's an important distinction. It's one to which I referred earlier, I think. Perhaps you weren't in the room at the time. And I just want to underscore that again.

I also want to say that what we want, with respect to your question about what ought to be illegal and what ought to be legal—what we want is a restoration of section 5 to the *Beer* standard, the retrogression standard. And if we get that——

Mr. NADLER. That's the pre-*Ashcroft v.*-whatever?

Mr. SHAW. Pre-*Ashcroft*, that's right. If we get that, we will be satisfied that we are protecting the interests of minority voters.

Mr. NADLER. Thank you very much.

Mr. CHABOT. The gentleman's time has expired. If the gentleman from Georgia would bear with us, I think that this gentleman from Georgia wanted to make a very quick point here.

Mr. WESTMORELAND. I just wanted to ask one question. I know Mr. Brooks, that he voted for the map for political reasons. If you saw an opportunity for Ms. Pelosi to be Speaker of the House, for Mr. Conyers to be Chairman of the Judiciary, for Steny Hoyer to be the Majority Leader, would you think that it would be okay to reduce the numbers in majority-Black congressional districts to produce that result?

Mr. BROOKS. It depends on how far you reduce them. If you are putting the African-American community in a position where they can no longer determine——

Mr. WESTMORELAND. But Mr. Brooks, we've already determined there is no number.

Mr. BROOKS. Well, you know, when we passed the Voting Rights Act in '65 and the reauthorization——

Mr. WESTMORELAND. And I'm not trying to interrupt you, but a simple "Yes" or "No."

Mr. BROOKS. It just depends. It's a hypothetical that you are——

Mr. WESTMORELAND. Do you think that it would be the wise political move to do that, even if it retrogressed majority-Black districts?

Mr. BROOKS. Well, retrogression would be something I could never accept. I would not ever sacrifice the full protections of section 5——

Mr. WESTMORELAND. Okay.

Mr. BROOKS. —simply to promote a particular candidate or a political party. And I think that's basically what it came down to in 2001 in Georgia. We were putting political decisions ahead of what the Voting Rights Act really is all about, and I think we made a mistake.

Mr. WESTMORELAND. Thank you.

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

The gentleman from Georgia, Mr. Bishop, is recognized for 5 minutes.

Mr. BISHOP. Thank you very much. I was really wanting to ask Mr. Brooks if he would put into the context what was actually happening. Because as I understand it—although I was not there at the time, I tried to keep my ear pretty close to the ground there—there were very strong feelings by White Democrats, led by the governor, with regard to the partisan outcome of redistricting. And there were very strong concerns within the Georgia legislative Black caucus with regard to protecting the non-retrogression standards.

And those two issues were tugging against one another. And as a consequence, the political and the voting rights ended up with a compromise in the plans that ultimately were voted on, which resulted in *Ashcroft*.

It's my understanding—and correct me if I'm wrong—that the governor at the time, who was very aggressive and very bold and, unlike many governors before him, decided to get involved in redistricting up-front——

Mr. BROOKS. He did.

Mr. BISHOP. —and personal, he was responding to what he perceived as good precedent from the Supreme Court that political gerrymandering was okay within the bounds of the Supreme Court, as

long as it didn't violate the Voting Rights Act. And he was trying to stretch that standard to the point that he could, to accomplish both the incumbency protection, the party protection, and to get as few squeaks or cries from the Black caucus in terms of retrogression. Would you say that's a fair statement?

Mr. BROOKS. I think you summarized it very well, Congressman Bishop. I think the governor was relying on the Shaw v. Reno decision. I think he was reading it as a lawyer, as you are, reading it very well, and he was trying to hold onto a Democrat-majority general assembly. The African-American legislators, who were all Democrats, were trying to hold onto their chairships, and were looking at going forward to the next election cycle, to elect more Democrats. So it was strictly a political decision. And you've summarized it very well.

Mr. BISHOP. So then, with respect to *Ashcroft*, it's the consensus of all the panelists, as I understand it, that effective enforcement under section 5 would be better without the *Ashcroft* standard, back to *Beers* [sic].

Mr. BROOKS. Yes.

Mr. BISHOP. And that, as I heard from Mr. Shaw, if we were to just go back to pre-*Ashcroft* law in our renewal of the Voting Rights Act, that we'll be where we need to be with regard to better and more effectively having standards for enforcing section 5 and the Voting Rights Act. Is that a fair statement?

Mr. SHAW. Yes.

Ms. LEWIS. Yes.

Mr. BISHOP. I appreciate very much all of your contributions to this discussion. I have some questions that bother me with regard to the abolition of the expiration of section 5, or the application of section 5 to all 50 States. Could I just get what your reactions would be to either of those consequences?

What do you think? What do you view the enforcement of the Voting Rights Act and of voting rights and the progress that has been made thus far, if, one, section 5 is allowed to expire or, two, if section 5 is expanded to all 50 States?

Mr. SHAW. If section 5 is allowed to expire, we will lose what has been part of this crown jewel civil rights legislation. We will find that there will be much less protection on behalf of minority voters against schemes that dilute their voting strength.

If it is extended to all 50 States, it will lay the groundwork for a Supreme Court decision which will strike down the Voting Rights Act, or at least section 5, as unconstitutional; because the Court has made it clear that there has to be a record that supports the extension of this kind of legislation to jurisdictions. And to extend it would be a terrible mistake. It would be a Trojan horse.

Mr. CHABOT. The gentleman's time has expired. Did the gentleman want to respond, very briefly?

Mr. BISHOP. Would you foresee any trends such as occurred post-Reconstruction, if the Voting Rights section 5 were not extended? For example, most recently, in Georgia the picture ID. If there were other pieces of legislation such as that that impacted on voting and the ability to vote, that had no oversight from the Justice Department or no cause of action in court to review that particular

action as is provided in the Voting Rights Act, do you foresee a recurrence of that pattern from 100 years ago?

Mr. SHAW. I think that, just as there were numerous Black Congressmen and Senators in the Reconstruction era, and we lost that in the post-Reconstruction era after the redemption, I think that there would be a threat of diminished representation.

I don't think we'll go back to where we were before. I don't think we'll ever do that. But I think there could be a lot of damage that could be done.

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

The Chair has several announcements to make here. First of all, we do have a ninth hearing scheduled for next week. The staffs are aware of this. It's on Tuesday at 12:30. It's on sections 6 and 8 of the Voting Rights Act, the Federal Examiners and Observer provisions.

We want to thank very much this panel for their very helpful testimony here this afternoon. This is, as we know, a very important topic. And we want to thank all the Members for their attendance.

I would also note that we have another hearing that was supposed to start at 4. We're obviously a little behind that. We apologize to the witnesses, who are probably here waiting.

We're going to take a 2-minute break, just to reset up the tables, and then we're going to begin right away. And it's been brought to our attention that we have votes coming up relatively soon——

Mr. CONYERS. Mr. Chairman?

Mr. CHABOT. —so we're going to try to get along as quickly as we can.

Yes, the gentleman from Michigan.

Mr. CONYERS. I wanted to indicate for the record that there is Lawrence Guyot, Esquire, in the chambers. And I met him in Mississippi, when I was a lawyer and he wasn't a lawyer. And I'm very glad that he is covering these hearings at this moment.

Mr. CHABOT. Excellent. Would the gentleman like to stand and be recognized here? [Applause.]

Mr. CONYERS. Civil rights leader.

Mr. CHABOT. Thank you. Okay, if there is no further business to come before the Committee, we are adjourned. We'll be back in 2 minutes.

[Whereupon, at 5:03 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

PREPARED STATEMENT OF THE HONORABLE JOHN LEWIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Statement of Congressman John Lewis
House Committee on Judiciary
Subcommittee on the Constitution
Oversight Hearing on "The Voting Rights Act: Section 5 – Judicial Evolution of the Retrogression Standard."
November 8, 2005

Chairman Chabot and Ranking Members Nadler and Conyers, thank you again for inviting me to participate in this important hearing on the Voting Rights Act. I am pleased that you are dedicating a full hearing to the judicial interpretation of the retrogression standard and the impact of Georgia v. Ashcroft.

I have a particular interest in this case, being from Georgia and having participated as a witness in the Georgia v. Ashcroft case. My interest in being here today is also rooted in the fact that a great deal of my testimony on the case of Georgia v. Ashcroft has been taken out of context. My testimony has been used by opponents of Section 5 of the Voting Rights Act to support conclusions that I would never draw. In fact, I have heard people suggest, even on the floor of the United States Senate, that because I acknowledge the progress we have made in the area of voting rights, that I somehow favor weakening Section 5. This could not be further from the truth.

I stand by my testimony that we have made changes and great strides in the area of voting rights, but we are not there yet and we have much farther to go. The Voting Rights Act was good in 1964 and it is good now and it should be extended.

I also think it is very important today to clarify what took place in the Georgia Redistricting that gave rise to Georgia v. Ashcroft. My testimony in Georgia v. Ashcroft reflected my political judgment, in that it was the goal of my part to draw the best possible map resulting in the greatest level of electoral success. The statements I made were in the context of a particular redistricting plan in the state of Georgia and should not be generalized beyond those specific facts. We should also keep in mind that every redistricting plan for every jurisdiction, whether it be in Georgia, Alabama or Mississippi, is equally fact specific and do not necessarily have weight or relevance outside that state or local jurisdiction. We must acknowledge those differences as we reauthorize Section 5 and ensure that no matter which covered jurisdiction we are in, that the VRA protects the rights of citizens to cast a ballot for candidates of their choice.

There are two very severe problems with the opinion in Georgia v. Ashcroft. First there is great danger in replacing the well established "opportunity to elect" standard with a new, ill-defined, subjective standard that is difficult to apply. Second, the Court's opinion creates issues with respect to who speaks for any minority group during a redistricting process and how much weight to give to that voice.

The "opportunity to elect" standard prior to Georgia v. Ashcroft was well understood and relatively easily applied. The new, subjective standard appears to allow ill-defined "influence districts" to be a non-retrogressive substitute for majority-minority districts,

even without an analysis of racially polarized voting. This is a very dangerous, and may turn back the clocks for minority voters, so that they cannot elect candidates of their own choice or their own race, but may only "influence" the election of white candidates. Influence is not a substitute for opportunity to elect. We need to ensure that this standard is clarified and meaningful.

I also believe that my testimony was given too much weight in the Supreme Court's decision in Georgia v. Ashcroft. There is a real danger in equating the interests of incumbent minority politicians with the interests of minority voters. I believed that the Georgia redistricting plan was in the interest of minority voters, and in the interest of Democrats. But I believe that the change in the retrogression standard to give great deference to incumbent legislators is a mistake and not the intent of the Voting Rights Act. The Department of Justice or the Courts should be required to conduct a broad analysis to determine what a particular minority community thinks, including both minority voters and minority politicians, and if, as a matter of politics al minorities want to take a certain action, then we will be sure that there is no discrimination.

In Georgia and in other places there has been collusion in drawing districts where some Democrats have colluded with some Republicans to take advantage of minority voters, and draw lines that ultimately favor Republicans. In Georgia we saw several state senators switch from the Democratic to the Republican party after the election. I cannot accept the Court's conclusion that the interests of an incumbent minority politician are the same as the interests of minority voters, with respect to redistricting. There is a clear conflict of interest there. When incumbents are drawing district lines, they are attempting to make themselves less vulnerable or to make their party more successful. This may or may not be in the best interests of minority voters and it is dangerous to give great weight to this factor in the retrogression analysis.

I appreciate this Committee's commitment to the continued success of the Voting Rights Act and look forward to working with you as we draft this legislation.

PREPARED STATEMENT OF THEODORE S. ARRINGTON, PROFESSOR AND CHAIR, DEPARTMENT OF POLITICAL SCIENCE, UNIVERSITY OF NORTH CAROLINA AT CHARLOTTE

Written Testimony of
Theodore S. Arrington, Ph.D.
On the Reauthorization of the Voting Rights Act
Before United States House of Representatives
Committee on the Judiciary
2 November 2005
(No oral testimony could be scheduled)
Washington, D.C.

Thank you Mr. Chairman for inviting me to testify before the Committee. Let me begin by stating that the Voting Rights Act is still needed and therefore should be reauthorized with some clarifications made necessary by some Supreme Court decisions such as *Georgia v Ashcroft*, *Shaw v. Reno, and Bossier Parish I and II*. (I won't address the latter case as the problems there are legal in nature and outside my areas of expertise.) While minority populations are now able, for the most part, to register and vote freely; minority vote dilution is still a problem. It is still a problem because voting throughout the country is still strongly racially or ethnically polarized, as I have discovered in my expert testimony in voting rights cases throughout the country.

I have submitted to the Committee a paper I presented to a roundtable at the Annual Meeting of the American Political Science Association. In that paper I discuss the effect of implementation of the Voting Rights Act on partisan gerrymandering, a subject I first broached in my testimony before the Federal District Court in the case that became *Thornburg v. Gingles* in the mid 1980s. Prior to *Gingles* many jurisdictions with heavy minority populations had districting arrangements which favored the Democratic Party. Minority populations were disbursed across many districts in such a fashion as to enable the election of white Democratic candidates, but with few or no districts having sufficient minority population for the election of representatives of choice of minority voters. Be-

cause Republican voters are more homogeneous in terms of race, ethnicity, and (at that time) class, Republican districts were easily packed with more Republican voters than are needed to win. It does not matter whether this arrangement, which favored white Democrats over minority Democrats and Republicans, was intentional or the result of what are often called "traditional districting principles." The effect was the same. Minority voters were denied equal participation in the political process because they did not have equal opportunity to elect representatives of their choice, and Republican voters were underrepresented.

With the more complete implementation of the Voting Rights Act in the 1990 reapportionment and redistricting cycle, this Democratic Party bias was reduced or eliminated in many jurisdictions. As my paper for the APSA shows, the districts for the U.S. House of Representatives in the 1990s had greatly reduced Democratic Party bias. In short, the implementation of the Voting Rights Act in the 1990 redistricting cycle ended some *de-facto* Democratic Party gerrymanders, while moving us toward equal participation in the political process for minority voters.

In *Georgia v. Ashcroft* the U.S. Supreme Court seemed to support the notion that a jurisdiction could satisfy §5 (and perhaps by implication §2) by substituting what are called "influence districts" to provide "substantive representation" instead of creating or maintaining districts in which minority voters have a reasonable opportunity to elect representatives of their choice. There are a number of problems with this. First, there are no clear guidelines for measuring influence districts or substantive representation. Like the Court's decisions about district shape in *Shaw v. Reno* and its progeny, we are left with no clear guidelines for drawing districts; no way to know how to comply with the Court's

mandate. This is quite unlike the one-person-one-vote standard, which can be mathematically determined as the districts are being drawn. At what level of minority concentration, short of a reasonable opportunity to elect representatives of their choice, does a district provide "influence"? Do minority voters have influence over a representative they voted against and whose policies they oppose? How many influence districts are equal to one opportunity to elect district in providing equal participation?

Second, to the extent that I can imagine what measures would be used to determine whether substantive representation or influence has been enhanced to prevent retrogression, these measures amount to simply helping Democratic Party candidates. In virtually every state legislature, in the Congress, and in many local jurisdictions, minority representatives – especially African Americans – are strongly allied with the Democratic Party. Helping Democratic Party candidates would be argued to be equivalent to increasing minority voter influence and helping minority substantive representation. In other words, influence districts, if seen as a replacement for opportunities for minority voters to elect representatives of their choice, would become simply a rationale for creating Democratic Party gerrymanders. This takes us back to the situation before *Gingles* when minority voters did not participate equally in the political process and Republican voters were underrepresented.

Substantive representation is often contrasted with what is called "descriptive representation," which means that only a black person can represent African-American voters, only women can represent female voters, and so forth. Quite frankly the concept of descriptive representation is a straw man. The Voting Rights Act does not require the election of minorities, and I know of no competent expert or voting rights lawyer who has

argued that it does. But I believe that the Voting Rights Act should require that minority voters have an equal opportunity to elect representatives of their choice. The fact derived from extensive analysis of voting patterns shows that minority voters, like the rest of us, usually prefer candidates who are like themselves in race, ethnicity, and partisanship. This is not descriptive representation, it is just giving minority voters the same opportunity that Anglo voters have to elect their choice. If minority voters are restricted to choosing among Anglo candidates, they cannot be said to be participating equally in the political process. Experts have developed procedures for determining whether a district offers minority voters a reasonable opportunity to elect representatives of their choice, and this can be known as the districts are drawn.

The reauthorization of the Voting Rights Act should make it clear that influence districts and substantive representation are not acceptable substitutes for districts in which minority citizens have a reasonable opportunity to elect representatives of their choice.

So far in my testimony I may have annoyed some Democratic members of this Committee. What I am about to say may annoy some Republican members. Just as failure to construct minority districts can result in a Democratic Party gerrymander, so too, the packing of minority voters can be used to create a Republican Party gerrymander. Some court decisions seem to indicate that a remedy for a violation of §2 or an attempt to avoid retrogression under §5 requires the construction of districts in which a majority of the voting age population or registered voters are minority – a so-called "minority-majority district." I do not believe that this is the best standard. Qualified experts usually rely on

court rulings that specify that minority voters in the district must have a "reasonable opportunity to elect representatives of their choice, even if their choice happens to be a member of that minority." Notice that the standard is a reasonable opportunity, not a certainty. There is no certainty in politics. Packing a district with more minority voters than are needed to provide a reasonable opportunity weakens the participation of minority voters in surrounding districts, and could be used to unfairly favor Republican Party candidates, creating a Republican Party gerrymander. The concentration of minority voters necessary to provide a reasonable opportunity to elect varies from place to place and from office to office.

The reauthorization of the Voting Rights Act should clarify the standards for a voting rights district as a district in which minority voters have a reasonable opportunity to elect a representatives of their choice even if their choice happens to be a member of that minority, which may be, but is not necessarily, a majority of the voters in the district.

As suggested above, *Shaw* and its progeny have produced another kind of problem in the implementation of the Voting Rights Act. The first prong of the *Gingles* standard states that minority voters must be numerous enough and geographically concentrated enough to form a majority in a single member district. I have no quarrel with numerosity, especially since I think *Holder v. Hall* is probably good policy. But the requirement of geographic concentration, as interpreted by the Supreme Court, has proven to be a major barrier to ending minority vote dilution. This is especially true for Congressional districts, which are so large, and for Hispanic voters who tend to be less geo-

graphically concentrated than African Americans or Indians. Moreover, African Americans are also becoming less geographically concentrated.

Since the shape limitations of *Shaw* seem to be based on constitutional rather than statutory interpretation, you may not be able to end the concern of the Court with district shape. Following *Gingles*, courts have been limited to using single-member districts as an imposed remedy for vote dilution. Other remedies can be used in cases where both plaintiffs and defendants agree. Limited voting and cumulative voting are widely used in various local governments, especially in Alabama and Texas, to provide all races and ethnic groups with an equal opportunity to elect representatives of their choice without drawing any kind of districts. I have co-authored one of the many peer reviewed, scholarly articles which present the statistical evidence of the effectiveness of these election procedures.

The reauthorization of the Voting Rights Act should clarify that the standards for a violation of §2 do not include a requirement of geographic concentration of minority voters.

The reauthorization of the Voting Rights Act should specifically authorize the Federal courts to order the use of limited voting or cumulative voting arrangements as a remedy to vote dilution under §2 in situations where minority voters are not geographically concentrated enough to form a *Shaw*-compliant District.

Last of all, I would like to address the numerous court decisions, which have provided that minority representation for state legislatures should be measured within a geographic region rather than in the legislature as a whole. For example, if minority voters are proportionally represented in one or two parts of a state where they are mostly con-

centrated, then it may be impossible to successfully bring a §2 action or object to pre-clearance under §5 even though the minority group does not participate equally in the political process because they have less than an equal opportunity to elect representatives of their choice in the state legislature as a whole. Geographic regions are artificially defined, and it is the legislature as a whole which should provide equal opportunity for minority citizens to elect representatives of their choice. (In *Georgia v. Ashcroft* the Court seems to recognize the importance of looking at the legislature as a whole.) Therefore, it may be necessary to have higher concentrations of minority opportunity districts in some places so that minority citizens have an equal opportunity to elect representatives of their choice in the legislature as a whole.

In the reauthorization of the Voting Rights Act, the standard for non-retrogression under §5 and for compliance with §2 should be that minority voters have an equal opportunity to elect candidates of their choice to governing bodies as a whole, and not just equal opportunity to elect representatives of their choice within regions.

Affirmative Districting

and the

Partisan Seats/Votes Relationship:

1972-2002

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Abstract of
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The Voting Rights Act, Supreme Court decisions, and improvements in geographic information technology have changed the redistricting process. An important question is how the partisan aspects of Congressional districting changed in the three reapportionment cycles since the one-person-one-vote rulings of the Supreme Court. Especially interesting are changes in the 1990 cycle, as affirmative districting became an important element in the process. The 1990 redistricting cycle did not give Republicans an unfair advantage in the seats/votes relationship nationwide or in the southern states, but it reduced the previous Democratic bias nationwide and in the south.

Affirmative Districting and the Partisan Seats/Votes Relationship: 1972-2002

The Voting Rights Act of 1965 (VRA), various Supreme Court decisions since the 1960s, and improvements in geographic information technology have changed and continue to change the redistricting process. An important question is how the partisan aspects of elections changed in the three reapportionment cycles since the one-person-one-vote rulings of the U.S. Supreme Court in *Wesberry vs. Sanders* (376 U.S. 1, 1964). Especially interesting are changes in the 1990 cycle as affirmative districting became an important element in the redistricting process.

Various authors argue that the 1990 round of redistricting was "maximization whatever the cost" (Cunningham 2001). They contend that the Republican administration of President George H.W. Bush used the Voting Section of the Civil Rights Division of the Department of Justice in combination with some black politicians, Republican operatives in the states, and G.O.P. judges to create the maximum number of minority packed districts. This effort, in turn, helped create a Republican gerrymander in an era when the Republicans were putting forth renewed efforts in the southern states and had greater control of the redistricting process in the north.

The question of whether such concentration of minority voters in some districts hurts Democrats is widely studied (e.g., Brace, Grofman and Handley 1987; Hill 1995; Petrocik and Desposato 1998). The theory is quite simple. Minority voters, especially blacks, are the most reliable Democratic voters. Therefore, the concentration of minority

voters in a district assures the election of a Democrat in that district. But it "bleaches" the surrounding districts, making them more likely to elect Republicans.

Shotts (2001, 2002) presents a theoretical model of the effects of affirmative districting on partisan outcomes. He concludes that VRA requirements have varying effects depending on which party controls the redistricting process. Engstrom and Ulbig's (2001) data point to the same conclusion. If Shotts, Engstrom, and Ulbig are right, then fair and responsive districts are compatible with affirmative districting. A comparison of the seats/votes relationship in the 1970, 1980, and 1990 redistricting cycles should provide a test of this contention.

Many authors have examined the redistricting cycles in the 1970s, 1980s, and 1990s using a variety of methods.[1] Some of these authors made assessments of the partisan effects of the districts without complete data on the five elections held after each cycle. No authors have used a consistent methodology to compare the results of all three post-*Wesberry* cycles using five elections for each decade.

How Should the 1990 Redistricting Cycle Change the Seat/votes Relationship?

The VRA, as interpreted by the Supreme Court, produced an increase in the number of minority districts. The number of majority-minority districts more than doubled in the 1990 round of redistricting, and did not decline after the 2000 round despite changes in Supreme Court policy in *Shaw v. Reno* (509 U.S. 630, 1993) and its progeny (Table 1). Districts in which minorities were more than 55% and 60% of the population also more than doubled after the 1990 redistricting round. The surprising lack of retrenchment in the 2000 districting cycle, despite *Shaw*, is a reflection of the increase in Latino districts (shown in Table 2).

Given the scholarship on the racial and partisan aspects of redistricting, what should we expect to have happened after the 1990 round of redistricting, which would be different from the 1970 and 1980 rounds?

First, we would expect that the number of unopposed Congressional contests in both parties would go up after the 1990 round. The process of concentrating minority voters (especially in the supermajorities common in 1991-2) would produce minority districts in which the Republicans would be noncompetitive. The surrounding districts would be bleached of the most reliable Democratic voters and therefore uncompetitive for the Democrats. This changer should quickly be seen by both parties, potential candidates would not run, and unopposed elections will result. This effect could be offset, however, by the conscious effort of the Republicans to contest more elections in the south during the 1990s. So we might expect an increase only in unopposed Republicans.

Second, we would expect that the swing ratio would be lower after the 1990 round of redistricting. The creation of more districts, which are heavily Democratic (minority districts) and more districts which are heavily Republican (bleached districts) would necessarily reduce the swing ratio because a healthy swing ratio requires that more districts be constructed in the competitive range.

And, third, we would expect that the 1990 redistricting cycle would produce a Republican bias. While the creation of minority districts creates "sure-fire" Democratic districts, it also creates heavily Republican districts. Many scholars have argued that the latter will outnumber the former. Moreover, the Republicans controlled the redistricting process in more states in the 1991-2 cycle, and should have been able to design the districts to their advantage, especially in conjunction with affirmative districting.

Methods

To determine how the Congressional election system as a whole translates votes into seats between the parties requires an examination of the seats/votes relationship (Kendall and Stuart 1950, Linehan and Schrodt 1978, Schrodt 1981, Taagepera 1973, Theil 1969). As Niemi (1990, 171) asserts ". . . if the Supreme Court is to consider squarely the question of gerrymandering sooner or later it will have to take a position on the significance of the relationship between votes and seats won by each political party" (see also Niemi 1985, 191).

Tufte (1973) advocated using simple OLS regression as a technique to relate the percentage of the votes that a party wins to the percentage of the seats won. (Also see Grofman 1983; Cain 1985; Niemi and Deegan 1978; and Niemi and Fett 1986 for related techniques.) Two measures are obtained from this kind of analysis. First, the slope of the regression line is called the "swing ratio." It tells us the extent to which the distribution of seats is responsive to changes in the vote. King and Browning (1987) formalize the theory of how seats and votes can be related. They point out that a swing ratio of 1.0 would mean that the districting system was producing proportional representation. A swing ratio greater than 1.0 is a majoritarian system giving a bonus to the majority party.

Secondly, the OLS regression can also tell us whether the system has a partisan bias, which can be taken to mean that it is a gerrymander. To determine the bias, one simply computes the value of the dependent variable (percentage of seats) when the independent variable (percentage of votes) is 50% using the regression equation. An unbiased system would be one where the regression line crosses 50% on both the X and Y axis.

One problem is that the theoretical relationship of seats and votes is an "S" curve, not a line (Campagna and Grofman 1990; Theil 1969, Taagepera 1973, Grofman 1983, King and Browning 1987). An examination of the possible curves presented by King and Browning (1987), however, shows that in the region where real competition actually occurs -- 40% to 60% on each variable -- the possible "curves" straighten out. Thus, OLS regression should provide unbiased estimates within this competitive range.

To use the procedure, however, requires "numerous elections over at least a decade to make a confident determination about the degree of bias and type of representation" (King and Browning 1987, 1267). While it is possible to estimate the seats/votes relationship before votes are cast for the new districts (e.g., Gary King's *Judgeit* software provides one method for doing so), the most valid measure of bias and swing ratio requires examination of the results of actual elections held using the districts. Therefore, analysis of the impact of the 1990 redistricting round is only possible now that we can look at the entire decade from 1992 to 2000.

Much of the literature appropriately concentrates on comparisons of the redistricting process using states as the units of analysis. But redistricting for the Congress should also be examined for what it is: the creation of a national legislature. In this paper I will look at the seat/votes relationship for the entire country with years as the units of analysis and then do separate analyses for the eleven states of the old confederacy and the states covered under the pre-clearance requirements of §5 of the VRA. A list of the data sources used for this paper is in the appendix.

The dependent variable in the regression is the Democratic percentage of the seats held by the two parties. Candidates who ran as independents are not counted as belonging to either party, even though they may later caucus with one party or the other.

Determining the percentage of the two-party votes received by each party (the independent variable) requires attention to two questions. The first question is how to count Louisiana elections. If there was no run-off election between a Democrat and a Republican in a Louisiana district, I counted the first election in the district (normally held in October, but held in November of 2002) as the election. The Democratic vote in such elections is the total vote for all Democratic candidates, and the Republican vote is the vote for all Republican candidates. If there is a run-off election between a Democrat and a Republican, I counted that as the election.

A second question is what to do with unopposed contests. I define an opposed contest as one in which there was both a Republican and a Democratic candidate. If the vote in unopposed elections is included, it inflates the total for the party that had the most unopposed candidates because an opponent would have received at least some votes. If the vote of the unopposed candidate is excluded, the vote of the party with the most unopposed candidates is understated because an unopposed candidate would undoubtedly receive a substantial majority of the votes if he/she were opposed.

One solution to this problem is to substitute the vote of some other set of candidates in districts where the Congressional candidate is unopposed. But on a nation-wide basis the only office available for that job is the Presidency, and that is only available in half the Congressional elections. Moreover, this is exactly the wrong office to use. The presidential contest is the most unlike any other election. People know more about presi-

dential candidates, care more about them, and often vote for president contrary to their Congressional party inclinations. Votes for U.S. Senate or Governor could be substituted into unopposed races, but this also has problems. Voters typically also know more about candidates for these offices, only 33 or 34 of the states have a Senate election in any year, and most governors now have four-year terms.

My solution to this problem is to estimate the vote that each party would receive in unopposed contests and add this to the vote in the opposed races. The formula for the adjustment of the vote for each party is in Figure 1. Tables 3 and 4 give the figures for each of the variables used in the formula nation-wide for each election from 1972 to 2002. The logic here is that we can vary the percentage of the vote that we would expect unopposed candidates would have received, on average, if they had been opposed. This would certainly be well above 50%. The presumed strength of the unopposed candidate is what convinces potential candidates in the other party not to run. I assume that the turn-out in unopposed districts would be the same as the average turnout in opposed contests. I present a number of models using various estimates for the vote division and report data for both these models and unadjusted vote totals of various kinds. If the results I obtain are consistent in the various models, I would have strong evidence that the findings are reliable.

Table 5 shows analysis in which the proportion of the vote candidates in unopposed elections would have received if they had been opposed (v) is varied from .55 to .85 to test various models. The 80% model (v = .8) gives the best correlation between seats and votes for the entire 1972-2002 period (R^2 = .914), but all of the correlations are quite high.

Data Presentation

Table 4 presents evidence on the expectation that unopposed Congressional candidacies will increase in the 1990 redistricting cycle. In comparison to the 1970 and 1980 cycles, the number of unopposed contests actually declined in the 1990s. The number of unopposed Democrats was reduced by more than half (from about 53.2 in the 1980s to 23.4 in the 1990s), however, the number of unopposed Republicans rose from an average of 18.4 in the 1980s to an average of 30.8 in the 1990s. We could take the increase in the number of unopposed Republicans to be a result of the creation of more bleached districts, and the decrease in the number of unopposed Democrats could be the result of Republican recruitment activity especially in the south. In any case, affirmative districting was not incompatible with an overall increase in opposed elections.

Table 4 also shows why it is so important to have a reliable procedure for dealing with unopposed races. The number of unopposed candidates in each party varies widely. The number of unopposed candidates ranged from ten to 58 unopposed Democrats and eight to 54 unopposed Republicans. There is only a slight, insignificant negative relationship between the number of unopposed contests in each party (R^2=.113, significance = .102).

The swing ratio increased as a result of the 1990 cycle and was substantially greater than following either the 1970 or the 1980 cycles (Table 6). The swing ratio was at its lowest in the 1980 period. There are very few differences in the swing ratio between the various kinds of unadjusted figures and the various estimation models. No matter what assumptions we make about the unopposed candidacies, we find that the swing ratio increased after the 1990 redistricting cycle. More opposed contests and higher swing ra-

tios equals more party competition at the same time that affirmative districting became a factor in the process.

An examination of changes in bias is also shown in Table 6. Did the 1990 round of redistricting help the Republicans? Yes. Did it provide an unfair advantage? That is, did the 1990 process, including a tremendous increase in majority-minority districts, produce a Republican bias (which would indicate a G.O.P. gerrymander)? No. The Democratic bias that is apparent in the 1970s and 1980s is reduced after 1990. In some of the models tested a slight Democratic bias remains, and in others a slight Republican bias is present. But none of these biases is very large, except in the unrealistic model in which unopposed results are included without any adjustment (Democratic bias = 6.163). I conclude that there was no "severe" bias in the 1990 redistricting cycle as required by the Supreme Court in *Davis v. Bandemer* (478 U.S. 190, 1986).

Although this article focuses on the Congressional districting system at the national level, it is useful to examine the same data for the southern states. This is the region, which has experienced the greatest change in partisan and racial politics in the last 30 years. Moreover, the majority of the affirmative districting in the 1990 round focused on this region, and most of these states are covered by the pre-clearance provisions of §5 of the VRA. Of the 69 districts in the 2002 elections which had more than 50% minority population, 31 of them were in the eleven states of the old Confederacy; of the 57 districts with more than 55% minority population, 28 were in the south; and of the 47 districts with more than 60% minority population, 24 were in the southern states.

Table 7 shows the number of unopposed contests in the eleven states of the old Confederacy. Throughout this period (1972-2000), the majority of unopposed contests in

the nation were in the south. The pattern of change is the same as in the nation as a whole. The number of unopposed Republicans increases four-fold from the 1970s to the 1990s, and the number of unopposed Democrats decreases to almost one-third of the 1970s level. But the total number of unopposed elections in the south declines from a mean of 35 in the 1970s to 31.8 in the 1990s.

The swing ratios and bias estimates for the Confederate states are given in Table 8. Again, we see the national pattern repeated. The 1990 cycle clearly increased the swing ratio, and reduced the Democratic bias that existed in the 1970s and 1980s. No matter which model we use, a Democratic bias remained in Congressional elections in the south after the 1990 cycle.

I performed the same analysis using those states covered by the pre-clearance provisions of §5 of the VRA.[1] The results were indistinguishable from the results presented here for the old Confederacy. Affirmative districting in the 1990s was compatible with increases in competition, districts which are more responsive to changes in voter sentiment, and reduced partisan bias.

Discussion

Republicans may use the fig leaf of affirmative districting to cover a naked gerrymander, especially if they are allowed to pack minority districts with higher concentrations of minority voters than is necessary for minority citizens to elect a representative of their choice. However, there is nothing about affirmative districting which is necessarily incompatible with responsive, competitive, fair districts or even a Democratic gerrymander. The 1990 redistricting did not create a Republican gerrymander for the U.S. Con-

gress as a whole or in the south where the activity of the Voting Section of the Department of Justice was concentrated.

Lublin and Voss (1998, 769) note: ". . . racial redistricting not only made it possible for the Republicans to win more seats with the same number of votes, but it actually caused the Republicans to win a larger share of the vote." Lublin adds (1999, 186): "Thus racial redistricting alters not only the aggregation of votes but also the quality of candidates presented, such that it indirectly boosts the Republican share of votes and seats by undercutting Democratic prospects." Downs (1957 mentions the hypothesis that quality candidates and other resources will gravitate to the party that is most likely to win the district.

It may be, as Lublin argues, that the 1990 redistricting cycle gave Republicans a boost in winning votes. Did it give them an unfair advantage? The assumption -- and this is a necessary assumption -- is that when we draw the districts in such a fashion as to fairly translate votes into seats, this will produce a level playing field in terms of partisan advantages and disadvantages that are sensitive to district composition. Both parties will be equally enabled or impeded in their campaigns by the district lines.

The 2000 round of districting, however, may be quite different. Analysis of the 2000 redistricting cycle is just beginning to be made based on the 2002 election or on voting data from the 1990s. One early reporter (Hirsch 2003) argues that the 2000 round gave the Republicans an unfair advantage. He argues that this is due to the greater Republican control of state legislatures in several large competitive states. He also notes that this latest round of redistricting was the most incumbent-friendly in history. Given the Republican bias evident in Michigan, Pennsylvania, and now Texas, it is possible that the

data for the first decade of this century will show a marked Republican bias in Congressional districts. But this cannot be blamed on affirmative districting provisions of the Voting Rights Act.

Endnotes

1. For the pre-1970 period see: Cox and Katz (1999). For the 1970 redistricting cycle see: Glazer, Grofman and Robbins (1987) and Squire (1985). For the 1980 cycle see: Squire (1995), Campagna and Grofman (1990), King and Browning (1987). For the 1990 cycle see: Cannon (1999), Grofman and Handley (1998), Lublin and Voss (1998), McDonald (1995), McDonald, Neimi and Abramowitz (1994), Swain, Borrelli, and Reed (1998), Hill (1995).

2. The list of states included in the §5 analysis is slightly from the states of the Old Confederacy. Arkansas and Tennessee are not covered by §5, and were excluded from this separate analysis. Arizona is covered by §5 and is included in this analysis. North Carolina and Florida are included in the §5 set, although only some counties in these two states are covered. In practice, these covered counties cause entire Congressional district plans from these states to be affected by pre-clearance. Other states that are partially covered are excluded from this separate analysis. These states have only one Congressional District (Alaska, New Hampshire, South Dakota, and Wyoming), or have such limited coverage that pre-clearance does not affect entire Congressional district plans (California, Colorado, Connecticut, Hawaii, Idaho, Massachusetts, Michigan, and New York).

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Appendix -- Data Sources

America Votes 24. 2000. Washington Government Institute, Congressional Quarterly.
(Used to collect remainder of Number of Unopposed Candidates for 1998-2002)

Dubin, M. 1998. *United States Congressional Elections*. Jefferson: McFarland & Company Inc.
(Used to collect Number of Unopposed Candidates for 1972-1996)

Techpolitics, The House Financial Services Committee
http://congress.techpolitics.org/houseofreps.htm
(Used to collect data on 2002 Congressional districts)

U.S. Bureau of the Census – American Factfinder
Summary Information Tables – General Population and Housing Characteristics by Congressional District
http://factfinder.census.gov
(Used to collect Number of Minority Seats – Percent Non-Hispanic White for 1982-2002)

U.S. Bureau of the Census. 1982. *1980 Census of Population – Supplementary Reports* Vol. 1-14, 9-18. Summary Table - 98th Congress, Population by Age, Race, and Residents, 1980, and Votes Cast for Congress 1982
(Used to collect Number of Minority Seats – Percent Non-Hispanic White for 1972-1980)

U.S. House of Representatives, Office of the Clerk
http://clerk.house.gov/members/election_information/elections.php
(Used to collect Total Votes Cast data for 1972-2002)

U.S. House of Representatives, Office of the Clerk
http://clerk.house.gov/histHigh/Congressional_History/index.php
(Used to collect Seats Won in House of Reps by Each Party data for 1972-2002)

Figure 1
Formulas for the Adjustment of the National Vote of Each Party
to Account for Unopposed Elections

$d = x \quad amv + bm(1 - v)$

$r - y \quad bmv + am(1 - v)$

Where:

d = adjusted vote, showing estimate of what the Democratic vote would be if all 435 districts had opposed contests in that year

r =adjusted vote, showing estimate of what the Republican vote would be if all 435 districts had opposed contests in that year

x = vote for all opposed Democratic candidates that year

y = vote for all opposed Republican candidates that year

a = the number of unopposed Democratic candidates that year

b = the number of unopposed Republican candidates that year

m = the mean number of votes cast for both Republican and Democratic candidates in opposed contests that year

v = the proportion of the vote that unopposed candidates would have received if they had been in an opposed contest

Table 1
Number of Minority Congressional Districts
in 1972, 1982, 1992, and 2002

Year	Number of Districts with Less than 50% Non-Hispanic White Population	Number of Districts with Less than 45% Non-Hispanic White Population	Number of Districts with Less than 40% Non-Hispanic White Population
1972-1980*	50	42	36
1982-1990	36	34	28
1992-2000	81	73	65
2002-	91	78	66

*Because the Census did not provide the racial and ethic data in a convenient fashion in the 1970 Census, we assumed that all "Hispanics" were white to compute the figures for the 1972-1980 period.

Table 2
Hispanic and African-American Congressional Districts
in the 2002 Election

Percent Black Population	Number of Districts	Percent Hispanic Population	Number of Districts
50% Plus	24	50% Plus	24
45% Plus	28	45% Plus	29
40% Plus	34	40% Plus	35

Table 3
Values of Variables Used in the Calculation of Adjusted Vote
for Democratic and Republican Congressional Candidates
from 1972 to 2002

Year	Vote for Democratic Candidates in All Opposed Contests (x)	Vote for Republican Candidates in All Opposed Contests (y)	Mean Turnout in Opposed Contests (m)
1972	32,884,963	31,410,227	172,373
1974	26,458,102	20,591,512	127,852
1976	36,680,332	30,404,466	175,615
1978	25,736,895	22,904,533	133,264
1980	35,317,202	35,637,761	186,233
1982	31,031,314	26,732,814	155,280
1984	36,866,639	37,537,063	203,846
1986	27,800,900	24,879,591	144,330
1988	36,772,400	35,023,843	198,332
1990	29,013,174	24,581,723	152,258
1992	46,259,160	41,113,572	219,529
1994	30,110,935	32,650,082	163,016
1996	42,038,703	41,184,529	205,998
1998	28,112,105	27,170,264	161,644
2000	41,613,697	41,936,827	225,204
2002	29,227,397	29,892,618	171,861

Table 4

Number of Unopposed Democrats and Republicans

Running for Congress 1972-2002

Year	Number of Unopposed Democrats (*a*)	Average for the Decade	Number of Unopposed Republicans (*b*)	Average for the Decade	Total Number of Major Party Candidates Unopposed	Average for the Decade
1972	45	48.2	16	12.6	61	60.8
1974	58		9		67	
1976	45		8		53	
1978	53		17		70	
1980	40		13		53	
1982	52	53.2	11	18.4	63	71.7
1984	58		12		70	
1986	54		16		70	
1988	57		16		73	
1990	45		37		82	
1992	19	23.4	17	30.8	36	54.2
1994	17		32		49	
1996	10		20		30	
1998	38		54		92	
2000	33		31		64	
2002	37		54		91	

Table 5

Adjusted Pearson's Correlation Squared Between
the Percentage of the Seats Won by the Democrats and
the Percentage of the Votes they Received with
Various Adjustments for Unopposed Candidacies
Including Swing Ratios and Bias Estimates
for Elections 1972-2002

Assumption that Unopposed Candidates Would Have Received This Percentage of the Two-Party Vote If the Election Had been Contested (v)	Bias to Democrats	Swing Ratio	Adjusted R^2 Correlation Between Seat/Votes
55%	1.82%	2.967	.789
60	1.45	2.813	.845
65	3.86	2.136	.880
Unopposed candidates votes and seats won Included (i.e., no adjustment)	4.91	1.772	.887
70	1.12	2.447	.901
75	1.02	2.268	.911
77.5	1.03	2.184	.913
80	1.02	2.103	.914
82.5	1.03	2.026	.914
85	1.00	1.952	.913

Table 6

Bias and Swing Ratios of the Seat/Vote Relationship
United States Congress by Districting Cycle 1972-2000
Comparing Unadjusted Figures and An Array of Adjustment Models

Model	1972-1980		1982-1990		1992-2000	
	Bias % *	Swing Ratio	Bias % *	Swing Ratio	Bias % *	Swing Ratio
Unopposed contests excluded from both percent votes and seats	3.046	1.992	3.662	1.630	0.340	2.33
Unopposed contests excluded from percent votes not percent seats	5.741	2.063	8.471	0.725	-0.65	2.41
Unopposed contests included in both percent votes and percent seats	4.861	1.926	8.411	0.517	6.163	2.21
55% Model ($v = .55$)	5.029	2.317	7.993	0.932	-0.41	2.65
60% Model ($v = .60$)	4.410	2.223	7.473	0.976	-0.20	2.58
65% Model ($v = .65$)	3.859	2.136	7.006	0.997	0.056	2.50
70% Model ($v = .70$)	3.300	2.054	6.665	0.984	0.273	2.42
75% Model ($v = .75$)	2.807	1.978	6.498	0.929	0.436	2.34
80% Model ($v = .80$)	2.350	1.907	6.516	0.832	0.656	2.25
85% Model ($v = .85$)	1.946	1.841	6.785	0.705	0.819	2.17

*Positive number indicates a Democratic bias, negative number indicates a Republican bias.

Table 7

Number of Unopposed Democrats and Republicans

Running for Congress 1972-2002 Old Confederacy States Only

Year	Number of Unopposed Democrats (*a*)	Average for the Decade	Number of Unopposed Republi-cans (*b*)	Average for the Decade	Total Number of Major Party Candidates Unopposed	Average for the Decade
1972	35	29.6	3	5.4	38	35.0
1974	37		0		37	
1976	29		4		33	
1978	28		10		38	
1980	19		10		29	
1982	26	29.6	7	11.4	33	41.0
1984	37		14		51	
1986	29		9		38	
1988	30		11		41	
1990	26		16		42	
1992	9	11.8	8	20.0	17	31.8
1994	7		23		30	
1996	3		11		14	
1998	24		36		60	
2000	16		22		38	
2002	17		27		44	

Table 8

Bias and Swing Ratios of the Seat/Vote Relationship United States Congress by Districting Cycle 1972-2000 Comparing Unadjusted Figures and An Array of Adjustment Models Old Confederacy States Only

Model	1972-1980		1982-1990		1992-2000	
	Bias % *	Swing Ratio	Bias % *	Swing Ratio	Bias % *	Swing Ratio
Unopposed contests excluded from both percent votes and seats	1.754	3.034	9.477	1.228	4.640	2.86
Unopposed contests excluded from percent votes not percent seats	15.30	1.409	14.56	0.649	1.502	2.84
Unopposed contests included in both percent votes and percent seats	8.945	1.261	7.865	1.097	8.011	2.43
55% Model ($v = .55$)	10.47	2.683	13.37	1.087	1.766	3.10
60% Model ($v = .60$)	6.593	2.838	12.15	1.168	2.572	2.96
65% Model ($v = .65$)	5.766	2.47	10.97	1.217	3.276	2.80
70% Model ($v = .70$)	6.601	1.997	9.937	1.214	3.807	2.63
75% Model ($v = .75$)	7.773	1.600	9.379	1.152	4.243	2.46
80% Model ($v = .80$)	8.919	1.302	9.252	1.034	4.606	2.30
85% Model ($v = .85$)	9.856	1.081	9.598	0.882	4.904	2.15

*Positive numbers indicate a Democratic bias.

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EDUCATION

The University of New Mexico, B.A. *Magna Cum Laude*, Senior Honors Thesis titled *Bernalillo County in Statewide Elections in New Mexico*, September 1963-June 1967.

The University of Arizona, M.A. Thesis titled *Grass Roots Organization: A Study of Precinct Committeemen*, September 1967-December 1968.

The University of Arizona, Ph.D. Dissertation titled *Belief Systems in Political Party Stratarchies*, January 1971-August 1973.

PROFESSIONAL EXPERIENCE

The University of New Mexico, Teaching Assistant, Department of Political Science, September 1966-June 1967.

Research Assistant to Professor Harry Stumpf, Director of a study of the Office of Economic Opportunity Legal Services Program in the San Francisco Bay Area of California, June 1967-August 1967.

The United States Army, Military Police, February 1969-January 1971.

The University of Arizona, Graduate Associate, Department of Government, June 1973-July 1973.

The University of North Carolina at Charlotte:
Assistant Professor of Political Science, July 1973-June 1978
Associate Professor of Political Science, July 1978-June 1985
Professor of Political Science, July 1985-present.

The University of North Carolina at Charlotte, College of Social and Behavioral Sciences, Coordinator of Internships, October 1974-August 1977.

President of the Faculty of The University of North Carolina at Charlotte, July 1983-June 1984.

Delegate to The University of North Carolina Faculty Assembly, July 1984-June 1989.

Assistant to the Vice-Chancellor for Faculty Affairs at The University of North Carolina at Charlotte, August 1986-July 1987.

Chairman of the Department of Political Science at The University of North Carolina at Charlotte, July 1987-June 1995, May 1997-present.

Co-Chairman, Self-Study of The University of North Carolina at Charlotte for reaccreditation by the Southern Association of Colleges and Schools, January 1990-August 1992.

BOOKS

Applied Political Inquiry (with Terrel Rhodes and Robert Mundt), Washington: University Press of America, 1983.

Elections, Parties, and Politics in Mecklenburg County (with William B.A. Culp, Jr. and Gerald Ingalls), Charlotte: Charlotte-Mecklenburg Board of Elections, Department of Geography and Earth Sciences and the Urban Institute at The University of North Carolina at Charlotte, 1988.

Who Votes and Why: A Review of American Electoral Behavior (with Schley R. Lyons) New York: The Robert A. Taft Institute for Two-Party Government, 1988.

JOURNAL ARTICLES

Comment on David Nexon's "Asymmetry in the Political System: Occasional Activists in the Republican and Democratic Parties: 1956-1964," *The American Political Science Review* 66 (March, 1972) 183-184.

Some Aspects of Political Experience on Issue Consciousness and Issue Partisanship Among Tucson Political Activists, *The American Journal of Political Science* 19 (November, 1975) 695-702.

Amateurs and Professionals Among Tucson Party Activists, *Georgia Political Science Association Journal* 4 (Fall, 1976) 79-89.

Comment on Christopher H. Achen's "Mass Political Attitudes and the Survey Response," *The American Political Science Review* 70 (December, 1976) 1230-1231.

Equal Rights Amendment Activists in North Carolina (with Patricia Kyle), *Signs: Journal of Women in Culture and Society* 3 (Spring, 1978) 666-680.

Machiavellianism of Political Activists, *Georgia Political Science Association Journal* 6 (Spring, 1978) 99-109.

Partisan Campaigns, Ballots, and Voting Patterns: The Case of Charlotte, *Urban Affairs Quarterly* 14 (December, 1978) 253-261.

Some Paradoxes of Campaign Finance Reform, *Commonsense: A Republican Journal of Thought and Opinion* 2 (Fall, 1979) 56-72.

The Advantages of a Plurality Election of the President (with Saul Brenner), *Presidential Studies Quarterly* 10 (Summer, 1980) 476-482.

Some Effects of Ideology and Threat Upon the Size of Opinion Coalitions on the United States Supreme Court (with Saul Brenner), *Journal of Political Science* 8 (Fall, 1980) 49-58.

Comment on Richard F. Bensel's "Creating the Statutory State: The Implications of the Rule of Law Standard in American Politics" *The American Political Science Review* 75 (June, 1981) 460-461.

Financing Local Election Campaigns (with Gerald Ingalls), in Warren Jake Wicker (ed.) *Urban Growth and Urban Life, 1981 Proceedings: The Third Annual Urban Affairs Conference of The University of North Carolina* (Chapel Hill: Urban Studies Council, 1981) 387-397.

Political Socialization of the Deaf (with Andrew Conrad), *Journal of the North Carolina Political Science Association* 2 (Winter, 1981-2) 91-95.

Willingness to Pay Per Capita Costs as a Measure of Support for Urban Services (with David Jordan), *Public Administration Review* 42 (March/April, 1982) 168-170.

William O. Douglas: Consistent Civil Libertarian or Parabolic Supporter? (with Saul Brenner), *The Journal of Politics* 45 (May, 1983) 490-496.

Effects of Campaign Spending on Different Types of Local Elections: The Charlotte Case" (with Gerald Ingalls), *American Politics Quarterly* 12 (January, 1984) 117-127.

Age, Race and Voter Mobilization in White Charlotte Neighborhoods, *Politics and Policy* 4 (Spring, 1984) 81-85.

Should the Electoral College be Replaced by the Direct Election of the President? A Debate (with Saul Brenner), *PS* 17 (Spring, 1984) 237-250.

Another Look at Approval Voting (with Saul Brenner), *Polity* 17 (Fall, 1984) 118-144.

Race and Local Campaign Finance in Charlotte, N.C. (with Gerald Ingalls), *Western Political Quarterly* 37 (December, 1984) 578-583.

CONGRESS Takes You On a Presidential Quest, *Rainbow Magazine* 4 (June, 1985) 195-196.

Advanced and Full-Featured, CMODEM Is a Comparable Terminal Program *Rainbow Magazine* 4 (July, 1985) 196-198.

How to Predict Election Turnouts, *Campaigns and Elections* 7 (May-June, 1986) 11-14.

Unanimous Decisionmaking on the United States Supreme Court: The Role of Case Stimuli and Judicial Attitudes (with Saul Brenner), *Political Behavior* 9 (Number 1, 1987) 75-86. Reprinted in Harold J. Spaeth and Saul Brenner (eds.) *Studies in U.S. Supreme Court Behavior* (New York: Garland Publishing, Inc. 1990) 207-220.

The Role of Gender in Local Campaign Financing: The Case of Charlotte, North Carolina (with Gerald Ingalls), *Women and Politics* 11 (Number 2, 1991) 61-90.

The Election of Blacks to School Boards in North Carolina (with Thomas Watts), *Western Political Quarterly* 44 (December, 1991), 1099-1105.

Outreach Programs and Voter Registration in North Carolina (with Timothy D. Mead), *State and Local Government Review* 24 (Number 3, Fall 1992) 113-116.

When Money Doesn't Matter: Campaign Spending for Minor Statewide Judicial and Executive Offices in North Carolina, *The Justice System Journal* 18 (Number 3, Summer 1996) 257-266.

The Limited Vote Alternative to Affirmative Districting (with Gerald Ingalls), *Political Geography* 17 (Number 6, April 1998) 701-728.

Party Registration Choices as a Function of the Geographic Distribution of Partisanship: A Model of 'Hidden partisanship' and an Illustrative Test (with Bernard Grofman), *Political Geography* 18 (Number 2, February 1999) 173-185.

Ideological Voting on the U.S. Supreme Court: Comparing the Conference Vote and the Final Vote with the Segal/Cover Scores (with Saul Brenner), *Jurimetrics* 41 (Summer, 2001) 505-512.

Measuring Salience on the Supreme Court (with Saul Brenner), *Jurimetrics* 43 (Fall, 2002) 99-113.

Strategic Voting for Damage Control on the Supreme Court (with Saul Brenner), *Political Research Quarterly* 57 (December, 2004) 565-573.

BOOK REVIEWS

Jack Fleer, *North Carolina Government and Politics*, Lincoln: University of Nebraska Press, 1994 for *Publius: The Journal of Federalism*, 25 (Number 1, Winter 1995) 126-127.

Maurice T. Cunningham, *Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice*, Westport: Praeger, 2001 for *American Review of Politics*, 22 (Spring & Summer 2001) 129-131.

William W. Lammers and Michael A. Genovese, *The Presidency and Domestic Policy: Comparing Leadership Styles, FDR to Clinton*, Washington: CQ Press, 2000 for *Politics and Policy*, 31 (Number 3, 2003) 561-562.

PAPERS

Equal Rights Amendment Activists in North Carolina (with Patricia Kyle), Panel on Women and Public Policy, Annual Meeting of the American Political Science Association, San Francisco, California, 1-6 Sep 1975.

The Size Principle and Supreme Court Decision-Making (with Saul Brenner), Panel on Supreme Court Behavior, Annual Meeting of the Southern Political Science Association, Nashville, Tennessee, 6-8 November 1975.

Interdependence in the Third World: A Study of Bloc Voting Cohesion in the U.N. General Assembly, 1965-1976 (with Patricia Kyle), International Studies Association Convention, St. Louis, Missouri, 19 March 1977.

Participation in Elections: A Study of Voter Mobilization in Charlotte, N,C., Panel on North Carolina Electoral Behavior, Annual Meeting of the North Carolina Political Science Association, Chapel Hill, North Carolina, 30-31 March 1979.

Financing Local Level Election Campaigns (with Gerald Ingalls), Panel on Citizen Participation, Third Annual Urban Affairs Conference of The University of North Carolina titled "Perspectives on Urban Growth and Urban Life," Charlotte, N.C., 1-3 April 1981.

Financing Local Elections: Who Gives What to Whom? (with Gerald Ingalls), Annual Meeting of the Southeastern Division of the Association of American Geographers, Atlanta, Georgia, 22-24 November 1981.

Financing Local Election Campaigns: Does Neighboring Help Raise Money? Does Money Win Elections? (with Gerald Ingalls), National Meeting of the Association of American Geographers, San Antonio, Texas, 26-28 April 1982.

A Method for Predicting Voter Turnout in Elections, Annual meeting of the North Carolina Political Science Association, Mars Hill, N.C., 18-19 April 1986.

A Teaching Model of a Responsible Two-Party System, Annual meeting of the North Carolina Political Science Association, Mars Hill, N.C., 18-19 April 1986.

Urbanization, Management Capacity and the Impact of the 1965 Voting Rights Act (with Timothy D. Mead), Annual meeting of the Urban Affairs Association, Akron, Ohio, 22-25 April 1987.

Is Campaigning at the Polls Effective? A Quasi Experiment Using the 1989 Charlotte Mayoral Election, Annual meeting of the North Carolina Political Science Association, Cullowhee, 20 March 1992.

Alternatives to Affirmative Gerrymandering: Limited Voting as One Option (with Gerald Ingalls), Annual Meeting of the Southeastern Division of the Association of American Geographers, Virginia Beach, 20-22 November 1994.

The Use of Limited Voting in the United States: Potential and Practice (with Gerald Ingalls), Annual Meeting of the Association of American Geographers, Chicago, Illinois, 18 March 1995.

Is Mandatory HMO Enrollment for Dependent Populations Acceptable? Public Opinion and Its Evolution Since the Backlash Against Managed Care (with William P. Brandon and Nancy Schoeps), Annual Meeting of the American Political Science Association, Washington, D.C., August 1997.

Public Opinion About Mandatory HMO Enrollment Under Medicaid, Medicare, Veterans, and Employer Payment Programs (with William P. Brandon and Nancy Schoeps), Annual Meeting of the American Public Health Association, Indianapolis, November 1997.

Affirmative Districting and the Partisan Seats/Votes Relationship: 1972-2002, Annual Meeting of the American Political Science Association, Philadelphia, PA, September 2003.

The Rational Losing Litigant Model and Measuring Ideology of the U.S. Supreme Court (with Saul Brenner), Annual Meeting of the American Political Science Association, Washington, DC, September 2005.

SELECTED PRESENTATIONS

Chairman of the panel Toward Explaining Women's Political Patterns, Annual meeting of the Southern Political Science Association, Atlanta, Georgia, 4-6 November 1976.

Discussant on the panel on Evaluation of the Carter Administration, Annual meeting of the North Carolina Political Science Association, Greensboro, N.C., 6-8 April 1978.

Chairman of the panel on American Politics, Annual meeting of the North Carolina Political Science Association, Asheville, N.C., 18-19 April 1980.

Chairman of the Seventh Annual Undergraduate Awards Competition, Annual meeting of the North Carolina Political Science Association, Asheville, N.C., 18-19 April 1980.

Chairman of the Thirteenth Annual Undergraduate Awards Competition, Annual meeting of the North Carolina Political Science Association, Mars Hill, N.C., 18-19 April 1986.

Participant in the Roundtable on North Carolina Elections, Annual meeting of the North Carolina Political Science Association, Greensboro, North Carolina, 8-9 April 1988.

Discussant at the panel on The Politics of Governing, Annual meeting of the North Carolina Political Science Association, Salisbury, North Carolina, 30-31 March 1990.

Change for Whom? Three Decades of Electoral Change and Continuity in North Carolina Elections (with Gerald Ingalls), a presentation at the Conference on Empowering Political and Economic Transformation, sponsored by the University of Colorado and the Political Geography Specialty Group of the American Association of American Geographers, Boulder Colorado, 15-18 April 1992.

Discussant on the panel on North Carolina and the 1992 Elections, Annual meeting of the North Carolina Political Science Association, Durham, North Carolina, 2-3 April 1993.

Discussant on the panel on Congressional politics, Annual meeting of the North Carolina Political Science Association, Charlotte, North Carolina, 18-19 March 1994.

Discussant on the Symposium on Redistricting in Theory and Practice After Shaw Versus Reno, Annual Meeting of the American Association of Geographers, Charlotte, North Carolina, 12 April 1996.

Invited presentation for The Kenelm Foundation-Campbell University Series at the Weymouth Center in Southern Pines, N.C. Two workshops on redistricting titled "From Gingles to Shaw -- The Role of North Carolina in the Formation of Districting Principles in the United States." One workshop for the public and one for honors students. September 1996.

Invited presentation in the series "The American Presidents and the American Presidency" sponsored by the Caldwell Community College and Technical Institute at the J.E. Broyhill Civic Center in Lenoir, N.C. Presentation titled "Clinton or Dole -- Choosing the Lesser of Two Evils or the Evil of Two Lessers." October 1996.

Chairman and discussant on the panel American National Politics, Annual meeting of the North Carolina Political Science Association, Boone, 3-4 April 1998.

Discussant on the Roundtable on Declining Enrollments in Political Science, Annual meeting of the North Carolina Political Science Association, Boone, 3-4 April 1998.

Testimony before the Subcommittee on the Constitution, Committee on the Judiciary, United States House of Representatives. Hearing on H.R. 1173, the "States' Choice of Voting Systems Act" Thursday, 23 September 1999, 2:00 p.m. in 22267 Rayburn House Office Building.

Member, Roundtable on Redistricting, Representation, and American Political Institutions, 100th Annual Meeting of the American Political Science Association, Philadelphia, 28-31 August 2003.

CONSULTING

Gingles vs. Edmisten, 590 F. SUPP. 345 (E.D.N.C.) 1984. Employed by plaintiffs, courtroom and affidavit testimony that the use of multimember districts for the N.C. General Assembly impedes the election of blacks and Republicans. Affirmed by the United States Supreme Court *Thornburg vs. Gingles*, 478 U.S. 30 (1986).

Alexander vs. Martin, Civil Action No. 86-1048-CIV-5 (E.D.N.C.) 1987. Employed by plaintiff's. Affidavit testimony that the use of multimember districts and statewide elections for Superior Court Judges in North Carolina impedes the elections of black candidates.

Republican Party of North Carolina vs. Hunt, Civil Action No. 88-263-CIV-5 (E.D.N.C.) 1988-1996. Employed by plaintiffs. Affidavit and deposition testimony that the procedure of statewide elections of Superior Court judges dilutes the votes of Republicans consistently degrading the votes of Republican voters and also degrades their influence on the political process as a whole in violation of constitutional rights.

Person vs. Moore County, Civil Action No. C-89-135-R (M.D.N.C.) 1990. Employed by defendants. Affidavit and deposition testimony supported the contention that the local governing bodies in this county were in compliance with the Voting Rights Act.

Ward vs. Columbus County, Civil Action No. 90-20-CIV-7-BR (E.D.N.C.) 1990. Retained by defendants. Affidavit, courtroom, and deposition testimony that black and American Indian voters were not cohesive in their voting patterns in this county.

Lake vs. State Board of Elections of North Carolina, Civil Action No. 2:91CV00254 (M.D.N.C.) 1991. Employed by the plaintiffs. Affidavit testimony on aspects of holding a special election in two counties to remedy irregularities in election for Associate Justice of N.C. Supreme Court in 1990.

Stafford vs. Burnick, Civil Action No. 2:91CV00542 (M.D.N.C.) 1991. Employed by the plaintiffs. Affidavit testimony about whether the options proposed in a referendum to be held in Guilford County North Carolina concerning consolidation of the school boards there would violate the Voting Rights Act.

Consultant for a coalition of groups objecting to preclearance of General Assembly and Congressional redistricting for North Carolina in 1991. Affidavit testimony to the United States Justice Department that the proposed districts were not consistent with the Voting Rights Act.

Consultant for a coalition of groups objecting to preclearance of General Assembly and Congressional redistricting for Georgia in 1991. Affidavit testimony to the United States Justice Department that the proposed districts were not consistent with the Voting Rights Act. This work was related to *Jones vs. Miller*, Civil Action No. 1-92-CV-330-JOF (N.D.GA) in which I would have been an expert witness for plaintiffs if that case had gon to trial.

Burton vs. Sheheen, Civil Action No. 3-91-2983-1 (The South Carolina Senate Defendant-Intervenors); *South Carolina Reapportionment Advisory Committee vs. Campbell*, Civil Action No. 3-91-3310-1; and *Blanton vs. Sheheen*, Civil Action No. 2-91-3635-1 (D.C.S.C. Columbia Division). Employed by plaintiffs in 1991-2. Affidavit and courtroom testimony that election for Congress and state legislature in South Carolina are racially polarized, that timely known and agreed to districts are important to minority candidates election, that the 1982 districts in the state are malapportioned, and comparison of proposed plans for redistricting.

Re MacKinnon and Government of Prince Edward Island (1993). Before the Supreme Court of Prince Edward Island, Canada. In the Matter of the *Canadian Charter of Rights and Freedoms* and in the matter of sections 147-151 of the *Elections Act*, R.S.P.E.I. 1988 Chapter E-1. 101 D.L.R.(4th) 362. Written and courtroom testimony for petitioner (City of Charlottetown) that it is practical and desirable to draw districts for the Legislative Assembly of the Province of P.E.I. that have a low population deviation. Included construc-

tion of districts with a total deviation of 4.9%, and presentation of those districts to the court.

Hines vs. Callis, Civil Action No. 89-62-CIV-2-BO (E.D.N.C.) 1992. Courtroom testimony that the town council election scheme offered by the Town of Ahoskie N.C. is a reasonable remedy for the admitted deficiencies in their system of at-large elections and would be sufficient to meet the requirements of the Voting Rights Act. Also see *Hines vs. Mayor and Town Council of Ahoskie* (Fourth Circuit United States Court of Appeals #92-2593) 15 July 1993.

Degrandy vs. Wetherell, Civil Action No. 92-40015-WS (N.D.FL) and *Florida State Conference of NAACP Branches vs. Chiles*, Civil Action No. 92-40131-WS (N.D.FL) 1992. Consultant for Common Cause of Florida, *amicus curiae* in the case. Affidavit and courtroom testimony before the Special Master appointed by the Court to aid in the construction of legislative and Congressional districts for the State of Florida.

Appointed in 1992 as the expert to aid Special Master Frederick B. Lacey in drawing Congressional districts for the State of New York. Lacey was appointed by the Court considering the case of *Puerto Rican Legal Defense and Education Fund, Inc. and Corchardo vs. Gantt*, CV-92-1521(SJ) (E.D.N.Y.) and *Waring vs. Gantt*, CV-92-1776(SJ) (E.D.N.Y.).

Appointed in 1992 as the expert to aid Special Master Frederick B. Lacey in drawing state legislative districts for New York. Also retained to directly advise the Court on methodological questions. The cases were: *The Fund for Accurate and Informed Representation, Inc. vs. Weprin*, 92-CV-283 (N.D.N.Y.); *Norman vs. Cuomo*, 92-CV-720 (N.D.N.Y.); and *Scaringe vs. Marino*, 92-CV-0593. Written and courtroom testimony.

Willis vs. Town of Trenton, North Carolina, 92-CIV-4-H (E.D.N.C.) 1993. Retained by defendants to outline for the Court the evidence plaintiffs must present to prove their claim that the town election procedures impede the election of blacks. Testified by report to the Court.

Retained by plaintiff National NAACP in the combined cases of *National Association for the Advancement of Colored People, et al. vs. Schaefer, et al.* (S-92-1409) and *Marylanders for Fair Representation vs. Schaefer, et al.* (S-92-510) in the Federal District Court for Maryland, 1993. Report, deposition, and courtroom testimony that the voting for General Assembly in Maryland is racially polarized, the minority community is politically cohesive, and the districts drawn by the State of Maryland provide less of an opportunity for minority citizens to participate in the political process than the districts drawn by plaintiffs.

Cane, et al. vs. Worcester County, Maryland, et al., Y-92-3226 (United States District Court, Maryland District) 1993. Retained by plaintiffs. Testified by report, deposition, and in court that the elections in Worcester County are racially polarized and that minor-

ity candidates of choice cannot win in the at-large elections for County Commission even if the minority community is strongly cohesive in their voting patterns. Also see Fourth Circuit United States Court of Appeals (#94-1579) 16 September 1994.

In 1992, consultant to the Cleveland County (N.C.) Board of Commissioners to formulate a plan to move from at-large to a mixed at-large district system in order to increase minority participation. Newly elected commissioners decided not to submit the new plan to the U.S. Justice Department for preclearance. This resulted in legal action: *Campbell and National Association for the Advancement of Colored People vs. Cleveland County Board of Commissioners et al.*, 4:94-CV-11 (W.D.N.C., Shelby Division) in 1994. Testified by affidavit, but not as expert retained by any party to the legal action.

In 1992, Co-Chair of the Blue Ribbon County Governance committee, appointed by the Mecklenburg County (N.C.) Commission to study possible changes in election procedures for the county commission. Proposed a new expanded Commission and new set of districts. Co-chair of the District Proposal Election Committee, which campaigned for the new proposal, which was adopted by the voters in November 1992. In 1993 the North Carolina General Assembly revised those districts and mandated that the revised districts be used for school board elections. In *Daly et al. vs. Hunt et al.* 3:93CV371-MU (W.D.N.C. Charlotte Division) during 1994 the state districts were challenged on one-person-one vote grounds. Testified, in a joint affidavit with Gerry F. Cohen of the N.C. General Assembly staff, about both sets of districts.

United States of America vs. Anson County Board of Education et al. 3:93CV210-P (W.D.N.C.) 1994. Retained by the United States Department of Justice. Testified by declaration that elections in Anson County are racially polarized, the African-American community is politically cohesive, and any at-large seats on the school board would dilute the vote of minority citizens because whites vote as a bloc to prevent minority candidates from winning election.

Charles T. Sutherland vs. Everett H. Hyde et al. 3:94CV00451 (M.D.N.C.) 1995. Retained by plaintiff to testify by affidavit about the effects of the ballot order of names in primaries on the results of elections. Ballot order does affect the outcome of some primary elections in North Carolina. This case became *Charles T. Sutherland, Jr. vs James Hunt, et al.* 1:97-CV-1123 (M.D.N.C.).

Thurman Gause et al. vs. Brunswick County, North Carolina et al. CA-93-80-7-D (E.D.N.C.). Retained by defendants (Brunswick County) in 1994 to testify about polarized voting and the dispersal of minority citizens within the county. While I did not testify, I was deposed by plaintiff's attorneys. Also see Fourth Circuit Court of Appeals (No. 95-3028) 13 August 1996.

Consultant on election systems and redistricting for Albemarle, N.C. City School District (1988); Hickory, N.C. City School District (1991); City of Hickory (1991); Winston-Salem/Forsyth, N.C. School District (1991); Moore County, N.C. Commission (1991); Mecklenburg County, N.C. Commission (1991-2); Reidsville, N.C. City Council (1992);

Rowan-Salisbury N.C. Board of Education (1992); plaintiffs bringing legal action against Mt. Olive, North Carolina (1993); plaintiffs bringing legal action against Laurenburg N.C. (1993); Albemarle N.C. County Commission (1993).

City of Charlottetown et al. and The Government of Prince Edward Island . (1996) Court File GSC-14198 before the Supreme Court of Prince Edward Island, Canada. In the matter of the *Canadian Charter of Rights and Freedoms* and in the matter of Sections 2, 3, 4, 5, 17(2) and the Schedule of the *Election Boundaries Act*, (S.P.E.I. 1994, Cap. 13, Bill No. 100). As a result of *MacKinnon vs. Government of Prince Edward Island* (see above), the Provincial legislature was forced to redistrict itself. The City of Charlottetown argued that the Province did not fully comply with that decision, and they brought suit to change the districts. Retained by City of Charlottetown, testified by report and at trial that the districts were a rural gerrymander.

Wayne Cook, et al. vs. Marshall County, Mississippi, et al. and United States of America Defendant Intervenor. (1996) CA 3:05 CV 155-D-A (N.D.MS.). Retained by the United States Department of Justice to prepare testimony on polarized voting, minority cohesion, the effects of low socio-economic status on political participation, and traditional districting practices. In this case the Justice Department defended the districts used to elect county supervisors against a challenge by white plaintiffs. Testified by report.

Cleveland County Association for Government by the People, et al. vs. Cleveland County Board of Commissioners, et al. (1997) CA 96-1447-SSS (U.S. District Court for D.C.). Retained by plaintiffs to testify about possible districting arrangements. Testified by affidavit that it is not possible to draw a majority minority district in a five district plan for Cleveland County, N.C. that would be considered "geographically compact" as defined by the Supreme Court in *Shaw vs. Hunt* given the size and dispersion of the African-American population in that jurisdiction.

The United States of America vs. New Roads Louisiana (1997) CA 96-7315-B-M2 (M.D.LA). Retained by the United States Department of Justice to prepare testimony on polarized voting, minority cohesion, and the effects of low socio-economic status on the political participation of minority citizens in New Roads Louisiana. Testified by declaration.

Consultant in 1999 to the United States Department of Justice, Civil Rights Division, Voting Section on various aspects of *Cromartie et al. vs. James B. Hunt, et al.* 99-1864 (E.D.N.C.) *and Smallwood et al. vs. Cromartie et al.* 99-1865 (E.D.N.C.). The United States elected not to intervene in these cases.

Dean Butch Wilson et al. vs. John W. Jones Jr. et al. (1999) CA 96-1052-BH-M. in the United States District Court, Southern District of Alabama, Northern Division. Retained by the United States Department of Justice to prepare a four district plan for Dallas County (Selma), Alabama. Testified by declaration, at trial, and at a meeting of Commissioners about the principles used to draw the plan.

Randy Royal, et al. vs. The State of North Carolina and the North Carolina Board of Elections 99 CV 13020 (2000), in the General Court of Justice, Superior Court Division, County of Wake, State of North Carolina. Retained by Plaintiffs to examine the effects of campaign spending on General Assembly elections. Testified in writing.

The United States of America vs. Blaine County Montana (2000) CV 99-122-GF-DWM (MT), in the United States District Court for the State of Montana. Retained by the United States Department of Justice to prepare written testimony on polarized voting, minority cohesion, and the effects of low socio-economic status on the political participation of minority (American Indian) citizens in Blaine County Montana. Also drew a three single-member district plan for election of commissioners to show that Indians are numerous enough and geographically concentrated enough to form a majority in one of the districts. Testified by deposition and at trial.

The United States of America vs. Charleston County Council (2001) CA 2-01-0155-11 (SC), in the United States District Court for the State of South Carolina. Retained by the United States Department of Justice to prepare testimony on polarized voting, minority cohesion, and the effects of low socio-economic status on the political participation of minority (African-American) citizens in Charleston, South Carolina. Also drew nine single-member districts for Charleston County Council to show that African-Americans are numerous enough and geographically concentrated enough to form a majority in three single-member districts in that county. Testified in writing, by deposition, and at trial during July 2002.

During the 2001 cycle of reapportionment I was consultant for the minority caucus of the Connecticut State Senate. I also drew Charlotte City Council Districts for the Alliance for a Better Charlotte and presented those districts to the City Council Redistricting Committee. My districts for the Charlotte/Mecklenburg Board of Education and Mecklenburg County Commissioners, drawn in my capacity as consultant to these bodies, were adopted.

Retained to advise the Minority Caucus of the Illinois House of Representatives and the Majority Caucus of the Illinois Senate. This resulted in several reports or declarations, including written and oral testimony before the Illinois State Redistricting Commission on 20 September 2001. The Commission enacted districts were challenged in *Campuzano, et al. vs. Illinois State Board of Elections et al.* in the United States District Court for the Northern District of Illinois, Western Division, Civil Action No. 01-C-50376. I was expert witness for plaintiffs in that case, and presented the districts for the Illinois General Assembly that I drew with Dr. Richard Engstrom in a declaration and at trial.

Retained by the Speaker of the South Carolina House of Representatives and the Majority Leader of the South Carolina Senate to advise them on redistricting. Since there was a deadlock between the General Assembly and the Governor of that state, the case went directly to Federal Court. The cases are *Colleton County Council et al. vs. Glenn F.McConnell, et al. (Civil Action No. 3:01-3581-10); Leatherman et al. vs Glenn F. McConnell, et al. (Civil Action No. 3:01-3609-10); and Marcharia, et al. vs. James H.*

Hodges et al. (Civil Action No. 3:01-3892-10) all in the United States District Court for the District of South Carolina Columbia Division. In the legal action I was retained by plaintiffs and testified by declaration, deposition, and at trial.

I was retained at various times during the year to advise the North Carolina Republican Party on developing redistricting issues, and wrote to the General Assembly Redistricting Committee and the United States Department of Justice about certain aspects of Congressional redistricting in North Carolina. The Congressional redistricting was challenged in The United States District Court for the Eastern District of North Carolina, Eastern Division in the case of *Foreman, et al. vs. Bartlett et al.* (Civil Action No. 4:01-CV-166-B0(4). I was retained by plaintiffs in that case, and testified by declaration.

The Louisiana House of Representatives, et al. vs. John Ashcroft, Attorney General of the United States (Civil Action No. 1:02CV00062) in the United States District Court for the District of Columbia. In 2002 I was retained by the Department of Justice to examine whether the proposed districting plan for the Louisiana House of Representatives was retrogressive under §5 of the Voting Rights Act. Prepared written and deposition testimony including proposed districts for Orleans and Baton Rouge parishes.

Working Families Party, et al. vs. New York City Board of Elections, et al. (Civil Action No. 03-3701) in the United States District Court for the Eastern District of New York. Retained by the Brennan Center at New York University, representing plaintiffs. Testified that votes in New York City, especially those of minority citizens, are lost because the New York City Board of Elections disabled or failed to reactivate the sensor latch on the 7,000 lever voting machines used in the city.

State of North Carolina vs. John Ashcroft, et al. (Civil Action No. 1:03 CV 02477 [RBW MG RCL]) in the United States District Court for the District of Columbia. In 2004 I was retained as consultant and then as potential expert witness for the Department of Justice to examine whether the proposed plans for the North Carolina General Assembly were retrogressive under §5 of the Voting Rights Act. Prepared a report for the Department.

AFFILIATIONS

The American Political Science Association, 1966-present
Pi Sigma Alpha, 1967-present
The Southern Political Science Association, 1974-present
North Carolina Political Science Association, 1974-present
Vox Pop (parties and interest group studies group), 1981-present
Legislative Studies Group, 1982-present
Presidency Studies Group, 1982-present
Representation and Electoral Systems Studies Group, 1984-present
Phi Kappa Phi, 1991-present

GRANTS AND AWARDS

National Defense Education Act Title IV Fellowship awarded by the Department of Political Science, The University of Arizona, September 1967-December 1968 and renewed for January 1971-August 1972, $7,200.

Dissertation year research grant awarded by the Department of Political Science, The University of Arizona, September 1972-August 1973, $2,400.

Summer research grant awarded upon recommendation of the Faculty Grants Committee from funds established for research by the Foundation of The University of North Carolina at Charlotte and the North Carolina General Assembly, to pursue a study of ticket splitting behavior, Summer 1978, $1,000.

Summer research grant awarded upon recommendation of the Faculty Grants Committee from funds established for research by the Foundation of The University of North Carolina at Charlotte and the North Carolina General Assembly, to pursue a study of campaign finance, Summer 1980, $1,000.

Summer research grant awarded upon recommendation of the Faculty Grants Committee from funds established for research by the Foundation of The University of North Carolina at Charlotte and the North Carolina General Assembly, to pursue a study of attitudes among elite African-Americans, Summer 1996, $8,196.

Faculty Service Award Recipient for 2000 from the UNC Charlotte Alumni Association for career accomplishments and service to the community.

POLITICAL ACTIVITY

President, Teen-Age Republicans, Bernalillo County, N.M., 1963-64
Vice President, Young Republicans, Bernalillo County, 1963-64
President, Young Republicans, University of New Mexico, 1964-65
Republican Precinct Chair, Bernalillo County, 1966
Precinct election official, Pima County, Arizona, 1968 and 1972
Republican Precinct Chair, Mecklenburg County, N.C., 1974-76
Precinct Supervisor, Mecklenburg County Republican Party, 1975-76
Vice Chair, Mecklenburg County Republican Party, 1976-77
Republican Nominee, Charlotte City Council, 1977
Information Chair, Mecklenburg County Republican Party, 1977-79

Ceased work for the Republican Party to assume a position on the Mecklenburg County Board of Elections: Member, July 1979-July 1991, Chair of the Board, July 1985-July 1991

After leaving the Board of Elections, I became a registered unaffiliated voter (that is, an independent).

MEDIA PRESENTATIONS AND MEDIA CONSULTING

Articles, appearances, and background consulting for television, radio, and print media. These include over one hundred different media including: *The Advocate*, American Broadcasting Network News, *Asheville Citizen-Times*, Associated Press, *Atlanta Constitution*, Boston Globe, British Broadcasting Corporation World News Service, *Business Journal, Business Week Magazine*, CBS Television ("Today" and "60 Minutes"), Cable News Network, C-Spann Network, *Canadian Broadcasting Corporation, Capitol Reporter*, *Charlotte Observer*, *Chicago Tribune*, Christian Broadcasting Network News, *Christian Science Monitor, City Journal* (NY City), *Congressional Quarterly*, Copley News Service, Cox Newspaper Chain, *Dailey News* (Washington, DC), *Dallas Morning News, Danville Virginia Register and Bee, Detroit Free Press, Durham Herald-Sun, The Economist* (London), Fox News Network, Freedom Newspaper Chain, Gannett News Service, *The Gaston Gazette, Greensboro News and Record, Greenville News* (S.C.), Hearst Newspaper chain, *The Herald Tribune* (S.E. Florida), *Hickory Daily Record* (NC),*The Hill Newspaper, Houston Chronicle, The Independent* (London), *The Independent* (Durham), *Inside Congress, The Irish Times* (Dublin), *Keene Sentinel* (NH), *Kepplinger Newsletter, Los Angeles Herald Examiner, Los Angeles Times*, MSNBC Network, Media General Newspaper Chain, *National Journal*, National Public Radio All Things Considered, *New Orleans Times Picayune*, *New York Daily News*, *New York Times*, *New York Times Magazine*, Newhouse News Service, *Newsday* (New York), *Newsweek*, North Carolina Public Radio, *People Magazine*, *Philadelphia Inquirer*, *Philadelphia Tribune, Raleigh News and Observer, Record and Landmark* (Statesville, NC), *Richmond Times, Roll Call News, Sacramento Bee, San Diego Union Tribune*, *Scholastic News, Shelby Star* (NC), Southan News of Canada, *St. Louis Post Dispatch, St. Petersberg Times*, Stateline.org, Thompson Newspaper Chain, *Tampa Tribune*, Time-Warner Cable, *Time Magazine, Toledo Blade, USA Today, Virginia Pilot, Washington Post, Washington Times, Wall Street Journal, Wilson Daily Times* (NC), *Winston-Salem Journal,* UNC Television Network, United Press International, *U.S. News and World Report, Washington Times, Winston-Salem Journal, Women's Voice*.

LETTER FROM MALDEF, NCLR, NALEO, AND LULAC TO THE HONORABLE STEVE CHABOT REGARDING *GEORGIA V. ASHCROFT* AND THE LATINO COMMUNITY

The Honorable Steve Chabot
Chairman, Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chabot and Members of the Subcommittee on the Constitution:

Thank you for holding hearings this past October and November regarding the reauthorization of the Voting Rights Act ("VRA"). On behalf of the more than 40 million Latinos living in the United States, we look forward to working with you towards meaningful VRA extension legislation.

The undersigned organizations strongly urge Congress to include legislative language in a reauthorized Voting Rights Act that will ensure that minority voters retain the opportunity to elect the candidates of their choice under Section 5 of the Act ("Section 5"). This legislative language is necessary because the 2003 Supreme Court decision in *Georgia v. Ashcroft* has severely curtailed the effectiveness of Section 5 in protecting Latino voting strength and has frustrated Congress's original intent regarding this crucial component of the VRA.

Section 5 was designed to protect Latinos and other minority voters who live in covered jurisdictions against governmental attempts to diminish their voting strength and prevent them from electing their candidates of choice. Section 5 is a critical component of the Voting Rights Act for the 11 million Latinos living in covered jurisdictions because many jurisdictions continue to respond to increasing political participation by Latino voters by attempting to enact election changes designed to diminish Latino voting strength.

Today, Latinos comprise the minority in a substantial number of single-member election districts across the country but have great difficulty exercising political influence in such districts or affecting the outcome of elections in these districts. It is exactly at the point at which Latino voters can exercise political power by electing their preferred candidate that many jurisdictions respond with discriminatory measures. For Latinos, the greatest number of election changes blocked by the Justice Department under Section 5 deal with jurisdictions in which Latino voters have become numerous enough to elect their preferred candidate in one or more districts.

Restoring Latino voters' ability to elect their candidate of choice lies at the heart of Section 5 and is vitally important to continued political progress. The renewal and restoration of Section 5 and Section 203, the language assistance provisions, are of equal importance to the Latino community. The undersigned organizations urge your leadership in restoring the original Section 5 protections afforded in the 1965 Voting Rights Act. If you have any questions, please contact Peter Zamora at MALDEF at (202) 293-2828 or Larry Gonzalez at NALEO at (202) 546-2536.

Sincerely,

The Mexican American Legal Defense and Educational Fund (MALDEF)
National Council of La Raza (NCLR)
National Association of Latino Elected Officials (NALEO)
League of United Latin American Citizens (LULAC)

PREPARED STATEMENT OF ROBERT A. KENGLE, FORMER DEPUTY CHIEF, VOTING SECTION, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

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

OVERSIGHT HEARING ON *GEORGIA* V. *ASHCROFT*

NOVEMBER 8, 2005

STATEMENT OF ROBERT A. KENGLE
ATTORNEY AT LAW

8807 Sumner Grove Drive
Laurel, MD 20708
bob_kengle@earthlink.net

Mr. Chairman and members of the Subcommittee, I thank you for the opportunity to submit this statement concerning the Supreme Court's 2003 decision in *Georgia* v. *Ashcroft*, 123 S.Ct. 2498 (2003). I believe that Section 5 and the other special provisions of the Voting Rights Act, along with the Act's language minority provisions, remain vital components of Congress' determination to effectuate the guarantees of the Fourteenth and Fifteenth Amendments, and I strongly support their reauthorization.

Until April of this year I had the privilege to serve as a Deputy Chief in the Voting Section of the Civil Rights Division of the United States Department of Justice. In that role I supervised the Voting Section's trial team for the *Ashcroft* case in the District Court for the District of Columbia, during both the initial litigation phase and the remand from the Supreme Court. I also played a limited direct role in the litigation by handling the cross-examination of the State's expert witness at trial. My statement reflects my own views based upon 20 years' experience with the Voting Section enforcing the Voting Rights Act. It does not disclose internal deliberations within the Department of Justice.

I. SUMMARY

I direct my comments principally to the Supreme Court's recognition of influence districts under Section 5 of the Voting Rights Act in the *Ashcroft* decision.

I do not disagree with every aspect of the *Ashcroft* decision. Its emphasis upon the rights of individual residents to contest Section 5 preclearance and the significance of the views of minority legislators are important considerations for Congress.1/ I also appreciate the fact that the recognition of influence districts under *Ashcroft* has been read as a positive step to protect and advance minority voting rights in a changing political landscape. I certainly would hope that this is the case.

1/ The United States was not the only defendant in the *Ashcroft* case. The district court permitted a group of Georgia citizens to intervene in the case to defend against the State's claims – not only for the Senate plan to which the United States objected, but also for the Congressional and State House plans, to which the United States had no opposition. I believe this recognition of a right of private citizens to challenge voting changes to which the United States did not object is quite significant, because it would support a decision by Congress to grant a private right of action to individual citizens to enforce the substantive provisions of Section 5 notwithstanding an administrative preclearance by the Attorney General. Such a private right of action heretofore has been foreclosed by the Supreme Court's decision in *Morris* v. *Gressette*, 342 U.S. 491 (1977) (note that while the Supreme Court held that the District Court did not abuse its discretion to allow intervention, only the Senate Plan was at issue before the Supreme Court). I raise this point because I think it is important for Congress to consider reasonable steps to help ensure that there is an effective means of recourse for both covered jurisdictions and affected citizens who believe that the Section 5 administrative preclearance process has resulted in an erroneous decision. At present, only covered jurisdictions have this option.

However, I believe that the Supreme Court's holdings with respect to influence districts were premature, in that they lacked a firm grounding in voting rights law that would justify why or explain how it should be applied in specific cases. Furthermore, while the reach of the *Ashcroft* decision may be somewhat more limited than generally thought, I believe that the *Ashcroft* decision as it stands today is certain to create real difficulties in trying to apply Section 5 in the future. Put simply, the *Ashcroft* decision does not provide a judicially manageable standard for making the comparisons that it requires. For these reasons I fear that the practical and theoretical gaps in the *Ashcroft* decision are likely to outweigh any benefits that it provides.

Assuming that Congress reauthorizes Section 5, there are three basic options with respect to *Ashcroft*'s adoption of influence districts: 1) let it stand, 2) repudiate it; or 3) accept the basic theory of influence districts but attempt to clarify the holding so as to provide a workable standard. If Congress chooses to act, a legislative clarification would have the benefit of providing guidance for the states, the Attorney General, the District Court for the District of Columbia, and the other federal courts who must occasionally apply Section 5 in fashioning interim remedies in covered jurisdictions.

However, I believe that Congress will be hard-pressed to settle upon workable set of decision rules that ultimately would be upheld when the Supreme Court has occasion to reconsider the influence district theory. I say this because there appears to be no consensus as to whether such decision rules are possible or what they should be. Moreover, I believe there are fundamental difficulties with incorporating the influence concept into federal civil rights jurisprudence that have not been addressed, which may well undermine the rationale for doing so in the first place.

II. WHAT *GEORGIA v. ASHCROFT* CHANGED

Since the Supreme Court issued its leading decision in *Beer* v. *United States* in 1976, the Section 5 retrogression analysis of redistricting plans focused upon first determining minority voters' current level of voting strength under the existing (benchmark) districts, and then assessing the extent to which the proposed redrawn redistricts would diminish that current voting strength, taking into account such factors as racially polarized voting.2/

2/ *Beer* v. *United States*, 425 U.S. 130 (1976). The *Beer* case involved the redistricting of the New Orleans city council districts. In the *Beer* case the Supreme Court interpreted the term "effect" under Section 5 to mean a voting change which leaves minority voters in a worse position than they presently occupy. That prohibited change -- a change to a worse position -- became known as retrogression. When the Supreme Court looked at the facts of the *Beer* case, it found that the city's proposed redistricting plan would create more districts with black voter registration majorities than the plan in effect at the time, and therefore that there was no retrogression because black voters would have a better chance to elect their preferred candidates under the new plan.

Beer recognized two basic categories of districts: districts in which minority voters would have the opportunity to elect candidates of their choice, and those in which they would not. Proposed redistricting plans under which minority voters would be expected to elect fewer candidates of their choice than under the benchmark plan would be retrogressive. The focus was the opportunity to elect candidates of choice notwithstanding polarized voting patterns and different rates of participation.3/ This was the schema followed in *Beer* and *City of Lockhart v. United States*, 460 U.S. 125 (1983).4/

Before *Ashcroft*, Section 5 was not understood to place any restriction upon States' ability to create or eliminate influence districts *per se.* By influence districts I refer to those districts in which minority voters are unable to elect candidates of their choice, but in which minority voters are sufficiently numerous to result in the election of representatives sympathetic to their interests.

In the *Ashcroft* decision the Supreme Court held that a three-judge court in the District Court for the District of Columbia had failed to consider the effect of newly-created influence districts when it denied Section 5 preclearance to the State of Georgia's 2001 State Senate redistricting plan.5/ The district court had found that reductions in the black voting age populations of three districts in the benchmark were retrogressive, and that this retrogression was

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3/ In assessing redistricting plans for retrogression, any objective decision rule must rely upon some classification scheme to count districts according to specified criteria. Most simplistically, one could simply classify and count districts based upon the percentage that fall within certain population ranges. Clearly, however, this would fail to take into account such factors as the level of racially polarized voting and differences in participation rates that vary by geographic area. Therefore, it is necessary to distinguish districts by their electoral performance – for example, by the traditional distinction of whether minority voters in the district can elect candidates of their choice.

4/ Of course, districts cannot always be readily classified – sometimes there are so-called "swing districts" in which the outcome is just not predictable, which can complicate the analysis.

5/ In October 2001, the State of Georgia filed a declaratory judgment action in the District Court for the District of Columbia seeking Section 5 preclearance for its 2001 Congressional, state senate and state house redistricting plans. A declaratory judgment action involving three statewide redistricting plans for which there had been no administrative submission was unprecedented. The State demanded a final judgment from the D.C. court before the end of 2001, which the D.C. court rejected, but the Court did set a firm trial date for the first week of February 2002. The Voting Section assigned a trial team of four attorneys to the case full-time and they immediately began an intensive investigation and analysis of the three statewide plans at issue. The Voting Section's trial team did an incredible job of meeting this most demanding schedule.

not offset by increases in black voters' opportunity to elect elsewhere in the 2001 plan.6/

Although the Supreme Court vacated the District Court's judgment against Georgia, it did not disturb the District Court's factual finding of retrogression in Districts 2, 12 and 26. The Supreme Court did hold that the District Court was wrong to have failed to consider the creation of new influence districts as a possible offset to that retrogression, and remanded the case for further consideration by the District Court.7/

The *Ashcroft* decision identified four categories of districts that it thought were relevant under Section 5:

1) so-called "safe" districts in which minority voters can be expected to elect their candidates of choice on their own;

2) a "greater number of districts [than Category 1] 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";

3) districts in which minority voters can be expected to elect their candidates of choice in coalition with politically compatible white voters; and

4) districts in which minority voters cannot be expected to elect candidates of their choice but can influence the election of candidates sympathetic to their interests.

In the remaining districts there would be no expectation of effective minority representation.

6/ Attached to my statement today are two comparisons of the 1997 benchmark plan and the 2001 plan. These data were included as Attachments A and B to the DOJ's brief on remand of the case; I have reformatted the table and graph for legibility but the data remain the same. Both make a side by side comparison of all 56 districts in each plan ranked by black voting age population percentage. In this way one can directly compare the two plans as a whole in order to see whatever net shift in the black voting age percentages of the districts would occur, as opposed to changes in individual districts that may or may not be offset by changes in other districts. The challenged districts were Districts 2 (Savannah), 12 (Albany) and 26 (Macon).

7/ On remand, DOJ argued that the bare population data and other evidence in the existing record were not adequate for Georgia to meet its burden of proof. The District Court agreed and granted DOJ's request to reopen discovery and set a second evidentiary hearing. The decision by a three-judge district court of Georgia in *Larios* v. *Cox* effectively mooted the *Ashcroft* case, and *Ashcroft* was dismissed before the Court ruled under the new standards.

In my view, the Court's failure to provide a framework for these categories of districts to be weighed against one another was a grave omission. To illustrate this I will turn to what I regard as the most critical passage in the *Ashcroft* decision, found at 123 S.Ct. 2513:

> The State may choose, consistent with Section 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. See *Thornburg* v. *Gingles*, 478 U.S., at 87-89, 199, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment); cf. *Johnson* v. *De Grandy*, 512 U.S., at 1020, 114 S.Ct. 2647.

I must make three preliminary points about this. First, I am quite uncomfortable with the notion that "the State may choose . . . to risk having fewer minority representatives", which strikes me as letting the fox guard the henhouse. Should Congress decide to ratify this type of "risk" under Section 5, it should make clear that it is minority voters and their representatives – and not the States -- who can consent to take such a risk, provided that their choice is knowing and informed, and therefore meaningful.

Second, for the Supreme Court to focus on achieving "a greater overall representation of a minority group" via Section 5 is rather remarkable in light of the Court's emphatic holdings in the two *Bossier Parish* cases that Section 5 is concerned only with retrogression8/ and in *Miller* v. *Johnson* and *Shaw* v. *Hunt* that maximization of minority voting strength is an improper reading of Section 5.9/ These strike me as unresolved contradictions that are likely to lead the Supreme

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8/ *Reno* v. *Bossier Parish School Board*, 520 U.S. 471 (1997) ("Bossier I"); *Reno* v. *Bossier Parish School Board*, 528 U.S. 320 (2000) ("Bossier II"). There are several other incongruities with the *Bossier Parish* cases in the *Ashcroft* decision. In *Bossier I*, the Court held that Section 2 of the Voting Rights Act -- which by the language of the statute is governed by the "totality of circumstances" standard -- is entirely separate from the retrogression standard of Section 5. Yet at 123 S.Ct. 2511, we find *Ashcroft* referring to the "totality of circumstances" in applying Section 5. The *Bossier I* decision also condemned shifting the Section 5 benchmark from the existing district configuration, which seems inconsistent with the *Ashcroft* holding that a proposed redistricting plan can be measured not just against current conditions in the existing districts (as has always been the accepted practice, and which I believe is the only rational approach), but also against the conditions at the time the existing districts were adopted. 123 S.Ct. at 2515-16. That in effect does shift the benchmark, leaving a situation in which it is not clear which benchmark is meant to control when they lead to different outcomes (which logically is the only time that it would matter).

9/ *Miller* v. *Johnson*, 515 U.S. 900 (1995); *Shaw* v. *Hunt*, 517 U.S. 899 (1996). During the 1990's the Supreme Court issued several decisions under the constitutional cause of action first recognized in *Shaw* v. *Reno*, 509 U.S. 630 (1993) Under *Shaw* the Supreme Court invalidated congressional redistricting plans from North Carolina, Georgia and Texas that it found to contain

Court in time to reconsider the *Ashcroft* decision.

Third, the Court's case citations here were to Justice O'Connor's concurrence in the 1986 *Gingles* decision and the 1992 *De Grandy* decision, both of which involved Section 2 of the Voting Rights Act. Neither of those held influence districts actionable under Section 2; Justice O'Connor herself wrote in 1993 for the Supreme Court that it had "not yet decided whether influence dilution claims such as appellees' are viable under § 2, [citations omitted], nor do we decide that question today." *Voinovich* v. *Quilter*, 507 U.S. 146 (1993). Clearly, the Court in *Ashcroft* was wading into new legal waters.

I believe that the most pressing issue this passage raises, however, is the lack of a practical rule for how it is to be applied. If the risk of some reduced number of minority representatives on the one hand is to be offset by some increased number of "representatives sympathetic to the interests of minority voters" on the other, then there must be some objective and manageable standard for deciding whether the offset is sufficient.10/ This simply cannot be a subjective decision by the courts or the Attorney General.

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racial classifications. The Supreme Court in the Georgia and North Carolina cases was extremely critical of the Department of Justice for what the Court called a "black-maximization" policy. It therefore seems incongruous to read in the *Ashcroft* decision that "[i]n order to maximize the electoral success of a minority group, a State may choose to create certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice." 123 S.Ct. at 2511; and "[i]n fact, various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts." 123 S.Ct. at 2512-13. I do not know how these passages can be reconciled with the Supreme Court's previous strong condemnation of race-conscious maximization of minority voting strength.

10/ But for this passage, *Ashcroft* might be read to create two categories of districts which are not balanced against one another. Under this reading one would have, in one hand, districts in which minority voters have the opportunity to elect candidates of the choice (Categories 1, 2 and 3, supra) and in the other hand one would have influence districts. While there might be retrogression within the opportunity to elect districts, and/or within the influence districts, they would not be weighed against each other. In other words, the loss of the opportunity to elect could not be offset by an increase in influence. Retrogression in either category could form the basis to deny preclearance. In this way concerns about an "apples and oranges" comparison, which I think are very valid, could be avoided. The principal rationale for influence districts is that they provide a means of electing candidates who are "sympathetic" to minority voters' interests. But if voting is racially polarized and the candidates elected are not minority voters' candidates of choice -- which by definition is true for influence districts -- then whether this sympathy is meaningful is open to question. Attempting to measure such potential sympathy in advance also presents serious analytical and evidentiary problems that have not been addressed.

The question, then, is how to decide what number of new influence districts is enough to offset the loss of a district with the opportunity to elect a candidate of choice. Two, three, four? *Ashcroft* is silent, and it is unclear when the Supreme Court will revisit the question.11/ Moreover, there are any number of further unanswered questions about how each of the four categories of districts is intended to be weighed against the others.

Those involved in the redistricting process have a strong and legitimate interest in knowing the rules by which their work will be judged. But until *Ashcroft* is clarified, there will be no choice but to debate and try to guess the eventual "right" answer.

III. FURTHER THOUGHTS ON THE THEORY OF INFLUENCE DISTRICTS

I believe the record shows that the influence district concept was one that the Court majority essentially chose to introduce into the *Ashcroft* case. Nothing in the text of Section 5 indicates that Congress intended Section 5 to extend into the realm of influence districts, nor am I aware of any support for doing so in the 1965, 1970, 1975, 1982 or 1992 legislative histories.

Georgia did not argue to the Supreme Court that it had created any new influence districts that outweighed the retrogression in Districts 2, 12 and 26. Georgia's main argument on appeal was that DOJ was trying to lock Georgia into supermajority districts; as I have discussed, that was not DOJ's position at all. While Georgia did argue that it reinforced the prospects of certain endangered white Democratic incumbents by adding heavily-black, heavily-Democratic precincts to those districts, and that this would be good for black legislators as Democrats, this was not the State's main argument, nor was it the same as creating ***new*** influence districts, as the Court seems to have supposed.

During oral argument in *Ashcroft* there were several questions by the Court that referred to the possibility that moving black voters from the challenged districts to majority-white districts might offset retrogression.12/ I would note that even here, the Court did not inquire as

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11/ As another example, the Court does suggest that "some greater number" of weaker districts is needed to offset the loss of "safe" districts, but does not explain the necessary calculus. 123 S.Ct. at 2511.

12/ The most direct discussion of influence districts occurred at Page 36 in response to a question from the Court during the Solicitor General's argument:

> QUESTION: . . . Why is it insignificant that you - - you change a district that was previously lily-white into a district that has, let's say, 30 percent black voters whose wishes and whose desires have to be taken into account by whoever is elected from that district, whether he's white or black? Why is that an insignificant benefit to - - to the black voters in that district so they won't get some - - some redneck discriminatory representative, but rather somebody who will take

to the legal and academic authorities later cited in its opinion in support of influence districts.13/

Although the *Ashcroft* decision is sometimes justified by the argument that the previous reading of Section 5 had locked jurisdictions into maintaining "packed" districts, I strongly disagree. In the *Ashcroft* case itself, the 1997 benchmark Senate plan contained 12 districts with a 2000 Black VAP of 50 percent or more, while the proposed 2001 senate plan reduced the black VAP percentage in 11 of those districts by amounts ranging from 3.4 to 26.3 percentage points. Nevertheless, DOJ contended that the reductions in only three of those 11 districts were retrogressive.14/ Indeed, DOJ's post-trial brief in the District Court explicitly said:

> At the same time, the United States does not regard Section 5 as a straightjacket that mechanistically requires existing minority population percentages -- no matter how high they are -- to be maintained in perpetuity. States and their political subdivisions should not be precluded by the Section 5 effect standard from revising their district boundaries, so long as the changes do not result in a "backsliding" of minority voters' effective voting strength."

> into account their needs, even if he is not a black man?
>
> MR. STEWART: As - - as an original matter, I think an argument could be made that black voters throughout the State of Georgia would be better off if every district were 27 percent black on the theory that even though they couldn't elect any candidates of choice, they could influence all legislators. But although an argument could be made along those lines, the Court has consistently, in its vote dilution cases, framed the inquiry in terms of the ability to elect - - to elect candidates of choice.

There is some additional discussion during the Intervenors' argument of increasing black voting strength by electing more Democrats.

13/ The Court in *Ashcroft* cited several academic works as support for the value of influence districts. Because this literature primarily concerned statewide partisan redistricting, especially Congressional redistricting, I believe that it provides little basis for an across-the-board application to local redistricting, where the numbers of districts may be much smaller and party identity may play a very different role. Section 5, of course, is vitally important to all manner of voting changes at the local level, as much if not more than it is to statewide redistricting.

14/ The reductions in Districts 2, 12 and 26 were -10.3, -4.8 and -11.7 percentage points, respectively, leaving each of those three districts with a black VAP percentage between 50.3 and 50.8 percent (and a black voter registration below 49 percent). The reductions in the other eight majority-black districts were -26.3, -16.3, -15.3, -12, -11.8, -11.2, -6.5 and -3.4 percentage points.

United States' Post-Trial Brief at 80. Thus, whatever the Court believed to have compelled *Ashcroft,* it was not freeing minority voters from an inflexible reading of Section 5 that consigned them to "packed" districts in which their votes were wasted.

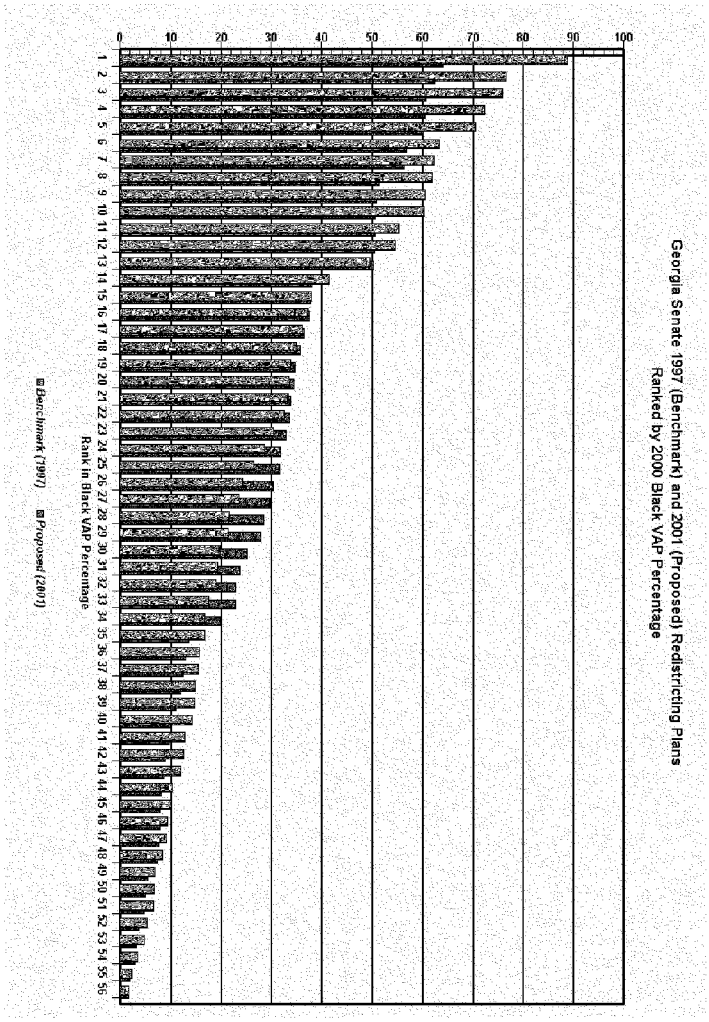
Finally, in my view the *Ashcroft* decision makes its greatest departure from the Supreme Court's other voting rights jurisprudence by introducing explicit partisan calculations into the Section 5 review process. Creating influence and coalition districts with partisan allies may in fact be the best way to maximize minority voting strength in particular cases, and I think that minority citizens and legislators need to be allowed considerable latitude to do so.

But to embody partisan calculations and tradeoffs into the Voting Rights Act itself has not been well thought out and provides a means and motive not only to politicize enforcement of Section 5, but also to undermine confidence that the Act will be enforced in a way that transcends party politics. Can the party that occupies the White House ever be seen as fairly deciding which party is best for minority voters? Can it reasonably be expected to do so? I am deeply concerned that by blurring the line between partisan advantage and protecting minority voters the fundamental justification for the Voting Rights Act will be lost.15/

I thank the Chairman and the Subcommittee once again for opportunity to submit this statement, and I would be happy to try to answer any questions you may have.

15/ The following troubling exchange occurs at Page 26, Lines 17-25, of the Court's transcript of the oral argument:

> MR. WALBERT: It's a de facto extension as a practical matter. There is no real likelihood that section 5 will not be extended as a practical matter. That's been true in '70, '75, '82. Whether it will be for 25 years, 20 or 50 or become permanent this time, I don't know.
>
> QUESTION: Maybe if we make it bad enough, they'll think about repealing it.
>
> (Laughter.)


Georgia Senate 1997 (Benchmark) and 2001 (Proposed) Redistricting Plans
Ranked by 2000 Black VAP Percentage
0
10
20
30
40
50
60
70
80
90
100
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56
Rank in Black VAP Percentage
Benchmark (1997)
Proposed (2001)

Georgia Senate 1997 (Benchmark) and 2001 (Proposed) Redistricting Plans
Ranked by 2000 Black VAP Percentage

Rank	1997 Plan District	Black VAP%	2001 Plan District	Black VAP%
1	43	88.91	10	64.14
2	38	76.61	43	62.63
3	35	76.02	35	60.69
4	55	72.4	55	60.64
5	10	70.66	38	60.29
6	22	63.51	36	56.94
7	26	62.45	39	56.54
8	15	62.05	22	51.51
9	2	60.58	15	50.87
10	36	60.36	26	50.8
11	12	55.43	12	50.66
12	39	54.73	34	50.54
13	44	49.62	2	50.31
14	14	41.62	23	38.15
15	11	38.08	25	37.8
16	3	37.34	41	37.65
17	25	36.12	29	36.5
18	20	35.12	14	35.82
19	34	33.96	44	34.71
20	33	33.59	8	34.65
21	23	33.42	16	33.9
22	29	32.63	3	33.73
23	8	30.44	20	33.06
24	13	28.7	33	31.98
25	4	26.61	11	31.68
26	19	24.38	4	30.51
27	18	23.62	40	29.67

28	7	21.68	6	28.45
29	27	21.47	13	27.91
30	16	19.97	5	25.24
31	46	19.4	7	23.76
32	24	19.09	47	23
33	32	17.59	19	22.88
34	45	16.83	46	20.05
35	41	16.79	24	13.56
36	1	15.83	31	13.06
37	5	15.68	42	12.64
38	30	15.07	18	12.08
39	17	14.9	52	11.11
40	6	14.33	28	10.08
41	28	12.85	30	9.7
42	9	12.8	9	8.88
43	47	11.99	1	8.79
44	52	10.33	37	8.33
45	42	10.3	17	7.97
46	40	9.57	56	7.84
47	37	9.39	50	7.68
48	31	8.49	48	7.47
49	48	7.02	32	5.6
50	56	6.86	21	5.07
51	21	6.57	45	4.79
52	49	5.44	27	3.78
53	53	4.78	54	3.24
54	50	3.52	49	2.99
55	54	2.34	53	2.07
56	51	1.75	51	1.77

123 S.Ct. 2498 Page 1
539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428, 71 USLW 4585, 03 Cal. Daily Op. Serv. 5549, 2003 Daily Journal D.A.R. 7001, 16 Fla. L. Weekly Fed. S 448
(Cite as: 539 U.S. 461, 123 S.Ct. 2498)

Briefs and Other Related Documents

Supreme Court of the United States
GEORGIA, Appellant,
v.
John ASHCROFT, Attorney General, et al.
No. 02-182.

Argued April 29, 2003.
Decided June 26, 2003.

State of Georgia sought preclearance of its state legislative redistricting plan under Voting Rights Act. A three-judge panel of the United States District Court for the District of Columbia, 195 F.Supp.2d 25, Sullivan, J., found failure to demonstrate lack of retrogressive effect on African-American voters and refused to preclear. State appealed. The United States Supreme Court, Justice O'Connor, held that: (1) District Court did not abuse its discretion by permitting private parties to intervene; (2) compliance with section of Act prohibiting vote dilution is not sufficient by itself to warrant preclearance; (3) assessment of racially retrogressive effect under Act depends not solely on comparative ability of minority group to elect candidate of its choice, but on all relevant circumstances including extent of group's opportunity to participate in political process; (4) minority group's opportunity to participate in turn depends on several factors including whether plan adds or subtracts "influence" or coalitional districts; and (5) District Court engaged in too narrow an inquiry by focusing on three particular proposed districts and by concentrating on factor of comparative ability to elect candidates to exclusion of other factors.

Vacated and remanded.

Justices Kennedy and Thomas filed concurring opinions.

Justice Souter filed dissenting opinion joined by Justices Stevens, Ginsburg and Breyer.

West Headnotes

[1] **Elections** 12(8)
144k12(8) Most Cited Cases
State bears burden of proof in action seeking judicial preclearance of legislative redistricting plan under Voting Rights Act. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

[2] **Federal Civil Procedure** 331
170Ak331 Most Cited Cases
Federal district court did not abuse its discretion by permitting private parties to intervene in state's action seeking judicial preclearance of legislative redistricting plan under Voting Rights Act; Act did not preclude intervention, and district court found that intervenors had identified interests not adequately represented by existing parties. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c; Fed.Rules Civ.Proc.Rule 24, 28 U.S.C.A.

[3] **Federal Civil Procedure** 331
170Ak331 Most Cited Cases
Private parties may intervene in Voting Rights Act judicial preclearance actions assuming they meet requirements of civil procedure rule governing intervention. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c; Fed.Rules Civ.Proc.Rule 24, 28 U.S.C.A.

[4] **Elections** 12(8)
144k12(8) Most Cited Cases
Compliance with Voting Rights Act section prohibiting vote dilution is not sufficient by itself to warrant preclearance of redistricting plan under separate section of Act prohibiting racial retrogression. Voting Rights Act of 1965, § 2(a), 5, 42 U.S.C.A. § § 1973(a), 1973c.

[5] **States** 27(4.1)
360k27(4.1) Most Cited Cases
In examining whether legislative redistricting plan is racially retrogressive in violation of Voting Rights Act, inquiry must encompass entire statewide plan as a whole; diminution of minority group's effective exercise of electoral franchise in one or two districts is sufficient to show violation of Act only if state cannot show that gains in plan as a whole offset loss in particular district. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

[6] **States 27(4.1)**
360k27(4.1) Most Cited Cases
Assessment of whether legislative redistricting plan results in retrogression of minority group's effective exercise of electoral franchise in violation of Voting Rights Act depends not solely on comparative ability of minority group to elect candidate of its choice, but on all relevant circumstances, including extent of group's opportunity to participate in political process and feasibility of creating nonretrogressive plan. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

[7] **States 27(6)**
360k27(6) Most Cited Cases
Under Voting Rights Act, state in attempting to maximize minority electoral success at time of legislative redistricting may choose either to create certain number of "safe" districts in which it is highly likely that minority voters will be able to elect candidate of their choice, or to create greater number of districts in which it is likely but not as likely that minority voters will be able to elect candidate of their choice. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

[8] **States 27(6)**
360k27(6) Most Cited Cases
Factors in assessing minority group's opportunity to participate in political process, as part of determination whether legislative redistricting plan results in racial retrogression in violation of Voting Rights Act, include whether plan adds or subtracts "influence" or coalitional districts, comparative position of legislative leadership, influence and power for representatives of benchmark majority-minority districts, and whether representatives elected from districts created and protected by Act support plan. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

[9] **States 27(4.1)**
360k27(4.1) Most Cited Cases
Federal district court engaged in too narrow an inquiry in determining whether state's legislative redistricting plan resulted in retrogression of African-Americans' electoral franchise in violation of Voting Rights Act; court focused on three proposed districts that would lose significant portion of African-American voters while ignoring significant increases in black voting-age population in other districts, and failed to explore in depth factors other than comparative ability of black voters in majority-minority districts to elect candidate of their choice, including support of legislators representing benchmark majority-minority districts and maintenance of legislative influence of those representatives. Voting Rights Act of 1965, § 5, 42 U.S.C.A. § 1973c.

****2500** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Georgia's 1997 State Senate districting plan is the benchmark plan for this litigation. That plan drew 56 districts, 11 of them with a total black population of over 50%, and 10 of them with a black voting age population of over 50%. The 2000 census revealed that these numbers had increased so that 13 districts had a black population of at least 50%, with the black voting age population exceeding 50% in 12 of those districts. After the 2000 census, the Georgia General Assembly began redistricting the Senate once again. It is uncontested that a substantial majority of Georgia's black voters vote Democratic, and that all elected black representatives in the General Assembly are Democrats. The Senator who chaired the subcommittee that developed the new plan testified he believed that as a district's black voting age population increased beyond what was necessary to elect a candidate, it would push the Senate more toward the Republicans, and correspondingly diminish the power of African-Americans overall. Thus, part of the Democrats' strategy was not only to maintain the number of majority-minority districts and increase the number of Democratic Senate seats, but also to increase the number of so-called "influence" districts, where black voters would be able to exert a significant--if not decisive--force in the election process. The new plan therefore "unpacked" the most heavily concentrated majority-minority districts in the benchmark plan, and created a number of new influence districts, drawing 13 districts with a majority-black voting age population, 13 additional districts with a black voting age population of between 30%-50%, and 4 other districts with a black voting age population of between ****2501** 25%-30%. When the Senate adopted the new plan, 10 of the 11 black Senators voted for it. The Georgia House of Representatives passed the plan with 33 of the 34 black Representatives voting for it. No Republican in either body voted for the plan, making the votes of

the black legislators necessary for passage. The Governor signed the Senate plan into law in 2001.

Because Georgia is a covered jurisdiction under § 5 of the Voting Rights Act of 1965, it must submit any new voting "standard, practice, or procedure" for preclearance by either the United States Attorney General or the District Court for the District of Columbia in order to ensure that the change "does not have the purpose [or] effect of denying ***462** or abridging the right to vote on account of race or color," 42 U.S.C. § 1973c. No change should be precleared if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 47 L.Ed.2d 629. In order to preclear its 2001 plan, Georgia filed suit in the District Court seeking a declaratory judgment that the plan does not violate § 5. To satisfy its burden of proving nonretrogression, Georgia submitted detailed evidence documenting, among other things, the total population, total black population, black voting age population, percentage of black registered voters, and the overall percentage of Democratic votes in each district; evidence about how each of these statistics compared to the benchmark districts; testimony from numerous participants in the plan's enactment that it was designed to increase black voting strength throughout the State as well as to help ensure a continued Democratic majority in the Senate; expert testimony that black and nonblack voters have equal chances of electing their preferred candidate when the black voting age population of a district is at 44.3%; and, in response to the United States' objections, more detailed statistical evidence with respect to three proposed Senate districts that the United States found objectionable--Districts 2, 12, and 26--and two districts challenged by the intervenors--Districts 15 and 22. The United States argued that the plan should not be precleared because the changes to the boundaries of Districts 2, 12, and 26 unlawfully reduced black voters' ability to elect candidates of their choice. The United States' evidence focused only on those three districts and was not designed to permit the court to assess the plan's overall impact. The intervenors, four African-Americans, argued that retrogression had occurred in Districts 15 and 22, and presented proposed alternative plans and an expert report critiquing the State's expert report. A three-judge District Court panel held that the plan violated § 5, and was therefore not entitled to preclearance.

Held:

1. The District Court did not err in allowing the private litigants to intervene. That court found that the intervenors' analysis of the plan identifies interests not adequately represented by the existing parties. Private parties may intervene in § 5 actions assuming they meet the requirements of Federal Rule of Civil Procedure 24, *NAACP v. New York*, 413 U.S. 345, 365, 93 S.Ct. 2591, 37 L.Ed.2d 648, and the District Court did not abuse its discretion in allowing intervention in this case, see *id.*, at 367, 93 S.Ct. 2591, *Morris v. Gressette*, 432 U.S. 491, 504-505, 97 S.Ct. 2411, 53 L.Ed.2d 506, in which the Court held that the decision to object belongs only to the Attorney General, is distinguished because it concerned the administrative, not the judicial, preclearance ***463** process. *Morris* itself recognized the difference between the two. See *id.*, at 503-507, 97 S.Ct. 2411. Pp. 2509-2510.

2. The District Court failed to consider all the relevant factors when it examined whether Georgia's Senate plan resulted in a retrogression of black voters' effective exercise of the electoral franchise. Pp. 2510-2517.

****2502** (a) Georgia's argument that a plan should be precleared under § 5 if it would satisfy § 2 of the Voting Rights Act, 42 U.S.C. § 1973, is rejected. A § 2 vote dilution violation is not an independent reason to deny § 5 preclearance, because that would inevitably make § 5 compliance contingent on § 2 compliance and thereby replace § 5 retrogression standards with those for § 2. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 477, 117 S.Ct. 1491, 137 L.Ed.2d 730. Instead of showing that its plan is nondilutive under § 2, Georgia must prove that it is nonretrogressive under § 5. Pp. 2510-2511.

(b) To determine the meaning of "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," *Beer*, *supra*, at 141, 96 S.Ct. 1357, the statewide plan must first be examined as a whole: First, the diminution of a minority group's effective exercise of the electoral franchise violates § 5 only if the State cannot show that the gains in the plan as a whole offset the loss in a particular district. Second, all of the relevant circumstances must be examined, such as minority voters' ability to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. See, *e.g.*, *Johnson v. De Grandy*, 512 U.S. 997, 1011-1012,

1020-1021, 114 S.Ct. 2647, 129 L.Ed.2d 775. In assessing the totality of the circumstances, a minority group's comparative ability to elect a candidate of its choice is an important factor, but it cannot be dispositive or exclusive. See, *e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 47-50, 106 S.Ct. 2752. To maximize such a group's electoral success, a State may choose to create either 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, see, *e.g.*, *id.*, at 48-49, 106 S.Ct. 2752, or 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 their candidates, see, *e.g.*, *id.*, at 88-89, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). Section 5 does not dictate that a State must pick one of these redistricting methods over the other. *Id.*, at 89, 106 S.Ct. 2752. In considering the other highly relevant factor in a retrogression inquiry--the extent to which a new plan changes the minority group's opportunity to participate in the political process--a court must examine whether the plan adds or subtracts "influence districts" where minority voters may not be able to elect a candidate of choice but can play a substantial, if not ***464** decisive, role in the electoral process, cf., *e.g.*, *Johnson, supra*, at 1007, 114 S.Ct. 2647. In assessing these influence districts' comparative weight, it is important to consider "the likelihood that candidates elected without decisive minority support would be willing to take the minority's interests into account." *Thornburg*, 478 U.S., at 100, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). Various studies suggest that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts. Section 5 allows States 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. See, *e.g.*, *id.*, at 87-89, 99, 106 S.Ct. 2752. Another method of assessing the group's opportunity to participate in the political process is to examine the comparative position of black representatives' legislative leadership, influence, and power. See *Johnson, supra*, at 1020, 114 S.Ct. 2647. 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. And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new plan. Pp. 2511-2514.

****2503** (c) The District Court failed to consider all the relevant factors. First, although acknowledging the importance of assessing the statewide plan as a whole, the court focused too narrowly on proposed Senate Districts 2, 12, and 26, without examining the increases in the black voting age population that occurred in many of the other districts. Second, the court did not consider any factor beyond black voters' comparative ability to elect a candidate of their choice. It improperly rejected other evidence that the legislators representing the benchmark majority-minority districts support the plan; that the plan maintains those representatives' legislative influence; and that Georgia affirmatively decided that the best way to maximize black voting strength was to adopt a plan that "unpacked" the high concentration of minority voters in the majority-minority districts. In the face of Georgia's evidence of nonretrogression, the United States' only evidence was that it would be more difficult for minority voters to elect their candidate of choice in Districts 2, 12, and 26. Given the evidence submitted in this case, Georgia likely met its burden of showing nonretrogression. Section 5 gives States the flexibility to implement the type of plan that Georgia has submitted for preclearance--a plan that increases the number of districts with a majority-black voting age population, even if it means that minority voters in some of those districts will face a somewhat reduced opportunity to elect a candidate of their choice. Cf. *Thornburg, supra*, at 89, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). While courts and the ***465** Justice Department should be vigilant in ensuring that States neither reduce minority voters' effective exercise of the electoral franchise nor discriminate against them, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters. Pp. 2514-2517.

(d) The District Court is in a better position to reweigh all the facts in the record in the first instance in light of this Court's explication of retrogression. P. 2517.

195 F.Supp.2d 25, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., *post*, p. 2517, and THOMAS, J., *post*, p. 2517, filed concurring opinions. SOUTER, J., filed a dissenting opinion, in which STEVENS,

GINSBURG, and BREYER, JJ., joined, *post,* p. 2518.

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Justice O'CONNOR delivered the opinion of the Court.

In this case, we decide whether Georgia's State Senate redistricting plan should have been precleared under § 5 of the Voting Rights Act of 1965, 79 Stat. 439, as renumbered and amended, 42 U.S.C. § 1973c. Section 5 requires that before a covered jurisdiction's new voting "standard, practice, ***466** or procedure" goes into effect, it must be precleared by either the Attorney General of the United States or a federal court to ensure that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Whether a voting procedure change should be precleared depends on whether the change "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976). We therefore must decide whether Georgia's State Senate redistricting plan is retrogressive as compared to its previous, benchmark districting plan.

I

A

Over the past decade, the propriety of Georgia's state and congressional districts has been the subject of repeated litigation. In 1991, the Georgia General Assembly began the process of redistricting after the 1990 census. Because Georgia is a covered jurisdiction under § 5 of the Voting Rights Act, see *Miller v. Johnson,* 515 U.S. 900, 905, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995), Georgia submitted its revised State Senate plan to the United States Department of Justice for preclearance. The plan as enacted into law increased the number of majority-minority districts from the previous Senate plan. The Department of Justice nevertheless refused preclearance because of Georgia's failure to maximize the number of majority-minority districts. See *Johnson v. Miller,* 929 F.Supp. 1529, 1537, and n. 23 (S.D.Ga.1996). After Georgia made changes to the Senate plan in an attempt to satisfy the United States' objections, the State again submitted it to the Department of Justice for preclearance. Again, the Department of Justice refused preclearance because the plan did not contain a sufficient number of majority-minority districts. See *id.,* at 1537, 1539. Finally, the United States precleared ***467** Georgia's third redistricting plan, approving it in the spring of 1992. See *id.,* at 1537.

Georgia's 1992 Senate plan was not challenged in court. See *id.,* at 1533-1534. Its congressional districting plan, however, was challenged as unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. See *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). In 1995, we held in *Miller v. Johnson* that Georgia's congressional districting plan was unconstitutional because it engaged in "the very racial stereotyping the Fourteenth Amendment forbids" by making race the "predominant, overriding factor explaining" Georgia's congressional districting decisions. 515 U.S., at 928, 920, 115 S.Ct. 2475. And even though it was "safe to say that the congressional plan enacted in the end was required in order to obtain preclearance," this justification did not permit Georgia to engage in racial gerrymandering. See *id.,* at 923, 115 S.Ct. 2475. Georgia's State Senate districts served as "building blocks" to create the congressional districting plan found unconstitutional in *Miller v. Johnson, Johnson v. Miller,* 929 F.Supp.,

at 1533, n. 8 (internal quotation marks omitted); see also *id.*, at 1536.

Georgia recognized that after *Miller v. Johnson*, its legislative districts were unconstitutional under the Equal Protection Clause. See 929 F.Supp., at 1533, 1540. Accordingly, Georgia attempted to cure the perceived constitutional problems with ****2505** the 1992 State Senate districting plan by passing another plan in 1995. The Department of Justice refused to preclear the 1995 plan, maintaining that it retrogressed from the 1992 plan and that *Miller v. Johnson* concerned only Georgia's congressional districts, not Georgia's State Senate districts. See 929 F.Supp., at 1540-1541.

Private litigants subsequently brought an action challenging the constitutionality of the 1995 Senate plan. See *id.*, at 1533. The three-judge panel of the District Court reviewing the 1995 Senate plan found that "[i]t is clear that a black maximization policy had become an integral part of the section ***468** 5 preclearance process ... when the Georgia redistricting plans were under review. The net effect of the DOJ's preclearance objection [s] ... was to require the State of Georgia to increase the number of majority black districts in its redistricting plans, which were already ameliorative plans, beyond any reasonable concept of non-retrogression." *Id.*, at 1539- 1540. The court noted that in *Miller v. Johnson*, we specifically disapproved of the Department of Justice's policy that the maximization of black districts was a part of the § 5 retrogression analysis. See 929 F.Supp., at 1539. Indeed, in *Miller*, we found that the Department of Justice's objections to Georgia's redistricting plans were "driven by its policy of maximizing majority-black districts." 515 U.S., at 924, 115 S.Ct. 2475. And "[i]n utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld." *Id.*, at 925, 115 S.Ct. 2475.

The District Court stated that the maximization of majority-minority districts in Georgia "artificially push[ed] the percentage of black voters within some majority black districts as high as possible." 929 F.Supp., at 1536. The plan that eventually received the Department of Justice's preclearance in 1992 "represented the General Assembly's surrender to the black maximization policy of the DOJ." *Id.*, at 1540. The court then found that the 1995 plan was an unconstitutional racial gerrymander. See *id.*, at 1543.

Under court direction, Georgia and the Department of Justice reached a mediated agreement on the constitutionality of the 1995 Senate plan. Georgia passed a new plan in 1997, and the Department of Justice quickly precleared it. The redrawn map resembled to a large degree the 1992 plan that eventually received preclearance from the Department of Justice, with some changes to accommodate the decision of this Court in *Miller v. Johnson*, and of the District Court in *Johnson v. Miller*.

***469** All parties here concede that the 1997 plan is the benchmark plan for this litigation because it was in effect at the time of the 2001 redistricting effort. The 1997 plan drew 56 districts, 11 of them with a total black population of over 50%, and 10 of them with a black voting age population of over 50%. See Record, Doc. No. 148, Pl. Exh. 1C (hereinafter Pl. Exh.). The 2000 census revealed that these numbers had increased so that 13 districts had a black population of at least 50%, with the black voting age population exceeding 50% in 12 of those districts. See 195 F.Supp.2d 25, 39 (D.D.C.2002).

After the 2000 census, the Georgia General Assembly began the process of redistricting the Senate once again. No party contests that a substantial majority of black voters in Georgia vote Democratic, or that all elected black representatives in the General Assembly are Democrats. The goal of the Democratic leadership--black and white--was to maintain the number of majority-minority districts and also increase the number of Democratic Senate seats. See *id.*, at 41-42. For example, the Director of Georgia's Legislative Redistricting Office, Linda Meggers, testified that the Senate Black Caucus " 'wanted to maintain' " the existing majority-****2506** minority districts and at the same time " 'not waste' " votes. *Id.*, at 41.

The Vice Chairman of the Senate Reapportionment Committee, Senator Robert Brown, also testified about the goals of the redistricting effort. Senator Brown, who is black, chaired the subcommittee that developed the Senate plan at issue here. See *id.*, at 42. Senator Brown believed when he designed the Senate plan that as the black voting age population in a district increased beyond what was necessary, it would "pus[h] the whole thing more towards [the] Republican[s]." Pl. Exh. 20, at 24. And "correspondingly," Senator Brown stated, "the more you diminish the power of African-Americans

overall." *Ibid.* Senator Charles Walker was the majority leader of the Senate. Senator Walker ***470** testified that it was important to attempt to maintain a Democratic majority in the Senate because "we [African-Americans] have a better chance to participate in the political process under the Democratic majority than we would have under a Republican majority." Pl. Exh. 24, at 19. At least 7 of the 11 black members of the Senate could chair committees. See 195 F.Supp.2d, at 41.

The plan as designed by Senator Brown's committee kept true to the dual goals of maintaining at least as many majority-minority districts while also attempting to increase Democratic strength in the Senate. Part of the Democrats' strategy was not only to maintain the number of majority-minority districts, but to increase the number of so-called "influence" districts, where black voters would be able to exert a significant--if not decisive--force in the election process. As the majority leader testified, "in the past, you know, what we would end up doing was packing. You put all blacks in one district and all whites in one district, so what you end up with is [a] black Democratic district and [a] white Republican district. That's not a good strategy. That does not bring the people together, it divides the population. But if you put people together on voting precincts it brings people together." Pl. Exh. 24, at 19.

The plan as designed by the Senate "unpacked" the most heavily concentrated majority-minority districts in the benchmark plan, and created a number of new influence districts. The new plan drew 13 districts with a majority-black voting age population, 13 additional districts with a black voting age population of between 30% and 50%, and 4 other districts with a black voting age population of between 25% and 30%. See Pl. Exh. 2C. According to the 2000 census, as compared to the benchmark plan, the new plan reduced by five the number of districts with a black voting age population in excess of 60%. Compare Pl. Exh. 1D with Pl. Exh. 2C. Yet it increased the number of majority-black voting age population districts by one, and it increased the number ***471** of districts with a black voting age population of between 25% and 50% by four. As compared to the benchmark plan enacted in 1997, the difference is even larger. Under the old census figures, Georgia had 10 Senate districts with a majority-black voting age population, and 8 Senate districts with a black voting age population of between 30% and 50%. See Pl. Exh. 1C. The new plan thus increased the number of districts with a majority black voting age population by three, and increased the number of districts with a black voting age population of between 30% and 50% by another five. Compare Pl. Exh. 1C with Pl. Exh. 2C.

The Senate adopted its new districting plan on August 10, 2001, by a vote of 29 to 26. Ten of the eleven black Senators voted for the plan. 195 F.Supp.2d, at 55. The Georgia House of Representatives passed the Senate plan by a vote of 101 to 71. Thirty-three of the thirty-four black Representatives voted for the plan. *Ibid.* No Republican in either the House or the Senate voted for the plan, making the votes of the black legislators necessary for passage. See *id.*, at 41. The Governor ****2507** signed the Senate plan into law on August 24, 2001, and Georgia subsequently sought to obtain preclearance.

B

Pursuant to § 5 of the Voting Rights Act, a covered jurisdiction like Georgia has the option of either seeking administrative preclearance through the Attorney General of the United States or seeking judicial preclearance by instituting an action in the United States District Court for the District of Columbia for a declaratory judgment that the voting change comports with § 5. 42 U.S.C. § 1973c; *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973). Georgia chose the latter method, filing suit seeking a declaratory judgment that the State Senate plan does not violate § 5.

[1] Georgia, which bears the burden of proof in this action, see *Pleasant Grove v. United States*, 479 U.S. 462, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987), attempted to prove that its Senate plan was not retrogressive ***472** either in intent or in effect. It submitted detailed evidence documenting in each district the total population, the total black population, the black voting age population, the percentage of black registered voters, and the overall percentage of Democratic votes (*i.e.*, the overall likelihood that voters in a particular district will vote Democratic), among other things. See 195 F.Supp.2d, at 36; see also Pl. Exhs. 2C, 2D. The State also submitted evidence about how each of these statistics compared to the benchmark districts. See 195 F.Supp.2d, at 36; see also Pl. Exhs. 1C, 1D, 1E (revised).

Georgia also submitted testimony from numerous people who had participated in enacting the Senate plan into law, and from United States Congressman

John Lewis, who represents the Atlanta area. These witnesses testified that the new Senate plan was designed to increase black voting strength throughout the State as well as to help ensure a continued Democratic majority in the Senate. The State also submitted expert testimony that African-American and non-African-American voters have equal chances of electing their preferred candidate when the black voting age population of a district is at 44.3%. Finally, in response to objections raised by the United States, Georgia submitted more detailed statistical evidence with respect to three proposed Senate districts that the United States found objectionable--Districts 2, 12, and 26--and two districts that the intervenors challenged--Districts 15 and 22.

The United States, through the Attorney General, argued in District Court that Georgia's 2001 Senate redistricting plan should not be precleared. It argued that the plan's changes to the boundaries of Districts 2, 12, and 26 unlawfully reduced the ability of black voters to elect candidates of their choice. See Brief for Federal Appellees 8; 195 F.Supp.2d, at 72. The United States noted that in District 2, the black voting age population dropped from 60.58% to 50.31%; in District 12, the black voting age population dropped from 55.43% to 50.66%; and in District 26, the black ***473** voting age population dropped from 62.45% to 50.80%. [FN1] Moreover, in all ****2508** three of these districts, the percentage of black registered voters dropped to just under 50%. The United States also submitted expert evidence that voting is racially polarized in Senate Districts 2, 12, and 26. See *id.*, at 69-71. The United States acknowledged that some limited percentage of whites would vote for a black candidate, but maintained that the percentage was not sufficient for black voters to elect their candidate of choice. See *id.*, at 70-71. The United States also offered testimony from various witnesses, including lay witnesses living in the three districts, who asserted that the new contours of Districts 2, 12, and 26 would reduce the opportunity for blacks to elect a candidate of their choice in those districts: Senator Regina Thomas of District 2, the only black Senator who voted against the plan; Senator Eric Johnson, the Republican leader of the Senate; and some black legislators who voted ***474** for the plan but questioned how the plan would affect black voters. See Vols. 25-27 Record, Doc. No. 177, United States Exhs. 707-736 (Depositions). As the District Court stated, "the United States' evidence was extremely limited in scope--focusing only on three contested districts in the State Senate plan. That evidence was not designed to permit the court to assess the overall impact of [the Senate plan]." 195 F.Supp.2d, at 37.

> FN1. Georgia and the United States have submitted slightly different figures regarding the black voting age population of each district. The differing figures depend upon whether the total number of blacks includes those people who self-identify as both black and a member of another minority group, such as Hispanic. Georgia counts this group of people, while the United States does not do so. Like the District Court, we consider all the record information, "including total black population, black registration numbers and both [black voting age population] numbers." 195 F.Supp.2d 25, 79 (D.D.C.2002). We focus in particular on Georgia's black voting age population numbers in this case because all parties rely on them to some extent and because Georgia used its own black voting age population numbers when it enacted the Senate plan. Moreover, the United States does not count all persons who identify themselves as black. It counts those who say they are black and those who say that they are both black and white, but it does not count those who say they are both black and a member of another minority group. Using the United States' numbers may have more relevance if the case involves a comparison of different minority groups. Cf. *Johnson v. De Grandy*, 512 U.S. 997, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Bush v. Vera*, 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996). Here, however, the case involves an examination of only one minority group's effective exercise of the electoral franchise. In such circumstances, we believe it is proper to look at *all* individuals who identify themselves as black.

Pursuant to Federal Rule of Civil Procedure 24, the District Court also permitted four African-American citizens of Georgia to intervene. The intervenors identified two other districts--Districts 15 and 22--where they alleged retrogression had occurred. The intervenors "present[ed] little evidence other than proposed alternative plans and an expert report critiquing the State's expert report." 195 F.Supp.2d, at 37.

A three-judge panel of the District Court held that Georgia's State Senate apportionment violated § 5,

and was therefore not entitled to preclearance. See *id.*, at 97. Judge Sullivan, joined by Judge Edwards, concluded that Georgia had "not demonstrated by a preponderance of the evidence that the State Senate redistricting plan would not have a retrogressive effect on African American voters" effective exercise of the electoral franchise. *Ibid.* The court found that Senate Districts 2, 12, and 26 were retrogressive because in each district, a lesser opportunity existed for the black candidate of choice to win election under the new plan than under the benchmark plan. See *id.*, at 93-94. The court found that the reductions in black voting age population in Districts 2, 12, and 26 would "diminish African American voting strength in these districts," and that Georgia had "failed to present any ... evidence" that the retrogression in those districts "will be offset by gains in other districts." *Id.*, at 88.

***475** Judge Edwards, joined by Judge Sullivan, concurred. Judge Edwards emphasized that § § 5 and 2 are "procedurally and substantively distinct provisions." *Id.*, at 97. He therefore rejected Georgia's argument that a plan preserving an equal opportunity for minorities to elect candidates of their choice satisfies § 5. Judge Edwards also rejected the testimony of the black Georgia politicians who supported the Senate plan. In his view, the testimony did not address whether racial polarization was occurring in Senate Districts 2, 12, and 26. See *id.*, at 101-102.

Judge Oberdorfer dissented. He would have given "greater credence to the political expertise and motivation of Georgia's African-American political leaders and ****2509** reasonable inferences drawn from their testimony and the voting data and statistics." *Id.*, at 102. He noted that this Court has not answered "whether a redistricting plan that preserves or increases the number of districts statewide in which minorities have a fair or reasonable opportunity to elect candidates of choice is entitled to preclearance, or whether every district must remain at or improve on the benchmark probability of victory, even if doing so maintains a minority super-majority far in excess of the level needed for effective exercise of [the] electoral franchise." *Id.*, at 117.

After the District Court refused to preclear the plan, Georgia enacted another plan, largely similar to the one at issue here, except that it added black voters to Districts 2, 12, and 26. The District Court precleared this plan. See 204 F.Supp.2d 4 (D.D.C.2002). No party has contested the propriety of the District Court's preclearance of the Senate plan as amended. Georgia asserts that it will use the plan as originally enacted if it receives preclearance.

We noted probable jurisdiction to consider whether the District Court should have precleared the plan as originally enacted by Georgia in 2001, 537 U.S. 1151, 123 S.Ct. 964, 154 L.Ed.2d 861 (2003), and now vacate the judgment below.

***476** II

[2] Before addressing the merits of Georgia's preclearance claim, we address the State's argument that the District Court was incorrect in allowing the private litigants to intervene in this lawsuit. Georgia maintains that private parties should not be allowed to intervene in § 5 actions because States should not be subjected to the political stratagems of intervenors. While the United States disagrees with Georgia on the propriety of intervention here, the United States argues that this question is moot because the participation of the intervenors did not affect the District Court's ruling on the merits and the intervenors did not appeal the court's ruling.

We do not think Georgia's argument is moot. The intervenors did not have to appeal because they were prevailing parties below. Moreover, the District Court addressed the evidence that the intervenors submitted, which is now in front of this Court. The issue whether intervenors are proper parties still has relevance in this Court because they argue here that the District Court correctly found that the Senate plan was retrogressive.

The District Court properly found that Federal Rule of Civil Procedure 24 governs intervention in this case. Section 5 permits a State to bring "an action in the United States District Court for the District of Columbia for a declaratory judgment." 42 U.S.C. § 1973c. Section 5 does not limit in any way the application of the Federal Rules of Civil Procedure to this type of lawsuit, and the statute by its terms does not bar private parties from intervening. In *NAACP v. New York*, 413 U.S. 345, 365, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973), we held that in an action under § 5, "[i]ntervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24."

To support its argument, Georgia relies on *Morris v. Gressette*, 432 U.S. 491, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977). In *Morris*, we held that in an *administrative* preclearance action, the decision to

object belongs only to the Attorney General and is not judicially ***477** reviewable. See *id.*, at 504-505, 97 S.Ct. 2411. But *Morris* concerned the administrative preclearance process, not the judicial preclearance process. *Morris* itself recognized the difference between administrative preclearance and judicial preclearance. See *id.*, at 503-507, 97 S.Ct. 2411.

[3] Here, the District Court granted the motion to intervene because it found that the intervenors' "analysis of the ... Senate redistricting pla[n] identifies interests that are not adequately represented ****2510** by the existing parties." App. to Juris. Statement 218a. Private parties may intervene in § 5 actions assuming they meet the requirements of Rule 24, and the District Court did not abuse its discretion in granting the motion to intervene in this case. See *NAACP v. New York, supra*, at 367, 93 S.Ct. 2591.

III

A

Section 5 of the Voting Rights Act "has a limited substantive goal: " 'to insure 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.' " *Miller*, 515 U.S., at 926, 115 S.Ct. 2475 (quoting *Beer v. United States*, 425 U.S., at 141, 96 S.Ct. 1357)." *Bush v. Vera*, 517 U.S. 952, 982-983, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996). Thus, a plan that merely preserves "current minority voting strength" is entitled to § 5 preclearance. *City of Lockhart v. United States*, 460 U.S. 125, 134, n. 10, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983); *Bush v. Vera, supra*, at 983, 116 S.Ct. 1941. Indeed, a voting change with a discriminatory but nonretrogressive purpose or effect does not violate § 5. See *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 341, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000). And "*no matter how unconstitutional it may be*," a plan that is not retrogressive should be precleared under § 5. *Id.*, at 336, 120 S.Ct. 866. "[P]reclearance under § 5 affirms nothing but the absence of backsliding." *Id.*, at 335, 120 S.Ct. 866.

[4] Georgia argues that a plan should be precleared under § 5 if the plan would satisfy § 2 of the Voting Rights Act of 1965, ***478** 42 U.S.C. § 1973. We have, however, "consistently understood" § 2 to "combat different evils and, accordingly, to impose very different duties upon the States." *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 477, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (*Bossier Parish II*). For example, while § 5 is limited to particular covered jurisdictions, § 2 applies to all States. And the § 2 inquiry differs in significant respects from a § 5 inquiry. In contrast to § 5's retrogression standard, the "essence" of a § 2 vote dilution claim is that "a certain electoral law, practice, or structure ... cause[s] an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986); see also *id.*, at 48-50, 106 S.Ct. 2752 (enunciating a three-part test to establish vote dilution); *id.*, at 85-100, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment); 42 U.S.C. § 1973(b). Unlike an inquiry under § 2, a retrogression inquiry under § 5, "by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan." *Bossier Parish I, supra*, at 478, 117 S.Ct. 1491. While some parts of the § 2 analysis may overlap with the § 5 inquiry, the two sections "differ in structure, purpose, and application." *Holder v. Hall*, 512 U.S. 874, 883, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (plurality opinion).

In *Bossier Parish I*, we specifically held that a violation of § 2 is not an independent reason to deny preclearance under § 5. See 520 U.S., at 477, 117 S.Ct. 1491. The reason for this holding was straightforward: "[R]ecognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent upon compliance with § 2. Doing so would, for all intents and purposes, replace the standards for § 5 with those for § 2." *Ibid.*

Georgia here makes the flip side of the argument that failed in *Bossier Parish I*--compliance with § 2 suffices for preclearance under § 5. Yet the argument fails here for the same reasons the argument failed in *Bossier Parish I*. We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard. Georgia's argument, like the argument ***479** in *Bossier Parish I*, would "shift the focus of § 5 ****2511** from nonretrogression to vote dilution, and [would] change the § 5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan." *Id.*, at 480, 117 S.Ct. 1491. Instead of showing that the Senate plan is nondilutive under § 2, Georgia must prove that its plan is nonretrogressive under § 5.

B

Georgia argues that even if compliance with § 2 does not automatically result in preclearance under §

5, its State Senate plan should be precleared because it does not lead to "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States, supra,* at 141, 96 S.Ct. 1357. See, *e.g.*, Brief for Appellant 32, 36.

[5] While we have never determined the meaning of "effective exercise of the electoral franchise," this case requires us to do so in some detail. First, the United States and the District Court correctly acknowledge that in examining whether the new plan is retrogressive, the inquiry must encompass the entire statewide plan as a whole. See 195 F.Supp.2d, at 73; Tr. of Oral Arg. 28-29. Thus, while the diminution of a minority group's effective exercise of the electoral franchise in one or two districts may be sufficient to show a violation of § 5, it is only sufficient if the covered jurisdiction cannot show that the gains in the plan as a whole offset the loss in a particular district.

[6] Second, any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. See, *e.g., Johnson v. De Grandy,* 512 U.S. 997, 1011- 1012, 1020-1021, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Richmond v. United States,* 422 U.S. 358, 371-372, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975); ***480** *Thornburg v. Gingles, supra,* at 97-100, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). "No single statistic provides courts with a shortcut to determine whether" a voting change retrogresses from the benchmark. *Johnson v. De Grandy, supra,* at 1020-1021, 114 S.Ct. 2647.

In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice. While this factor is an important one in the § 5 retrogression inquiry, it cannot be dispositive or exclusive. The standard in § 5 is simple--whether the new plan "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States,* 425 U.S., at 141, 96 S.Ct. 1357.

[7] The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. 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. See *Thornburg v. Gingles,* 478 U.S., at 48-49, 106 S.Ct. 2752; *id.,* at 87-89, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). 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. See *id.,* at 88-89, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment); cf. Pildes, Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N.C.L.Rev. 1517 (2002).

Section 5 does not dictate that a State must pick one of these methods of redistricting over another. Either option "will ****2512** present the minority group with its own array of electoral risks and benefits," and presents "hard choices about what would truly 'maximize' minority electoral success." *Thornburg v. Gingles, supra,* at 89, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). On one hand, a smaller number of safe ***481** majority-minority districts may virtually guarantee the election of a minority group's preferred candidate in those districts. Yet even if this concentration of minority voters in a few districts does not constitute the unlawful packing of minority voters, see *Voinovich v. Quilter,* 507 U.S. 146, 153-154, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993), such a plan risks isolating minority voters from the rest of the State, and risks narrowing political influence to only a fraction of political districts. Cf. *Shaw v. Reno,* 509 U.S., at 648-650, 113 S.Ct. 2816. And while such districts may result in more "descriptive representation" because the representatives of choice are more likely to mirror the race of the majority of voters in that district, the representation may be limited to fewer areas. See H. Pitkin, The Concept of Representation 60-91 (1967).

On the other hand, spreading out minority voters over a greater number of districts creates more districts in which minority voters may have the opportunity to elect a candidate of their choice. Such a strategy has the potential to increase "substantive representation" in more districts, by creating coalitions of voters who together will help to achieve the electoral aspirations of the minority group. See *id.*, at 114. It also, however, creates the risk that the minority group's preferred candidate may lose. Yet

as we stated in *Johnson v. De Grandy*, *supra*, at 1020, 114 S.Ct. 2647:

> "[T]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics."

***482** Section 5 gives States the flexibility to choose one theory of effective representation over the other.

[8] In addition to the comparative ability of a minority group to elect a candidate of its choice, the other highly relevant factor in a retrogression inquiry is the extent to which a new plan changes the minority group's opportunity to participate in the political process. " '[T]he power to influence the political process is not limited to winning elections.' " *Thornburg v. Gingles*, *supra*, at 99, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment) (quoting *Davis v. Bandemer*, 478 U.S. 109, 132, 106 S.Ct. 2797, 92 L.Ed.2d 85 (1986)); see also *White v. Regester*, 412 U.S. 755, 766-767, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149-160, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971); *Johnson v. De Grandy*, *supra*, at 1011-1012, 114 S.Ct. 2647.

Thus, a court must examine whether a new plan adds or subtracts "influence districts"--where 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. Cf. *Shaw v. Hunt*, 517 U.S. 899, 947, n. 21, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (STEVENS, J., dissenting); *Hays v. Louisiana*, 936 F.Supp. 360, 364, n. 17 (W.D.La.1996); *Johnson v. De Grandy*, 512 U.S., at 1011-1012, 114 S.Ct. 2647; *Thornburg v. Gingles*, 478 U.S., at 98-100, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). In 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 interests into account." *Id.*, at 100, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). ****2513** In fact, various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts. See, *e.g.*, 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, 185 (1999) (noting that racial redistricting in the early 1990's, which created more majority-minority districts, made Congress "less likely to adopt initiatives supported by blacks"); Cameron, Epstein, & ***483** O'Halloran, Do Majority-Minority Districts Maximize Substantive Black Representation in Congress? 90 Am. Pol. Sci. Rev. 794, 808 (1996) (concluding that the "[d]istricting schemes that maximize the number of minority representatives do not necessarily maximize substantive minority representation"); C. Swain, Black Faces, Black Interests 193-234 (1995); Pildes, 80 N.C.L.Rev., at 1517; Grofman, Handley, & Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N.C.L.Rev. 1383(2001).

Section 5 leaves room for States to use these types of influence and coalitional districts. Indeed, the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable. See Pitkin, *supra*, at 142; Swain, *supra*, at 5. 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. See *Thornburg v. Gingles*, *supra*, at 87-89, 99, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment); cf. *Johnson v. De Grandy*, 512 U.S., at 1020, 114 S.Ct. 2647.

In addition to influence districts, one other method of assessing the minority group's opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts. A legislator, no less than a voter, is "not immune from the obligation to pull, haul, and trade to find common political ground." *Ibid.* Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. 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 ***484** shake hands on a deal. 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.

And it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan. The District Court held that the support of legislators from benchmark majority-minority districts may show retrogressive purpose, but it is not relevant in assessing retrogressive effect. See 195 F.Supp.2d, at 89; see also *post,* at 2523-2524 (SOUTER, J., dissenting). But we think this evidence is also relevant for retrogressive effect. As the dissent recognizes, the retrogression inquiry asks how "voters will probably act in the circumstances in which they live." *Post,* at 2526. The representatives of districts created to ensure continued minority participation in the political process have some knowledge about how "voters will probably act" and whether the proposed change will decrease minority voters' effective exercise of the electoral franchise.

The dissent maintains that standards for determining nonretrogression under § 5 that we announce today create a situation where "[i]t is very hard to see anything left of" § 5. *Post,* at 2519. But the dissent ignores that the ability of a minority ****2514** group to elect a candidate of choice remains an integral feature in any § 5 analysis. Cf. *Thornburg v. Gingles, supra,* at 98, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). And the dissent agrees that the addition or subtraction of coalitional districts is relevant to the § 5 inquiry. See *post,* at 2518, 2524. Yet assessing whether a plan with coalitional districts is retrogressive is just as fact-intensive as whether a plan with both influence and coalitional districts is retrogressive. As Justice SOUTER recognized for the Court in the § 2 context, a court or the Department of Justice should assess the totality of circumstances in determining retrogression under § 5. See ***485***Johnson v. De Grandy, supra,* at 1020-1021, 114 S.Ct. 2647. And it is of course true that evidence of racial polarization is one of many factors relevant in assessing whether a minority group is able to elect a candidate of choice or to exert a significant influence in a particular district. See *Thornburg v. Gingles,* 478 U.S., at 37, 106 S.Ct. 2752; *id.,* at 100-104, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment); see also *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332 (1973); *Zimmer v. McKeithen,* 485 F.2d 1297 (C.A.5 1973) (en banc).

The dissent nevertheless asserts that it "cannot be right" that the § 5 inquiry goes beyond assessing whether a minority group can elect a candidate of its choice. *Post,* at 2519. But except for the general statement of retrogression in *Beer,* the dissent cites no law to support its contention that retrogression should focus solely on the ability of a minority group to elect a candidate of choice. As Justice SOUTER himself, writing for the Court in *Johnson v. De Grandy, supra,* at 1011-1012, 114 S.Ct. 2647, has recognized, the "extent of the opportunities minority voters enjoy to participate in the political processes" is an important factor to consider in assessing a § 2 vote-dilution inquiry. See also *Thornburg v. Gingles, supra,* at 98-100, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). In determining how the new districting plan differs from the benchmark plan, the same standard should apply to § 5.

C

[9] The District Court failed to consider all the relevant factors when it examined whether Georgia's Senate plan resulted in a retrogression of black voters' effective exercise of the electoral franchise. First, while the District Court acknowledged the importance of assessing the statewide plan as a whole, the court focused too narrowly on proposed Senate Districts 2, 12, and 26. It did not examine the increases in the black voting age population that occurred in many of the other districts. Second, the District Court did not explore in any meaningful depth any other factor beyond the comparative ability of black voters in the majority-***486** minority districts to elect a candidate of their choice. In doing so, it paid inadequate attention to the support of legislators representing the benchmark majority-minority districts and the maintenance of the legislative influence of those representatives.

The District Court correctly recognized that the increase in districts with a substantial minority of black voters is an important factor in the retrogression inquiry. See 195 F.Supp.2d, at 75-78. Nevertheless, it did not adequately apply this consideration to the facts of this case. The District Court ignored the evidence of numerous other districts showing an increase in black voting age population, as well as the other evidence that Georgia decided that a way to increase black voting strength was to adopt a plan that "unpacked" the high concentration of minority voters in the majority-minority districts. Its statement that Georgia did not "presen[t] evidence regarding potential gains in minority voting strength in Senate Districts other than Districts 2, 12 and 26" is therefore clearly erroneous.

Id., at 94. Like the dissent, we accept the District Court's findings that the reductions in **2515 black voting age population in proposed Districts 2, 12, and 26 to just over 50% make it marginally less likely that minority voters can elect a candidate of their choice in those districts, although we note that Georgia introduced evidence showing that approximately one-third of white voters would support a black candidate in those districts, see *id.*, at 66, and that the United States' own expert admitted that the results of statewide elections in Georgia show that "there would be a 'very good chance' that ... African American candidates would win election in the reconstituted districts." *Id.*, at 71; see also *id.*, at 84-85. Nevertheless, regardless of any racially polarized voting or diminished opportunity for black voters to elect a candidate of their choice in proposed Districts 2, 12, and 26, the District Court's inquiry was too narrow.

*487 In the face of Georgia's evidence that the Senate plan as a whole is not retrogressive, the United States introduced nothing apart from the evidence that it would be more difficult for minority voters to elect their candidate of choice in Districts 2, 12, and 26. As the District Court stated, the United States did not introduce any evidence to rebut Georgia's evidence that the increase in black voting age population in the other districts offsets any decrease in black voting age population in the three contested districts: "[T]he United States' evidence was extremely limited in scope--focusing only on three contested districts in the State Senate plan." *Id.*, at 37. Indeed, the District Court noted that the United States' evidence "was not designed to permit the court to assess the overall impact" of the Senate plan. *Ibid.*

Given the evidence submitted in this case, we find that Georgia likely met its burden of showing nonretrogression. The increase in black voting age population in the other districts likely offsets any marginal decrease in the black voting age population in the three districts that the District Court found retrogressive. Using the overlay of the 2000 census numbers, Georgia's strategy of "unpacking" minority voters in some districts to create more influence and coalitional districts is apparent. Under the 2000 census numbers, the number of majority black voting age population districts in the new plan increases by one, the number of districts with a black voting age population of between 30% and 50% increases by two, and the number of districts with a black voting age population of between 25% and 30% increases by another 2. See Pl. Exhs. 1D, 2C; see also *supra*, at 2506-2507.

Using the census numbers in effect at the time the benchmark plan was enacted to assess the benchmark plan, the difference is even more striking. Under those figures, the new plan increases from 10 to 13 the number of districts with a majority-black voting age population and increases from 8 to 13 the number of districts with a black voting age population of between 30% and 50%. See Pl. Exhs. 1C, 2C. Thus, *488 the new plan creates 8 new districts--out of 56--where black voters as a group can play a substantial or decisive role in the electoral process. Indeed, under the census figures in use at the time Georgia enacted its benchmark plan, the black voting age population in Districts 2, 12, and 26 does not decrease to the extent indicated by the District Court. District 2 drops from 59.27% black voting age population to 50.31%. District 26 drops from 53.45% black voting age population to 50.80%. And District 12 actually *increases*, from 46.50% black voting age population to 50.66%. See Pl. Exhs. 1C, 2C. [FN2] And regardless of any **2516 potential retrogression in some districts, § 5 permits Georgia to offset the decline in those districts with an increase in the black voting age population in other districts. The testimony from those who designed the Senate plan confirms what the statistics suggest--that Georgia's goal was to "unpack" the minority voters from a few districts to increase blacks' effective exercise *489 of the electoral franchise in more districts. See *supra*, at 2505-2507.

FN2. The dissent summarily rejects any inquiry into the benchmark plan using the census numbers in effect at the time the redistricting plan was passed. See *post*, at 2525. Yet we think it is relevant to examine how the new plan differs from the benchmark plan as originally enacted by the legislature. The § 5 inquiry, after all, revolves around the change from the previous plan. The 1990 census numbers are far from "irrelevant." *Ibid.* Rather, examining the benchmark plan with the census numbers in effect at the time the State enacted its plan comports with the one-person, one-vote principle of *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and its progeny. When the decennial census numbers are released, States must redistrict to account for any changes or shifts in population. But before

> the new census. States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned. After the new enumeration, no districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years. And if the State has not redistricted in response to the new census figures, a federal court will ensure that the districts comply with the one-person, one-vote mandate before the next election. See, *e.g.*, *Branch v. Smith*, 538 U.S. 254, 123 S.Ct. 1429, 155 L.Ed.2d 407 (2003); *Lawyer v. Department of Justice*, 521 U.S. 567, 117 S.Ct. 2186, 138 L.Ed.2d 669 (1997); *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993).

Other evidence supports the implausibility of finding retrogression here. An examination of black voters' opportunities to participate in the political process shows, if anything, an increase in the effective exercise of the electoral franchise. It certainly does not indicate retrogression. The 34 districts in the proposed plan with a black voting age population of above 20% consist almost entirely of districts that have an overall percentage of Democratic votes of above 50%. See Pl. Exh. 2D. The one exception is proposed District 4, with a black voting age population of 30.51% and an overall Democratic percentage of 48.86%. See *ibid.* These statistics make it more likely as a matter of fact that black voters will constitute an effective voting bloc, even if they cannot always elect the candidate of their choice. See *Thornburg v. Gingles*, 478 U.S., at 100, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment). These statistics also buttress the testimony of the designers of the plan such as Senator Brown, who stated that the goal of the plan was to maintain or increase black voting strength and relatedly to increase the prospects of Democratic victory. See *supra*, at 2505-2506.

The testimony of Congressman John Lewis is not so easily dismissed. Congressman Lewis is not a member of the State Senate and thus has less at stake personally in the outcome of this litigation. Congressman Lewis testified that "giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made," and that the Senate plan "will give real meaning to voting for African Americans" because "you have a greater chance of putting in office people that are going to be responsive." Pl. Exh. 21, at 21-23. Section 5 gives States the flexibility to implement the type of plan that Georgia has submitted for preclearance--a plan that increases the number of districts with a majority-black voting age population, even if it means that in some of those districts, minority voters will face a ***490** somewhat reduced opportunity to elect a candidate of their choice. Cf. *Thornburg v. Gingles*, *supra*, at 89, 106 S.Ct. 2752 (O'CONNOR, J., concurring in judgment).

The dissent's analysis presumes that we are deciding that Georgia's Senate plan is not retrogressive. See *post*, at 2522-2526. To the contrary, we hold only that the District Court did not engage in the correct retrogression analysis because it focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts. While the District Court engaged in a thorough analysis of the issue, we must remand the case for the District Court to examine the facts using the standard that we announce today. We leave it for the ****2517** District Court to determine whether Georgia has indeed met its burden of proof. The dissent justifies its conclusion here on the ground that the District Court did not clearly err in its factual determination. But the dissent does not appear to dispute that if the District Court's legal standard was incorrect, the decision below should be vacated.

The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. Cf. *Johnson v. De Grandy*, 512 U.S., at 1020, 114 S.Ct. 2647; *Shaw v. Reno*, 509 U.S., at 657, 113 S.Ct. 2816. As Congressman Lewis stated: "I think that's what the [civil rights] struggle was all about, to create what I like to call a truly interracial democracy in the South. In the movement, we would call it creating the beloved community, an all-inclusive community, where we would be able to forget about race and color and see people as people, as human beings, just as citizens." Pl. Exh. 21, at 14. While courts and the Department of Justice should be vigilant in ensuring that States neither reduce the effective exercise of the electoral franchise nor discriminate against minority voters, the Voting Rights Act, as properly interpreted, should encourage the transition to a society where race no longer matters: a society where integration ***491** and color-blindness are not just qualities to be proud of, but are simple facts of life. See *Shaw v. Reno*, *supra*, at 657, 113 S.Ct. 2816.

IV

The District Court is in a better position to reweigh all the facts in the record in the first instance in light of our explication of retrogression. The judgment of the District Court for the District of Columbia, accordingly, is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, concurring.

As is evident from the Court's accurate description of the facts in this case, race was a predominant factor in drawing the lines of Georgia's State Senate redistricting map. If the Court's statement of facts had been written as the preface to consideration of a challenge brought under the Equal Protection Clause or under § 2 of the Voting Rights Act of 1965, a reader of the opinion would have had sound reason to conclude that the challenge would succeed. Race cannot be the predominant factor in redistricting under our decision in *Miller v. Johnson*, 515 U.S. 900, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995). Yet considerations of race that would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be what save it under § 5.

I agree that our decisions controlling the § 5 analysis require the Court's ruling here. See, *e.g.*, *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000). The discord and inconsistency between §§ 2 and 5 should be noted, however; and in a case where that issue is raised, it should be confronted. There is a fundamental flaw, I should think, in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive. This serious issue has not been raised here, and, as already observed, ***492** the Court is accurate both in its summary of the facts and in its application of the controlling precedents. With these observations, I join the opinion of the Court.

Justice THOMAS, concurring.

I continue to adhere to the views expressed in my opinion in *Holder v. Hall*, 512 U.S. 874, 891, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (opinion concurring in judgment). I join the Court's opinion because ****2518** it is fully consistent with our § 5 precedents.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

I

I agree with the Court that reducing the number of majority-minority districts within a State would not necessarily amount to retrogression barring preclearance under § 5 of the Voting Rights Act of 1965. See *ante*, at 2511- 2512. The prudential objective of § 5 is hardly betrayed if a State can show that a new districting plan shifts from supermajority districts, in which minorities can elect their candidates of choice by their own voting power, to coalition districts, in which minorities are in fact shown to have a similar opportunity when joined by predictably supportive nonminority voters. Cf. *Johnson v. De Grandy*, 512 U.S. 997, 1020, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994) (explaining in the context of § 2 that although "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice").

Before a State shifts from majority-minority to coalition districts, however, the State bears the burden of proving that nonminority voters will reliably vote along with the minority. See, *e.g.*, ***493***Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997). It must show not merely that minority voters in new districts may have some influence, but that minority voters will have effective influence translatable into probable election results comparable to what they enjoyed under the existing district scheme. And to demonstrate this, a State must do more than produce reports of minority voting age percentages; it must show that the probable voting behavior of nonminority voters will make coalitions with minorities a real prospect. See, *e.g.*, Pildes, Is Voting-Rights Law Now at War With Itself? Social Science and Voting Rights in the 2000s, 80 N.C.L.Rev. 1517, 1539 (2002). If the State's evidence fails to convince a factfinder that high racial polarization in voting is unlikely, or that high white crossover voting is likely, or that other political and demographic facts point to probable minority effectiveness, a reduction in supermajority districts

must be treated as potentially and fatally retrogressive, the burden of persuasion always being on the State.

The District Court majority perfectly well understood all this and committed no error. Error enters this case here in this Court, whose majority unmoors § 5 from any practical and administrable conception of minority influence that would rule out retrogression in a transition from majority-minority districts, and mistakes the significance of the evidence supporting the District Court's decision.

II

The Court goes beyond recognizing the possibility of coalition districts as nonretrogressive alternatives to those with majorities of minority voters when it redefines effective voting power in § 5 analysis without the anchoring reference to electing a candidate of choice. It does this by alternatively suggesting that a potentially retrogressive redistricting plan could satisfy § 5 if a sufficient number of so-called "influence districts," in addition to "coalitio[n] districts," were created, *ante,* at 2513, 2514, or if the new plan provided minority groups ***494** with an opportunity to elect a particularly powerful candidate, *ante,* at 2513. On either alternative, the § 5 requirement that voting changes be nonretrogressive is substantially diminished and left practically unadministrable.

****2519** A

The Court holds that a State can carry its burden to show a nonretrogressive degree of minority "influence" by demonstrating that " 'candidates elected without decisive minority support would be willing to take the minority's interests into account.' " *Ante,* at 2512 (quoting *Thornburg v. Gingles,* 478 U.S. 30, 100, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) (O'CONNOR, J., concurring in judgment)). But this cannot be right.

The history of § 5 demonstrates that it addresses changes in state law intended to perpetuate the exclusion of minority voters from the exercise of political power. When this Court held that a State must show that any change in voting procedure is free of retrogression it meant that changes must not leave minority voters with less chance to be effective in electing preferred candidates than they were before the change. "[T]he purpose of § 5 has always been to insure 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." *Beer v. United States,* 425 U.S. 130, 141, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976); see, *e.g., id.,* at 140-141, 96 S.Ct. 1357 ("Section 5 was intended 'to insure that [the gains thus far achieved in minority political participation] shall not be destroyed through new [discriminatory] procedures and techniques' " (quoting S.Rep. No. 94-295, p. 19 (1975), U.S.Code Cong. & Admin.News 1974, pp. 774, 785)). In addressing the burden to show no retrogression, therefore, "influence" must mean an opportunity to exercise power effectively.

The Court, however, says that influence may be adequate to avoid retrogression from majority-minority districts when it consists not of decisive minority voting power but of sentiment on the part of politicians: influence may be sufficient ***495** when it reflects a willingness on the part of politicians to consider the interests of minority voters, even when they do not need the minority votes to be elected. The Court holds, in other words, that there would be no retrogression when the power of a voting majority of minority voters is eliminated, so long as elected politicians can be expected to give some consideration to minority interests.

The power to elect a candidate of choice has been forgotten; voting power has been forgotten. It is very hard to see anything left of the standard of nonretrogression, and it is no surprise that the Court's cited precedential support for this reconception, see *ante,* at 2512, consists of a footnote from a dissenting opinion in *Shaw v. Hunt,* 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), and footnote dictum in a case from the Western District of Louisiana.

Indeed, to see the trouble ahead, one need only ask how on the Court's new understanding, state legislators or federal preclearance reviewers under § 5 are supposed to identify or measure the degree of influence necessary to avoid the retrogression the Court nominally retains as the § 5 touchstone. Is the test purely *ad hominem,* looking merely to the apparent sentiments of incumbents who might run in the new districts? Would it be enough for a State to show that an incumbent had previously promised to consider minority interests before voting on legislative measures? Whatever one looks to, however, how does one put a value on influence that falls short of decisive influence through coalition? Nondecisive influence is worth less than majority-minority control, but how much less? Would two influence districts offset the loss of one majority-

minority district? Would it take three? Or four? The Court gives no guidance for measuring influence that falls short of the voting strength of a coalition member, let alone a majority of minority voters. Nor do I see how the Court could possibly give any such guidance. The Court's "influence" is simply not functional in the political and judicial worlds.

****2520 *496** B

Identical problems of comparability and administrability count at least as much against the Court's further gloss on nonretrogression, in its novel holding that a State may trade off minority voters' ability to elect a candidate of their choice against their ability to exert some undefined degree of influence over a candidate likely to occupy a position of official legislative power. See *ante*, at 2513. The Court implies that one majority-minority district in which minority voters could elect a legislative leader could replace a larger number of majority-minority districts with ordinary candidates, without retrogression of overall minority voting strength. Under this approach to § 5, a State may value minority votes in a district in which a potential committee chairman might be elected differently from minority votes in a district with ordinary candidates.

It is impossible to believe that Congress could ever have imagined § 5 preclearance actually turning on any such distinctions. In any event, if the Court is going to allow a State to weigh minority votes by the ambitiousness of candidates the votes might be cast for, it is hard to see any stopping point. I suppose the Court would not go so far as to give extra points to an incumbent with the charisma to attract a legislative following, but would it value all committee chairmen equally? (The committee chairmen certainly would not.) And what about a legislator with a network of influence that has made him a proven dealmaker? Thus, again, the problem of measurement: is a shift from 10 majority-minority districts to 8 offset by a good chance that 1 of the 8 may elect a new Speaker of the House?

I do not fault the Court for having no answers to these questions, for there are no answers of any use under § 5. The fault is more fundamental, and the very fact that the Court's interpretation of nonretrogression under § 5 invites unanswerable questions points to the error of a § 5 preclearance regime that defies reviewable administration. We are ***497** left with little hope of determining practically whether a districting shift to one party's overall political advantage can be expected to offset a loss of majority-minority voting power in particular districts; there will simply be greater opportunity to reduce minority voting strength in the guise of obtaining party advantage.

One is left to ask who will suffer most from the Court's new and unquantifiable standard. If it should turn out that an actual, serious burden of persuasion remains on the States, States that rely on the new theory of influence should be guaranteed losers: nonretrogression cannot be demonstrated by districts with minority influence too amorphous for objective comparison. But that outcome is unlikely, and if in subsequent cases the Court allows the State's burden to be satisfied on the pretense that unquantifiable influence can be equated with majority-minority power, § 5 will simply drop out as a safeguard against the "unremitting and ingenious defiance of the Constitution" that required the procedure of preclearance in the first place. *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966).

III

The District Court never reached the question the Court addresses, of what kind of influence districts (coalition or not) might demonstrate that a decrease in majority-minority districts was not retrogressive. It did not reach this question because it found that the State had not satisfied its burden of persuasion on an issue that should be crucial on any administrable theory: [FN1] the State had not shown ****2521** the possibility ***498** of actual coalitions in the affected districts that would allow any retreat from majority-minority districts without a retrogressive effect. This central evidentiary finding is invulnerable under the correct standard of review.

FN1. The District Court correctly recognized that the State bears the burden of proof in establishing that its proposed redistricting plan satisfied the standards of § 5. See, *e.g.*, 195 F.Supp.2d 25, 86 (D.D.C.2002) ("We look to the State to explain why retrogression is not present"); see also *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 478, 117 S.Ct. 1491, 137 L.Ed.2d 730 (1997) (covered jurisdiction "bears the burden of proving that the change does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" (internal quotation marks omitted)); *id.*, at 480, 117

> S.Ct. 1491 (Section 5 "imposes upon a covered jurisdiction the difficult burden of proving the *absence* of discriminatory purpose and effect"); *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 332, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) ("In the specific context of § 5 ... the covered jurisdiction has the burden of persuasion"); cf. *Beer v. United States*, 425 U.S. 130, 140, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976) (Congress in passing § 5 sought to "freez[e] election procedures in the covered areas unless the changes can be shown to be nondiscriminatory" (internal quotation marks omitted)).

This Court's review of the District Court's factual findings is for clear error. See, *e.g.*, *Miller v. Johnson*, 515 U.S. 900, 917, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Pleasant Grove v. United States*, 479 U.S. 462, 469, 107 S.Ct. 794, 93 L.Ed.2d 866 (1987); *McCain v. Lybrand*, 465 U.S. 236, 258, 104 S.Ct. 1037, 79 L.Ed.2d 271 (1984); *City of Lockhart v. United States*, 460 U.S. 125, 136, 103 S.Ct. 998, 74 L.Ed.2d 863 (1983). We have no business disturbing the District Court's ruling "simply because we would have decided the case differently," but only if based "on the entire evidence, [we are] left with the definite and firm conviction that a mistake has been commited." *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001) (internal quotation marks omitted). It is not, then, up to us to "decide whether Georgia's State Senate redistricting plan is retrogressive as compared to its previous, benchmark districting plan." *Ante*, at 2504. Our sole responsibility is to see whether the District Court committed clear error in refusing to preclear the plan. It did not.

A

The District Court began with the acknowledgment (to which we would all assent) that the simple fact of a decrease in black voting age population (BVAP) in some districts is not alone dispositive about whether a proposed plan is retrogressive:

> ***499** " 'Unpacking' African American districts may have positive or negative consequences for the statewide electoral strength of African American voters. To the extent that voting patterns suggest that minority voters are in a better position to join forces with other segments of the population to elect minority preferred candidates, a decrease in a district's BVAP may have little or no effect on minority voting strength." 195 F.Supp.2d 25, 76 (D.D.C.2002).

See *id.*, at 78 ("[T]he Voting Rights Act allows states to adopt plans that move minorities out of districts in which they formerly constituted a majority of the voting population, provided that racial divisions have healed to the point that numerical reductions will not necessarily translate into reductions in electoral power"); *id.*, at 84 ("[T]he mere fact that BVAP decreases in certain districts is not enough to deny preclearance to a plan under Section 5"). [FN2]

> FN2. Indeed, the other plans approved by the District Court, Georgia's State House plan, 195 F.Supp.2d, at 95, congressional plan, *ibid.*, and the interim plan approved for the State Senate, 204 F.Supp.2d 4, 7 (D.D.C.2002), all included decreases in BVAP in particular districts.

The District Court recognized that the key to understanding the impact of drops in a district's BVAP on the minority group's "effective exercise of the electoral franchise," *Beer*, 425 U.S., at 141, 96 S.Ct. 1357, is the level of racial polarization. If racial elements consistently vote in separate blocs, decreasing the proportion of ****2522** black voters will generally reduce the chance that the minority group's favored candidate will be elected; whereas in districts with low racial bloc voting or significant white crossover voting, a decrease in the black proportion may have no effect at all on the minority's opportunity to elect their candidate of choice. See, *e.g.*, 195 F.Supp.2d, at 84 ("[R]acial polarization is critically important because its presence or absence in the Senate Districts challenged by the United States goes a long way to determining whether ***500** or not the decreases in BVAP and African American voter registration in those districts are likely to produce retrogressive effects").

This indisputable recognition, that context determines the effect of decreasing minority numbers for purposes of the § 5 enquiry, points to the nub of this case, and the District Court's decision boils down to a judgment about what the evidence showed about that context. The District Court found that the United States had offered evidence of racial polarization in the contested districts, [FN3] *id.*, at 86, and it found that Georgia had failed to present anything relevant on that issue. Georgia, the District Court said, had "provided the court with no competent, comprehensive information regarding white crossover voting or levels of polarization in

individual districts across the State." *Id.*, at 88. In particular, the District Court found it "impossible to extrapolate" anything about the level of racial polarization from the statistical submissions of Georgia's lone expert witness. *Id.*, at 85. And the panel majority took note that Georgia's expert "admitted on cross-examination" that his evidence simply did not address racial polarization: "the whole point of my analysis," the expert stated, "is not to look at polarization per se. The question is not whether or not blacks and whites in general vote for different candidates." *ibid.* (internal quotation marks omitted).

> FN3. The majority cites the District Court's comment that " 'the United States' evidence was extremely limited in scope--focusing only on three contested districts in the State Senate plan.' " *Ante*, at 2508 (quoting 195 F.Supp.2d, at 37). The District Court correctly did not require the United States to prove that the plan was retrogressive. As the District Court explained: "[u]ltimately, the burden of proof in this matter lies with the State. We look to the State to explain why retrogression is not present, and to prove the absence of racially polarized voting that might diminish African American voting strength in light of several districts' decreased BVAPs." *Id.*, at 86.

Accordingly, the District Court explained that Georgia's expert:

> ***501** "made no attempt to address the central issue before the court: whether the State's proposal is retrogressive. He failed even to identify the decreases in BVAP that would occur under the proposed plan, and certainly did not identify corresponding reductions in the electability of African American candidates of choice. The paucity of information in [the expert's] report thus leaves us unable to use his analysis to assess the expected change in African American voting strength statewide that will be brought by the proposed Senate plan." *Id.*, at 81.

B

How is it, then, that the majority of this Court speaks of "Georgia's evidence that the Senate plan as a whole is not retrogressive," against which "the United States did not introduce any evidence [in] rebut[tal]," *ante*, at 2515? The answer is that the Court is not engaging in review for clear error. Instead, it is reweighing evidence *de novo*, discovering what it thinks the District Court overlooked, and drawing evidentiary conclusions the District Court supposedly did not see. The Court is mistaken on all points.

1

Implicitly recognizing that evidence of voting behavior by majority voters is crucial to any showing of nonretrogression when minority numbers drop under a proposed ****2523** plan, the Court tries to find evidence to fill the record's gap. It says, for example, that "Georgia introduced evidence showing that approximately one-third of white voters would support a black candidate in [the contested] districts." *Ibid.* In support of this claim, however, the majority focuses on testimony offered by Georgia's expert relating to crossover voting in the pre-existing rather than proposed districts. 195 F.Supp.2d, at 66. The District Court specifically noted that the expert did not calculate crossover voting under the proposed plan. *Id.*, at 65, n. 31 ("The court also emphasizes ***502** that Epstein did not attempt to rely on the table's calculations to demonstrate voting patterns in the districts, and calculated crossover in the existing, and not the proposed, Senate districts"). Indeed, in relying on this evidence the majority attributes a significance to it that Georgia's own expert disclaimed, as the District Court pointed out. See *id.*, at 85 ("[I]t is impossible to extrapolate these voting patterns from Epstein's database. As Epstein admitted on cross-examination: the whole point of my analysis is not to look at polarization per se. The question is not whether or not blacks and whites in general vote for different candidates" (internal quotation marks omitted)).

2

In another effort to revise the record, the Court faults the District Court, alleging that it "focused too narrowly on proposed Senate Districts 2, 12, and 26." *Ante*, at 2514. In fact, however, it is Georgia that asked the District Court to consider only the contested districts, and the District Court explicitly refused to limit its review in any such fashion: "we reject the State's argument that this court's review is limited only to those districts challenged by the United States, and should not encompass the redistricting plans in their entirety.... [T]he court's review necessarily extends to the entire proposed plan." 195 F.Supp.2d, at 73. The District Court explained that it "is vested with the final authority to approve or disapprove the proposed change as a whole." *Ibid.* "The question before us is whether the proposed Senate plan as a whole, has the 'purpose or effect of denying or abridging the right to vote on

account of race or color.' " *Id.*, at 103 (Oberdorfer, J., concurring in part and dissenting in part) (quoting 42 U.S.C. § 1973c). Though the majority asserts that "[t]he District Court ignored the evidence of numerous other districts showing an increase in black voting age population," *ante*, at 2514, the District Court, in fact, specifically considered the parties' dispute over the statewide ***503** impact of the change in black voting age population. See, *e.g.*, 195 F.Supp.2d, at 93 ("The number of Senate Districts with majorities of BVAP would, according to Georgia's calculations, increase from twelve to thirteen; according to the Attorney General's interpretation of the census data, the number would decrease from twelve to eleven").

3

In a further try to improve the record, the Court focuses on the testimony of certain lay witnesses, politicians presented by the State to support its claim that the Senate plan is not retrogressive. Georgia, indeed, relied heavily on the near unanimity of minority legislators' support for the plan. But the District Court did not overlook this evidence; it simply found it inadequate to carry the State's burden of showing nonretrogression. The District Court majority explained that the "legislators' support is, in the end, far more probative of a lack of retrogressive *purpose* than of an absence of retrogressive *effect*." *Id.*, at 89 (emphasis in original). As against the politicians' testimony, the District Court had contrary "credible," *id.*, at 88, evidence of retrogressive effect. This evidence was the testimony of the expert witness presented by the United States, which "suggests the existence of highly racially polarized voting in the proposed ****2524** districts," *ibid.*, evidence of retrogressive effect to which Georgia offered "no competent" response, *ibid.* The District Court was clearly within bounds in finding that (1) Georgia's proposed plan decreased BVAP in the relevant districts, (2) the United States offered evidence of significant racial polarization in those districts, and (3) Georgia offered no adequate response to this evidence.

The reasonableness of the District Court's treatment of the evidence is underscored in its concluding reflection that it was possible Georgia could have shown the plan to be nonretrogressive, but the evidence the State had actually offered simply failed to do that. "There are, without doubt, ***504** numerous other ways, given the limited evidence of racially polarized voting in State Senate and local elections, that Georgia could have met its burden of proof in this case. Yet, the court is limited to reviewing the evidence presented by the parties, and is compelled to hold that the State has not met its burden." *Id.*, at 94. "[T]he lack of positive racial polarization data was the gap at the center of the State's case [and] the evidence presented by [the] estimable [legislators] does not come close to filling that void." *Id.*, at 100.

As must be plain, in overturning the District Court's thoughtful consideration of the evidence before it, the majority of this Court is simply rejecting the District Court's evidentiary finding in favor of its own. It is reweighing testimony and making judgments about the competence, interest, and character of witnesses. The Court is not conducting clear error review.

4

Next, the Court attempts to fill the holes in the State's evidence on retrogression by drawing inferences favorable to the State from undisputed statistics. See *ante*, at 2515-2516. This exercise comes no closer to demonstrating clear error than the others considered so far.

In the first place, the District Court has already explained the futility of the Court's effort. Knowing whether the number of majority BVAP districts increases, decreases, or stays the same under a proposed plan does not alone allow any firm conclusion that minorities will have a better, or worse, or unvarying opportunity to elect their candidates of choice. Any such inference must depend not only on trends in BVAP levels, but on evidence of likely voter turnout among minority and majority groups, patterns of racial bloc voting, likelihood of white crossover voting, and so on. [FN4] Indeed, ***505** the core holding of the Court today, with which I agree, that nonretrogression does not necessarily require maintenance of existing supermajority minority districts, turns on this very point; comparing the number of majority-minority districts under existing and proposed plans does not alone reliably indicate whether the new plan is retrogressive.

FN4. The fact that the Court premises its analysis on BVAP alone is ironic given that the Court, incorrectly, chastises the District Court for committing the very error the Court now engages in, "fail[ing] to consider all the relevant factors." *Ante*, at 2514.

Lack of contextual evidence is not, however, the only flaw in the Court's numerical arguments. Thus,

in its first example, *ante,* at 2515, the Court points out that under the proposed plan the number of districts with majority BVAP increases by one over the existing plan, [FN5] but the Court does not mention that the number of districts with BVAP levels over 55% decreases by four. See Record, Doc. No. 148, Pl. Exhs. 1D, 2C. Similarly, the Court points to an increase of two in districts with ****2525** BVAP in the 30% to 50% range, along with a further increase of two in the 25% to 30% range. *Ante,* at 2515. It fails to mention, however, that Georgia's own expert argued that 44.3% was the critical threshold for BVAP levels, 195 F.Supp.2d, at 107, and the data on which the Court relies shows the number of districts with BVAP over 40% actually decreasing by one, see Record, Doc. No. 148, Pl. Exhs. 1D, 2C. My point is not that these figures conclusively demonstrate retrogression; I mean to say only that percentages tell us nothing in isolation, and that without contextual evidence the raw facts about population levels fail to get close to indicating that the State carried its burden to show no retrogression. They do not come close to showing clear error.

> FN5. Though the Court does not acknowledge it in its discussion of why "Georgia likely met its burden," *ante,* at 2515, even this claim was disputed. As the District Court explained: "[t]he number of Senate Districts with majorities of BVAP would, according to Georgia's calculations, increase from twelve to thirteen; according to the Attorney General's interpretation of the census data, the number would decrease from twelve to eleven." 195 F.Supp.2d, at 93.

***506** 5

Nor could error, clear or otherwise, be shown by the Court's comparison of the proposed plan with the description of the State and its districts provided by the 1990 census. *Ante,* at 2515-2516. The 1990 census is irrelevant. We have the 2000 census, and precedent confirms in no uncertain terms that the issue for § 5 purposes is not whether Georgia's proposed plan would have had a retrogressive effect 13 years ago: the question is whether the proposed plan would be retrogressive now. See, *e.g., Reno v. Bossier Parish School Bd.,* 528 U.S. 320, 334, 120 S.Ct. 866, 145 L.Ed.2d 845 (2000) (Under § 5 "the baseline is the status quo that is proposed to be changed"); *Holder v. Hall,* 512 U.S. 874, 883, 114 S.Ct. 2581, 129 L.Ed.2d 687 (1994) (plurality opinion) (Under § 5, "[t]he baseline for comparison is present by definition; it is the existing status"); *City of Lockhart v. United States,* 460 U.S., at 132, 103 S.Ct. 998 ("The proper comparison is between the new system and the system actually in effect"); Cf. 28 CFR § 51.54(b)(2) (2002) (when determining if a change is retrogressive under § 5 "[t]he Attorney General will make the comparison based on the conditions existing at the time of the submission"). The Court's assumption that a proper § 5 analysis may proceed on the basis of obsolete data from a superseded census is thus as puzzling as it is unprecedented. It is also an invitation to perverse results, for if a State could carry its burden under § 5 merely by showing no retrogression from the state of affairs 13 years ago, it could demand preclearance for a plan flatly diminishing minority voting strength under § 5. [FN6]

> FN6. For example, if a covered jurisdiction had two majority-minority districts in 1990, but rapidly changing demography had produced two more during the ensuing decade, a new redistricting plan, setting the number of majority-minority districts at three would conclusively rule out retrogression on the Court's calculus. This would be the case even when voting behavior showed that nothing short of four majority-minority districts would preserve the status quo as of 2000.

***507** 6

The Court's final effort to demonstrate that Georgia's plan is nonretrogressive focuses on statistics about Georgia Democrats. *Ante,* at 2516. The Court explains that almost all the districts in the proposed plan with a BVAP above 20% have a likely overall Democratic performance above 50%, and from this the Court concludes that "[t]hese statistics make it more likely as a matter of fact that black voters will constitute an effective voting bloc." *Ibid.* But this is not so. The degree to which the statistics could support any judgment about the effect of black voting in State Senate elections is doubtful, and even on the Court's assumptions the statistics show no clear error by the District Court.

As for doubt about what the numbers have to do with State Senate elections, it is enough to know that the majority's figures are taken from a table describing Democratic voting in statewide, not local, elections. The Court offers no basis for assuming that voting for Democratic candidates in statewide elections

correlates ****2526** with voting behavior in local elections, [FN7] and in fact, the record points to different, not identical, voting patterns. The District Court specifically noted that the United States's expert testified that "African American candidates consistently received less crossover voting in local election[s] than in statewide elections," 195 F.Supp.2d, at 71, and the court concluded that there is "compelling evidence that racial voting patterns in State Senate races can be expected to differ from racial voting patterns in statewide races," *id.*, at 85-86.

> FN7. Even if the majority wanted to rely on these figures to make a claim about Democratic voting in statewide elections, the predictors' significance is utterly unclear. The majority pulls its figures from an exhibit titled, "Political Data Report," and a column labeled, "% OVER DEMVOTES," Pl. Exh. 2D. See *ante*, at 2516. The document provides no information regarding whether the numbers in the column reflect an average of past performance, a prediction for future performance, or something else altogether.

***508** But even if we assume the data on Democratic voting statewide can tell us something useful about Democratic voting in State Senate districts, the Court's argument does not hold up. It proceeds from the faulty premise that even with a low BVAP, if enough of the district is Democratic, the minority Democrats will necessarily have an effect on which candidates are elected. But if the proportion of nonminority Democrats is high enough, the minority group may well have no impact whatever on which Democratic candidate is selected to run and ultimately elected. In districts, say, with 20% minority voters (all of them Democrats) and 51% nonminority Democrats, the Democratic candidate has no obvious need to take the interests of the minority group into account; if everybody votes (or the proportion of stay-at-homes is constant throughout the electorate) the Democrat can win the general election without minority support. Even in a situation where a Democratic candidate needs a substantial fraction of minority voters to win (say the population is 25% minority and 30% nonminority Democrats), the Democratic candidate may still be able to ignore minority interests if there is such ideological polarization as between the major parties that the Republican candidate is entirely unresponsive to minority interests. In that situation, a minority bloc would presumably still prefer the Democrat, who would not need to adjust any political positions to get the minority vote.

All of this reasoning, of course, carries a whiff of the lamp. I do not know how Georgia's voters will actually behave if the percentage of something is x, or maybe y, any more than the Court does. We are arguing about numerical abstractions, and my sole point is that the Court's abstract arguments do not hold up. Much less do they prove the District Court wrong.

IV

Section 5, after all, was not enacted to address abstractions. It was enacted "to shift the advantage of time and ***509** inertia from the perpetrators of the evil to its victim," *Beer*, 425 U.S., at 140, 96 S.Ct. 1357 (internal quotation marks omitted) (quoting H.R.Rep. No. 94-196, pp. 57-58 (1970)), and the State of Georgia was made subject to the requirement of preclearance because Congress "had reason to suppose" it might "try ... to evade the remedies for voting discrimination" and thus justifies § 5's "uncommon exercise of congressional power." *South Carolina v. Katzenbach*, 383 U.S., at 334-335, 86 S.Ct. 803. Section 5 can only be addressed, and the burden to prove no retrogression can only be carried, with evidence of how particular populations of voters will probably act in the circumstances in which they live. The State has the burden to convince on the basis of such evidence. The District Court considered such evidence: it received testimony, decided what it was worth, and concluded as the trier of fact that the State ****2527** had failed to carry its burden. There was no error, and I respectfully dissent.

539 U.S. 461, 123 S.Ct. 2498, 156 L.Ed.2d 428, 71 USLW 4585, 03 Cal. Daily Op. Serv. 5549, 2003 Daily Journal D.A.R. 7001, 16 Fla. L. Weekly Fed. S 448

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• 2003 WL 1945491 (Appellate Brief) Reply Brief of the State of Georgia (Apr. 18, 2003)

• 2003 WL 1792241 (Appellate Brief) Brief of Appellee Intervenors Patrick L. Jones, Roielle L. Tyra, Georgia W. Benton, and Della Steele (Apr. 02,

2003)

• 2003 WL 1801075 (Appellate Brief) Brief for the Federal Appellees (Apr. 02, 2003)

• 2003 WL 1792238 (Appellate Brief) Brief Amicus Curiae of Georgia Coalition For The Peoples' Agenda in Support of Appellees (Apr. 01, 2003)

• 2003 WL 554486 (Appellate Brief) Brief of Appellant State of Georgia (Feb. 22, 2003)

• 02-182 (Docket) (Aug. 06, 2002)

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