From Literacy Tests to Photo ID Laws: A Historical Analysis of Congress, the Courts and Voting Rights Since 1965

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FROM LITERACY TESTS TO PHOTO ID LAWS:
A HISTORICAL ANALYSIS OF CONGRESS, THE COURTS AND VOTING RIGHTS SINCE 1965

A SENIOR HONORS THESIS

SUBMITTED TO

THE HONORS PROGRAM

OF THE

DEPARTMENT OF POLITICAL SCIENCE

BY

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APRIL, 2013
To my entire family, especially my mother, for their love and support
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Acknowledgments

I would first like to thank Prof. Shep Melnick for introducing me to the topic of voting rights. His “Policy and Politics” course was by far my favorite class at Boston College. I would like to thank him for his advice and guidance throughout this process.

At the same time, I would also like to thank all the professors in the Political Science Department and the Boston College administration. I was privileged to have been a part of the Honors Program and to have had the opportunity to attend BC.

I also owe a great debt of gratitude to the staff at the Voting Section of the Civil Rights Division at the U.S. Department of Justice. I could not have asked for a better way to learn more about voting rights. My internship in Washington, D.C. would not have been the same were it not for their friendship and instruction.

Above all, I would like to thank my family for their love and support. To my mother who has always encouraged me to challenge myself and pursue my dreams. All that I am and all that awaits me in this life is because of you. To my father whose example is before me. I can only dream of becoming the devoted husband and caring father you have been. To my sisters whose patience and kindness inspires me to be a better brother and a better person. To my Uncle Zef and Aunt Miki who have given me more than I could ever repay them in a dozen lifetimes and to their children who mean more to me than they will ever know. To all my grandparents who sacrificed so much so that I could have a better life. And to all my aunts and uncles, cousins and friends, thank you for teaching me the importance of family, friendship and faith.

A.M.D.G.
“The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men.”

- President Lyndon B. Johnson
Introduction

On the morning of the Indiana Democratic Presidential Primary on May 6, 2008, twelve nuns from St. Mary’s Convent near the University of Notre Dame were prevented from voting. Ironically, Sister Julie McGuire, an inspector at the polling place and a member of the convent herself, was forced to turn her fellow sisters away because they lacked the necessary photo identification required by Indiana’s new photo ID law. The story quickly gained national attention but it also shed light on a growing trend among the states in the wake of the 2000 presidential election. The controversy in Florida had convinced some that voter fraud was a common problem in U.S. elections. And so, within a few years, states like Indiana, Georgia and Arizona passed strict voter identification requirements in an effort to combat voter fraud and safeguard electoral confidence. However, as Richard Hasen explains, these laws were not so much about protecting the integrity of the election system as much as they were about manipulating the rules for political gain.1

The “ID epidemic” as I call it quickly spread across the country. According to the Brennan Center for Justice, in 2011 alone, thirty-four states introduced voter ID legislation.2 During that time, forty-one states introduced 180 restrictive laws, ranging from proof-of-citizenship requirements to reductions in the registration and early-voting periods. To be sure, most of these laws were not in effect for the 2012 presidential election and some are currently facing legal action. However, in Kansas, New Hampshire and Tennessee, voters were required to present photo identification. And by the 2014

elections, as it stands now, Pennsylvania and South Carolina will also make similar
requests of their voters. In light of these figures, we can clearly see a trend among the
states to make voting more difficult on the part of voters. And because many of these
restrictive laws disproportionately affect minority voters, the debate over voting rights
has been renewed.

Because these voter ID laws are so new, the literature on them is somewhat
limited. The data concerning the effects of such laws on voter turnout is largely
inconclusive with conflicting studies showing increases and decreases in turnout where
these laws exist.\(^3\) And even though more research has been done with respect to election
fraud, there is still no evidence proving that voter fraud is as widespread as proponents of
these laws have suggested.\(^4\) Nevertheless, that has not stopped state legislatures from
implementing voter ID requirements. However, the purpose of this thesis is not to
consider the pros or cons of photo identification laws. Instead, I wish to place these laws
in the broad context of the history of voting rights since 1965. As the title of this thesis
suggests, my goal is to explain how the courts, Congress and the Department of Justice
have enforced the Voting Rights Act of 1965 and how this history might inform their
decisions concerning voter ID laws going forward.

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\(^3\) See Stephen Ansolabehere and Nathaniel Persily, “Voter Fraud in the Eye of the Beholder: The Role of
7 (May 2008), pp. 1737-1774. The authors point out the effect of voter fraud on turnout is still a “novel
conjecture in the academic research on voter turnout.” However, they do submit that “perceptions of higher
rates of voter fraud ought to correlate negatively with participation in the electoral process.” Much less is
known about how voter ID laws affect turnout in jurisdictions where the public perception of voter fraud is
high.

681. According to the Carter-Baker Report of the Commission on Federal Election Reform, of the 196,
139, 871 ballots cast between October 2002 and August 2005, federal officials only charged eight-nine
individuals with “casting multiple votes, providing false information about their felon status, buying votes,
submitting false voter registration information or voting improperly as a noncitizen. This represents a fraud
rate of 0.000045%.”
During every decennial redistricting cycle, we often hear civil rights leaders refer to racially gerrymandered districts as “second generation barriers to minority representation.” The phrase refers to the ways in which minority voting rights are denied or abridged other than by simply restricting access to the ballot. “First generation barriers” to voting rights therefore refer to those early devices and practices like literacy tests and poll taxes which did restrict access to the ballot for black voters in the Deep South. For the most part, these first generation barriers have disappeared altogether. As a result, most of the history of voting rights litigation concerns second generation issues such as proportional representation and the ability of minorities to elect their candidate of choice. However, I would argue that with the recent election laws sweeping the nation, we are seeing the rise of “third generation barriers” to voting rights in the form of strict voter ID laws, proof of citizenship requirements and other restrictive measures which essentially determine who is eligible to cast a ballot.5

I have also used these generational terms to classify the actions of the courts, Congress and the Justice Department in addressing these burdens on the right to vote over the years. As we will see in Chapter 1, the first generation was characterized by a deferential Supreme Court which interpreted Congress’ enforcement powers under the Fourteenth and Fifteenth Amendments very broadly. During this period, the Court empowered the Attorney General to suspend illegal voting devices and afforded the Justice Department great authority with which to enforce Section 5 of the Voting Rights Act of 1965.

5 Others have also begun to refer to these voter suppressive measures as “third generation” barriers. See Ryan P. Haygood, “The Past as Prologue: Defending Democracy Against Voter Suppression Tactics on the Eve of the 2012 Elections” *Rutgers Law Review*, Vol. 64, No. 4 (Summer 2012), pp. 1019-1064. Ryan Haygood is the Director of the Political Participation Group of the NAACP’s Legal Defense and Education Fund.
Over time, however, minority voters were then threatened by racially
gerrymandered districts and discriminatory at-large election systems. This led to the
second generation of voting rights cases in which the Court primarily addressed the issue
of redistricting. However, as we will also see in Chapters 2 and 3, there were two phases
to this period. During the first phase, the Court used the standard of proportional
representation in reviewing redistricting plans. As a result, the DOJ had considerable
latitude with which to review redistricting submissions. The second phase was defined by
an ideological shift on the Court which rejected the standard of proportional
representation and significantly reduced the ability of the Justice Department to enforce
Section 5 of the Act. Following this change in the Court’s interpretation, the third
generation has been defined by a growing skepticism and criticism of the VRA. More
recently, the Court has raised serious constitutional concerns with the Act and in the
latest challenge to the law it appears willing to strike down the statute.

The recent voter ID laws have highlighted this tension between the courts and the
Department of Justice with respect to their competing and sometimes conflicting
interpretations of the Voting Rights Act. However, these voter ID laws have also exposed
what many have perceived as an increased polarization in the DOJ’s decisions. These
allegations have led many not only to question the DOJ’s ability to effectively enforce the
VRA but whether the VRA is even necessary anymore. Of course, things have changed
since 1965 and the Act has certainly achieved a great deal of success. But given the
partisan interests at stake over these restrictive election laws, the Voting Rights Act may
still be necessary after all.
Chapter 1: The Early Years

“We have long been mindful that, where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. The right to vote is too precious, too fundamental to be so burdened or conditioned.”


The recent constitutional challenges to the Voting Rights Act are, in many ways, very similar to the first such Supreme Court cases during the mid-1960s. Indeed, Luis Fuentes-Rohwer characterizes these recent cases as “replays” of the first cases which dealt with Congress’ enforcement powers under the Fourteenth and Fifteenth Amendments. However, as more states begin to implement photo identification requirements at the polls, the courts will not just be dealing with complex issues of redistricting or proportional representation anymore. As Alexander Keyssar argues, the questions concerning these photo identification requirements are essentially about access to the ballot. In this respect, we have come full circle since 1965 by returning to the question of ballot access. But in order to understand how Congress, the Department of Justice and the courts are treating this issue, it is important to begin with those very first cases whose implications are still felt today.

The first generation of voting rights cases dealt with the fundamental question of access to the ballot. As we will see in this chapter, these cases concerned literacy tests and poll taxes which prevented minority voters from exercising their constitutional right to vote. In addressing these cases, the Supreme Court interpreted the authority granted to

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Congress under the Fourteenth and Fifteenth Amendments very broadly, thus justifying Section 5 and the entire Voting Rights Act as a constitutional exercise of congressional enforcement powers. However, most recently, this view of congressional authority has come into question and the Court does not appear to be as deferential to Congress as before. Now, Congress and the Court will be forced to revisit the same questions first raised nearly fifty years ago although this time, the results may not be the same.

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The condition of black voters in the Deep South at the time of the presidential election of 1964 was no different than it was at the end of the nineteenth-century. Despite the ratification of the Fifteenth Amendment in 1870, hundreds of thousands of eligible black voters were denied their constitutional right to vote. In places like Louisiana and Georgia, the number of black males registered to vote was as low as 4%.3 Little had changed over the course of a century where, by 1964, in Mississippi and Alabama, black registration was less than 10 percent and 24 percent, respectively.4 For many, it became increasingly clear that the federal government lacked the means necessary to enforce the Fourteenth and Fifteenth Amendments and finally put an end to the widespread disenfranchisement of black voters in the South.

3 Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2009), 91-92. As Keyssar explains, immediately following the ratification of the Fifteenth Amendment, the number of registered black males actually increased and turnout in the Post-Reconstruction South among blacks (and poor whites for that matter) was very high. But the effects were short-lived. “By the mid-1870s, many northern Republicans, including President Grant, had lost their enthusiasm for policing the South; preoccupied with an economic depression and labor conflict in the North, they wearyly drifted toward a ‘let alone policy’” (85). As a result, registration and turnout for blacks fell to the single digits in the Deep South where it would remain for decades (92).

4 Ibid, 212. The turnout data in 1964 is important because this was the data used for the “coverage formula” in Section 4 (b) of the Voting Rights Act that determined which states would be “covered” under Section 5 of the Act.
By the 1960s, the civil rights movement was gaining significant momentum but the Deep South seemed immune to the changing social and political attitudes of the rest of the nation. However, the incident in Selma, Alabama in March of 1965 known as “Bloody Sunday” sparked a national outcry by civil rights leaders. Eight days later, President Lyndon Johnson addressed a joint session of Congress and took his case before the nation for a comprehensive bill “designed to eliminate illegal barriers to the right to vote.”5 Two days after the president’s speech, the Voting Rights Act of 1965 was introduced into Congress on March 17, 1965 and signed by the president in August of that year. However, in the years immediately following the passage of the VRA, many states in the South challenged the new law and continued to deny the franchise to black voters.

I. Judicial Deference to Congressional Enforcement Powers

The first constitutional challenge of the new Voting Rights Act to reach the Supreme Court was South Carolina v. Katzenbach6. Less than six months after President Johnson had signed the bill, South Carolina argued that Congress exceeded its constitutional powers under the Fourteenth and Fifteenth Amendments when it passed the Voting Rights Act. The state challenged the most important provisions of the law, namely the coverage formula in Section 4, the suspension of literacy tests and the preclearance clause in Section 5. South Carolina believed that submitting voting related changes to the Attorney General for approval first before they could be enforced violated fundamental constitutional principles, among them the separation of powers and equal sovereignty of
states. While the Court agreed in principle that the Act “may have been an uncommon exercise of congressional power,” Chief Justice Warren, writing for the majority, noted “that exceptional conditions can justify legislative measures not otherwise appropriate.”

In brief, the Court held that the widespread and unabashed disenfranchisement of black voters in the South was enough to justify this burden on select states, however unconstitutional it may have appeared.

At the heart of *South Carolina v. Katzenbach* is a fundamental issue with voting rights perhaps the most important one: access to the ballot. South Carolina, like many other states in the Deep South, had literacy requirements for voting. In 1895, the state constitution was amended so that any person who wished to vote had to be able to read a section of the state constitution or explain a section of the constitution to a poll manager. Such literacy requirements were unanimously upheld in *Lassiter v. Northampton County Board of Elections*. Justice William Douglas, writing the opinion of the Court, argued that such tests were permissible so long as they were not “merely [devices] to make racial discrimination easy.” However, these literacy tests in the South were not “fairly applied” and because “proving discrimination on a case-by-case basis was a laborious chore,” “discriminatory literacy tests were the most important devices for restricting voting by African Americans in the South.” Indeed, such “tests” and “devices” had a

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7 *South Carolina* at 334.
8 See *South Carolina State Constitution, Article II, Section 6*.
10 *Lassiter* at 53.
significantly discriminatory effect on the black electorate considering that 50 percent of all black males were illiterate at the time.\textsuperscript{12}

South Carolina defended the use of literacy tests by citing the Court’s ruling in \textit{Lassiter}, “that [such devices] are not in themselves contrary to the Fifteenth Amendment.”\textsuperscript{13} However, in this case, the Court believed that in most of the states covered by the Act, including South Carolina, these “tests and devices” were “instituted with the purpose of disenfranchising Negroes and [were] administered in a discriminatory fashion for years.”\textsuperscript{14} Moreover, in many cases, as the Court explained, white voters “[were] excused altogether from the literacy and understanding tests, or [were] given easy versions, [were] given extensive help from voting officials and [were] registered despite serious errors in their answers.”\textsuperscript{15} In light of such findings, the Court identified a serious violation of the Equal Protection Clause and while it did not answer the question regarding the constitutionality of literacy tests, the Court did uphold the power of Congress to suspend them.\textsuperscript{16}

Once President Johnson signed the Act, seven states immediately became covered under Section 5 as prescribed by the coverage formula in Section 4.\textsuperscript{17} South Carolina believed that this violated the equal sovereignty of the states and that Congress “would be [robbing] the courts of their rightful constitutional role…to strike down statutes and

\begin{footnotes}
\item[12] Keyssar (2009), 89.
\item[13] Katzenbach at 333.
\item[14] Ibid. at 333-34.
\item[15] Id. at 312.
\item[16] Id. at 304. Congress amended the VRA in 1970 to include a nationwide ban on literacy tests. The Supreme Court upheld this ban that same year in \textit{Oregon v. Mitchell}, 400 U.S. 112 (1970).
\item[17] See Appendix 1. These states include Alabama, Georgia, Louisiana, Mississippi, almost all of North Carolina, South Carolina and Virginia By 1975, Alaska, Arizona and Texas were also covered in their entirety in addition to several counties in California, Florida, Michigan, New York and New Hampshire.
\end{footnotes}
procedures.” Again, the Supreme Court argued otherwise. Not only was Congress authorized to do so under Section 2 of the Fifteenth Amendment but the equality of the states argument had no bearing in this case. As Chief Justice Warren pointed out, “That doctrine applies only to the terms upon which States are admitted to the Union and not to the remedies for local evils which have subsequently appeared.” In a brief rebuttal, the Court upheld the Act’s coverage formula as a “permissible method of dealing with a problem…in a limited geographic area” and after 1975, the coverage formula would remain intact and unchallenged.

The preclearance provision of the Voting Rights Act is as controversial today as it was when South Carolina first challenged it. Section 5 requires a jurisdiction covered by Section 4 of the Voting Rights Act to submit any voting related changes to the Attorney General for approval before they can be implemented or enforced. In *South Carolina*, the Court acknowledged that many of the covered states “had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees.” Thus, Section 5 was adopted in order to prevent states from circumventing the law. South Carolina argued that Congress exceeded its constitutional authority in passing Section 5 but the Court, mindful

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18 *Katzenbach* at 325.
20 *Id.*
21 With the 1982 amendments, Congress established the procedures by which jurisdictions could “bail out” of Section 5 coverage. As of November 2012, dozens of counties, towns and school districts, most of which are in Virginia, have successfully bailed out of Section 5. See Appendix 1.
22 *Katzenbach* at 335.
of “these unique circumstances,” held that Congress acted in a “permissibly decisive manner” under the powers granted by Section 2 of the Fifteenth Amendment.\(^{23}\)

The Court accepted these “stringent remedies” as legitimate efforts by Congress “to banish the blight of discrimination in voting.”\(^{24}\) However, in doing so, “it gave considerable deference to congressional determinations about the means necessary to ‘enforce’ the Fifteenth Amendment.”\(^{25}\) This became the precedent for most of the early voting rights cases. During this “first generation” of cases, the courts rejected many suits filed by covered states based on federalism objections and violations of the separation-of-powers doctrine. Instead, as Victor Andres Rodriquez has shown, the Court “generally accorded Congress great deference with respect to Section 5 and interpreted the Act’s provisions as being expansive in scope.”\(^{26}\) At this point in time, many jurisdictions in the South were still using literacy tests and poll taxes to deny blacks the right to vote and Congress needed, in the words of Chief Justice Warren, “an array of potent weapons against [this] evil” and the courts were willing to grant them such authority.

### II. Poll Taxes and Equal Protection

Land-ownership and taxpaying requirements were among the many voting qualifications in post-revolutionary America. And while many states over time repealed these qualifications, states like Virginia continued to enforce the payment of a poll tax as a condition for voting in state elections well into the 1960s. In *Breedlove v. Suttles*\(^ {27}\), the

\(^{23}\) *Katzenbach* at 335.

\(^{24}\) *Ibid* at 308.


\(^{27}\) 302 U.S. 277 (1937).
Supreme Court unanimously upheld the use of a poll tax in state elections but, as with the fate of literacy tests, Congress moved to outlaw such discriminatory voting practices. The Twenty-fourth Amendment, which prohibited the use of poll taxes in federal elections, was ratified on January 23, 1964. Soon thereafter, with the Voting Rights Act of 1965, Congress declared “that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting.”28 And so, under Section 10 of the Act, Congress empowered the Attorney General to suspend such poll taxes in the covered jurisdictions. The “test case” for such legislative authority was *Harper v. Virginia Board of Elections*29 in which Supreme Court was forced to revisit the matter of Congress’ authority under the Fourteenth and Fifteenth Amendments.30

The question before the Court in *Harper* was whether or not requiring the payment of a poll tax as a precondition to voting was a form of “invidious discrimination” and, thus, constituted a violation of the Equal Protection Clause.

Furthermore, if such a violation existed, was Congress authorized to abolish the use of poll taxes in state elections? The majority ruled in the affirmative, finding that “wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”31 The Court acknowledged, as it had in *Lassiter*, that the states have a

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30 The circumstances surrounding the Court’s ruling in *Harper* are quite remarkable and deserve some attention. As Richard Hasen explains, *Harper* initially began as a “6-3 per curiam summary affirmer of the state poll tax” (Hasen 2003, 37). However, upon reading a dissent written by Justice Goldberg who was joined by Chief Justice Warren and Justice Douglas, Justice Black offered to put the case for a full hearing “expecting a similar 6-3 vote affirming the validity of the poll tax” (38). But, as Hasen further writes, Justices Brennan, Clark and White changed positions and Justice Black found himself in the minority with Justice Harlan.
31 *Harper* at 668.
right “to fix voting qualifications” but “to introduce wealth or payment of a fee as a
measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.”32 As
Justice Douglas put it, “Once the franchise is granted to the electorate, lines may not be
drawn which are inconsistent with the Equal Protection Clause.”33 Voting qualifications
constituted violations of the Equal Protection Clause if they were found to be “irrational”
or “arbitrary” and the Court viewed poll taxes as such. Thus, according to the majority,
abolishing poll taxes in state elections was within the powers granted to Congress by the
Fourteenth and Fifteenth Amendments.

Justices Hugo Black and John Harlan (joined by Justice Stewart) filed two
separate dissenting opinions and as Alex Keyssar notes, “[They] may have had the more
cogent and historically grounded legal argument.”34 They argued that “in holding the
Virginia poll tax violative of the Equal Protection Clause, the Court departed from long-
established standards governing the application of that clause.”35 The three dissenting
justices shared the majority’s sentiments regarding poll taxes but they did not consider
them to be “necessarily irrational or arbitrary and therefore not under the scope of the
Equal Protection Clause.”36 As Justice Black argued, poll taxes can be “reasonable” and
“rational” either as a policy for revenue-collecting or simply for the “belief that voters
who pay a poll tax will be interested in furthering the State's welfare when they vote.”37
But more importantly, as they argued, because poll taxes did not fall under the scope of

32 *Harper* at 668. Interestingly enough, the Court seemed to believe that wealth was even less of an
appropriate voting qualification than literacy since at least “the ability to read and write . . . has some
relation to standards designed to promote intelligent use of the ballot” (citing *Lassiter* at 51).
33 *Ibid* at 665.
34 Keyssar (2009), 219.
35 *Harper* at 681.
36 Keyssar, 219.
37 *Harper* at 674.
the Equal Protection Clause, it was not for the courts to “adopt a new political theory” concerning voting qualifications.  

The Court’s ruling in *Harper* and subsequent property-owning and taxpaying requirement cases would eventually yield a new standard of “strict scrutiny that would loom large in later suffrage law.” Essentially, the state could not burden or condition the right to vote without proving it did so because of a “compelling state interest.” Moreover, such burdens and conditions “had to be tailored with great precision, so that ‘all those excluded,’ were clearly less interested in or affected by the election’s outcome than those who were permitted to vote.” This level of judicial scrutiny and the “innovative use of the equal protection clause” in *Harper* are characteristic of this “first generation” of voting rights cases in which the Supreme Court addressed the issue of access to the ballot while also redefining Congress’ enforcement powers under the Fourteenth and Fifteenth Amendments.

### III. *Literacy Tests and a Further Empowered Congress*

The threat of disenfranchisement for non-English speaking voters was just as real as it was for black voters who were subjected to unfair, discriminatory literacy requirements. In its original form, the Voting Rights Acts of 1965 did not explicitly provide for any immediate relief for members of language minority groups. Section 4 (e) prohibited the states from conditioning the right to vote on English literacy but made no mention of bilingual ballots or language assistance at the polls. The absence of such

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38 *Harper* at 674.
39 Keyssar (2009), 220
41 *Id.*
measures quickly became an issue not limited to the covered jurisdictions of the South. By virtue of geography, Texas and Arizona saw a sharp rise in Mexican immigrants but by the 1960s, “hundreds of thousands of Puerto-Rican born residents were living in New York City,” many of whom “were being denied the franchise because of their inability to pass the state’s English-language literacy exam.” As a result, in *Katzenbach v.* Morgan, the Supreme Court was forced to rule on Congress’ authority to enforce the language provisions of the Voting Rights Act, the effects of which extended far beyond civil rights.

The Supreme Court did not find literacy tests to be unconstitutional in *Lassiter* and it was certainly not prepared to say otherwise here. Rather, as Justice William Brennan noted, the Court’s task was limited to determining whether or not Section 4 (e) was an appropriate exercise of Congress’ authority under Section 5 of the Fourteenth Amendment. In a 7-2 decision, the majority held that while “the States have power to fix voting qualifications, they cannot do so contrary to the Fourteenth Amendment or any other constitutional provision.” Thus, Section 4 (e) “may be regarded as an enactment [by Congress] to enforce the Equal Protection Clause.” In deciding this particular case, the Court not only offered Congress considerable latitude with respect to enforcing the Voting Rights Act. Indeed, as Richard Hasen argues, the Court also advocated for an “expansive view of congressional power under Section 5 of the Fourteenth Amendment.”

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42 Keyssar (2009), 210 and 208.
45 *Id.*
46 *Id.* at 653.
In other words, enforcing the Equal Protection Clause was not just reserved for the courts. Backed by the Supreme Court, Congress had the authority to enact legislation it believed would “secure the guarantees of the Fourteenth Amendment.”

Legal scholars have come to identify in Justice Brennan’s opinion a “ratchet theory” for congressional enforcement of the Equal Protection Clause. Essentially, “Congress could overenforce the Equal Protection Clause, but it could not take away basic equal protection guarantees recognized by the Court.” This significant showing of judicial deference to congressional enforcement powers was concerning for some, especially Justice John Marshall Harlan who saw such a move as a departure from the “fundamentals in the American constitutional system – the separation of legislative and judicial function and the boundaries between federal and state political authority.”

Justice Harlan of course voted with the majority in *South Carolina* in affirming Congress’ authority under Section 2 of the Fifteenth Amendment to enforce the preclearance provision of the VRA. However, he argued that the language provisions of the VRA at question in *Morgan* were “a significantly different type of congressional enactment.” Section 5 of the VRA may have been a “justifiable exercise of congressional initiative” but in his opinion, questions concerning possible violations of

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47 Hasen (2003), 122. Richard Hasen emphasizes that the Court’s decision in *Morgan* is even more significant given the Court’s decision in *South Carolina* a few months earlier in which the Supreme Court supported an equally expansive view of the enforcement powers under Section 2 of the Fifteenth Amendment.

48 *Morgan* at 652.

49 Hasen (2003), 124.

50 *Morgan* at 664.

51 *Ibid* at 667.
the Equal Protection Clause were those “for the judicial branch to ultimately determine,” not Congress.\footnote{Morgan at 667.}

Justice Brennan’s “ratchet theory” came under immediate attack by those who, like Justice Harlan, believed the Court was jeopardizing the principles of federalism and confusing the distinctive roles of the legislative and judicial branches. To be sure, Justice Brennan stipulated that Congress did not have the “power to exercise discretion in the other direction and to enact ‘statutes so as in effect to dilute equal protection and due process decisions of this Court.'”\footnote{Ibid at 652 supra note 10.} However, some were unconvinced, arguing that “if Congress' interpretive power is grounded on special legislative competence not possessed by courts’… that competence should extend to a judgment that the courts have gone too far in expanding the scope of individual rights.”\footnote{William Cohen, “Congressional Power to Interpret Due Process and Equal Protection,” Stanford Law Review, Vol. 27, No. 3 (Feb 1975): 603-620.} Even worse, some feared that such a “ratchet theory” could lead to a dilemma of “competing claims of constitutional rights.”\footnote{Ibid, 607.} As one jurist put it, “Could a congressional expansion of the power of courts to issue gag orders to the press in criminal cases be justified as an enhancement of fair trial without the necessity of any judicial determination of the freedom of the press issue?”\footnote{Ibid.} Ultimately, the Court’s holdings in \textit{Morgan} and other early voting rights cases yielded two separate readings of these decisions. Since the Court views “burdens” on the right to vote with strict scrutiny, is this expansive view of congressional power limited to voting rights or do these cases speak to a broader interpretation of Congress’ enforcement powers under the Fourteenth and Fifteenth Amendments not limited to voting rights? Many have argued the latter suggesting that with \textit{Katzenbach v. Morgan}, it seemed clear that Court was “widening the constitutional arc of

equality beyond mere race” and voting rights.\textsuperscript{57} In either case, the Court was certainly moving in the direction of conferring more authority on Congress.

\textit{IV. Expanding the Scope of Preclearance}

Simply put, the Voting Rights Act of 1965 had one goal: “to provide ballots for southern blacks.”\textsuperscript{58} Yet still, even after the courts struck down discriminatory tests and devices that kept black voters from the polls, it became clear that simply providing ballots for disenfranchised minorities was not enough. Minority voters in the Deep South were denied equal representation in their state legislatures because of racially gerrymandered districts and discriminatory at-large election systems. Such was the case in \textit{Reynolds v. Sims} which led to Chief Justice Warren to declare, “The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.”\textsuperscript{59} As it was written, Section 5 of the VRA required states to submit to the Attorney General for approval any changes in the procedures for conducting their elections. It made no mention of submitting changes for election methods or as a result of redistricting but all that changed with \textit{Allen v. State Board of Elections}.\textsuperscript{60} The Supreme Court significantly expanded the scope of preclearance to include such changes and as Abigail Thernstrom writes, “A law initially designed simply to open doors of electoral opportunity was


\textsuperscript{60} 393 U.S. 544 (1969).
transformed into an effort to protect minorities from any measure that might weaken their electoral strength.\textsuperscript{61}

\textit{Allen v. Board of Elections} included several cases from Mississippi and Virginia ("consolidated on appeal and argued together") concerning the application of Section 5. The appellants in each of the first three cases argued that certain amendments to the Mississippi Election Code were subject to preclearance. They included: (1) "at-large election of county supervisors instead of election by districts;" (2) "eliminated the option of electing or appointing superintendents of education in 11 counties and provided that they shall be appointed;" (3) certain "requirements for independent candidates running in general elections."\textsuperscript{62} The fourth case concerned a challenge to a Virginia statute for handwritten write-in votes. Essentially, the Supreme Court had to interpret the language of the Voting Rights Act and determine exactly which changes in "standard, practice or procedure with respect to voting" were subject to preclearance.

The majority in \textit{Allen} interpreted Section 5 to cover virtually any and all changes to election law in a covered state regardless of how minor it may have seemed. In the words of Chief Justice Warren, "Congress apparently feared that the mere suspension of existing tests would not completely solve the problem, given the history some States had of simply enacting new and slightly different requirements with the same discriminatory effect. Not underestimating the ingenuity of those bent on preventing Negroes from voting, Congress therefore enacted § 5."\textsuperscript{63} It was clear that each of the "practices" or "procedures" in question would have in some way disenfranchised black voters.

\textsuperscript{61} Thernstrom (2009), 33.
\textsuperscript{62} Allen at 544.
\textsuperscript{63} Ibid at 566.
Switching from district to at-large voting for county offices would have certainly prevented a minority candidate of choice being elected in a majority-white county. Blacks would have been further excluded from the franchise by having certain county officers appointed rather than elected and by making it more difficult for independent candidates to appear on the ballot. Precisely for these reasons, Section 5 was created to guard against “racist mischief.”

Justice Harlan’s dissent in *Allen* would have a significant influence on future challenges to Section 5 for years to come. In his opinion, the provisions of the Voting Rights Act did not extend beyond questions of ballot access. As a result, redistricting plans or changes from district to at-large voting were not subject to preclearance because, as Justice Harlan argued, “Section 5 was not designed to implement new substantive policies.” Instead, Section 5 was designed to be the mechanism by which the protections of Section 4 were enforced. It could not require preclearance for changes that were not expressly stated elsewhere in the Act. For this reason, Justice Harlan understood “Section 5’s federal review procedure [to be] ancillary to Section 4's substantive commands” and accused the Court’s decision of “permitting the tail to wag the dog.”

But perhaps the most important point in Justice Harlan’s dissent came when he questioned the Court’s allegedly unfounded preference for district systems over at-large

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64 Although Justice Harlan issued a dissenting opinion, he concurred with the majority’s findings regarding the Virginia statute. Virginia had changed the procedures for write-in votes and when illiterate voters attempted to affix prepared labels to their ballots, the Board of Elections refused to count their ballots. Justice Harlan agreed that at least in that case, “Virginia has quite obviously altered the manner in which an election is conducted when, for the first time, it has been obliged to issue regulations concerning the way in which illiterate voters shall be processed at the polls” (*Allen* at 593).
65 Thernstrom (2009), 50.
66 *Allen* at 584.
67 *Ibid*.
68 *Id.* at 585.
voting. As he stated, “It is not clear to me how a court would go about deciding whether an at-large system is to be preferred over a district system.” Justice Harlan’s doubts would be confirmed in future voting rights cases in which the Court was forced to established standards for preclearance by determining what constituted discriminatory “purpose and effect” and how the electoral franchise of minorities was best protected.

Critics of the Court’s ruling in Allen, like Abigail Thernstrom who calls it a “radical decision,” acknowledge that “in the context of time and place, the Allen decision was on solid ground.” Even though minorities were now protected from literacy tests and poll taxes, they were being denied equal representation because of racial gerrymandering and discriminatory election systems. As a result, the Court supported a broad interpretation of Section 5 hoping to prohibit discriminatory election practices that were not limited to simply the design of paper ballots or poll locations. However, as Justice Harlan cautioned in his dissent, once the Court expanded the scope of Section 5, determining which changes should be precleared became more difficult in the absence of clear instructions or standards for preclearance. Not until 1976 did the Supreme Court establish a standard of “nonretrogression” in Beer v. United States. However, the question of standards for preclearance would remain disputed and unresolved for the next two decades as tensions arose between Congress and the courts.

V. Extensions, Amendments and an Emboldened Congress

Many of the most important provisions of the Voting Rights Act, including the ban on literacy tests and the preclearance requirement, were temporary. But in 1970, Congress

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69 Allen at 586.
70 Thernstrom (2009), 52.
considered the reauthorization of the Act and the extension of these temporary provisions for an additional five years. Emboldened by the Court’s findings in *Katzenbach v. Morgan*, Congress pushed forward with a nationwide ban on literacy tests. In addition, Section 5 was extended for another five year period but more importantly, Congress amended the coverage formula in Section 4. As a result, those jurisdictions which were accused of using discriminatory election practices in the 1968 presidential election were now covered under Section 5. In a matter of five years, federalism objections to the Act seemed to be a thing of the past. The 1970 amendments embodied the confidence with which Congress expanded the scope of Section 5 and strengthened the overall legislative authority of the Act.

Congress again took up the reauthorization of the Voting Rights Act in 1975. As with the 1970 amendments, the coverage formula was revised and the preclearance requirement was further extended to Alaska, Arizona and Texas. As Michael McDonald puts it, “The appetite of the majority in 1975 was to expand coverage, not reduce it.” Additionally, Congress extended Section 5 for eight years. However, this time around, Congress also amended the Act to include Section 203 which outlined certain procedures for assisting language minority groups in the appropriate jurisdictions. If a state or political subdivision met certain criteria, it had to provide “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, in the language of the applicable minority group, as well as in the English

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72 Michael P. McDonald, “Who’s Covered? Coverage Formula and Bailout,” in *The Future of the Voting Rights Act*, ed. by David L. Epstein et al. (New York: Russell Sage Foundation, 2006): 255-276. According to McDonald, with the 1970 revisions to the coverage formula, some jurisdictions that had successfully bailed out of Section 5 coverage were instantly brought back under the federal review requirements of the Act. Additionally, several counties across the United States from California to New York were brought under Section 5 coverage for the first time. All of this came about despite a serious effort by many southern representatives to limit the scope of Section 5 coverage (257).
73 Ibid, 258. At the same time, other counties in California, Florida, North Carolina and elsewhere were also included in the new coverage formula.
74 Ibid.
language.” Now, the Act would protect language minorities from discriminatory practices and covered jurisdictions would have to meet even more requirements in order to obtain approval from the federal government.

It is important to note that the 1970 and 1975 amendments to the Voting Rights Act were a reaction to the Supreme Court rulings in the cases mentioned in this chapter. Once the Court had supported the “stringent remedies” of the Act as it did in South Carolina, Morgan and Harper, Congress felt empowered enough not only to extend the temporary provisions of the Act but also to bring more states under its jurisdiction. Throughout the history of voting rights policy and litigation, this has often been characteristic of the relationship between Congress and the courts as the next chapters will discuss. The courts rule on Congress’ authority to enforce the Voting Rights Act and, with each reauthorization of the Act, Congress and the Department of Justice respond accordingly, sometimes contrary to the courts’ directives.

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Each of the Supreme Court cases discussed in this chapter is representative of the first generation of voting rights. They all address issues related to ballot access and they all reflect a Supreme Court that is very deferential to Congress. As we saw in South Carolina, Morgan and Harper, the Supreme Court struck down literacy requirements and poll taxes while also expanding the reach of federal oversight and defending the authority of Congress to enforce Section 5. The Court acknowledged the unprecedented nature of these provisions but emphasized the unique circumstances in certain areas that justified such extraordinary measures. However, given the nature of the recent challenges to the VRA, these cases have a

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renewed relevance to the conversation but they also appear to be in question. As Chief Justice John Roberts wrote in a recent opinion, “Some of the conditions that the Court relied upon in upholding this statutory scheme in [these cases] have unquestionably improved. Those improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success, but the Act imposes current burdens and must be justified by current needs.” Nevertheless, how the Court will treat these early voting rights cases in their assessment of photo identification laws and the current challenges to the VRA remains to be seen.

In continuing with our study of the history of congressional enforcement and judicial review of the VRA, we should look to Justice Harlan’s dissent in *Allen* and how that led to the evolving standards of preclearance and the so called “second generation” of voting rights cases. If we recall, Justice Harlan questioned “how the attorney general and the courts should decide which electoral procedures impermissibly discriminate against minority groups.” As Daniel Lowenstein and Richard Hasen have shown, with *Beer v. United States*, the Supreme Court addressed these issues by establishing the standard of “nonretrogression.” However, as Abigail Thernstrom puts it, “The [Beer] decision had only the most tenuous hold on voting rights enforcement.” We shall see in the next two chapters how the *Beer* decision introduced a period of competing interpretations and conflicting standards among the courts, Congress and the Department of Justice.

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77 Lowenstein and Hasen (2001), 207.
78 Ibid.
79 Thernstrom (2009), 61.
Chapter 2: The Battle Lines Are Drawn

“The purpose of Section 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.”


For the first fifteen years or so after the passage of the Voting Rights Act, the Supreme Court, Congress and the Department of Justice were all in agreement, more or less, with respect to their interpretation and enforcement of the Act’s provisions. It was as one constitutional historian called it, a “golden age for civil liberties.”¹ But by the 1980s, the courts and Congress often found themselves on opposing sides of the debate. The controversy surrounding minority voting rights became less about access to the ballot and more about proportional representation. Since then, the debate has been almost exclusively dominated by the issue of partisan gerrymandering. However, more recently, the courts and the Department of Justice have focused their attention on controversial photo identification laws. Therefore, in order to understand how the courts and the DOJ are handling this issue, it is necessary to examine the second generation cases which established the standards for preclearance still in use today.

Second generation barriers are those which discriminate against minority voters in other ways than simply restricting access to the ballot, namely, racial gerrymandering. In this chapter, we will begin with the retrogression standard that emerged from Beer v. United States followed by the Supreme Court’s controversial decision in City of Mobile v. Bolden which elevated proof of discriminatory intent to a position never before seen in

voting rights litigation, at least not since the passage of the VRA. We will then discuss how Congress responded to these landmark cases with the 1982 amendments and explain how this jockeying between the courts and Congress effected Section 5 enforcement during the 1980s and 1990s. To be sure, there will undoubtedly be a great deal of material that is either discussed briefly or left out entirely. After all, one could devote an entire thesis to the jurisprudence concerning redistricting alone. Instead, the purpose of this chapter is to simply illustrate the tension that developed and still exists today among the courts, the Department of Justice and Congress during this second generation.

I. The Nonretrogression Standard

Once the Supreme Court expanded the scope of Section 5 to cover “all changes, no matter how small,”\(^2\) enforcing the preclearance provision of the Voting Rights Act became a more demanding bureaucratic process. For example, by 1970, the total number of preclearance requests submitted to the Department of Justice was 2,559.\(^3\) By 1980, it reached 38,184 and, five years later, over 80,000 Section 5 submissions were made.\(^4\) However, it was unclear “under what standard the district court or the Attorney General had to use in assessing whether a district plan [or other voting change] had the effect of denying or abridging the right to vote on racial grounds.”\(^5\) In \textit{Beer v. United States}, the Supreme Court sought to establish such a standard. Whereas in the early voting rights

\(^4\) \textit{Ibid.} To be fair, the coverage formula was amended in 1975 and three more states (Alaska, Arizona and Texas) were brought under the jurisdiction of Section 5. However, while this might explain a modest rise in submissions, the exponential rise in submissions was due in large part to the increasing number of changes submitted as a result of \textit{Allen} rather than the increase in covered jurisdictions. As Abigail Thernstrom has shown, the number of changes requiring preclearance rose from 358 in 1970 to 22,000 in 1992 (Thernstrom 2009, 116).
\(^5\) Fuentes-Rohwer (2009), 729.
cases, the Court was addressing “constitutional inquiries” regarding the Equal Protection Clause and the Fourteenth Amendment, the Court in *Beer* was now addressing a “question of statutory interpretation.”6 The Court determined for itself what Congress intended in drafting Section 5 and the result was the retrogression standard. However, the decision signaled “a retreat from the earlier, expansive interpretations of the Act” and represented “an aggressive Court doing what it [wanted] with the open-ended and forgiving language of the Voting Rights Act.”7

After the 1970 census, the city of New Orleans adopted a new reapportionment plan for its council districts. As Timothy O’Rourke explains, the seven-member city council consisted of five ward seats and two at-large seats.8 Under the existing or “benchmark” plan, black voters constituted a majority in only one of the five wards despite the fact that 45 percent of the population was black. In the proposed plan, the percentage of registered voters in the majority-minority ward increased slightly from 50.2 percent to 52.6 percent. The plan also increased the percentage of the black population in another ward from 49.4 to 50.6 percent but, as O’Rourke points out, they still “remained a minority of registered voters” in that ward.9 The United States in this case argued that the reapportionment plan had a discriminatory effect such that black voters were not afforded proportional representation. In an opinion written by Justice Stewart, the majority argued otherwise, reversing a lower court’s ruling and approving the

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6 Fuentes-Rohwer (2009), 729.
7 Ibid.
9 Ibid, 93.
reapportionment plan despite the fact that it did not reflect the potential power of black voters in the city of New Orleans.

The Attorney General and the district court both denied preclearance for the reapportionment plan on the ground that it “inevitably would have the effect of diluting the maximum potential impact of the Negro vote.”10 In fact, the district court went even further by objecting to the plan because it still maintained two at-large seats in a city with a majority-white population. Although the plan did increase the minority population in two wards, the plan was accused of being discriminatory because it did not increase the voting strength of black voters by creating more majority-minority districts where possible. But Justice Stewart, along with four of his colleagues, argued that a proposed voting change had to be measured against the benchmark practice and not against what the Attorney General or a district court deemed to be the best case scenario. Such a narrow interpretation of Section 5 by the majority came from their reading of the legislative proceedings on the reauthorization of the VRA. Even though the word “retrogression” never appeared in the text of the Act or in the congressional hearings, Justice Stewart confidently asserted that “the purpose of Section 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.”11

The dissenting justices criticized the majority’s departure from previous rulings in which Section 5 was afforded “‘the broadest possible scope’ to reach ‘any state enactment which altered the election law of a covered State in even a minor way.’”12

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10 Beer at 136.
11 Ibid at 141. Emphasis added.
12 Id. at 145 (J. Marshall quoting Allen).
brief dissent, Justice White challenged the majority’s understanding of Section 5 to reach “only those changes in election procedures that are more burdensome to the complaining minority than pre-existing procedures.”\textsuperscript{13} According to Justice White, Section 5 is not “satisfied unless, to the extent practicable, the new electoral districts afford the Negro minority the opportunity to achieve legislative representation roughly proportional to the Negro population.”\textsuperscript{14} Interestingly enough, Justice White was simply repeating how the Court interpreted Section 5 only a year before in \textit{City of Richmond v. United States}.\textsuperscript{15} In an opinion written by White himself, the Court held, “An annexation reducing the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation does not violate Section 5 of the Act as long as the postannexation system fairly recognizes, as it does in this case, the minority's political potential.”\textsuperscript{16} However, this was clearly not the case with the reapportionment plan adopted by the city of New Orleans in which black voters were afforded the same representation in 1971 as they were in 1961, despite a significant rise in the black population.

\textsuperscript{13} \textit{Beer} at 143.
\textsuperscript{14} \textit{Ibid}.
\textsuperscript{15} 422 U.S. 358 (1975). O’Rourke disagrees with Thernstrom’s argument that the Court’s ruling in \textit{Beer} was at odds with \textit{Richmond}. However, in his attempt to reconcile the findings in \textit{Beer} with \textit{Richmond}, O’Rourke overlooks the circumstances of these two cases. The city of Richmond increased the white population percentage by annexing adjacent territories but the city also went from at-large voting to district voting, thus protecting minority voting strength from dilution. True, as O’Rourke argues, any “annexation that increased the white population percentage of a city could be viewed as retrogressive” but the Court in \textit{Richmond} did not stop there, as it did in \textit{Beer} (1992, 94). The majority went one step further by requiring proportional representation in the face of such retrogression. Under the \textit{Richmond} approach, the city of New Orleans, which already had a ward system in place, would have had to increase the number of majority-minority wards to reflect the changing demographics. Instead, by establishing the standard of nonretrogression, the Court in \textit{Beer} permitted the city to maintain the status quo by drawing only one majority-minority ward. Thus, as Thernstrom has justifiably shown, the Court committed itself to an unsustainable double standard. “Retrogression was the test in \textit{Beer}; proportional representation in \textit{Richmond}” (2009, 60).
\textsuperscript{16} \textit{Richmond} at 378.
Justice Marshall, joined by Justice Brennan, labeled the majority’s reading of Section 5 “an awkward construction” which “approves a blatantly discriminatory plan.”

In criticizing the retrogression standard, Marshall reminded the Court, “We have made clear that dilution of voting power refers to resulting voting strength that is something less than potential (i.e., proportional) power, not to a reduction of existing power.”

Justice Marshall took issue especially with the majority’s decision to separate the constitutional standard from the statutory one. As Marshall explained, “Section 5’s language plainly contemplates: whether, in absolute terms, the covered jurisdiction can show that its proposed plan meets the constitutional standard. Because it is consistent with both the statutory language and the legislative purposes, this is the proper construction of the provision.” In other words, because the statutory language is consistent with the constitutional standard of the Fifteenth Amendment, a violation of one is naturally a violation of the other.

Ultimately, as Ellen Katz argues, the question in Beer was “how far beyond retrogression the Court understood Section 5 to extend.” By “ignoring the statutory

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17 Beer at 146. It should be noted that in his dissent in Richmond, J. Brennan, also joined by J. Marshall, seemed to foreshadow (and even agree with) the retrogression standard when he wrote, “The reliance upon postannexation fairness of representation is inconsistent with what I take to be the fundamental objective of Section 5, namely, the protection of present levels of voting effectiveness for the black population” (Richmond at 388). Of course, in Beer, the majority upheld the reapportionment plan precisely because it “protected the present levels of voting effectiveness for the black population” while Brennan and Marshall argued that merely protecting present levels of voting effectiveness would only perpetuate discrimination. But even if, as Justice Stewart noted, determining the retrogressive effect of a reapportionment plan was different from finding retrogression under a postannexation plan, Brennan and Marshall appeared to be shifting positions. In their minds, regardless of whether it was a redistricting or annexation plan, proportional representation and not retrogression, should be the standard.

18 Beer at 157. The “Fourteenth Amendment Reynolds line of cases” Justice Marshall refers to are White v Regester, 412 U.S. 755 (1973) and Whitcomb v. Chavis, 403 U.S. 124 (1971) which will be discussed in the next section of this chapter which focuses on the Court’s decisions regarding Section 2 cases and the debate between discriminatory intent versus effect.

19 Ibid at 153.

language,” as Justice Marshall stated, the majority limited Section 5’s application to constitutional violations alone. Such a narrow construction “offered a manageable standard that avoided the larger problems associated with White’s and Marshall’s approach,” but it essentially “allowed jurisdictions to maintain the status quo,” even when the status quo did not reflect the potential of minority voting strength. But, as Thernstrom has shown, Congress and the Department of Justice found “detours around retrogression” and “over time, Richmond’s standard prevailed.” Nevertheless, with Beer, the Supreme Court showed it was no longer going to interpret the provisions of the Voting Rights Act as expansively as it had before.

II. Discriminatory Intent and an Aggressive Court

In City of Mobile v. Bolden, the Supreme Court, according to many observers at the time, dealt a significant blow to the Voting Rights Act. In order to establish a violation of Section 2 of the Act or of the Fourteenth Amendment, the Court held that plaintiffs had to prove invidious discriminatory intent; simply proving the discriminatory effects of a reapportionment plan or other voting change was no longer enough. The Bolden decision was immediately criticized by civil rights advocates and election law experts alike. To begin with, as Frank R. Parker argued, the Court broke precedent with previous voter dilution cases in which the “totality of circumstances,” not intent or effect alone, would determine if a proposed change violated Section 2. Perhaps most

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21 Beer at 150.
22 O’Rourke (1992), 94.
23 Thernstrom (2009), 60.
24 Ibid, 120 and 60.
important was that the Court imposed “a more difficult standard of proof for minority
plaintiffs to meet in challenging the constitutionality of [certain] election laws.”27 For
years, those who challenged discriminatory election systems “enjoyed excellent success”
but *Bolden* “disturbed this state of affairs.”28 The “expanded scope of the intent
doctrine”29 in *Bolden* represented a Court that was growing evermore critical of voting
rights litigation.

Before *Bolden*, claims of voter dilution brought under Section 2 required a
showing of discriminatory effect as well as a host of other factors such as history of
discrimination or racially polarized voting. Frank R. Parker called this the “*Whitcomb-
White-Zimmer* formula,”30 a reference to two Supreme Court cases and one from the Fifth
Circuit Court of Appeals which all dealt with claims of voter dilution. In *Whitcomb v.
Chavis*31, the Supreme Court emphasized that the burden of proving discriminatory effect
rests on the plaintiff. In *White v. Regester*32, the Court decided this burden was met under
the standard of “totality of circumstances” which included showing “a history of
discrimination, the existence of cultural and language barriers, racially divisive campaign
appeals, limited numbers of minority-elected officials, a depressed socioeconomic status
for a minority and the use of potentially discriminatory majority vote and numbered-post
requirements.”33 When a circuit court of appeals “tracked almost exactly the [same]

27 Peyton McCrary, “Discriminatory Intent: The Continuing Relevance of ‘Purpose’ Evidence in Vote-
28 Lowenstein and Hasen (2001), 229.
29 Ibid at 349.
30 Parker (1983), 725.
33 Laughlin McDonald, “The 1982 Amendments of Section 2 and Minority Representation,” in
*Controversies in Minority Voting* ed. by Bernard Grofman et al. (Washington, D.C.: Brookings Institution,
evidentiary factors listed in *Whitcomb* and *White*” in *Zimmer v. McKeithen*\(^{34}\), the “results test” emerged as the legal precedent for establishing a constitutional violation for claims of voter dilution. But all of that changed with *Bolden*.

Justice Stewart, writing for the Court, believed that in order to establish a constitutional violation, evidence of discriminatory intent was more important than any of the other circumstances considered in *White*. Indeed, Justice Stewart wrote that the Court’s decision in *White* was perfectly consistent with a previous ruling where the Court held that “the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.”\(^{35}\) Justice Stewart then went on to completely “repudiate the *Zimmer* holding,” claiming it was based upon a “misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause.”\(^{36}\) Despite Stewart’s assertion that the Court was “applying an already established intent standard,” as Samuel Issacharoff argues, “Its holding was irreconcilable both with precedent and with the conventionally understood doctrinal basis of intent.”\(^{37}\) The “hostility to the relief [traditionally] afforded civil rights litigants” was unmistakable. With *Bolden*, the Court imposed an “onerous burden of proof”\(^{38}\) that made challenging discriminatory election practices exceedingly difficult.

In his dissent, Justice Marshall called for a “fresh consideration” of the facts, acknowledging that, in the past, the Court had often adopted “inconsistent approaches” in

\(^{34}\) 485 F.2d 1297 (5th Cir. 1973).
\(^{36}\) Parker (1983), 733 supra note 90 quoting *Mobile* at 73.
\(^{38}\) McDonald (1992), 67.
voter dilution cases. He disagreed with the plurality’s reading of *Washington*, saying, “To assume the Court intended covertly to overrule the discriminatory-effects test applied in *White v. Regester* without even citing *White*” would be an “unpalatable assumption.” Justice Marshall went on to remind the Court that voter dilution cases “were premised on the infringement of a fundamental right, not on the Equal Protection Clause's prohibition of racial discrimination.” By applying the intent standard in a voter dilution case, the Court was “deviating from the principle” that “under traditional fundamental rights analysis, strict scrutiny did not follow from discriminatory intent but from impact upon protected rights.” But perhaps the most concerning issue for Justice Marshall was the Court’s silence as to what evidence would be required to show discriminatory intent. All of this led him to conclude that the Court’s ruling in *Bolden*, its “manipulation of doctrines” and “drawing of improper distinctions” had made it “an accessory to the perpetuation of racial discrimination.”

The Court’s ruling in *Bolden* represented a significant departure from the very first Supreme Court cases in which the Voting Rights Act was broadly interpreted and the threshold for proving constitutional violations was more easily met. The immediate effects of the *Bolden* decision suggested that it was nothing short of a major defeat for minority voting rights at the time. As Alex Keyssar explains, “Numerous [dilution] suits were dismissed or withdrawn, judgments reversed and challenges to at-large voting systems turned down in the lower courts because of the lack of evidence of deliberate

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39 *Mobile* at 130.
41 *Id.* at 119.
42 Issacharoff (1982), 343.
43 *Ibid* at 141.
discrimination.” Thus, like Beer, the Bolden decision came to represent this second
generation of voting rights in which the Court was no longer willing to interpret the
provisions of the Act as broadly as it had before. But, with the reauthorization of the Act
in 1982, Congress “quickly came to the rescue.”

III. The 1982 Amendments: Congress Strikes Back

When Congress first amended the Voting Rights Act in 1970 and then again in
1975, it strengthened the core provisions of the Act in response to the Court’s rulings
upholding the constitutionality of the law. The 1982 amendments were also in response to
the Court’s rulings, except this time, “the express purpose was to overrule the Court’s
interpretation of Section 2 and thus eliminate the requirement of proving discriminatory
intent in cases brought under that section.” Many in Congress were “unhappy” with the
Bolden decision to say the least, and by rewriting the language of Section 2, Congress
sought to restore the standard of “totality of circumstances” first articulated in White.
Congressional amendments to the VRA which overturned the Court’s decisions became
characteristic of the second generation of voting rights. The Court, “lost in a political
thicket,” interpreted the language of the Act with inconsistent standards and Congress
reclaimed the “lost ground” by rebuking the Court and amending the Act accordingly.

As it was originally written, Section 2 was almost a word-for-word reiteration of
the Fifteenth Amendment. But in response to Bolden, Congress amended the language of
Section 2 as follows: “No voting qualification or prerequisite to voting or standard,

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44 Keyssar (2009), 237.
45 Thernstrom (2009), 144.
46 Parker (1983), 747.
47 Thernstrom, 73.
practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) of this title, as provided in subsection (b) of this section." The incorporation of the “results test” in Section 2 was a clear rebuttal of the Court’s findings in *Bolden*. But the 1982 amendments also included the addition of subsection (b) which reinstated the *Whitcomb-White* formula which the plurality in *Bolden* had rejected:

A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered:

Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The last sentence of subsection (b) is especially noteworthy. As Justice Stevens stated in his concurring opinion in *Bolden*, never before had the Court “established a constitutional right to proportional representation for racial minorities.” Although, as he explained, states and jurisdictions were “not constitutionally prohibited from according some measure of proportional representation to a minority group,” they were certainly not required to do so. Thus, it appeared that Congress, while willing to upend the Court’s findings in *Bolden*, was not willing to go so far by extending to minorities the right to proportional representation which would have invited further judicial scrutiny of the Act.

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49 Ibid.
50 *Mobile* at 86.
51 Ibid supra note 6.
Perhaps more interesting than the 1982 amendments themselves were the House and Senate reports that accompanied them. In particular, the Senate’s Judiciary Committee issued a report that included several factors for the courts to consider when determining violations of Section 2.\textsuperscript{52} As Laughlin McDonald points out, these “readily verifiable factors” were almost entirely derived from \textit{White v. Regester}, and, as in \textit{White}, “the factors were illustrative, not exhaustive and no particular number had to be proved.”\textsuperscript{53} Congress wanted to be clear as to what constituted a violation of Section 2 and how that determination should be met rather than have the courts get lost in the statutory language of the Act and determine for themselves what Congress intended.\textsuperscript{54}

In \textit{Rogers v. Lodge}\textsuperscript{55}, the Supreme Court seemingly accepted Congress’ rejection of the \textit{Bolden} decision. As Richard Hasen writes, only two days after Congress amended Section 2, the Court “appeared to backpedal from the discriminatory intent standard” by allowing plaintiffs “to prove discriminatory intent inferentially through proof of discriminatory effect.”\textsuperscript{56} Laughlin McDonald identifies two reasons for the sudden change: first, Justice Stewart, who wrote the opinion in \textit{Bolden}, was replaced by Justice Sandra Day O’Connor, who voted for the plaintiffs in \textit{Rogers}; and second, Chief Justice Warren Burger who, quoting one observer, “‘was stung by nationwide criticism of the

\begin{itemize}
\item \textsuperscript{53} McDonald (1992), 68. See also Frank Parker (1983) who details the legislative history of the 1982 amendments including efforts by some in the Senate to “restore the \textit{Bolden} intent test” and statements by representatives in the House who “stressed that ‘the amendment is designed to make clear that proof of discriminatory intent is not required to establish a Section 2 violation” (749-750).
\item \textsuperscript{54} The 1982 Amendments also included changes to the bailout procedures outlined in Section 4. In order to “bailout” from Section 5 coverage, a jurisdiction would have to demonstrate that in the past ten years, there was no evidence of discriminatory behavior, among other things. See “Terminating Coverage Under the Act’s Special Provisions” under “Section 4 of the Voting Rights Act” from the Voting Section of the Civil Rights Division at the U.S. Department of Justice. http://www.justice.gov/crt/about/vot/misc/sec_4.php.
\item \textsuperscript{55} 458 U.S. 613 (1982).
\item \textsuperscript{56} Hasen (2003), 31.
\end{itemize}
Bolden decision,”” switched his vote.\textsuperscript{57} True, as Alex Keyssar puts it, “The reign of Bolden was brief thanks to the happenstance of timing.” However, the intent standard would once again make another appearance in the Court’s rulings fifteen years later.

After 1982, the courts and Congress appeared to be on two different tracks with respect to their interpretation of the Act and how it addressed second generation barriers to minority voting. On one hand, the Supreme Court was moving in the direction of preventing the DOJ from making decisions about constitutional violations. It did so by severely limiting the application of Section 5 with the retrogression approach and burdening plaintiffs in Section 2 claims with the intent standard. On the other hand, Congress understood the statutory language to be consistent with the constitutional standards. Congress responded swiftly by amending Section 2 and instating the “results test” and the Department of Justice found ways around the rigid retrogression standard (which will be discussed later in this chapter). Thus, the 1982 amendments signified the fundamental differences between the courts and Congress and revealed a fracture in judicial and legislative framework of voting rights enforcement that had remained intact and in relative harmony since 1965.

\textit{IV. The Supreme Court and the Amended Section 2}

In \textit{Thornburg v. Gingles}\textsuperscript{58}, the Supreme Court once again took up the issue of voter dilution. However, the Court went further in its assessment of the amended Section 2 than it did in \textit{Rogers}. Rather than accept the list of factors set forth in the Senate Judiciary Committee report, the Court added to that list a “three-prong test” for

\textsuperscript{57} McDonald (1992), 69.
\textsuperscript{58} 478 U.S. 30 (1986).
establishing a constitutional violation in cases brought under Section 2. Justice Brennan, writing for the Court, noted that the Senate’s report was “neither comprehensive nor exclusive “and that “other factors may also be relevant and may be considered.”59 As McDonald puts it, in the opinion of the Court, the factors listed in the Senate report were “deemed supportive of, but not essential to, a finding of voting rights violations.”60 While it may seem that the Court was only further complicating Section 2 litigation, as Richard Hasen states, “The Gingles framework has remained essentially intact.”61 Nevertheless, the “riot of opinions” in Gingles did prove that “the amendments of Section 2 had solved none of the definitional and normative problems so evident in the Fourteenth Amendments cases between 1971 and 1980.”62

Justice Brennan argued that in order to establish a violation of Section 2, minority plaintiffs had to meet three conditions: “First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. Second, the minority group must be able to show that it is politically cohesive. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.”63 With respect to the first two conditions, Justice Brennan stated, “Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.”64 Furthermore, “If the minority group is not politically cohesive, it cannot be

59 Gingles at 45.
60 McDonald (1992), 69.
61 Hasen (2003), 33.
62 Thernstrom (2009), 85.
63 Gingles at 51.
64 Ibid supra note 17 at 50.
said that the selection of a multimember electoral structure thwarts distinctive minority
group interests." In other words, minority voters must prove that they are large enough
to constitute a majority in a single-member district and that a significant portion of the
group votes for the same candidates otherwise, a violation of Section 2 does not exist.

As Abigail Thernstrom has shown, Justice Brennan’s third condition was met
with skepticism on the part of the other members of the Court. He identified racially
polarized voting to occur when a minority preferred candidate was defeated by the
majority voting-age population. But Thernstrom considered Brennan’s interpretation to
be an “‘implicit repudiation of Whitcomb’” which led Justice O’Connor to argue,
“‘Amended §2 is intended to codify the ‘results’ test employed in Whitcomb v. Chavis
and White v. Regester’ but ‘the vote dilution analysis adopted by the Court today clearly
bears little resemblance to the ‘results’ test that emerged in Whitcomb and White.’”
David Epstein and Sharyn O’Halloran shared similar concerns with Brennan’s
formulation. They argued the Gingles framework had “serious shortcomings both
statistically and substantively.” As they argue, the Gingles standard does not clearly
define who qualifies as a minority candidate of choice especially since the Supreme
Court has argued that such a person need not be a member of the minority group.
Moreover, the Gingles decision does not address the serious question of how majority-
minority districts impact the substantive representation of minority interests.

65 Gingles at 51.
66 J. Brennan was joined by Marshall, Blackmun Stevens, and White although J. O’Connor wrote a special
concurrence joined by C.J. Burger, Powell and Rehnquist.
67 Thernstrom (2009), 87 quoting J. O’Connor in Gingles at 84 and 98.
68 See David L. Epstein and Sharyn O’Halloran, “Measuring the Electoral and Policy Impact of Majority-
paper explains in greater detail the Gingles method and the authors propose solutions to many of the
“shortcomings” they have identified with their ecological regression analysis.
Concentrated minority populations may in fact, as they propose, be counterproductive and the *Gingles* formula does not account for this. Thus, while the *Gingles* analysis may have “simplified decisions in voting rights cases and added greater predictability,” subsequent redistricting cases suggest that it did not resolve the issue entirely.\(^69\)

Justice O’Connor argued that Section 2 was amended in order to return to the pre-*Bolden* results test employed in voter dilution cases and, indeed, the legislative record supported such a view. In her special concurrence which Thernstrom states “read like a dissent,” Justice O’Connor was primarily concerned with Brennan’s “simple and invariable” definition of voter dilution and racial bloc voting.\(^70\) O’Connor argued that the Court did not address a critical question: “How much of an impairment of undiluted minority voting strength is necessary to prove vote dilution?”\(^71\) This question, one which “reflects a basic conflict on the Court about the core values at stake in voting cases,”\(^72\) indicated O’Connor’s reservations about limiting the definition of voter dilution to the ability of minority groups to elect their preferred candidates.\(^73\) As Paul W. Jacobs and Timothy O’Rourke have argued, it is essentially a fundamental disagreement as to whether or not “protection against dilution is a group entitlement, or instead, an

\(^{69}\) McDonald (1992), 70.

\(^{70}\) *Gingles* at 90.

\(^{71}\) *Ibid* at 91. It is worth comparing Justice O’Connor’s special concurrence in *Gingles* with Justice Harlan’s dissent in *Allen*. In *Gingles*, O’Connor questioned what kind of standard would be used in assessing at-large systems in Section 2 cases. In *Allen*, Harlan proposed a similar question as to what standard the Attorney General or the Court would use in determining preclearance for jurisdictions switching from at-large systems to district voting under Section 5.


\(^{73}\) Justice White also wrote a concurring opinion, however, like O’Connor, he did not believe that a violation of Section 2 existed merely when a minority preferred candidate was defeated. As he argued, such a definition of racial bloc voting is “interest-group politics rather than a rule hedging against racial discrimination.” He continued, “I doubt that this is what Congress had in mind in amending 2 as it did, and it seems quite at odds with the discussion in *Whitcomb v. Chavis*.” (*Gingles* at 83).
individual entitlement.” Thus, Justice O’Connor’s ultimate concern with Justice Brennan’s approach was that it came “perilously close to establishing a group right to proportional representation, notwithstanding the proviso of amended Section 2.”

The fallout from *Thornburg v. Gingles* cannot be emphasized enough. If the purpose of the Court was to “simplify” Section 2 litigation, one could argue, as many already have, that *Gingles* had the opposite effect. At present, the Court’s implicit endorsement of proportional representation in *Gingles* does not seem as controversial as it did in 1986, especially because of the Court’s findings in recent redistricting cases. Nonetheless, as Thernstrom summarizes, “[*Gingles*] left the lower courts and the Supreme Court in subsequent cases to struggle with making sense of two layers of complexity: the statute itself and the Court’s interpretation of it in its 1986 decision.” At the very least, the *Gingles* decision represented a badly divided Court and demonstrated that the 1982 amendments did little to resolve the complex issues that first emerged in *Whitcomb* and *White*. As the next section will explain, this tension that began to develop between Congress and the Court left the Department of Justice in a difficult position.

**V. Making Sense of the Situation: DOJ Enforcement After 1982**

Enforcing the Voting Rights Act has never been a small task for the Department of Justice. Needless to say, the persistent tinkering of the law by Congress and the courts over the years has made enforcing Section 5 even more difficult. As a result, the Department of Justice, but more specifically, the Voting Section of the Civil Rights Division, has been caught in middle as the courts and Congress have clashed over the

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74 Jacobs and O’Rourke (1987), 295.
75 Ibid.
76 Thernstrom (2009), 90.
“proper” interpretation of the Act. But as the debate changed from the simple yet fundamental question of ballot access to the complicated yet controversial question of proportional representation, the DOJ quickly found itself at the center of the controversy. Applying the Court’s strict definition of retrogression to “second generation” barriers to voting was not exactly practical and when the Civil Rights Division interpreted retrogression to meet its needs, it was labeled by its critics as “lawless.”

Similar criticisms were also raised when the Division tried to evade the discriminatory intent standard in the wake of *Bolden*. Nevertheless, as the following section will explain, the patterns of Section 5 enforcement over the years illustrate how the DOJ treated different issues at different times and, more importantly, how it responded to congressional amendments and the Supreme Court’s decisions.

During the 1970s, a majority of the objections interposed by the Attorney General concerned discriminatory devices and at-large systems. These two changes alone accounted for 59 percent of all objections made between 1968 and 1979. Moreover, 77 percent of all objections during that time were based on retrogression. What this suggests is that during the first generation of voting rights and especially after the Court’s ruling in *Allen*, Section 5 activity significantly increased and retrogression was the main legal basis of the DOJ’s determinations. However, the fallout from the intent requirement of *Bolden* and the 1982 amendments had a noticeable effect on Section 5 enforcement.

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77 Thernstrom (2009), 124.
78 Peyton McCrary, Christopher Seaman, and Richard Valelly, “The Law of Preclearance: Enforcing Section 5,” in *The Future of the Voting Rights Act* ed. by David L. Epstein et al. (New York: Russell Sage Foundation, 2006): 20-37. The distribution of objections for other change types was relatively balanced and diverse when compared to later decades especially during the 1990s when redistricting alone accounted 52 percent of all objections. *Supra* Table 2.1.
79 Ibid, 25. The authors point out that during this period, only “nine objections (just 2 percent) were based on intent alone and only twenty-two more (6 percent) were based on a combination of intent and retrogressive effect.”
Instead of the results test or discriminatory intent or retrogressive effect emerging as the sole legal standard for Section 5 objections, they all became grounds for a denial of preclearance.\(^8^0\) And while some criticized the DOJ during this time for being “out-of-control” and “outside-the-law,”\(^8^1\) the argument can be made that this was largely the doing of the Court’s conflicting decisions and Congress’ indiscernible standards.

The distribution of objections made during the 1980s changed considerably. The Attorney General interposed twice as many objections to redistricting submissions than in the previous decade. A total of 165 redistricting plans were denied preclearance, which accounted for 38 percent of the total objections during that decade.\(^8^2\) More important, however, was the decline in determinations based on retrogression alone for redistricting submissions. As McCrary and Seaman explain, retrogressive effect was the basis for 40 percent of the objections in the 1970s but, by the 1980s, the number had fallen to 35 percent and by the 1990s it fell even further to 10 percent.\(^8^3\) On the other hand, “Objections based on purpose alone increased from seven (11 percent) in the 1970s to seventy-five (44 percent) during the next decade and 112 (58 percent) in the 1990s.”\(^8^4\)

Another noteworthy trend was the increasing number of objections based on a combination of discriminatory intent and retrogressive effect. During the 1980s, 24 percent of redistricting submissions were denied preclearance because of this “combined

\(^8^1\) Thernstrom (2009), 120.
\(^8^2\) McCrary, Seaman and Valelly (2006), 26. The authors note that the pattern is similar for all voting changes. Whether it was annexations or enhancing devices, there was a precipitous decline in the use of the retrogression standard and marked increase in findings of discriminatory intent as reasons for denying preclearance. *Supra* Table 2.2.
\(^8^3\) Ibid, 26.
\(^8^4\) Ibid.
standard,” compared to 7 percent a decade earlier. However, in this respect, Abigail Thernstrom accuses the Justice Department of “assuming that effect and purpose were interchangeable concepts.” As she contends, “The Department of Justice moved perilously close to this position, frequently suggesting that jurisdictions refusing to implement an alternative, more racially “fair” plan were engaging in deliberate discrimination. And, with recourse to that option, Beer could be safely ignored.” Under the stewardship of Chief Justice Rehnquist, the Supreme Court shared such an opinion of Section 5 enforcement and, for the first time, the Court’s crosshairs were now focused squarely on the Department of Justice.

Second-generation barriers to voting, especially racial gerrymandering, exposed the Department of Justice and the preclearance process to more scrutiny. There were those who criticized the Civil Rights Division for pursuing a political agenda in reviewing redistricting submissions but such accusations led one former Voting Section attorney to claim, “With only a few exceptions, political considerations have not entered into the application of the provisions of the Voting Rights Act in any national administration.” Nevertheless, the Rehnquist Court grew critical of the DOJ’s enforcement policies under Section 5 and in two landmark redistricting cases, the Court essentially reprimanded the Justice Department for its “maximization policy.” As Thernstrom submits, “‘Fairly’ drawn plans were those that gave blacks ‘safe’ seats in proportion to the black population – to the greatest degree possible. A plan that was not

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85 McCrary, Seaman and Valelly (2006), 27.
86 Thernstrom (2009), 123.
87 Ibid.
‘fairly drawn’ was ‘retrogressive.’” Interestingly enough, the preclearance guidelines released by the DOJ in 1985 made no mention of creating the maximum number of majority-minority districts. Yet many argued the Voting Section objected to plans that did not create majority-minority districts where possible and, eventually, the issue came before the Supreme Court.

In *Shaw v. Reno*[^89][^90], the Supreme Court struck down a reapportionment plan in North Carolina finding that race-drive reapportionment legislation, in the absence of a compelling state interest, violates the Equal Protection Clause. However, as Richard Hasen has argued, “The Court failed to clearly define the nature of the injury, not even the elements necessary to prove it or who had standing to raise it.”[^91] But the post-Shaw redistricting cases sought to address this “lack of doctrinal clarity,”[^92] in particular, *Miller v. Johnson*[^93], in which the Court, as Thernstrom puts it, “put additional meat on the bare constitutional bones in *Shaw*.“[^94] In that decision, the majority reaffirmed its position in *Shaw* and criticized the Department of Justice for its “minority-district maximization policy.”[^95] Writing the opinion of the Court, Justice Kennedy stated, “In 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.” This judicial lambasting of the Department of Justice approached its peak in 1996 when a district court in *Smith v. Beasley* stated, “The Department of Justice in the

[^89]: Thernstrom (2009), 121.
[^91]: Hasen (2003), 140.
[^92]: Ibid, 141.
[^94]: Thernstrom, 148.
[^95]: Hasen notes that in the *Shaw* line of redistricting cases, “the matters have been fleshed out, more or less, by a consistent five-member majority (Chief Justice Rehnquist and Justices Kennedy, O’Connor, Scalia and Thomas)” (140).
present case, as it had done in *Miller*, misunderstood its role under the preclearance provisions of the Voting Rights Act. The purpose of Section 5 review has been explained above and it does not require maximization; it is intended to prevent retrogression.”

To be sure, a great deal of the literature on redistricting and the debate between the courts and the DOJ has been noticeably omitted. However, the purpose of this section has not been to explain the jurisprudence concerning racial redistricting. Rather, this section attempts to illustrate the developing tension between the courts and the DOJ that came to characterize the second generation of voting rights. Of course, the fact that this tension began with the issue of redistricting is not inconsequential. The difficulty has been, and continues to be at present, that “given the correlation between race and partisan identification,” issues like redistricting and photo identification laws are particularly contentious. The purpose here is to point out the distinction the Court has made between “impermissible districting based on race and permissible districting based upon partisan affiliation.” It is of great importance because it appears that such a distinction between racially-motivated efforts and politically-driven ones is being extended to photo identification laws.

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There can be no mistaking the dramatic change between the first and second generation of voting rights cases. To begin with, the courts and the Department of Justice had moved beyond the issue of ballot access to the more complicated question of proportional representation. But, in doing so, the two came into conflict with one another

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97 Hasen (2003), 140.
98 Ibid.
and the more amiable relationship between them which defined the first generation soon became a thing of the past. The Court showed in *Beer* and *Bolden* that it was no longer willing to interpret the VRA as expansively as it had before. It did so by establishing the standards of retrogression and discriminatory intent. And although Congress effectively overturned the Court’s rulings with the 1982 amendments, such actions only served to further excite the tension which still exists today, if not more so.

The redistricting cases also highlighted the fundamental disagreements between the courts and the Department of Justice with respect to their competing interpretations of the Voting Rights Act. As we will see, the Supreme Court’s distinction between racially-motivated efforts and politically-driven ones would have serious implications for future voting rights cases, especially the Court’s recent decision concerning Indiana’s photo identification requirement. But before we examine these specific voter identification laws, in the next chapter, we will look at several other important cases which also reveal an aggressive Court redefining discriminatory purpose and separating violations of Section 2 from those of Section 5.
Chapter 3: The Voting Rights Act in Transition

“To permit congressional power to prohibit the conduct challenged in this case requires state and local governments to cede far more of their powers to the Federal Government than the Civil War Amendments ever envisioned; and it requires the judiciary to cede far more of its power to interpret and enforce the Constitution than ever envisioned. The intrusion is all the more offensive to our constitutional system when it is recognized that the only values fostered are debatable assumptions about political theory which should properly be left to the local democratic process.”


The latter half of the second generation of voting rights cases was marked by a noticeable ideological shift on the Supreme Court. As Victor Andres Rodriquez states, “The ascension of William Rehnquist to the position of Chief Justice and the appointments of Justices Scalia and Thomas shifted the balance on the Court towards a more restrictive view of Congress’ constitutional enforcement powers.”

This “conservative judicial activism” revealed itself in a series of decisions in which the Court, led by a consistent five-member majority of its more “conservative” members, limited Congress’ authority under the Fourteenth Amendment and became increasingly skeptical of the “federalism costs” inherent in Section 5 of the Voting Rights Act. During this “second phase” or “new federalism revolution” as Richard Hasen calls it, the Court sought to prevent Congress and the Justice Department from making their own

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1 Rodriguez (2003), 792. Instead of using generational terms to classify the voting rights cases since 1965, Rodriquez divides the history of voting rights litigation into two “eras.” The first such era was championed by the Warren and Burger Courts which interpreted congressional enforcement power very broadly. The second era has since been shaped by the Rehnquist Court which has constructed such legislative power very narrowly (793).

2 Ibid, 793.

3 John Roberts and Samuel Alito replaced Chief Justice William Rehnquist and Justice Sandra Day O’Connor, respectively, thereby preserving this conservative majority along with Justices Scalia and Thomas. Justice Kennedy, who is often considered to be the Court’s “swing vote,” has often voted with the conservative members of the Court particularly on the issue of voting rights.

4 Hasen (2003), 125.
determinations about constitutional violations while enforcing the Act, especially with respect to the questions of voter dilution and proportional representation. Given that this second phase has persisted for the last two decades, voting rights have been under the scrutiny of the Court for some time now and much of what the Court decided during this period has brought us to a point where many feel previous interpretations of Voting Rights Act and even the Act itself are in serious jeopardy.

We will begin this chapter by looking at two important Supreme Court decisions starting with Justice William Rehnquist’s dissent in *City of Rome v. United States.* Next, we will look at *City of Boerne v. Flores* in which the Court reversed its position regarding congressional enforcement powers. Also, in the next chapter, we will see the issue of discriminatory intent remerge and discuss how the Court’s findings in the *Bossier Parish* cases influenced the 2006 amendments to the Act which, in many ways, was a repeat of the aftermath of the *Bolden* decision. Ultimately, the purpose of this chapter will be to demonstrate how these cases represented a concerted effort by the Rehnquist Court to restrict the authority of Congress and the Justice Department and prevent them from making determinations about constitutional issues. Finally, we will conclude this chapter with *Northwest Austin v. Holder,* the most serious constitutional challenge to the Voting Rights Act since *City of Rome.* As we will see later, much of what the Court said in that case laid the foundation for future challenges to the Act, the result of which we see today with the most recent facial challenge to the law.

5 446 U.S. 156 (1980). Although this case predates many of the cases discussed in the previous chapter, I have included it here because it represents the early beginnings of what Richard Hasen calls the “new federalism revolution” (2006, 85). Being that the dissent was written by then-Justice William Rehnquist, it is especially informative of how the Court treated the federalism arguments against the Voting Rights Act under his leadership.
I. *The Federalism Costs Become Too Costly*

In *City of Rome v. United States*, the Supreme Court reconsidered the constitutionality of the Voting Rights Act for the first time in nearly fifteen years. The city of Rome, Georgia had made several voting-related changes, most of which were denied preclearance by the Attorney General because of the disparate effect they would have had on black voters. However, the city argued that since the Fifteenth Amendment only prohibited “purposeful racial discrimination in voting,” Congress could not “prohibit voting practices lacking discriminatory intent even if they [were] discriminatory in effect.” That Congress exceeded its authority under the Fifteenth Amendment was the same argument raised in *South Carolina* and Justice Marshall, writing for the Court, indeed recognized it as such when he said, “The appellants are asking us to do nothing less than overrule our decision in *South Carolina v. Katzenbach*.” However, then-Justice Rehnquist was willing to do exactly that as he explained in his dissent, the language of which “gained adherents” and “[raised] serious concerns about the constitutionality of the Voting Rights Act.”

Many of the concerns Justice Rehnquist expressed in his dissent in *Rome* were similar to those first raised by Justice Harlan in his dissent in *Morgan*. Like Justice Harlan, who voted with the majority in *South Carolina*, Justice Rehnquist accepted the remedial actions of Congress to prevent purposeful discrimination. However, in judging the effects of certain election practices, Justice Rehnquist believed that Congress and, by extension, the Justice Department were making their own determinations about

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6 *Rome* at 173.
7 *Rome* at 174.
8 Hasen (2003), 125.
constitutional violations which, as Justice Harlan emphasized, “was a question for the judicial branch ultimately to determine.” Justice Rehnquist echoed that sentiment when he stated, “Today's decision is nothing less than a total abdication of that authority, rather than an exercise of the deference due to a coordinate branch of the government.” He also went on to criticize the majority’s interpretation of discriminatory effect to include the ability of minority voters to elect a candidate of choice, arguing, “The enforcement provisions of the Civil War Amendments were not premised on the notion that Congress could empower a later generation of blacks to "get even" for wrongs inflicted on their forebears.” In doing so, Justice Rehnquist repeated the views of his predecessors in previous cases who also debated the necessity to afford minority voters proportional representation. In the end, for Justice Rehnquist preclearance requirement was a “straitjacket” on state sovereignty and he believed the majority was extending Congress’ remedial powers beyond what the Court had envisioned fifteen years earlier.

Justice Rehnquist’s dissent in Rome was essentially a complete and comprehensive summary of every argument levied against the Voting Rights Act up until that time. It represented a fundamental opposition by some on the Court to “a broad view of federal government power to regulate state and local governing rules.” However, the majority in Rome reaffirmed the Court’s ruling in South Carolina and once again, the Act

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9 Morgan at 667. Justice Harlan’s dissent in Morgan is regularly cited in Justice Rehnquist’s dissent here in Rome. In many respects, both dissenting opinions can be traced to Justice Black’s dissent in South Carolina in which he said, “Neither the Fifteenth Amendment nor any other Amendment to the Constitution has given the slightest indication of a purpose to grant Congress the power to veto state laws either by itself or its agents” (South Carolina at 361).
10 Rome at 207.
11 Ibid at 218.
12 Id. at 207. Justice Powell wrote a separate dissent but he focused instead on the city’s initial argument that it was not subject to Section 5’s preclearance requirement. As a result, his inquiries into the constitutionality of the Act dealt with Section 4(a) and the process by which jurisdictions could “bail out” of Section 5 coverage.
13 Hasen (2006), 85.
was justified as an appropriate exercise of Congress’ authority under the Fifteenth Amendment. But changes in the membership of the Supreme Court, now led by Chief Justice Rehnquist, signaled an end to such judicial deference. Rehnquist’s dissent in *Rome* clearly demonstrated how a conservative-leaning Court would treat voting rights enforcement in subsequent cases.

Perhaps one of the most important cases decided by the Rehnquist Court was *City of Boerne v. Flores*. As Richard Hasen explains, the archbishop of San Antonio, Texas applied for a building permit to renovate a church in Boerne, Texas. When the city denied the permit because of zoning laws, the archbishop filed a suit under the Religious Freedom Restoration Act of 1993 (RFRA). In a 6-3 decision, the Supreme Court struck down the RFRA as an unconstitutional exercise of Congress’ authority under Section 5 of the Fourteenth Amendment. The *Boerne* decision was a complete reversal of the Court’s findings in *Morgan* and such a restriction of congressional power would have serious implications for the future of the Voting Rights Act.

Much of Justice Kennedy’s opinion relied on an “instructive” comparison of the RFRA and the Voting Rights Act. As he explained, the legislative history concerning the VRA showed that there were serious, constitutional violations of a fundamental right that justified the Act as “remedial, preventative legislation.” With regards to the RFRA, there was no such evidence of widespread “religious bigotry” which led Justice Kennedy to argue, “The RFRA is so out of proportion to a supposed remedial or

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15 Hasen (2003), 126.
16 *Boerne* at 530.
18 Id., 535.
preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”¹⁹ This distinction was made by the Court in order to distinguish between “enforcement” and “remedial” legislation and why Congress could enact one but not the other. As Justice Kennedy noted, “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”²⁰ In this way, as Richard Hasen has argued, the Court rejected Justice Brennan’s “ratchet theory” in *Morgan* which allowed Congress to “overenforce” the Fourteenth Amendment.²¹

In order to determine the difference between “remedial” and “enforcement” legislation, the majority proposed a “congruence and proportionality test.”²² According to Justice Kennedy, “There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”²³ Such language, as Rodriguez shows, represented the “Court’s concern that its own power to interpret the Constitution might be eroded if Congress could change the scope of the Fourteenth Amendment legislatively.”²⁴ As this chapter will argue, this was a concern that defined the “second phase” of the second generation. The Rehnquist Court adopted a fundamentally different view of the Voting Rights Act, one which completely changed how Congress and the Justice Department should enforce it. Questions about proportional representation or the ability to elect a candidate of choice were questions of a constitutional nature for the Court to determine. At the very least, they were questions

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¹⁹ *Id.*, 532.
²⁰ *Boerne* at 519.
²¹ Hasen (2003), 126.
²² Rodriguez (2003), 794.
²³ *Boerne* at 520.
²⁴ Rodriguez, 794.
about political theory that the Court believed should be left up to the democratic process, not Congress or the DOJ. Thus, as Rodriguez has argued, “The Court sought to protect its role as supreme expositor of the Constitution” and such a concern was the certainly underlying principle behind the Court’s ruling in *Boerne*.

As others have argued and as this chapter will explain further, the Rehnquist Court became “increasingly responsive to the separation-of-powers objection in reviewing, and striking down, legislation authorized under the Equal Protection Clause of the Fourteenth Amendment.”25 For years, the Supreme Court rejected these federalism objections to the Voting Rights Act but with *Boerne*, the Rehnquist Court indicated that such objections to congressional enforcement powers were indeed appropriate. This dramatic reversal of the Court’s interpretation of the Fourteenth Amendment was driven by what the Court saw as “institutional overreaching” by a Justice Department spurred on by an over-empowered Congress.26 Having dealt with Congress in *Boerne*, the Supreme Court then moved to limit the authority of the DOJ in two of its most controversial decisions since *Bolden*.

II. **Separating Intent from Effect: The Bossier Parish Cases**

The two most important features of the VRA are Sections 2 and 5. To summarize what previous chapters have explained at length, while Section 5 applies only to the covered jurisdictions prescribed by the Act, Section 2 applies to the entire country. In addition, the standards governing these two provisions are also different. Retrogression is the standard for Section 5 while violations of Section 2 are established using the “totality

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25 Rodriguez (2003), 786.
26 Katz (2001), 1208.
of circumstances” standard. But, more importantly, the burden of proof shifts. Under Section 5, a covered jurisdiction must prove to the Attorney General that a proposed change will not have the purpose or effect of discriminating against minority voters. Under Section 2, the burden of proof is on the plaintiff to show such discrimination exists. But, as Abigail Thernstrom argues, the DOJ “ignored” these distinctions by “incorporating Section 2 into the legal standards governing the enforcement of Section 5.” Such was the opinion of the Supreme Court in 2000 when the Court “curtailed [this] interpretive freedom Voting Section attorneys had been exercising” and emphasized that preclearance under Section 5 could not be conditioned on compliance with Section 2.

After the 1990 census, the Bossier Parish School Board in Louisiana adopted a new redistricting plan for its school board elections. Under the original plan, there were no majority-minority districts and, despite opposition from local civil rights leaders, the new plan did not create any such districts. When the plan was submitted for preclearance, the Attorney General objected noting that “‘black residents [were] sufficiently numerous and geographically compact so as to constitute a majority in two single member districts.’” However, because the original plan did not have any majority-minority districts, a district court in Washington, D.C., upheld the new plan because it maintained the status-quo and, thus, was nonretrogressive. In a 7-2 decision, the Supreme Court upheld the district court’s judgment and found that “replacing the standards for §5 with

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27 Thernstrom (2009), 130.
28 Ibid.
29 Reno v. Bossier Parish School Board, 520 U.S. 471 (1997) at 475 quoting Attorney General’s August 30, 1993 objection letter. If we recall, phrases such as “sufficiently numerous” and “geographically compact” refer to the Gingles test used in Section 2 claims of voter dilution. Critics of the DOJ point to such objections as examples of the DOJ merging Section 2 standards with Section 5 enforcement.
§2…would contradict [the Court’s] longstanding interpretation of these two sections of the Act.”

Justice O’Connor, writing for the majority, emphasized that the Court “consistently understood Sections 2 and 5 to combat different evils and impose very different rules upon the States.” In Beer, the Court held that “§5 [was] designed to combat only those effects that are retrogressive.” Requiring a jurisdiction to meet this burden under Section 5 and satisfy the “results test” of Section 2 would be “to increase further the serious federalism costs already implicated by §5.” Justice O’Connor further explained that shifting “the focus of §5 from nonretrogression to vote dilution [would] change the §5 benchmark from a jurisdiction's existing plan to a hypothetical, undiluted plan.” As Abigail Thernstrom points out, such a hypothetical plan would “inescapably…be a plan ensuring minority office holding in proportion to the black population – a point which O’Connor did not mention” but one that Justice Stephen Breyer “explicitly acknowledged in his dissent.” Ultimately, the majority did not want the Justice Department using the standard of proportional representation, a standard which, although alluded to in previous redistricting cases, was never actually accepted by the Court.

In Part III of O’Connor’s opinion, the Court addressed the appellant’s argument that “evidence showing that a jurisdiction's redistricting plan dilutes the voting power of minorities is at least relevant in a §5 proceeding because it tends to prove that the

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31 Ibid.
32 Id. at 480.
33 Id.
34 Thernstrom (2009), 63.
jurisdiction enacted its plan with a discriminatory ‘purpose.’” Citing its decision in *Shaw v. Hunt*, the majority did not agree. As Justice O’Connor wrote, “That evidence of a plan's dilutive impact may be relevant to the §5 purpose inquiry does not, of course, mean that such evidence is dispositive of that inquiry. In fact, we have previously observed that a jurisdiction's single decision to choose a redistricting plan that has a dilutive impact does not, without more, suffice to establish that the jurisdiction acted with a discriminatory purpose.” In other words, the dilutive impact of a redistricting plan could not, on its own, prove discriminatory purpose under Section 5. However, Justices Breyer and Ginsburg, who both voted with the majority, believed otherwise and did not join Part III of the majority’s opinion.

Justice Breyer argued that evidence of dilutive impact should be given more consideration than the majority would suggest in determining preclearance for a redistricting plan. He offered the following example:

Suppose that a covered jurisdiction is choosing between two new voting plans, A and B. Neither plan is retrogressive. Plan A violates every traditional districting principle, but from the perspective of minority representation, it maintains the status quo, thereby meeting the “effects” test of § 5. Plan B is basically consistent with traditional districting principles and it also creates one or two new majority-minority districts (in a State where the number of such districts is significantly less than proportional to minority voting age population). Suppose further that the covered jurisdiction adopts Plan A. Without any other proposed evidence or justification, ordinary principles of logic and human experience suggest that the jurisdiction would likely have adopted Plan A with “the purpose . . . of denying or abridging the right to vote on account of race or color.”

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35 *Bossier Parish* (1997) at 487.
36 517 U.S. 899 (1996). In this case, Justice Rehnquist, writing for a five-member majority, stated, “We doubt that a showing of discriminatory effect under §2, alone, could support a claim of discriminatory purpose under §5” (*supra* note 7 at 914).
37 *Bossier Parish* (1997) at 488. In its declaratory judgment, the district court went so far as to say that “evidence of dilutive impact is irrelevant even to an inquiry into retrogressive intent” under Section 5 (at 490). However, the majority “rejected this notion” and reasoned that such evidence may be relevant but not conclusive in proving discriminatory purpose.
38 *Ibid* at 494.
Justice Breyer criticized the majority’s limited interpretation of “purpose” in Section 5, stating, “I can find nothing in the Court’s discussion that shows that Congress intended to restrict the meaning of the statutory word ‘purpose’ short of what the Constitution itself requires.” He argued that vote dilution was a “harm that Section 5 guards against” and the majority’s holdings in Part III would allow “unconstitutional plans adopted with an unconstitutional purpose” to obtain preclearance.39

While seven justices may have agreed that the Attorney General could not deny preclearance because of a suspected violation of Section 2, the Court was more divided on the relationship between discriminatory purpose and effect. These divisions became more pronounced when the case reached the Supreme Court again after having been initially remanded to the district court.40 This time, as Abigail Thernstrom explains, the Supreme Court had “to answer a question, that, surprisingly, had never been raised in the decades since Beer had been decided: Did the retrogression test for discrimination govern the question of unacceptable effect alone, or was it equally applicable to assessments of invidious purpose?”41 Simply put, could a redistricting plan (or other voting-related change for that matter), adopted with a discriminatory purpose but having a nonretrogressive effect, be precleared? In the most controversial decision since Bolden, five justices believed such a plan should be precleared.

39 Bossier Parish (1997) at 495. In his opinion, Justice Breyer cites the Court’s decision in Rogers v. Lodge which, if we recall from the previous chapter, allowed plaintiffs in Section 2 “to prove discriminatory intent inferentially through proof of discriminatory effect” (Hasen (2003), 31). Although Rogers was a Section 2 case, Justice Breyer appears to suggest that such an inference should be extended to Section 5 cases.
40 Commentators often refer to the second hearing of Reno v. Bossier Parish (528 U.S. 320 (2000)) as Bossier Parish II.
41 Thernstrom (2009), 64.
Justice Scalia, who wrote the opinion in *Bossier Parish II*, emphasized that after *Beer*, the Court has always understood the “purpose” and “effect” prongs of Section 5 to be limited to retrogression. True, the language of “denying” and “abridging” the right to vote appears elsewhere in the Act, namely in Section 2, and there the Court “has appropriately read ‘purpose’ to refer not only to retrogression, but to discrimination more generally.”42 However, as Justice Scalia stipulated, “Giving the language different meaning in §5 is faithful to the different context in which the term ‘abridging’ is used.”43 Cases brought under Sections 2 and 5 are different by their very nature and the statutory language and standards governing them are equally so. As Justice Scalia explained:

In §5 preclearance proceedings – which uniquely deal only and specifically with changes in voting procedures – the baseline is the status quo that is proposed to be changed: If the change ‘abridges the right to vote’ relative to the status quo, preclearance is denied, and the status quo (however discriminatory it may be) remains in effect. In §2 or Fifteenth Amendment proceedings, by contrast, which involve not only changes but (much more commonly) the status quo itself, the comparison must be made with a hypothetical alternative: If the status quo ‘results in [an] abridgement of the right to vote’ or ‘abridge[s] [the right to vote]’ relative to what the right to vote ought to be, the status quo itself must be changed.

Such a distinction was possible precisely because of the Court’s ruling in *Bossier Parish I* which held that preclearance under Section 5 cannot be denied because of a violation of Section 2. But, more importantly, the distinction was made because the Court did not want the career staff at the Justice Department to enforce Section 5 against “hypothetical alternatives.” The majority’s ruling significantly limited the scope of the “purpose” prong and the impact on Section 5 enforcement after *Bossier Parish II* was evidence of that.

43 Ibid, 321.
Justice Souter, joined by Justices Breyer, Ginsburg and Stevens, not only criticized the majority’s decision in *Bossier Parish*; he also criticized the Court’s ruling in *Beer*. As he stated in his thirty-page dissent, “The Court was mistaken in *Beer* when it restricted the effect prong of §5 to retrogression, and the Court is even more wrong today when it limits the clear text of §5 to the corresponding retrogressive purpose.”44 Justice Souter was “unconvinced” that “Congress intended preclearance of a plan not shown to be free of dilutive intent (let alone a plan shown to be intentionally discriminatory).”45 Such a narrow construction of the “purpose” prong ignored the legislative record which clearly “illustrated exactly the sort of relentless bad faith on the part of covered jurisdictions that led to the enactment of §5.”46 Even if one were to accept the ruling in *Beer* that the “effects test” is strictly limited to retrogression, the dissenting justices argued that Congress surely could not have intended such an assumption to be made about the “intent” prong.47 It was the same argument Justices Marshall and White raised in their dissent in *Beer* and, as in this case, it was not enough to convince a majority of the Court.

The Court’s ruling in *Bossier Parish II*, as in *Bolden*, had a noticeable effect on DOJ enforcement. During the 1990s, forty-three percent of all objections interposed by

44 *Bossier Parish* (2000) at 342. Justice Souter did not want to overturn the retrogression standard established in *Beer*. As he explained, “Although I adhere to the strong policy of respecting precedent in statutory interpretation and so would not reexamine *Beer*, that policy does not demand that recognized error be compounded indefinitely, and the Court’s prior mistake about the meaning of the effects requirement of § 5 should not be expanded by an even more erroneous interpretation of the scope of the section’s purpose prong.”
46 Id.
47 Id. at 375. Justice Kennedy wrote, “For even if retrogression is an acceptable standard for identifying prohibited effects, that assumption does not justify an interpretation of the word “purpose” that is at war with both controlling precedent and the plain meaning of the statutory text.”
the Attorney General were based on intent alone. 48 However, after Bossier Parish II but before 2006, “virtually all objections were based on effect.” 49 Proving retrogressive intent on the part of a submitting jurisdiction was difficult and with Bossier Parish II, the “majority guaranteed that the number of objections [based on intent] would be very substantially reduced.” 50 In fact, as McCrary and Seaman show, “At most, two of the forty-one objections were based on the elusive concept of retrogressive intent.” In light of such evidence, one could see why the authors considered Bossier Parish II to have been “the most transformative decision regarding Section 5 of the Voting Rights Act since the 1976 opinion in Beer.” 51

The Bossier Parish cases represented a Court “dissatisfied with the conduct of the DOJ in assessing preclearance submissions.” As Ellen Katz states, “In the Court’s view, the DOJ spent more than a decade implementing a ‘black maximization’ policy under which it required covered jurisdictions to draw the maximum number of black-majority districts possible, regardless of their contours or the communities of interest they encompass. In pursuit of this ‘policy,’ the DOJ is said to have denied preclearance based on unreasonable constructions of Section 5.” 52 For the Rehnquist Court, these “unreasonable constructions” included applying Section 2 standards to the preclearance

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49 Ibid. The Court decided Bossier Parish in 2000 and Congress amended the Voting Rights Act in 2006, effectively overturning the decision. Thus, the authors’ study of DOJ enforcement in the wake of the Bossier Parish II ruling is limited to this six-year period.
50 Ibid, 29.
51 Ibid. Others such as Timothy G. O’Rourke and Luis Fuentes-Rohwer do not believe that Bossier Parish II accounted for the dramatic decrease in objections based on intent. First, the fact that the case was decided in 2000 does not explain the drop of intent-based objections in states like South Carolina which began in 1995. Second, as they argue, “An important determinant of an administrative agency’s interpretation of a statute is more than simply a clarification of the underlying legal standard by a higher court: significant variables include the frequency of judicial review and the level of scrutiny of the administrative agency’s decision.” See Charles and Fuentes-Rohwer (2006).
52 Katz (2001), 1212.
process and misinterpreting the “purpose” prong of Section 5. And even though these
to overturn the *Bolden* decision. Similarly, when Congress reauthorized the Act in 2006,
decisions, [they] still reflected the skepticism with which the Court views DOJ conduct in
With each case during this second phase, the Rehnquist Court grew more
this realm.” With each case during this second phase, the Rehnquist Court grew more
skeptical of the DOJ and more receptive to the separation-of-powers objections.
However, despite whatever concerns the Court may have expressed, Congress was not
willing to part ways with the law when it considered its reauthorization in 2006.

III. The 2006 Amendments: Congress Strikes Back (Again)

When Congress amended the Voting Rights Act in 1982, the express purpose was
to overturn the *Bolden* decision. Similarly, when Congress reauthorized the Act in 2006,
the law was amended in order to overturn the Court’s ruling in *Bossier Parish II*. As
Abigail Thernstrom states, “The point was clear: Section 5, as it was understood before
the 2000 decision in *Bossier Parish*, had to be restored.” And so, intent became once
again “a stand-alone question” and the “mere evidence of discriminatory purpose –
regardless of whether such purpose seeks to make minorities worse off than the status
quo – [was] grounds for a denial of preclearance.” Thus, the 2006 reauthorization, like
the amendments of 1982, was characteristic of the second generation in which Congress
rebuked the Court for its controversial interpretations of the Act and amended the
statutory language accordingly.

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54 Thernstrom (2009), 176. The 2006 reauthorization also addressed the Supreme Court’s decision in
*Georgia v. Ashcroft*, 539 U.S. 461 (2003). Congress made it clear that voting laws could be denied
preclearance when they “diminished the ability of minorities to elect their preferred candidates of choice.”
55 Ibid, 177.
For the most part, there were few changes to the VRA with the 2006 reauthorization. As Nathaniel Persily states, “The same jurisdictions remained covered, the bailout procedures remained intact, the DOJ retained its special place in the preclearance regime and the legislation was reauthorized once again for twenty-five years.”\textsuperscript{57} However, the few changes that were made were very important. As it was originally written in 1965, Section 5 “said that no voting change could be precleared unless the D.C. Court or the Justice Department had found it did not ‘have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.’”\textsuperscript{58} As Thernstrom explains, “The ‘and’ had united the two terms, implying they should be read together, which meant that the standard governing ‘effect’ (retrogression) also governed intent.”\textsuperscript{59} This was how the Court read Section 5 in \textit{Bossier Parish II}. But, as Thernstrom continues, with the 2006 reauthorization, the Act “separated the two terms, permitting a definition of intent independent from effect. Under the revised statute, jurisdictions had the burden of proving that voting changes would have ‘neither’ the purpose ‘nor’ the effect of denying or abridging voting rights.”\textsuperscript{60} Even in the absence of retrogressive effect, under the amended Section 5, the DOJ could deny preclearance if it found evidence of discriminatory purpose.

As with the previous reauthorizations of the Act, Congress compiled a long and detailed record of evidence and testimony relating to voter discrimination. Indeed, as Kristen Clarke writes, “The record amassed by Congress during the 2006 reauthorization bears remarkable resemblance to the record underlying the 1975 reauthorization and the

\textsuperscript{57} Persily (2007), 207.
\textsuperscript{58} Thernstrom (2009), 177.
\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid.
record underlying the 1982 reauthorization.”\(^{61}\) Altogether, the House and the Senate compiled over 20,000 pages of records, including over 4,000 pages of Section 5 objections letters from the DOJ and other “formal legal documents such as complaints and consent decrees.”\(^{62}\) Dozens of witnesses appeared before congressional hearings as well as many election officials and experts who testified to the effectiveness of Section 5 and the other provisions of the VRA. Ultimately, this comprehensive record served to justify Section 5 by illustrating the presence of “increasingly sophisticated forms of discrimination in the covered jurisdictions.”\(^{63}\)

With the 2006 reauthorization of the Voting Rights Act, the legislative record amassed by Congress may have been more important than the changes Congress actually made to the legislation. Of course, this is not to say that the changes were insignificant. Overturning the Court’s decision in \textit{Bossier Parish II}, even if it was done by only changing a few words in Section 5, was significant in its own right. Nevertheless, the sheer size of the record indicated that “[Congress’] approach was deliberative, thoughtful and comprehensive in scope.”\(^{64}\) However, the “veneer of bipartisanship” in the final vote “glossed over serious disagreements between the parties” over the new VRA. It was these same disagreements that led many observers to predict that the Act would be “doomed” the next time the Court considered its constitutionality.\(^{65}\) And yet, as the next section will discuss, when a case challenging the law reached the Supreme Court, the Court was not willing to strike down the Act although it came dangerously close to doing exactly that.

\(^{62}\) Ibid, 403.
\(^{63}\) Ibid, 431.
\(^{64}\) Ibid, 402.
\(^{65}\) Persily (2007), 252.
IV. The Voting Rights Act in Peril: NAMUDNO v. Holder

Soon after Congress extended the Voting Rights Act for an additional twenty-five year period, a small utility district in Austin, Texas challenged the law. In *Northwest Austin Municipal Utility District Number One v. Holder* 66, the district argued that under the bailout procedures set forth in Section 4 (a) of the Act, it should be released from the preclearance requirements of Section 5. But, more importantly, the appellants challenged the constitutionality of the 2006 reauthorization. It was the first major challenge to the law since *City of Rome* and, given the leanings of the Roberts Court, many observers feared the Court would strike down Section 5. The law and the manner in which it was enforced had been under the scrutiny of the Rehnquist Court for the greater part of the last decade. And under Chief Justice John Roberts, a similar skepticism and concern for the “federalism costs” still resonated with the conservative majority. Nevertheless, as one commentator put it, “The thunderous case ended in a whimper.” 67 The Court chose not to rule on the constitutionality of law but instead allowed the utility district to bailout from Section 5 coverage. However, Chief Justice Roberts’ opinion was anything but a ringing endorsement of the preclearance provision. It was clear after *NAMUDNO* that the Voting Rights Act was in serious jeopardy.

A district court in Washington, D.C. ruled that the utility district was ineligible to bail out from Section 5 coverage because the bailout procedures in Section 4 (a) only applied to states and political subdivisions. The district court argued that according to the statute, a political subdivision only referred to counties, parishes or other subunits that

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66 557 U.S. 193 (2009). The appellant in this case is commonly abbreviated and referred to as NAMUDNO.
registered voters. However, the Supreme Court did not interpret the term so narrowly. Referring to the 1982 amendments, Chief Justice Roberts argued that “piecemeal bailout” was indeed permitted and that Section 5 does not treat each “governmental unit as the State itself.”68 As he stated, the government’s argument against the district being considered a political subdivision “would render even counties unable to seek bailout so long as their State was covered.” The ability of a political subdivision to bail out of Section 5 coverage did not depend on the matter of the state’s coverage and on this issue, the Court was unanimous. 69

Adhering to the doctrine of constitutional avoidance, the Court did not rule on the constitutionality of Section 5 since it granted the appellant relief from the statute by allowing it to bail out from coverage.70 However, as Ellen Katz writes, although Chief Justice Roberts avoided striking down the statute, he “nevertheless displaced the district court’s broad opinion and, along the way, made clear how he would resolve the constitutional question.”71 He acknowledged that “the historical accomplishments of the Voting Rights Act are undeniable” but noted that “things have changed in the South.”72 As Chief Justice Roberts explained, “Some of the conditions that we relied upon in upholding this statutory scheme in Katzenbach and City of Rome have unquestionably improved. Voter turnout and registration rates now approach parity. Blatantly

68 NAMUDNO at 209.
69 Justice Thomas wrote an opinion concurring and dissenting in part. He agreed that the utility district should be permitted to bail out from Section 5 coverage but he did not believe the doctrine of constitutional avoidance was appropriate in this case. Justice Thomas devoted the majority of his opinion challenging the constitutionality of Section 5.
70 The district court did not avoid this question and upheld the statute against the constitutional challenge. See 573 F. Supp. 2d 221.
72 NAMUDNO at 200.
discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” Of course, as he admits, “These improvements are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success.” But, as Chief Justice Roberts famously stated, “The Act imposes current burdens and must be justified by current needs.”

Ellen Katz argues that the language in Chief Justice Roberts’ opinion can be best understood as “operative holding – one that strikes down the statute but stays the order until the next case in which the question is observed.” Such a case is currently before the Court but exactly how the Court will use its findings in NAMUDNO to inform its decision there remains to be seen. Nevertheless, Chief Justice Roberts’ opinion in this case suggests that he shared the same concerns with the VRA as his predecessor, Chief Justice William Rehnquist. NAMUDNO serves as an example of this “second phase” of the second generation in which the Court, under the stewardship of Chief Justices Rehnquist and Roberts, has grown more skeptical of the Voting Rights Act and how it was being enforced by the Justice Department. As this chapter has shown, these “federalism concerns” came out of the second generation cases concerning voter dilution and proportional representation. Looking ahead, how the Court handled those federalism objections may indicate how it will deal with similar arguments as the discussion turns to photo identification laws and the fundamental question of ballot access.

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73 NAMUDNO at 200.
74 Ibid.
75 Id. at 201.
76 Katz (2009), 998.
77 The case I am referring to is Shelby County v. Holder, Docket No. 12-96 argued Wednesday, February 27, 2013. We will discuss this case in greater detail later.
As we explained in the previous chapter, second generation barriers are those which discriminate against minority voters in other ways than simply restricting access to the ballot, namely, racial gerrymandering. Thus, when we say “second generation cases,” we are referring specifically to the early redistricting cases which concerned voter dilution and raised the question of proportional representation. But, as this chapter has argued, during the second generation there was a noticeable ideological shift on the Supreme Court. Under Chief Justice William Rehnquist, proportional representation was rejected as the standard for approving redistricting submissions. Congress’ enforcement powers were significantly reduced after Boerne and Section 5 enforcement was greatly restricted after the Bossier Parish cases. More importantly, as the current Roberts Court has shown, the Court has become more receptive to the federalism objections brought up against the Voting Rights Act. Together, these decisions by the Court shaped this “second phase” of the second generation and it has brought us to a point where the likelihood of the Act being struck down is greater than ever before.

Now that we have examined the history of voting rights litigation and enforcement up until NAMUDNO, we can move onto the discussion of photo identification laws. As we will see in the next chapter, the very nature of these voter identification laws suggests that we have come full circle since 1965 by returning to the fundamental question of ballot access. The Supreme Court decisions, the legislative history and the record of DOJ enforcement since then will likely have a great influence on how these three parties deal with these photo ID laws. As we will also see, many of the states which have implemented such laws have defended their right to regulate and
secure the integrity of their elections from voter fraud. These justifications for ID laws have refueled the federalism debate surrounding the VRA at a time when the law is especially vulnerable to such arguments given the Supreme Court’s recent decisions.
Chapter 4: Photo ID Laws and the “Third Generation”

“In particular, the [Supreme] Court has not specifically addressed how the retrogression test applies to ‘ballot access’ laws (e.g., laws governing the procedures for voting and voter registration) such as the ones before us. Indeed, the case law interpreting the section 5 effect test deals primarily with so called ‘second generation barriers . . . to preventing minority voters from fully participating in the electoral process.’ There are no cases squarely addressing how the retrogression analysis should function in a ballot access case like this one.”


After the debacle in Florida during the 2000 presidential election, a partisan war erupted over election procedures and administration. As Richard Hasen describes it, “It was a voting war between the ideals of integrity and access, between preventing fraud and assuring enfranchisement and between Democratic officials looking to benefit Democratic candidates and Republican officials looking to benefit Republican candidates.”¹ In the years since the 2000 presidential election, many states have tightened their election rules in an attempt to restore confidence in their electoral systems. Many of these efforts include proof of citizenship requirements, shorter early-voting periods, and, most notably, photo identification laws. According to the Brennan Center for Justice, during the 2011 legislative session alone, at least thirty-four states introduced voter identification legislation.² This figure is particularly surprising considering that before 2006, no states required voters to show photo identification at the polls. The sudden push for such restrictive voting qualifications has naturally renewed the debate over minority voting rights. Second generation issues such as racial gerrymandering are no longer the

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¹ Hasen (2012), 40.
only barriers to minority voters. With photo ID laws, we have entered into a “third
generation” that bears a striking resemblance to the first generation.

In the previous three chapters, we discussed the legislative and judicial history of
voting rights litigation in an effort to trace the development of Section 5 enforcement
since 1965. As we learned, most of the standards of preclearance used by the courts and
the Justice Department today arose from those second generation cases concerning
redistricting. In this chapter, we will examine how these standards, which addressed
issues of proportional representation, are being applied to photo identification laws which
deal with the entirely different question of ballot access. We will begin with the Supreme
Court’s decision in *Crawford v. Marion County Election Board*\(^3\). In that case, the Court
upheld Indiana’s voter ID law. We will then look at how the Justice Department and the
lower courts treated two controversial photo ID laws in Texas and South Carolina.
Finally, we will conclude the chapter by looking briefly at Georgia’s voter ID law and the
controversy surrounding the Justice Department’s decision in that case. Ultimately, the
purpose of this chapter will be to show that the courts and the DOJ are using standards
which were not designed to deal specifically with “ballot access laws” such as photo ID
requirements. As a result, this has led to many controversial and even conflicting
decisions by the courts and the DOJ.

I. *The Supreme Court Weighs In*

In 2005, the Indiana state legislature passed a law requiring its voters to present a
valid form of government-issued photo identification before casting a regular ballot in

\(^3\) 553 U.S. 181 (2008).
any election. The law passed both chambers of the state legislature in a “stunning partisan vote.”\(^4\) As Alex Keyssar explains, “No Republicans voted against it, while no Democrats voted for it.”\(^5\) At the time, the law was the strictest of its kind. Although several other states requested photo identification, Indiana became the first to require government-issued photo ID at the polls.\(^6\) The law was immediately challenged but a district court and a court of appeals both upheld Indiana’s photo ID law claiming that the law imposed only a minor burden on voters who did not have the requisite ID. In the fall of 2007, the Supreme Court agreed to hear the case.

Justice Stevens wrote the majority opinion for the Court which upheld the photo ID law in a 6-3 decision. Beginning with the standard established in Harper v. Virginia Bd. of Elections\(^7\), Justice Stevens wrote, “Even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.”\(^8\) However, in Andersen v. Celebrezze\(^9\), the Court “confirmed the general rule that ‘evenhanded restrictions that protect the integrity and reliability of the electoral process itself’ are not invidious and satisfy the standard set forth in Harper.”\(^10\) In other words, not all burdens on the right to vote are unconstitutional if they are imposed in order to protect the integrity of elections. This led Justice Stevens to cite two more cases, Norman v. Reed\(^11\) and Burdick v.

\(^4\) Keyssar (2009), 285.
\(^5\) Keyssar (2009), 285.
\(^6\) According to the 2011 report from the Brennan Center, Florida, Hawaii, Idaho, Louisiana, Michigan and South Dakota request some form of photo identification at the polls. However, if a registered voter cannot provide photo ID, he or she may still cast a regular ballot after an “alternative verification procedure like a signature match or sworn affidavit” (4).
\(^7\) 383 U.S. 663 (1966). If we recall from Chapter 1, this case concerned a state poll tax in Virginia.
\(^8\) Crawford at 186.
\(^10\) Crawford at 187.
Takushi\textsuperscript{12}, both of which applied the balancing approach used in Andersen. Thus, in determining the validity of Indiana’s voter ID law, Justice Stevens began his opinion with an analysis of the state’s interest in passing the law and weighing them against the burdens the law imposed on the voters.

The state identified three interests by requiring photo ID at the polls: (1) “deterring and detecting voter fraud;” (2) “preventing voter fraud;” (3) “safeguarding voter confidence.”\textsuperscript{13} However, as Justice Stevens pointed out, “The only kind of voter fraud that [this law] addresses is in-person voter impersonation” and the state could not provide any evidence of such fraud “at any time in its history.”\textsuperscript{14} Nevertheless, even in the absence of such evidence, Justice Stevens declared that the state still had a legitimate interest in protecting and preserving the integrity of its elections. As he stated, “While the most effective method of preventing election fraud may be well debatable, the propriety of doing so is perfectly clear.”\textsuperscript{15} And with respect to the petitioner’s claim that the law was motivated by partisan interests, Justice Stevens responded, “If a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided motivation for the votes of individual legislators.”\textsuperscript{16} Despite the apparent partisan motivations and the lack of evidence for voter fraud, Justice Stevens demonstrated great deference to the state’s interests in upholding the photo ID law.

\textsuperscript{12} 504 U.S. 428 (1992).
\textsuperscript{13} Crawford at 188-89.
\textsuperscript{14} Ibid at 192. Justice Stevens infamously cited Boss Tweed and the elections of the late-nineteenth century in New York City as an example of voter fraud. Only a handful of other examples of absentee ballot or registration fraud were mentioned, none of which occurred in Indiana.
\textsuperscript{15} Id. at 193.
\textsuperscript{16} Id. at 201.
Using the balancing approach, the majority argued that the burdens imposed on the voters in Indiana did not outweigh the state’s valid interest in protecting its elections. As Justice Stevens wrote, “For most voters who need [photo ID], the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photography surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.”\textsuperscript{17} To begin with, Justice Stevens cited the findings of the district court judge who “estimated that 99% of Indiana’s voting age population already possessed the necessary photo identification.”\textsuperscript{18} Moreover, the burden imposed on those who did not have the necessary photo ID was mitigated by the fact that the state provided free photo identification cards to registered voters and those who still did not possess the required photo ID could cast provisional ballots. Ultimately, the petitioners could not provide a single compelling case of a voter unfairly burdened by the law. Because of this, Justice Stevens concluded, “A facial challenge must fail where the statute has a ‘plainly legitimate sweep.’”\textsuperscript{19} In other words, the Indiana photo ID law must be considered broadly as it applies to all voters. In this way, the Court ruled that the photo ID requirement imposes only a limited burden on voters’ rights not sufficient enough to outweigh the state’s “precise interests.”\textsuperscript{20}

Justice Scalia, joined by Justices Thomas and Alito, wrote a separate opinion concurring in judgment. Rather than use the balancing approach of \textit{Burdick}, Justice Scalia preferred a “two-track approach.” As David Williams explains, one track would apply the standard of “strict scrutiny” to “severe burdens” on the right to vote, “meaning

\begin{itemize}
\item \textsuperscript{17} \textit{Crawford} at 196.
\item \textit{Ibid} at 185, \textit{supra} note 6.
\item \textit{Id}.
\end{itemize}
that such burdens will be upheld only if they serve a truly compelling state interest in the least burdensome way possible.”  

On the other track, “The Court should treat with deference those ‘ordinary and widespread burdens’ that are ‘merely inconvenient.’” According to Justice Scalia, Indiana’s photo ID law was governed by this “second track.” That “some voters” were burdened or effected by the law was inconsequential. Justice Scalia emphasized that the standard of strict scrutiny was “reserved for laws that severely restrict the right to vote.” When considering the effects of the Indiana law “on voters generally,” the standard of strict scrutiny did not apply. As a result, Justice Scalia did not weigh the “special burdens” against the state’s interest because the limited scope of the burden itself was enough to uphold the law.

Justice Souter, who wrote the dissenting opinion, agreed with Justice Steven’s balancing approach. However, he did not believe the majority was rigorous enough in its inquiry of the “hard facts that the standard of review demands” in *Burdick*. The burdens Justice Stevens had identified were more substantial than he described. Justice Souter discussed in great detail the travel costs and fees associated with acquiring the necessary government-issued photo identification. He then described the difficulty some voters would have in gathering the appropriate documents to apply for such photo ID. Additionally, there was also the burden of having to travel to a local BMV office which, under certain circumstances, would require voters to travel great distances, especially in

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22 Williams, 382 quoting J. Scalia at 204.
23 *Crawford* at 206.
24 With respect to the mitigating factor of providing provisional ballots for eligible voters, Justice Scalia stated, “That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence – not a constitutional imperative that falls short of what is required” (208).
25 *Id.* at 211.
rural counties which only one had BMV office. For Justice Souter, the provisional-ballot exception did not “amount to much relief” in the face of these burdens. After all, in order for that provisional ballot to be counted, the voter would have to incur the same travel burdens associated with acquiring the necessary identification in the first place. Ultimately, Justice Souter believed the burdens were more severe than the majority described and, under the Burdick standard, the Indiana law was unconstitutional.

The Supreme Court’s decision in Crawford was met with widespread criticism, at least in the civil rights community and among election law experts. Many observers were especially troubled by how the Court reached its decision. As David Williams stated, “The Court inevitably makes its decision based on background assumptions and burdens of proof.” There was no evidence of voter fraud in Indiana, and like Justice Souter, many pointed out that photo ID requirements only address in-person voter impersonation. Documented instances of registration and absentee-ballot fraud, although few in number, did exist in Indiana and elsewhere but photo ID laws leave these problems “untouched.”

The Crawford decision had serious implications for future voter ID laws which rapidly grew in number across the nation. As the next sections will explain, Indiana’s photo ID law became a model for similar laws in others states. However, when states covered by Section 5 began adopting photo ID requirements, the debate surrounding these laws instantly became more complicated.

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26 Crawford at 213. Several counties in Indiana such as Allen, Fayette, and Henry counties have fewer than five BMV offices. Justice Souter explained in many of those counties, public transportation was not available which made the burden of traveling to those offices even more severe.

27 Ibid at 216. Interestingly enough, Justice Souter does not make any reference to the provision of the law which provides free photo-identification cards for those who do not have a driver’s license or other acceptable form of government-issued ID.

28 Id at 226.
II.  The Lone Star Controversy

The voter identification law passed by the Texas state legislature in 2011 would have been the most stringent law of its kind in the nation. On March 12, 2012, in a letter signed by Assistant Attorney General Thomas E. Perez, the Justice Department objected to the law.\(^{29}\) Afterwards, when Texas sought a declaratory judgment from a district court in Washington, D.C., a three-judge panel unanimously affirmed the Attorney General’s objection and denied preclearance under Section 5. Both the district court and the DOJ used the retrogression standard and the Supreme Court’s ruling in \textit{Crawford} in their assessment of the voter ID law. And both reached the same conclusion that the law would have a disproportionate effect on minorities in Texas who lacked the necessary photo ID.

The Justice Department’s objection letter began by citing \textit{Crawford}, “recognizing the state’s legitimate interest in preventing voter fraud and safeguarding voter confidence.”\(^{30}\) However, the letter mentioned that the state’s submission “did not include evidence of significant in-person voter impersonation not already addressed by the state’s existing laws.”\(^{31}\) Under the \textit{Beer} standard, Texas had to show that its proposed voter ID law would not have a retrogressive effect when compared to its existing voter identification laws (i.e. the benchmark practice). The state failed to do so and using the state’s own data sets concerning registered voters without a driver’s license, the Justice

\(^{29}\) See Appendix 3.2, Letter from Assistant Attorney General Thomas E. Perez to Director of Elections Keith Ingram, March 12, 2012.

\(^{30}\) Ibid, 2.

\(^{31}\) Id.
Department estimated that Hispanics made up anywhere between 29.0 percent and 38.2 percent of registered voters who lacked the necessary photo identification.\textsuperscript{32}

The letter continued with an analysis of the only mitigating measure in the law, that the state’s Department of Public Safety would issue free election identification certificates to eligible voters. But, as Justice Souter argued with respect to a similar provision in Indiana’s law, acquiring these election certificates were no less burdensome than acquiring the requisite photo ID itself. As the letter explained, an applicant would have “to provide two pieces of secondary identification, or one piece of secondary identification and two supporting documents.”\textsuperscript{33} If this was not possible, “the least expensive option would be to spend $22 on a copy of the voter’s birth certificate.”\textsuperscript{34} Apart from these financial costs, the letter cited other burdens such as traveling to a county DPS office, the problem being that in 81 of the state’s 254 counties, there were no operational driver’s license offices.\textsuperscript{35} Moreover, “Only 49 of the 221 currently open driver’s license offices across the state have extended hours.”\textsuperscript{36} Such burdens, as the Attorney General pointed out, were “particularly noteworthy given Texas’ geography and demographics which arguably make the necessity for mitigating measures greater than in other states.”\textsuperscript{37} In the face of such retrogression, the law was denied preclearance by the Justice Department.

\textsuperscript{32} Id., 3. The letter pointed out that the “state provided no data on whether African American or Asian registered voters were also disproportionately affected by [the law].”
\textsuperscript{33} DOJ letter (March 2012), 4.
\textsuperscript{34} Ibid.
\textsuperscript{35} Id. Using the state’s January 2012 data set, the DOJ found that in counties without a DPS office, 14.6 percent of Hispanics do not have any form of government-issued photo ID, compared to 8.8 percent of non-Hispanics.
\textsuperscript{36} Id. The letter cited one state senator who stated that some voters in his district would have “to travel up to 176 miles roundtrip in order to reach a driver’s license office.”
\textsuperscript{37} Id.
When Texas sought a declaratory judgment from a district court in Washington, D.C., it argued that voter ID laws were not subject to the effects test of Section 5 because “such laws can never ‘deny[ ] or abridge[ ] the right to vote.’” According to the state, “Would-be voters who refuse to countenance even ‘minor inconveniences’ have chosen not to vote” and because the “choice lies with prospective voters, voting rights can hardly be considered to have been ‘denied’ or ‘abridged’ by the state.” However, Circuit Judge David S. Tatel, writing the opinion of the Court, rejected the argument for “completing miss[ing] the point of Section 5.” Referring to Allen, Judge Tatel reminded the state that Section 5 applied to all changes “no matter how small.” Then, citing the Court’s ruling in Beer, Judge Tatel emphasized that such changes could not result in a retrogressive effect. He concluded by saying, “If, as Texas argues, [the law] imposes only a ‘minor inconvenience’ on voters, the consequence of that argument is not that [the law] would be exempt from Section 5, but rather that it could easily be precleared because it would not undermine minorities ‘effective exercise of the electoral franchise.’” The district court refused to “collapse the entire retrogression analysis into a question of voter ‘choice.’”

The second argument Texas raised rested on the “equal sovereignty” of the states doctrine. According to that argument, “A state interest that is unquestionably legitimate for Indiana – without any concrete evidence of a problem – is unquestionably legitimate for Texas as well.” Judge Tatel responded by stating that Crawford did not control this case. As he explained, “In Crawford itself, the Court noted that it was ‘consider[ing] only

40 Ibid at 18.
41 Id.
42 Id. at 19.
43 Id. at 21.
the statute’s broad application to all Indiana voters.’ Here, not only do we face different questions – does [Texas’ law] have discriminatory purpose or retrogressive effect – but we focus on the limited subset of voters who are racial and language minorities.”

However, Judge Tatel was not willing to accept the United States’ argument that Crawford was wholly irrelevant in this case. True, the law concerned a voter ID law passed in a state not covered by Section 5 but the Supreme Court’s findings regarding the effects of such laws had “obvious ramifications for Section 5 cases.” As Judge Tatel stated, “The upshot of all of this is that Texas can prove that its photo ID law lacks retrogressive effect even if a disproportionate number of minority voters in the state currently lack photo ID.” However, to do so, Texas also had to prove how these affected voters could easily obtain acceptable IDs without being unjustly burdened which it ultimately could not do.

As Judge Tatel stated in his concluding remarks, Texas may have faced an “impossible burden” but that was because of the law Texas enacted. Interestingly enough though, his opinion listed five defeated amendments by the legislature which he believed “would have made this a far closer case.” Recognizing the controversial nature of the issue before him, Justice Tatel wrote, “Nothing in this opinion remotely suggests that Section 5 bars all covered jurisdictions from implementing photo ID laws.” This question of how Section 5 applied to voter ID laws grew more important as more states covered by the VRA passed voter ID legislation. However, as the next section will

44 Id. at 20.
46 Ibid at 56.
47 Ibid. Such amendments included reimbursing travel costs, waiving all fees for those who needed the election identification certificate and extending the hours of operation for DPS offices.
48 Ibid at 55.
discuss, the question also became more complicated when the DOJ and the courts began reaching different conclusions about voter ID laws in those states.

III. Preclearance for the Palmetto State

On May 18, 2011, Governor Nikki Haley of South Carolina signed Act R54, requiring voters in her state to present government-issued photo identification before they voted. The law was very similar to Texas’ voter ID law with a few, albeit very important exceptions. But, on December 23, 2011, the Attorney General objected to the law. In a letter signed by the Assistant Attorney General for Civil Rights, the Justice Department was unable to conclude that the state met its burden under Section 5.49 Like Texas, South Carolina then sought a declaratory judgment from a district court in Washington, D.C. except this time, the district court granted the law preclearance. The fact that the district court granted preclearance for South Carolina’s law after the Attorney General initially objected to it suggests that assessing voter ID laws under Section 5 may not be as straightforward as one might assume.

The Justice Department’s letter to South Carolina also cited the Supreme Court’s decision in Crawford and, as with the Texas objection letter, it also pointed out that the state did not include any evidence of voter fraud in its submission. Then, using the retrogression test from Beer, the DOJ began its analysis of the law’s impact on minority voters in South Carolina. According to the data provided by the state, the DOJ emphasized that 10.0% of non-white registered voters lacked any form of DMV-issued

49 See Appendix 3.3, Letter from Assistant Attorney General Thomas E. Perez to Assistant Deputy Attorney General C. Havird Jones, Jr., December 23, 2011. The Attorney General actually objected to South Carolina’s law before he interposed an objection to Texas’ law. However, Texas’ law was first to appear in a district court and, for that reason, we began with the Texas voter ID law.
Although non-white voters comprised 30.4% of the state’s registered voters, they accounted for over a third of registered voters who did not have the required photo ID. A county-by-county analysis by the Department further showed that across the state’s 46 counties, “the rate of registered voters without DMV-issued identification ranged from a low of 6.3% to a high of 14.2%.” These racial disparities in the proposed law clearly represented a retrogressive effect. All told, 81,938 minority citizens already registered to vote would be rendered ineligible to participate in the elections if the identification requirements were implemented.

The Attorney General then addressed the “reasonable impediment provision” in the law. According to the law, “If the elector suffers from a reasonable impediment that prevents the elector from obtaining a photograph identification” he or she would sign an affidavit saying so and cast a provisional ballot. The ballot would ultimately be counted unless the election clerk or county commission had reason to believe the affidavit was false. However, in its submission, the state did not define what a “reasonable impediment” was nor did it provide “guidance regarding how this standard should be interpreted or applied.” Moreover, as the Attorney General wrote, “The exception’s vagueness raises the possibility that it will be applied differently from county to county, and possibly from polling place to polling place, and thus risks exacerbating rather than mitigating the retrogressive effect of the new requirements on minority voters.”

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50 Ibid, 2.
51 Id., 3.
52 DOJ letter (December 2011), 3.
53 Ibid.
54 Id.
55 Id.
56 Id.
result, the “reasonable impediment” provision was not a valid mitigating factor especially since its vagueness allowed for further retrogression.

The law also provided free photo registration cards to every voter as well as training programs for poll workers and public education and outreach services regarding the new voter requirements. However, even though the Attorney General admitted that these provisions “could potentially mitigate the law’s discriminatory effects,” they were not under consideration because they were not final. The DOJ determined that the law disproportionately affected minority voters and that was all the Attorney General needed to deny the law preclearance.

By the time the South Carolina voter ID law reached a district court in Washington, D.C., the state had adopted the guidelines and procedures the Attorney General inquired about in his objection letter. Nevertheless, the law remained the same and yet a three-judge panel unanimously granted the law preclearance. To begin with, the district court argued that under the new law, every voter would be able to cast a ballot regardless of the identification they provided. Voters who did not have a form of government-issued photo identification could continue to use their non-photo voter registration cards. Moreover, those non-photo registration cards could be used to obtain the new free photo-registration cards which under pre-existing law cost $5. In light of this, Circuit Judge Brett Kavanaugh, writing the opinion of the court, concluded, “By

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57 DOJ letter (December 2011), 4. The Attorney General cannot make a determination for any changes that are not final or have not been adopted by the appropriate governing body.
58 The use on non-photo voter registration cards was a point the Attorney General did not address in his objection letter.
59 The new photo-registration cards were available at any county DMV office. As the district court mentioned, in South Carolina’s 46 counties, there is at least one DMV office. This is especially important considering in Texas, there were 81 counties which did not have an operational motor vehicle office.
allowing voters with non-photo registration cards to continue to vote without photo IDs, South Carolina specifically sought to alleviate the burden on voters who might not have obtained one of the qualifying IDs.”

Judge Kavanaugh then turned to perhaps the most important feature of the law: the reasonable impediment provision. According to the statements made by state legislators and the state attorney general, the reasonable impediment provision was meant “to be interpreted broadly” and “err in favor of the voter” “so as to accommodate voters currently without photo IDs.” As for what qualified as a reasonable impediment, the state argued that the “reasonableness of the listed impediment was to be determined by the individual voter, not by a poll manager or county board.” Despite these statements, as Judge Kavanaugh wrote, “The Department of Justice and the interveners have oddly resisted the expansive interpretation of [the photo ID law]. They have insisted that the broad interpretation of the reasonable impediment provision advanced by the South Carolina Attorney General and State Election Commission contravenes the statutory language.” However, the district court did not agree and thus accepted the reasonable impediment provision, as broadly interpreted by state officials, to be a condition of preclearance.

Judge Kavanaugh’s opinion also included a noteworthy comparison of South Carolina’s voter ID law to similar laws in other states (Indiana, Georgia, New Hampshire

62 Ibid at 9. “Although county boards generally cannot second-guess whether the reason given was a “reasonable impediment” that prevented the voter from obtaining a photo ID, statements simply denigrating the law – such as, “I don’t want to” or “I hate this law” – need not be accepted. Nor need nonsensical statements such as, to borrow an absurd example given at trial, ‘The moon is made of green cheese, so I didn’t get a photo ID.’ The ability of county boards to police the outermost boundaries of the expansive reasonable impediment provision in this commonsense way does not affect our evaluation of law.”
63 Id. at 11.
and Texas). Because of the law’s “ameliorative measures,” Judge Kavanaugh asserted, “It is not an overstatement to describe South Carolina’s law as significantly more friendly to voters currently without qualifying photo IDs than the voter ID laws in Indiana, Georgia, New Hampshire and Texas.” 64 By providing provisional ballots to qualified voters and offering free photo identification cards, South Carolina’s voter ID law contained two key ameliorative provisions. The photo ID laws in Georgia and New Hampshire only contained one of these provisions and those in Indiana and Texas had neither of them. 65 Judge Kavanaugh made this comparison to show that South Carolina’s voter ID law was more ameliorative to voters without photo ID than other laws previously precleared by the DOJ and upheld by other courts. 66

The district court’s decision to overturn the Attorney General’s objection and grant South Carolina preclearance for its voter ID law was very significant. If anything, it showed that applying the standards of Section 5 to photo ID laws can be very tricky. A simple retrogression test may not consider all parts of the law fairly, as was the case with South Carolina. As the district court argued, mitigating or ameliorative measures are important factors to take into consideration. Ultimately, not all photo ID laws are the same. Some, like the failed Texas law, are more restrictive than others like South Carolina’s law which makes every effort to include each voter. But as more covered

64 Id. at 27.
65 Judge Kavanaugh emphasizes the use of provisional ballots in South Carolina because it “resembles the kind of affidavit requirement that the Department of Justice has agreed would not materially burden the right to vote” (18). See Appendix 3.1.
66 Judge Kavanaugh was aware that Texas’ law was denied preclearance but he included it in his analysis anyway in order to prove that if the voter ID laws from those states were “placed on a spectrum of stringency, South Carolina’s clearly would fall on the less stringent end” (27). In a brief concurring opinion, District Judge John Bates interestingly observed, “Without the review process under the Voting Rights Act, South Carolina’s voter photo ID law certainly would have been more restrictive.”
states begin to enact photo ID laws of their own, it is likely the DOJ and the courts will come into conflict with each other again.

IV. The ID Epidemic and DOJ Credibility

In 2005, Georgia became the first state to require its voters to present a valid form of government-issued photo identification before voting. Using Judge Kavanaugh’s “spectrum of stringency” from the South Carolina case, Georgia’s photo ID law is among the strictest of its kind in the nation. The law significantly reduced the list of acceptable forms of identification to six government-issued IDs and eliminated the affidavit for voters who did not have the necessary ID. To the surprise of many, the Department of Justice approved the law. However, a leaked internal memo indicated serious divisions between the career staff and political appointees in the Voting Section. The controversy that ensued represented what many saw as an increased polarization in the DOJ’s preclearance decisions. More recently, this polarization has become more pronounced after a 258-page report by the Inspector General found that “high partisan stakes associated with some of the statutes that the Voting Section enforces have contributed to polarization and mistrust within the Section.” Voter ID laws like Georgia’s have highlighted these divisions which undermine the DOJ’s credibility at a time when the DOJ’s role in enforcing the VRA has come into question.

The memo that was drafted by members of the career staff, including the Section’s Deputy Chief, was a comprehensive and very detailed analysis of the state’s

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67 Voters who did not have the necessary photo identification could cast a provisional ballot. However, in order for the ballot to be counted, they had to show the election registrar the required ID within 48 hours.
photo ID law. The 51-page memo considered everything from vehicle access to the costs of each form of acceptable photo ID. Ultimately, the memo concluded that Georgia did not meet its burden under *Beer* nor did the state “demonstrate that it could not satisfy its stated goal of combating voter fraud while avoiding retrogression.”  

The memo did include specific “nonretrogressive alternatives” that the law did not consider such as retaining the affidavit or at least some of the various forms of ID acceptable under the existing law. The absence of such ameliorative measures however “weighed strongly in favor of interposing an objection.” Nevertheless, John Tanner, the heavily criticized Chief of the Voting Section, granted the law preclearance. When the law was struck down by a district court later that year, the state repealed the law and passed a revised statute which was granted preclearance again and subsequently upheld by a circuit court of appeals in 2009.

The controversy surrounding the Georgia voter ID law was concerning for those already skeptical of the DOJ’s enforcement policies and the partisan motivations that came to influence its decisions. Although the law was eventually struck down and replaced with a “less retrogressive” one, the incident demonstrated just how contentious the debate is concerning photo ID laws. As previous sections have explained, the debate has grown more intense as more states begin implementing these laws and as the DOJ’s role in enforcing the VRA becomes more dubious.

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69 U.S. Department of Justice, Voting Section of the Civil Rights Division, “Section 5 Recommendation Memorandum” (August 25, 2005), 33.
70 DOJ Memo (August 2005), 35.
71 John Tanner later resigned in 2007 after controversial remarks he made regarding the impact of voter identification requirements on minority voters.
72 See *Common Cause/Georgia v. Billups*, No. 07-14664 (11th Cir. Jan. 14, 2009). The revised law reinstated the use of affidavits and slightly expanded the list of acceptable forms of identification.
If we recall, the first generation of voting rights cases dealt with issues of literacy tests and poll taxes which were questions about access to the ballot. As we have seen in this chapter, voter identification laws are also essentially about ballot access. In each case we examined in this chapter, the courts and the DOJ have often rested their objections on the evidence that minority voters were disproportionately affected by photo ID laws because they lacked the necessary identification. Those laws which were upheld often had mitigating factors and ameliorative measures which offset the retrogressive effect of those laws. However, as we saw in the case of South Carolina, the courts and the DOJ have sometimes reached different conclusions on certain voter ID laws using the same retrogression standard established in *Beer*.

The *Crawford* decision confirmed that states had a legitimate interest to protect the integrity of their elections and safeguard electoral confidence. Even in the absence of any evidence of voter fraud, the Supreme Court found a voter identification law to be a justifiable burden on the right to vote. Nevertheless, only two states fully covered by Section 5 have strict photo identification requirements in place.73 Indeed, the only voter ID law that the Department of Justice has approved was New Hampshire’s in 2012.74 However, the DOJ is currently reviewing two photo ID laws from Alabama and Virginia.

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73 See Appendix 2. Arizona allows voters to substitute a form of photo identification with two forms of non-photo documentary identification.

74 See Appendix 3.1, Letter from T. Christian Herren, Chief of Voting Section to J. Gerald Hebert (September 4, 2012). Technically, New Hampshire does not qualify as a state fully covered by Section 5 since only a handful of townships in the state are covered. However, whenever a statewide law is passed which results in a change in voting practice or procedure, the state must obtain preclearance from the DOJ first.
Although this third generation of voting rights deals with the same fundamental question of ballot access as the first generation, the primary difference is the relationship between the courts and the DOJ. During the first generation, the courts afforded Congress and the Justice Department great deference with respect to their enforcement powers under the Voting Rights Act. The Supreme Court granted Congress and the DOJ significant authority and supported their actions under the Act. But, more recently, the courts and the Justice Department do not appear to be of the same opinion. The South Carolina photo ID law is the best example. However, because these photo ID laws are relatively new, it is difficult to predict how the courts and the DOJ will treat these laws as more begin to appear across the country.
Conclusion

During oral arguments in *Shelby County v. Holder*, Chief Justice John Roberts indicated that out of the 3,700 preclearance requests made in 2005, the Attorney General issued only one objection. The point he was trying to make was one that many critics of the Voting Rights Act have raised in recent years, namely, that Section 5 has served its purpose. Of course, no one doubts the tremendous success of the VRA. As Chief Justice Roberts himself pointed out in 2009, “Voter turnout and registration rates now approach parity. Blatantly discriminatory evasions of federal decrees are rare. And minority candidates hold office at unprecedented levels.” However, discrimination in the electoral system still exists even if it as not as blatant as it was nearly fifty years ago. To quote Justice Stephen Breyer, “[Discrimination] is an old disease, it’s gotten better, a lot better, a lot better, but it’s still there.”

With voter identification requirements, we have come full circle since 1965 by returning to the fundamental question of ballot access. However, unlike the first generation, this third generation promises to be more confrontational for the courts and the Department of Justice. Previous interpretations of the Act and indeed the Act itself appear to be in jeopardy given the ideological leanings of the Supreme Court and the perceived increase of polarization in the DOJ’s decisions. As we await the Court’s decision in the recent constitutional challenge to the VRA, I submit that the statute will be dramatically weakened if not struck down entirely. Even if the Court somehow upholds Section 5, it is likely the Court will strike down the coverage formula in Section 4 and force Congress to determine which states and jurisdictions should still remain under the supervision of the federal government. However, such a task is politically
infeasible and many argue that such a ruling by the Court would be the equivalent of striking down the statute entirely. Nevertheless, whatever the Court decides, we can say with certainty that the future of voting rights enforcement will be very different from what is today.

And so, at a time when the Court appears ready to strike down the Voting Rights Act, voter ID laws reminds us that discrimination still exists in our elections. The partisan interests at stake over these voter suppressive laws and the ever-present reality of partisan gerrymandering are evidence of that. Unfortunately, the hopeful wishing of Chief Justice Earl Warren remains unfulfilled as we still “look forward to the day when truly ‘the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.’”
Appendix 1: Table of Section 5 Covered Jurisdictions

Source: Redrawing the Lines

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<td>Merrimack County:</td>
<td>Rockingham County</td>
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<td>Boscawen Town</td>
<td>Scotland County</td>
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<td>Rockingham County:</td>
<td>Union County</td>
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<td>Newington Town</td>
<td>Vance County</td>
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<td>Sullivan County:</td>
<td>Washington County</td>
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<td>Unity Town</td>
<td>Wayne County</td>
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<td>New York:</td>
<td>Wilson County</td>
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<td>Bronx County</td>
<td>South Carolina</td>
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<td>Kings County</td>
<td>South Dakota:</td>
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<td>New York County</td>
<td>Shannon County</td>
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<tr>
<td>Texas</td>
<td>Todd County</td>
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<tr>
<td>Virginia*</td>
<td>Texas</td>
</tr>
</tbody>
</table>

*Fifteen political subdivisions in Virginia (Augusta, Botetourt, Essex, Frederick, Greene, Middlesex, Pulaski, Roanoke, Rockingham, Shenandoah, and Warren Counties and the Cities of Fairfax, Harrisonburg, Salem and Winchester) have “bailed out” from coverage pursuant to Section 4 of the Voting Rights Act. The United States consented to the declaratory judgment in each of those cases.
### Appendix 2: Details of Voter Identification Requirements in Covered States

**Source: National Conference of State Legislatures**

<table>
<thead>
<tr>
<th>State</th>
<th>Requirement</th>
<th>Acceptable Forms of ID</th>
<th>Voters Without ID</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alabama</strong> §§17-9-30</td>
<td><strong>Existing Law:</strong> Each elector shall provide identification to an appropriate election official prior to voting.</td>
<td>• Government-issued photo ID&lt;br&gt;• U.S. passport&lt;br&gt;• U.S. military ID&lt;br&gt;• Employee ID card with photo&lt;br&gt;• Alabama college/university ID with photo&lt;br&gt;• Alabama hunting or fishing license&lt;br&gt;• Alabama gun permit&lt;br&gt;• FAA-issued pilot's license&lt;br&gt;• Birth certificate (certified copy)&lt;br&gt;• Social security card&lt;br&gt;• Naturalization document&lt;br&gt;• Court record of adoption or name change&lt;br&gt;• Medicaid or Medicare card&lt;br&gt;• Electronic benefits transfer card&lt;br&gt;• Utility bill, bank statement, government check, paycheck or government document showing name and address of voter</td>
<td><strong>Existing Law:</strong> Vote a challenged or provisional ballot or vote, if s/he is identified by two poll workers as an eligible a voter on the poll list, and both poll workers sign the voting sign-in register by the voter’s name.</td>
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</table>

**New Law:** Each elector shall provide valid photo identification to an appropriate election official prior to voting. | **New Law:** • Valid Alabama driver's license or non-driver ID card<br>• Valid photo voter ID card or other valid ID card issued by any state or the federal government, as long as it contains a photo<br>• Valid U.S. passport<br>• Valid government employee ID card with a photo<br>• Valid student or employee ID card issued by a college or university in the state, provided it includes a photo<br>• Valid U.S. military ID card containing a photo<br>• Valid tribal ID card containing a photo | **New Law:** Vote a provisional ballot or vote a regular ballot if s/he is identified by two election officials as an eligible voter on the poll list, and both election workers sign a sworn affidavit so stating. |

**NOTE:** AL’s new photo ID law is scheduled to take effect for the 2014 primary election. It also requires preclearance by the USDOJ.
<table>
<thead>
<tr>
<th>State</th>
<th>Section</th>
<th>Identification Requirements</th>
</tr>
</thead>
</table>
| Alaska | §15.15.225 | Before being allowed to vote, each voter shall exhibit to an election official one form of identification.  
- Official voter registration card  
- Driver's license  
- Birth certificate  
- Passport  
- Hunting or fishing license  
- Current utility bill, bank statement, paycheck, government check or other government document with the voter’s name and address  
An election official may waive the identification requirement if the election official knows the identity of the voter. A voter who cannot exhibit a required form of identification shall be allowed to vote a questioned ballot. |
| Arizona | §16-579(A) | Every qualified elector shall present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the elector.  
- Valid Arizona driver's license  
- Valid Arizona non-driver identification  
- Tribal enrollment card or other form of tribal identification  
- Valid U.S. federal, state or local government issued identification  
- Utility bill dated within 90 days of the election  
- Bank or credit union statement dated within 90 days of the election  
- Valid Arizona vehicle registration  
- Indian census card  
- Property tax statement  
- Vehicle insurance card  
- Recorder’s Certificate  
An elector who does not provide the required identification shall receive a provisional ballot. Provisional ballots are counted only if the elector provides identification to the county recorder by 5pm on the fifth business day after a general election that includes an election for federal office, or by 5pm on the third business day after any other election. |
| Georgia | §21-2-417 | Each elector shall present proper identification to a poll worker at or prior to completion of a voter's certificate at any polling place and prior to such person's admission to the enclosed space at such polling place.  
- Georgia driver's license, even if expired  
- ID card issued by the state of Georgia or the federal government  
- Free voter ID card issued by the state or county  
- U.S. passport  
- Valid employee ID card containing a photograph from any branch, department, agency, or entity of the U.S. Government, Georgia, or any county, municipality, board, authority or other entity of this state  
- Valid U.S. military identification card  
- Valid tribal photo ID  
If you show up to vote and you do not have one of the acceptable forms of photo identification, you can still vote a provisional ballot. You will have up to three days after the election to present appropriate photo identification at your county registrar's office in order for your provisional ballot to be counted. |
<table>
<thead>
<tr>
<th>State</th>
<th>Section</th>
<th>Requirement</th>
<th>Identification Options</th>
<th>Note</th>
</tr>
</thead>
</table>
| Louisiana   | §18:562 | Each applicant shall identify himself, in the presence and view of the bystanders, and present identification to the commissioners. | • Louisiana driver’s license  
• Louisiana special ID card  
• Other generally recognized picture identification | If the applicant does not have identification, s/he shall sign an affidavit to that effect before the commissioners, and the applicant shall provide further identification by presenting his current registration certificate, giving his date of birth or providing other information stated in the precinct register that is requested by the commissioners. However, an applicant that is allowed to vote without the picture identification required by this Paragraph is subject to challenge as provided in R.S. 18:565. |
| Mississippi | §23-15-563 | Mississippi’s voter ID law requires USDOJ pre-clearance before it can take effect. | An elector who votes in person in a primary or general election shall present government-issued photo identification before being allowed to vote. Voters who live and vote in a state-licensed care facility are exempt. | Mississippi’s voter ID law is not in effect for the November 2012 election. |
| South Carolina | §7-13-710 | When a person presents himself to vote, he shall produce a valid and current ID. | • South Carolina driver’s license  
• Photo ID card issued by the SC Dept. of Motor Vehicles  
• Passport  
• Military ID bearing a photo | If you have a reasonable impediment to obtaining Photo ID, you may vote a provisional ballot after showing your non-photo voter registration card. |
<table>
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<tr>
<th>Existing law:</th>
<th>Existing law:</th>
<th>Existing law:</th>
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<tr>
<td>On offering to vote, a voter must present the voter’s voter registration certificate to an election officer at the polling place.</td>
<td>Voter registration certificate</td>
<td>A voter who does not present a voter registration certificate when offering to vote, but whose name is on the list of registered voters for the precinct in which the voter is offering to vote, shall be accepted for voting if the voter executes an affidavit stating that the voter does not have the voter’s voter registration certificate in the voter’s possession and the voter presents other proof of identification. A voter who does not present a voter registration certificate and cannot present other identification may vote a provisional ballot. A voter who does not present a voter registration certificate and whose name is not on the list of registered voters may vote a provisional ballot.</td>
</tr>
<tr>
<td>New law:</td>
<td>New law:</td>
<td>New law:</td>
</tr>
<tr>
<td>On offering to vote, a voter must present to an election officer at the polling place one form of identification.</td>
<td>Driver’s license, Department of Public Safety ID card, A form of ID containing the person’s photo that establishes the person’s identity, A birth certificate or other document confirming birth that is admissible in a court of law and establishes the person’s identity, U.S. citizenship papers, A U.S. passport, Official mail addressed to the person, by name, from a governmental entity, A copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the person’s name and address, Any other form of ID prescribed by the secretary of state.</td>
<td>Driver’s license, Election identification certificate, Dept. of Public Safety personal ID card, U.S. military ID, U.S. citizenship certificate, U.S. passport.</td>
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</tbody>
</table>

**NOTE:** TX's new photo ID law takes effect after preclearance by the USDOJ. Pre-clearance was denied on March 13, 2012, and the state is expected to apply for reconsideration from the Federal District Court of Washington, D.C.
<table>
<thead>
<tr>
<th>Virginia</th>
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<tr>
<td>§24.2-643(B)</td>
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<tr>
<td><strong>NOTE:</strong> Beginning on July 1, 2014, Virginia law will require a photo ID in order to vote.</td>
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</table>

The officer shall ask the voter to present any one of the specified forms of identification.

Existing law:
- Virginia voter registration card
- Social Security card
- Valid Virginia driver's license
- Any other identification card issued by a government agency of the Commonwealth, one of its political subdivisions, or the United States
- Employee identification card containing a photograph
- Any valid student ID card issued by any institution of higher education located in Virginia
- Copy of a current utility bill, bank statement, government check or paycheck that shows the name and address of the voter
- Concealed handgun permit

New law (all must be current and valid and bear a photo of the voter):
- Virginia voter registration card
- United States passport
- Virginia driver's license
- Any other identification card

Any voter who does not show one of the forms of identification specified in this subsection shall be offered a provisional ballot marked ID-ONLY that requires no follow-up action by the registrar or electoral board other than matching submitted identification documents from the voter for the electoral board to make a determination on whether to count the ballot. In order to have his or her ballot counted, the voter must submit a copy of one of the forms of identification to the electoral board by facsimile, electronic mail, in-person submission, or timely United States Postal Service or commercial mail delivery, to be received by the electoral board no later than noon on the third day after the election.

- License to carry a concealed handgun issued by the Dept. of Public Safety

All of the above must include a photo of the voter. With the exception of the certificate of citizenship, these forms of ID cannot be expired, or cannot have expired more than 60 days before the election.
- issued by a government agency of the Commonwealth, one of its political subdivisions, or the United States
- Concealed handgun permit
- Any valid student ID card issued by any institution of higher education located in Virginia
- Employee identification card
J. Gerald Hebert, Esq.
191 Somervelle Street, #405
Alexandria, Virginia 22304

Stephen B. Pershing, Esq.
1416 E Street, N.E.
Washington, D.C. 20002

Dear Messrs. Hebert and Pershing:

This refers to Chapter 284 (S.B. 289) (2012), Chapter 289 (H.B. 1354) (2012), and the revised Challenged Voter Affidavit form for the State of New Hampshire, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your submissions on July 5 and 6, 2012; additional information was received on July 12, 2012.

Under existing law, an election-day voter must announce his or her name to the ballot clerk. The ballot clerk verifies the name on the registered voter checklist, reads the address on the checklist to the voter for verification, and enters corrections to the address, if appropriate. At this point, if the voter is not challenged under RSA 659:27-33, the voter may cast a regular ballot.

Chapter 284 amends the benchmark procedure to require in-person voters to present photographic identification at the polling place. Under Chapter 289, a voter who is unable to present any form of allowable identification specified in Chapter 284 at the polling place is nonetheless entitled to execute a “challenged voter affidavit,” which entitles the voter to cast a regular ballot. This affidavit does not have to be notarized, does not require an excuse, and requires only that voters affirm that they are who they claim to be, are qualified to vote, and have a legal domicile in the applicable town or ward. After September 1, 2013, voters who elect to sign the challenged voter affidavit will have their picture taken at the polling place by an election official and will then be allowed to cast a regular ballot. Voters who object to having their picture taken for religious reasons will be allowed to complete an affidavit of religious exemption in lieu of being photographed. In addition, if, for some reason, a photograph cannot be taken, the voter may cast a regular ballot.

Prior to September 1, 2013, the identification requirement may be satisfied by a New Hampshire driver's license or a driver's license from any other state, regardless of expiration date; a voter identification card issued under the provisions of RSA 260:21; a United States
armed services identification card; a United States passport, regardless of expiration date; a valid
student identification card; or any other valid photo identification issued by federal, state, county,
or municipal government. In addition to these forms of identification, a voter may present any
photographic identification determined to be legitimate by the supervisors of the checklist, the
moderator, or the town or city clerk. If a voter does not have photographic identification, the
voter's identity may also be verified by a moderator or supervisor of the checklist or the town or
city clerk.

After September 1, 2013, the identification requirement will be satisfied by a driver's
license issued by any state or the federal government; a non-driver's identification card issued by
the motor vehicles authority of any state; a United States armed services identification card; or a
United States passport. Photographic identification presented after September 1, 2013 may not
have an expiration date exceeding five years, and the name on the identification must
substantially conform to the name in the registration record.

Chapters 284 and 289 also make changes respecting procedures for executing an affidavit
of religious exemption, notice and education regarding the identification requirements, penalties
relating to voter fraud, procedures for obtaining a free voter identification card, and election fund
expenditures.

With respect to the provision in Chapter 284 which allows voters without the requisite
identification to execute a qualified voter affidavit, you have advised us that this change was
superseded by the change in Chapter 289, which replaces the "qualified voter affidavit" with a
"challenged voter affidavit" described above. Accordingly, no determination by the Attorney
General is required or appropriate concerning this matter. Procedures for the Administration of
Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.35.

The Attorney General does not interpose any objection to the remaining specified
changes. However, we note that Section 5 expressly provides that the failure of the Attorney
General to object does not bar subsequent litigation to enjoin the enforcement of the changes. 28
C.F.R. 51.41.

Sincerely,

[Signature]

A. Christian Herren, Jr.
Chief, Voting Section
Mr. Keith Ingram  
Director of Elections  
Elections Division  
Office of the Texas Secretary of State  
P.O. Box 12060  
Austin, Texas 78711-2060

Dear Mr. Ingram:

This refers to Chapter 123 (S.B. 14) (2011), which amends the Texas Transportation Code relating to the issuance of election identification certificates, and which amends the Texas Election Code relating to the procedures for implementing the photographic identification requirements, including registration procedures, provisional-ballot procedures, notice requirements, and education and training requirements, for the State of Texas, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. We received your response to our January 9, 2012 follow-up to our September 23, 2011 request for additional information on January 12, 2012; additional information was received through February 17, 2012.

According to the 2010 Census, the State of Texas had a total population of 25,145,561, of whom 9,460,921 (37.6%) were Hispanic, 2,975,739 (11.8%) were black, 1,027,956 (4.1%) were Asian, and 11,397,345 (45.3%) were Anglo. Texas’s total voting-age population was 18,279,737, of whom 6,143,144 (33.6%) were Hispanic, 2,102,474 (11.5%) were black, 758,636 (4.2%) were Asian, and 9,074,684 (49.6%) were Anglo. The five-year aggregate American Community Survey (2006-2010) estimates that Texas had a Hispanic citizen voting-age population of 25.5 percent.

We have carefully considered the information you have provided, as well as census data, comments and information from other interested parties, and other information, including the state’s previous submissions. Under Section 5, the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed changes have neither the purpose nor the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group. Georgia v. United States, 411 U.S. 526 (1973); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.52(c). With regard to Sections 9 and 14 of S.B. 14, concerning photographic identification
With regard to Sections 9 and 14 of S.B. 14, concerning photographic identification requirements for in-person voting and acceptable forms of photographic identification, I cannot conclude that the state has sustained its burden under Section 5 of the Voting Rights Act. Therefore, on behalf of the Attorney General, I must object to Sections 9 and 14 of S.B. 14.

We start our analysis recognizing the state’s legitimate interest in preventing voter fraud and safeguarding voter confidence. Crawford v. Marion County Election Bd., 553 U.S. 181 (2008). In that vein, the state’s sole justifications for changing the current practice to require photographic identification to vote in person that appear in the legislative proceedings and are presented in its submission are to ensure electoral integrity and deter ineligible voters from voting. At the same time, we note that the state’s submission did not include evidence of significant in-person voter impersonation not already addressed by the state’s existing laws.

The voting changes at issue must be measured against the benchmark practice to determine whether they 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 (1976). In support of its position that this proposed requirement will not have such a prohibited effect, the state provided two sets of registered-voter data, which were matched with two different data sources maintained by the state’s Department of Public Safety (DPS). One set was current as of September 16, 2011, and the other as of early January 2012. The September data reported that there were 12,780,841 registered voters, of whom 2,785,227 (21.8%) were Hispanic. The January data reported that there were 12,892,280 registered voters, of whom 2,810,869 (21.8%) were Hispanic.

There is, however, a significant difference between the two data sets with regard to the number and characteristics of those registered voters without a driver’s license or personal identification card issued by DPS. The September data indicate that 603,892 (4.7%) of the state’s registered voters do not have such identification; this population consists of 174,866 voters (29.0% of the 603,892 voters) who are Hispanic and 429,026 voters (71.0%) who are non-Hispanic. The January data indicate that 795,955 (6.2%) of the state’s registered voters do not have such identification; this population consists of 304,389 voters (38.2%) who are Hispanic and 491,566 voters (61.8%) who are non-Hispanic. The state has not provided an explanation for the disparate results. More significantly, it declined to offer an opinion on which of the two data sets is more accurate. Accordingly, we have considered both in reviewing your submission.

Starting our analysis with the September data set, 6.3 percent of Hispanic registered voters do not have the forms of identification described above, but only 4.3 percent of non-Hispanic registered voters are similarly situated. Therefore, a Hispanic voter is 46.5 percent more likely than a non-Hispanic voter to lack these forms of identification. In addition, although Hispanic voters represent only 21.8 percent of the registered voters in the state, Hispanic voters represent fully 29.0 percent of the registered voters without such identification.

Our analysis of the January data indicates that 10.8 percent of Hispanic registered voters do not have a driver’s license or personal identification card issued by DPS, but only 4.9 percent of non-Hispanic registered voters do not have such identification. So, Hispanic registered voters are more than twice as likely as non-Hispanic registered voters to lack such identification. Under
the data provided in January, Hispanics make up only 21.8 percent of all registered voters, but fully 38.2 percent of the registered voters who lack these forms of identification.

Thus, we conclude that the total number of registered voters who lack a driver’s license or personal identification card issued by DPS could range from 603,892 to 795,955. The disparity between the percentages of Hispanics and non-Hispanics who lack these forms of identification ranges from 46.5 to 120.0 percent. That is, according to the state’s own data, a Hispanic registered voter is at least 46.5 percent, and potentially 120.0 percent, more likely than a non-Hispanic registered voter to lack this identification. Even using the data most favorable to the state, Hispanics disproportionately lack either a driver’s license or a personal identification card issued by DPS, and that disparity is statistically significant.

The state has provided no data on whether African American or Asian registered voters are also disproportionately affected by S.B. 14.

Sections 9 and 14 of S.B. 14 would also permit a voter to vote in person using military photographic identification, a United States citizenship certificate that contains the person’s photograph, a United States passport, or a license to carry a concealed handgun. The state has produced no data showing what percent of registered voters lack a driver’s license or personal identification card issued by DPS, but do possess another allowable form of photographic identification. Nor has the state provided any data on the demographic makeup of such voters. In addition, when the Texas Legislature was considering S.B. 14, there were a number of legislative proposals to expand the forms of identification that could be used by voters to meet this new requirement – including proposals to allow any state-issued or tribal identification with a photograph to be used for regular voting – but those proposals were rejected.

In view of the statistical evidence illustrating the impact of S.B. 14 on Hispanic registered voters, we turn to those steps that the state has identified it will take to mitigate that effect.

You have informed us that the DPS-issued “free” election identification certificate, which is proposed to be implemented by Section 20 of S.B. 14, would protect voters who do not already have another acceptable form of identification. The application process for these certificates will mirror the manner in which a person obtains a driver’s license. First-time applicants will be required to furnish various supplemental documents and undergo an application process that includes fingerprinting and traveling to a driver’s license office.

An applicant for an election identification certificate will be required to provide two pieces of secondary identification, or one piece of secondary identification and two supporting documents. If a voter does not possess any of these documents, the least expensive option will be to spend $22 on a copy of the voter’s birth certificate. There is a statistically significant correlation between the Hispanic population percentage of a county and the percentage of a county’s population that lives below the poverty line. The legislature tabled amendments that would have prohibited state agencies from charging for any underlying documents needed to obtain an acceptable form of photographic identification.
As noted above, an applicant for an election identification certificate will have to travel to a driver’s license office. This raises three discrete issues. First, according to the most recent American Community Survey three-year estimates, 7.3 percent of Hispanic or Latino households do not have an available vehicle, as compared with only 3.8 percent of non-Hispanic white households that lack an available vehicle. Statistically significant correlations exist between the Hispanic voting-age population percentage of a county, and the percentage of occupied housing units without a vehicle.

Second, in 81 of the state’s 254 counties, there are no operational driver’s license offices. The disparity in the rates between Hispanics and non-Hispanics with regard to the possession of either a driver’s license or personal identification card issued by DPS is particularly stark in counties without driver’s license offices. According to the September 2011 data, 10.0 percent of Hispanics in counties without driver’s license offices do not have either form of identification, compared to 5.5 percent of non-Hispanics. According to the January 2012 data, that comparison is 14.6 percent of Hispanics in counties without driver’s license offices, as compared to 8.8 percent of non-Hispanics. During the legislative hearings, one senator stated that some voters in his district could have to travel up to 176 miles roundtrip in order to reach a driver’s license office. The legislature tabled amendments that would have, for example, provided reimbursement to voters who live below the poverty line for travel expenses incurred in applying for the requisite identification.

The third and final point is the limited hours that such offices are open. Only 49 of the 221 currently open driver’s license offices across the state have extended hours. Even Senator Troy Fraser, the primary author of this legislation in the Senate, acknowledged during the legislative hearing that, “You gotta work to make sure that [DPS offices] are open.” Despite the apparent recognition of the situation, the legislature tabled an amendment that would have required driver’s license offices to be open until 7:00 p.m. or later on at least one weekday and during four or more hours on at least two Saturdays each month.

The legislation mandates a statewide voter-education effort concerning the new identification requirement, but does not provide specific standards for the program. The state, however, has yet to approve a final version of the materials designed to accomplish that goal, either for voters or for election officials. The state has indicated that it will implement a new educational program; but as of this date, our information indicates that the currently proposed plan will incorporate the new identification requirement into a general voter-education program.

The legislation requires that poll-worker training materials reflect the new identification requirements. This is particularly vital because a poll-worker can permit a voter to cast a ballot if the name as listed on the documentation is “substantially similar to but does not match exactly” the name on the voter registration list, and if the voter also submits an affidavit stating that he or she is the person on the list of registered voters. Though the Secretary of State’s office has adopted an administrative rule to guide poll-workers in determining when names are substantially similar, the rule gives poll-workers a great deal of discretion. The state has provided no enforcement guidelines to prevent the vagueness of this standard from leading to inconsistency or bias in its application.
Even after submitting data that show over 600,000 registered voters do not have either a driver’s license or personal identification card issued by DPS – and that a disproportionate share of those registered voters are Hispanic – the state has failed to propose, much less adopt, any program for individuals who have to travel a significant distance to a DPS office, who have limited access to transportation, or who are unable to get to a DPS office during their hours of operation. This failure is particularly noteworthy given Texas’s geography and demographics, which arguably make the necessity for mitigating measures greater than in other states. The state also has not developed any specific proposals to educate either voters about how to comply with the new identification requirement or poll officials about how to enforce the proposed change.

In conclusion, the state has not met its burden of proving that, when compared to the benchmark, the proposed requirement will not have a retrogressive effect, or that any specific features of the proposed law will prevent or mitigate that retrogression. Additionally, the state has failed to demonstrate why it could not meet its stated goals of ensuring electoral integrity and deterring ineligible voters from voting in a manner that would have avoided this retrogressive effect. Because we conclude that the state has failed to meet its burden of demonstrating that the proposed law will not have a retrogressive effect, we do not make any determination as to whether the state has established that the proposed changes were adopted with no discriminatory purpose.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the changes affecting voting that are occasioned by Sections 9 and 14 of Chapter 123 (S.B. 14) (2011). Sections 1 through 8, 10 through 13, 15, and 17 through 22 of S.B. 14 are directly related to the procedures for implementing the photographic identification requirements, including registration procedures, provisional-ballot procedures, notice requirements, and education and training requirements. Accordingly, no determination by the Attorney General is required or appropriate under Section 5. 28 C.F.R. 51.22 and 51.35.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that these proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the submitted changes continue to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10. To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that the State of Texas plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman (202/514-8690), a deputy chief in the Voting Section.
Because the Section 5 status of this legislation is presently before the United States District Court for the District of Columbia in *State of Texas v. Holder*, No. 1:12-cv-00128 (D.D.C.), we are providing the Court and counsel of record with a copy of this letter.

Sincerely,

[Signature]

Thomas E. Perez  
Assistant Attorney General
December 23, 2011

C. Havird Jones, Jr., Esq.
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, South Carolina 29211-1549

Dear Mr. Jones:

This refers to Act R54 (A27 H3003) (2011), relating to domicile factors, duplicate registration, consideration of challenges, the State Election Commission voter registration card system implementation, photographic identification requirements and provisional ballots, special identification card provisions, the State Election Commission voter education program, and the State Election Commission registered voter list, for the State of South Carolina, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. On August 29, 2011, the Attorney General informed you that no objection would be interposed to sections 1 and 3 of Act R54, and that additional information was required to complete our review of sections 2, 4, 5, 6, 7, and 8 of Act R54. We received your response to our request for additional information on October 27, 2011; additional information was received through December 23, 2011.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that the proposed changes have neither the purpose nor the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. Georgia v. United States, 411 U.S. 526 (1973); Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. 51.52(e). The voting change at issue must be measured against the benchmark practice to determine whether 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 (1976).

We have given careful consideration to the information you provided, as well as Census data and information and comments from other interested persons. The Attorney General does not interpose any objection to sections 2 and 6 of Act R54, concerning issuance of a duplicate registration notification card and amendment of procedures for special identification cards issued by the Department of Motor Vehicles (DMV). However, we note that Section 5 of the Voting Rights Act expressly provides that failure of the Attorney General to object does not bar subsequent litigation to enjoin enforcement of the changes. 28 C.F.R. 51.41.
With regard to section 5 of Act R54, concerning photographic identification requirements and provisional ballots, I cannot conclude that the state has sustained its burden under Section 5 of the Voting Rights Act. Therefore, on behalf of the Attorney General, I must object to section 5 of Act R54.

Section 5 of Act R54 would require voters to present one of five forms of photo identification to vote in person. Currently, state law does not require voters to present photo identification in order to vote; in addition to a driver’s license or non-driver photo identification card, an elector can vote using a voter registration card with no photograph, along with the voter’s signature on the poll list. The current version of the state’s identification requirement has been in effect since 1988. In the state’s submission and in the record of the legislative proceedings, the justification offered for changing the current practice to require photo identification to vote in person has been to combat voter fraud. Although the state has a legitimate interest in preventing voter fraud and safeguarding voter confidence, Crawford v. Marion County Election Board, 128 S. Ct. 1610 (2008), the state’s submission did not include any evidence or instance of either in-person voter impersonation or any other type of fraud that is not already addressed by the state’s existing voter identification requirement and that arguably could be deterred by requiring voters to present only photo identification at the polls.

In assessing the impact of the proposed photo identification requirements in section 5 of Act R54, we turn first to the data that the state has provided concerning registered voters within the state. The most recent voter registration data available from the State Election Commission indicate that, as of October 1, 2011, there were a total of 2,701,843 registered voters in the state, of whom 69.6% were white and 30.4% were non-white. These data also show that of the total number of registered voters in the state, 239,333 (or 8.9%) did not possess DMV-issued photo identification (either a driver’s license or a non-driver’s photo ID card) that would satisfy the requirements under Act R54. When disaggregated by race, the state’s data show that 8.4% of white registered voters lacked any form of DMV-issued ID, as compared to 10.0% of non-white registered voters. In other words, according to the state’s data, which compare the available data in the state’s voter registration database with the available data in the state’s DMV database, minority registered voters were nearly 20% more likely to lack DMV-issued ID than white registered voters, and thus to be effectively disenfranchised by Act R54’s new requirements. We note that the voter registration data matched against the DMV database, and provided to us by the state, does not include several categories of existing registered voters listed as inactive voters, and hence, the number of registered voters without DMV-issued ID may well be higher than even these numbers suggest.

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1 Section 5 of Act R54 would also permit a voter to vote in person using a U.S. passport, a military photo identification, or a state voter registration card containing a photograph of the voter. The state has produced no data demonstrating what percent of registered voters lack a DMV-issued identification but do possess a U.S. passport or military photo identification. The state voter registration card containing a photograph of the voter does not yet exist and is proposed to be implemented by section 4 of Act R54.
Put differently, although non-white voters comprised 30.4% of the state’s registered voters, they constituted 34.2% of registered voters who did not have the requisite DMV-issued identification to vote. Non-white voters were therefore disproportionately represented, to a significant degree, in the group of registered voters who, under the proposed law, would be rendered ineligible to go to the polls and participate in the election.

An examination of the county-by-county rates of total registered voters without DMV-issued identification raises additional concerns. Across the state’s 46 counties, the rate of registered voters without DMV-issued identification ranges from a low of 6.3% to a high of 14.2%. Notably, seven counties with the highest percentages of registered voters who lack DMV-issued identification are also among the ten counties in South Carolina that have the highest percentage of voting-age persons who are non-white.

The absolute number of minority citizens whose exercise of the franchise could be adversely affected by the proposed requirements runs into the tens of thousands. According to the state’s statistics, there are 81,938 minority citizens who are already registered to vote and who lack DMV-issued identification.

These data showing significant racial disparities in the proposed photo identification requirement are of course as available to the state as they are to the Attorney General. However, both in the state’s initial submission and in the subsequent communications between us during the course of our review, the state has failed entirely to address the disparity between the proportions of white and non-white registered voters who lack DMV-issued identification.

In sum, however analyzed, the state’s data demonstrate that non-white voters are both significantly burdened by section 5 of Act R54 in absolute terms, and also disproportionately unlikely to possess the most common types of photo identification among the forms of identification that would be necessary for in-person voting under the proposed law.

Act R54 includes an exemption to the photo identification requirement if “the elector suffers from a reasonable impediment that prevents the elector from obtaining a photograph identification.” The Act provides that this exemption is to be applied by the individual county boards of registration and elections, but does not provide a definition of “reasonable impediment” or guidance regarding how this standard should be interpreted or applied. On August 16, 2011, the state attorney general issued an opinion that provides some limited guidance on this provision, but no additional guidelines have been made available. You have further informed us that the state attorney general’s opinion will not be supplemented to provide additional clarity, and no other state entity plans to issue any further guidance on applying the “reasonable impediment” exemption. Given the ambiguity of the Act’s “reasonable impediment” exemption and the uncertainty as to how it may be applied, we cannot conclude that this provision will mitigate the law’s discriminatory effects. To the contrary, the exemption’s vagueness raises the possibility that it will be applied differently from county to county, and possibly from polling place to polling place, and thus risks exacerbating rather than mitigating the retrogressive effect of the new requirements on minority voters.
Section 4 of Act R54 requires the State Election Commission to implement a system in order to issue new free photographic voter registration cards, to be used for voting purposes only. This new system has the potential to mitigate the discriminatory effect described above as regards the existing forms of DMV-issued identification. However, the procedures submitted by the state purporting to set forth the specifications of the system and planned distribution of the photo voter registration cards were described to us as being not final and subject to change. In addition, section 4 provides that the new cards "may be used for voting purposes only," but the state's current requirements, in light of the Attorney General's objection to section 5 of Act R54, would not permit this new registration card to be used as an allowable form of ID for voting.

Section 7 of Act R54 requires the State Election Commission to undertake a number of training, public education, and outreach activities regarding the new photo identification requirements and other provisions of the Act. In the course of our review, the state has provided various drafts of educational material it believes may be effective, but has not developed any final training or educational materials. And section 8 of Act R54, in conjunction with section 7 of the Act, requires the State Election Commission to contact registered voters who lack the requisite identification to inform them of the manner in which they can obtain the necessary identification. The state has provided significantly conflicting information regarding how it will ascertain which voters will be targeted by this program, and has not provided details regarding this proposed process, which is not yet final.

Because the proposed procedures to implement sections 4, 7, and 8 are not yet final, and because these changes are related to the proposed photographic identification requirement in section 5 of Act R54, the Attorney General will make no determination with regard to sections 4, 7, and 8 of the Act. See 28 C.F.R. 51.22(b), 51.35.

We recognize the possibility that efforts by the state, including efforts made pursuant to sections 4, 7, and 8 of Act R54, if applied comprehensively throughout the state, could potentially mitigate Act R54's discriminatory effects. Of course, if the state adopts finalized measures that substantially address the racial disparities described above, the state should not hesitate to resubmit section 5 of Act R54 for further review under Section 5 of the Voting Rights Act. 28 C.F.R. 51.43.

As the state may be aware, the Attorney General interposed an objection in 1994 to a voter photo identification law in Louisiana that would have required first-time voters to show a driver's license or other photo identification at the polls, on the ground that this requirement would have had a retrogressive effect at that time on Louisiana's minority voters. In 1997, Louisiana submitted a modified version of its voter identification requirement that included measures designed to substantially address this retrogressive effect, and the Attorney General interposed no objection to this revised procedure.

Until South Carolina succeeds in substantially addressing the racial disparities described above, however, the state cannot meet its burden of proving that, when compared to the benchmark standard, the voter identification requirements proposed in section 5 of Act R54 will not have a retrogressive effect. Because we conclude that the state has failed to meet its burden
of demonstrating that section 5 of Act R54 will not have a retrogressive effect, we do not make any determination as to whether the state has established that the proposed changes to its voter identification requirements were adopted with no discriminatory purpose.

The state made its initial submission to the Attorney General on June 30, 2011. Almost six months later, and on the 55th day of the 60-day administrative review period following your response to our written request for additional information, the state forwarded an undated letter from the state DMV director that purports to disagree with the data previously provided to us by the State Election Commission regarding the number of registered voters in the state who lack DMV-issued identification. We followed up with you immediately by telephone, but the state offered no additional supporting documentation. Moreover, the state did not provide any data whatsoever refuting the fact, demonstrated by the state’s earlier data, that minority registered voters are about 20% more likely than white registered voters to lack DMV-issued identification. The state instead advised that it had nothing further to add to assist in our analysis. The absence of any supporting documentation to accompany this new letter, including racial data and methodology, reinforces our conclusion that the state has not met its burden of proving that the requirements of section 5 of Act R54 comply with the Voting Rights Act. In this regard, I note that our regulations permit the state to request that the Attorney General reconsider this objection. 28 C.F.R. 51.45. Any request for reconsideration should be in written form and should contain all relevant information or legal argument. We also reiterate our willingness to continue our discussions regarding efforts the state may take to address the racial gap that presently exists among photo identification holders in the state.

Under Section 5 of the Voting Rights Act you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 28 C.F.R. 51.44. However, until the objection is withdrawn or a judgment from the United States District Court for the District of Columbia is obtained, the submitted change continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10. To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action that South Carolina plans to take concerning this matter. If you have any questions, you should contact Robert S. Berman (202-514-8690), a deputy chief of the Voting Section.

Sincerely,

[Signature]

Thomas E. Perez
Assistant Attorney General
Bibliography


Index of Cases


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

City of Rome v. United States, 446 U.S. 156 (1980).


