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LOWERING THE PRECLEARANCE HURDLE

Reno v. Bossier Parish School Board, 120 S. Ct. 866 (2000)

Alaina C. Beverly ★

Congress passed the Voting Rights Act of 1965 in an attempt to eliminate rampant racial discrimination in voting procedures.[1] Two tools used to combat racial discrimination under the Act are Section 2, which is a plain prohibition of racial discrimination in voting regulations,[2] and Section 5, which provides a unique enforcement mechanism for "covered" jurisdictions that have histories of discriminatory voting practices.[3] Section 5 of the Act prohibits any change in a "voting qualification, prerequisite, standard, practice, or procedure" without receiving preclearance from either the Attorney General or the United States District Court for the District of Columbia.[4] Preclearance is allowed under Section 5 if a proposed voting change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[5] The covered jurisdiction bears the burden of proving that its voting plan satisfies the criteria for preclearance under Section 5.[6]

This Case Note examines a recent Supreme Court decision that collapses the purpose and effect prongs of Section 5, effectively lowering the barrier to preclearance for covered jurisdictions. In *Reno v. Bossier*

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1. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."); *see also* Beer v. United States, 425 U.S. 130, 140 (1976).

2. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973(a) (1994) ("No voting [practice] . . . shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color. . . .").

3. A "covered" jurisdiction under the Act is any state or separate political subdivision, such as a county or a parish, that on November 1, 1964 (1) maintained a "test or device" as determined by the Attorney General and (2) had less than 50% of its voting-age residents registered, or voted in the presidential election of November 1964, as determined by the Director of the Census. *See* Katzenbach, 383 U.S. at 317.

4. 42 U.S.C. § 1973(c).

5. *Id.*

6. *See* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 478 (1997) [hereinafter *Bossier Parish I]* (citing City of Rome v. United States, 446 U.S. 156, 183 n.18 (1980)).

Parish School Board II[7] the Court determined that Section 5 disallows only voting plans that are enacted with a retrogressive purpose (i.e., with the purpose to "worsen" the position of minority voters). The Court held that Section 5 does not prohibit preclearance of a plan enacted with a discriminatory purpose but without a retrogressive effect. Evidence of a Section 2 violation alone will not be enough to prove a jurisdiction's discriminatory purpose and prevent Section 5 preclearance.

By collapsing the purpose and effect prongs of Section 5, the Court's decision has a number of critical implications for future voting rights jurisprudence. First, the case dramatically transforms voting rights doctrine by holding that a violation of Section 2—a violation of federal law—will not prohibit preclearance under Section 5. Second, it implies that Fourteenth and Fifteenth Amendment constitutional standards may not be relevant to Section 5 preclearance. Third, challengers will have fewer avenues available to enjoin a discriminatory voting rights plan. The high burden of proof once required of a jurisdiction to gain preclearance will effectively be placed upon that jurisdiction's challengers. Overall, the Court's interpretation of Section 5 will make it significantly easier for jurisdictions to gain preclearance of voting changes with a discriminatory, albeit nonretrogressive, purpose.

I

The facts of the redistricting process in *Bossier Parish I* and *II* are uncontested. The school board of Bossier Parish, Louisiana, was a jurisdiction subject to Section 5 preclearance requirements because of its past efforts to "limit or evade" its obligation to desegregate the Parish schools.[8] To equalize the population among the Board's twelve districts after the 1990 census, the School Board adopted a redistricting plan chosen in the summer of 1991 by the parish's Police Jury, which is its representative governing body, for the School Board's own election system.[9] This plan (the Jury plan), as applied to the Police Jury, was precleared by the Attorney General.[10] In the twelve-district Jury plan, no

7. 120 S. Ct. 866 (2000) [hereinafter *Bossier Parish II*]. The Supreme Court granted certiorari over the Bossier Parish School Board preclearance issue twice. *See Bossier Parish II*; *Bossier Parish I*. This Case Note analyzes primarily the impact of *Bossier II*.

8. *Id.* at 880. (Souter, J., concurring in part and dissenting in part) (citing to stipulation agreement).

9. *See id.* at 869.

10. *See id.*

majority-minority districts were drawn.[11] Although proposed early on in the deliberation process, the School Board refrained from adopting the Jury plan, instead hiring a redistricting consultant to devise a different plan.[12] George Price, president of the local chapter of the NAACP, presented the School Board with a second plan that would create two districts containing a majority of black voting-age residents.[13] Without addressing the possibility of creating any majority-minority districts, the School Board adopted the Police Jury plan in the fall of 1992,[14] "over vocal opposition from local residents, black and white alike."[15]

The parties to the suit did not agree upon the motives underlying adoption of the Jury plan. The Board defended the plan based upon its interest in respecting existing precinct lines and expediency, given that the Attorney General had already approved the Jury plan.[16] However, the Board also stipulated that it had "applied its energies for decades" towards circumventing its obligations to desegregate the Parish schools. Based upon this stipulation, the petitioners challenged the Board's adoption of the Jury plan as another defiant tactic to avoid compliance with the Voting Rights Act.[17] Petitioners implied that the Board passed the Jury plan only in an effort to avoid having to consider the majority-minority plan proffered by the NAACP.[18]

On January 4, 1993, the Board submitted its redistricting plan to the Attorney General, who objected to preclearance.[19] The Board filed an action for preclearance in the District Court for the District of Columbia immediately after the Attorney General denied the Board's request for preclearance.[20] The District Court granted preclearance, and appellants filed jurisdictional statements with the Supreme Court.[21]

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11. *See id.* A majority-minority district is one in which racial or ethnic minority citizens are sufficiently large enough in number to constitute effective voting majorities in a single-member district.

12. *See id.*

13. *See id.*; *see also Bossier Parish I*, 520 U.S. at 475.

14. *See Bossier Parish I*, 520 U.S. at 475.

15. *Id.*

16. *See id.*

17. *See Bossier Parish II*, 120 S. Ct. at 880 (Souter, J., concurring in part and dissenting in part).

18. *See id.* at 869.

19. *See id.* (citing the Attorney General's response that "the Board was 'not free to adopt a plan that unnecessarily limits the opportunity for minority voters to elect their candidates of choice' ").

20. *See id.* at 869.

21. *See id.* at 870.

In *Bossier Parish I*, the first appeal to the Supreme Court, the Court affirmed the District Court, holding that Section 5 preclearance should not be denied solely on the basis that the plan adopted by Bossier Parish School Board may violate Section 2 of the Voting Rights Act.[22] The Court further held that Section 2 evidence may be 'relevant' to a Section 5 inquiry inasmuch as the discovery of a plan with dilutive impact makes it "more probable" that the jurisdiction effecting the plan also acted with intent to retrogress."[23] However, the Court remanded to the District Court to determine whether Section 5 purpose inquiry ever extends beyond the search for retrogressive intent.[24] On remand, the District Court concluded that there was no evidence of a discriminatory but non-retrogressive purpose, but it did not reach the question of whether Section 5 prohibits preclearance of a plan enacted with discriminatory purpose.[25] Faced with the question again after district and circuit court review, the Court in *Bossier Parish II* answered its own inquiry by refusing to investigate the Board's adoption of the Jury plan for a discriminatory purpose beyond any retrogressive purpose.[26] The Court upheld the adoption of the Jury plan by the Bossier Parish School Board because the plan was not drawn to intentionally worsen the position of minorities in the district.

Writing for the majority in *Bossier Parish II*, Justice Scalia claimed that defining discriminatory purpose as intent to retrogress "has value and effect . . . even when it does not cover additional conduct."[27] He believed that a retrogressive characterization of the purpose prong is beneficial to appellants challenging preclearance of a covered jurisdiction because when "conduct . . . has both 'the purpose of x' and 'the effect of x,' the Government need only prove that the conduct at issue has 'the purpose of x' in order to prevail."[28] Thus, under Scalia's theory, the government is "spared the necessity of countering the jurisdiction's evidence regarding actual retrogressive effect . . . ."[29] However, defining 'discriminatory purpose' as 'intent to retrogress' and defining 'discriminatory effect' as 'retrogressive effect' the

22. *See Bossier Parish I*, 520 U.S. at 485.

23. *See id.* at 487 ("[W]e leave open for another day the question of whether the § 5 purpose extends beyond the purpose of retrogressive intent.").

24. *See id.* at 486.

25. *See Bossier Parish II*, 120 S. Ct. at 870 ("It noted that one could 'imagine a set of facts that would establish a "non-retrogressive, but nevertheless discriminatory, purpose," but those imagined facts are not present here.' The District Court therefore left open the question that we had ourselves left open on remand: namely, whether the Section 5 purpose inquiry extends beyond the search for retrogressive intent.") (citation omitted).

26. *See id.* at 878.

27. *Id.* at 873.

28. *Id.*

29. *Id.*

Court essentially collapses the two prongs of Section 5. The Court now reads purpose so narrowly that dispositive evidence in a preclearance challenge under the purpose prong must reflect a jurisdiction's blatant wish to effectuate harm on a minority voting community. Such evidence is so unlikely in today's age of sophisticated discrimination that the Court has effectively read the purpose prong out of Section 5, leaving the retrogressive effect prong as the only recourse for challengers. The practical effect of the Court's reading is to force litigants to prove that a plan enacted by a covered jurisdiction has a retrogressive effect.

The holding of *Bossier Parish II* illuminates an inherent tension between the purpose and effect prongs of Section 5 as they have developed in voting rights jurisprudence. The Supreme Court drew guidance in *Bossier Parish II* from *Beer v. United States*.[30] *Beer* involved the redistricting of the New Orleans City Council following the 1970 census. The council designed a voting plan that provided for black population majorities in two districts but a black voter majority in only one district.[31] In that case, the Court reasoned that "a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5."[32] In *Beer*, the Court concluded that, for purposes of Section 5, "the phrase 'denying or abridging the right to vote on account of race or color' . . . limited the term it qualified, 'effect,' to retrogressive effects."[33] The Court held that a Section 5 submission must be approved if it has no retrogressive effect and if the new apportionment itself does not otherwise discriminate "on the basis of race or color as to violate the Constitution."[34]

II

In *Bossier Parish II*, the Court's narrow interpretation of the purpose prong of Section 5 rejected the notion that the phrase "abridging the right to vote on account of race or color" means retrogression when it modifies "effect," but accepted the idea that it means discrimination when it modifies "purpose."[35] The Court "refuse[d] to adopt a construction [of Section 5] that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modify-

30. 425 U.S. 130 (1976).

31. *See id.* at 136.

32. *Id.* at 141, *quoted in Bossier Parish II*, 120 S. Ct. at 872.

33. *Bossier Parish II*, 120 S. Ct. 866 at 872 (citing *Beer*, 425 U.S. at 132).

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

35. *Bossier Parish II*, 120 S. Ct. at 872.

ing."[36] The conclusion reached by this limited interpretation of 'purpose' is that both the purpose and effect prongs of Section 5 only prohibit the preclearance of a voting plan adopted with an intent to retrogress or a retrogressive effect.

The Court's limited construction of the purpose prong of Section 5 departs from significant voting rights jurisprudence. In *Bossier Parish II*, Justice Scalia offers cursory reasons for distinguishing case law in which the Supreme Court has given broader meaning to the purpose prong than to the effect prong of Section 5. For example, in *Richmond v. United States*,[37] the city of Richmond requested preclearance of a proposed annexation that would have reduced the black population of the district from fifty-two percent to forty-two percent.[38] In that case, the District Court held that "the invidious racial purpose underlying the annexation had not been eliminated since no objectively verifiable, legitimate purpose for annexation had been shown . . . ."[39] Justice White, writing for the Court, held that "an annexation reducing the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation is not a statutory violation as long as the post-annexation electoral system fairly recognizes the minority's political potential."[40] The Court stated that official action "taken for the *purpose of discriminating* against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute."[41] Moreover, "[a]n annexation proved to be of this kind and not proved to have a justifiable basis is forbidden by § 5, *whatever its actual effect may have been or may be.*"[42] Justice Scalia acknowledged this language in *Bossier Parish II*, but described the once-broad interpretation of 'purpose' in *Richmond* as "nothing more than an *ex necessitate* limitation upon the effect prong in the particular context of annexation . . . ."[43]

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36. *Id.* (citing Bank America Corp. v. United States, 462 U.S. 122, 129 (1983)).

37. 422 U.S. 358 (1975).

38. *See id.* at 372.

39. *Id.* at 367 (citation omitted) The Court also accounted for the fact that the annexation did not "effectively eliminate or sufficiently compensate for the dilution of the black voting power . . . ." *Id.*

40. *Id.* at 378; *see also id.* at 371 (concluding that an annexation does violate Section 5 "as long as the ward system fairly reflects the strength of the Negro community as it exist[ed] after the annexation").

41. *Id.* at 378 (emphasis added).

42. *Id.* at 379 (emphasis added).

43. *Bossier Parish II*, 120 S. Ct. at 873. It should be noted that Justice Scalia sees annexation cases as "exception[s] to normal retrogressive effect principles," not as part and parcel of a broader reading of purpose principles. *Id.*

In another annexation case, *City of Pleasant Grove v. United States*,[44] the Supreme Court once again read the purpose prong expansively. In *Pleasant Grove*, the Court held that Pleasant Grove, Alabama acted with a discriminatory purpose by annexing two parcels of land inhabited by Whites while refusing to annex adjacent Black neighborhoods that had petitioned for inclusion.[45] Pleasant Grove claimed that its action was permissible because there were no Black voters in the city at the time of annexation. Therefore, the annexations could not have caused an impermissible *effect* on black voting.[46] Justice Scalia joined the majority's reasoning that a discriminatory purpose under Section 5 may relate to "anticipated as well as present circumstances."[47] The Court also rejected the proposition that Pleasant Grove's action could not be evidence of a discriminatory purpose simply because it had no impermissible effect.[48] Thus, *Pleasant Grove* also supports a disjunctive reading of the purpose and effect prongs of Section 5.

Although *Miller v. Johnson*[49] is not heralded as a victory for minorities in voting rights case law, it is an example of a *non-annexation* case where the Court extended the discriminatory purpose prong of Section 5 beyond retrogressive intent.[50] *Miller v. Johnson* was a suit brought by White plaintiffs who claimed that Georgia's congressional reapportionment scheme violated the Equal Protection Clause of the Fourteenth Amendment.[51] In considering the equal protection claim, the Court investigated Georgia's preclearance process. Georgia's reapportionment scheme was drawn because according to the 1990 census, Georgia was entitled to an additional eleventh congressional seat.[52] The General Assembly's voter plans, each including two majority-minority districts, were refused preclearance twice.[53] The Department of Justice relied on the fact that Georgia had chosen not to enact an alternative plan drawn by the ACLU that proposed three majority-minority districts in light of

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44. 479 U.S. 462 (1987).

45. *See id.* at 466, 472.

46. *See id.* at 471.

47. *Id.*

48. *See id.*

49. 515 U.S. 900 (1995).

50. Justice Breyer and Justice Ginsburg support this in their partial dissent in *Bossier Parish I*. *See* 520 U.S. at 496–97 ("The [*Bossier Parish I*] Court indicated that an ameliorative plan would run afoul of the § 5 purpose test if it violated the Constitution.").

51. *See Miller*, 515 U.S. at 909.

52. *See id.* at 906.

53. *See id.* at 906-07.

Georgia's twenty-seven percent Black population.[54] The Department of Justice concluded that Georgia's choice of a reapportionment plan that did not maximize the minority voting interest evidenced a forbidden Section 5 discriminatory purpose.[55]

The Court rejected the Justice Department's argument in *Miller*,[56] but the reason that the majority gave belies a broader interpretation of Section 5's purpose prong. The Court reasoned that "[t]he State's policy of adhering to other districting principles instead of creating as many majority-minority districts as possible does not support an inference" of an unlawful discriminatory purpose.[57] This statement clearly indicates that the *Miller* Court viewed discriminatory purpose as more that just retrogression. Justice Breyer remarked in his concurrence in *Bossier Parish I*:

> if the only relevant purpose [in *Miller*] were a retrogressive purpose, this reasoning, with its reliance upon traditional districting principles, would have been beside the point. . . . Indeed, the Court indicated that an ameliorative plan would run afoul of the § 5 purpose test if it violated the Constitution.[58]

This reading of *Miller* is critical because it not only shows that the Court's interpretation of purpose has extended beyond a purely retrogressive purpose, but it also illuminates the Court's reliance on the import of constitutional standards to interpreters of discriminatory purpose under Section 5.

A collapsed reading of the purpose and effects prongs is also at odds with *Beer*'s invitation for the Court to look to constitutional standards when interpreting Section 5.[59] In *Beer*, the Court cited Fourteenth Amendment cases, including *Fortson v. Dorsey*,[60] *Burns v.*

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54. *See id.* at 907.

55. *See id.* at 924.

56. *See id.*

57. *Id.*

58. *Bossier Parish I*, 520 U.S. at 496–97 (citation omitted).

59. For a detailed discussion of this theory, see Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 193-210 (1983).

60. 379 U.S. 433 (1965). This case involved an equal protection challenge to Georgia's multi-member election system. The Georgia statute apportioned the state's 54 senatorial seats among 54 senatorial districts drawn along existing county lines. However, where there was more than one district in a county, the statute provided that all the county's senators were to be elected by a countywide vote. *See id.* at 434-35. In its reasoning, the Court considered issues of candidate responsiveness to the minority community. The Court held that absent population disparities among districts in the county's population, or evidence supporting an assertion that the purpose of the scheme was to dilute the minority vote, equal protection was not violated by a hybrid system in which some counties used multi-member elections and others elected only one senator. *See id.* at 436-38.

Richardson,[61] *Whitcomb v. Chavis*,[62] and *White v. Register*[63] as standards against which a Section 5 violation should be judged.[64] The cases recognize several factors beyond retrogression that can be considered in determining voter dilution.[65] These principles were catalogued in *Zimmer v. McKeithen*,[66] an *en banc* Fifth Circuit decision, as evidence of discriminatory purpose in a vote dilution inquiry. The "*Zimmer* factors" command:

> [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy

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61. 384 U.S. 73 (1966). *Burns* involved a challenge to the constitutionality of Hawaii's legislative apportionment scheme. The Court held that the legislature's use of multimember districts in its interim reapportionment plan does not constitute invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 88.

62. 403 U.S. 124 (1971). Residents of Marion and Lake Counties, Indiana, challenged state statutes establishing Marion County as a multi-member district. The petitioners claimed that the laws diluted the votes of African Americans and poor persons living in the "ghetto area" of Marion County. *Id.* at 128-29. The case established that in constitutional voter dilution cases it is the plaintiffs' burden to produce evidence that its members had less opportunity than did other residents in the district to participate in the political process. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 374 (1998).

63. 412 U.S. 755 (1973). This case involved a reapportionment plan for the Texas House of Representatives that provided for 150 representatives to be selected from 79 single-member districts and 11 multimember districts, resulting in a 9.9% population disparity between the smallest- and largest-drawn districts. The plan was challenged on the basis that the state failed to justify the population variations and that use of multimember districts in two counties unconstitutionally diluted the votes of African Americans and Mexican Americans. *See id.* at 758-59. Considering a history of discrimination, the number of minorities elected, the responsiveness of elected officials, and cultural and language barriers to accessing the political process, the Court unanimously found that the multimember districts unconstitutionally diluted the votes of African Americans and Mexican Americans. *See id.* at 766–70.

64. *See* Beer v. United States, 425 U.S. 130, 142-43 n.14 (1978).

65. *See* Motomura, *supra* note 59, at 196–97 (including racially polarized voting, history of racial discrimination, historical lack of minorities elected and the relationship between socioeconomic status and political participation). *See generally* ISSACHAROFF, KARLAN, & PILDES, *supra* note 62, at 385-87 (discussing the development of the meaning of purpose in voter dilution cases).

66. 485 F.2d 1297 (5th Cir. 1973).

> underlying the preference for multi-member or at-large districting, or the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made.[67]

The Attorney General consistently has incorporated these Fourteenth and Fifteenth Amendment vote dilution standards when objecting to reapportionment schemes that have discriminatory purposes.[68] Thus, the *Bossier Parish II* Court's interpretation of purpose, limited to retrogression, is at odds with *Beer*'s invitation to import constitutional vote dilution standards into Section 5 analysis.

Beer's emphasis on only retrogressive effect can be viewed as a temporal aberration in voting rights jurisprudence. The standard in *Beer* was retrogressive effect because, at the time of the case, the law was unclear as to whether discriminatory purpose was an essential element for a claim of unconstitutional racial vote dilution. *Beer* predates cases like *Washington v. Davis*,[69] *City of Mobile v. Bolden*,[70] and their progeny, which developed the definition of discriminatory purpose in Fourteenth and Fifteenth Amendment jurisprudence.[71] Three years after *Beer*, the Court concluded that a finding of discriminatory purpose requires a showing that "the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effect upon an identifiable group."[72] While *Bolden* sets a high standard for discriminatory purpose, its definition cannot be reconciled with a definition of discriminatory purpose limited to retrogression. Thus, the reading of purpose in *Bossier Parish II* is inconsistent with the emphasis on, and definitions of, discriminatory purpose that developed after *Beer*.

It could be argued that *Bolden* articulated a constitutional definition of discriminatory purpose, while *Bossier Parish School Board* is confined to a statutory interpretation of discriminatory purpose. However, it is implausible to suggest that Congress's intent in enacting the Voting Rights Act was to move so far astray of constitutional protections. The legislative history of the Voting Rights Act evidences Congress's goal of enabling the Act to achieve the full aspirations of the Fifteenth Amendment for

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67. *Id.* at 1305.

68. *See* Motomura, *supra* note 59, at 245.

69. 426 U.S. 229 (1976).

70. 446 U.S. 55 (1980).

71. *See* Washington v. Davis, 426 U.S. at 242 (holding that a disproportionate impact on a racial group, by itself, is not necessarily evidence of a violation of the Fourteenth Amendment); *Bolden*, 446 U.S. at 65 (concluding that only a finding of discriminatory intent can result in a violation of the Fifteenth Amendment).

72. Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

African American voters.[73] At the time of the passage of the Voting Rights Act, Congress was confronted with systematic evasion of the voting rights statutes of 1957,[74] 1960,[75] and 1964:[76]

> The judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat, resisters seek new ways and means of discriminating. As the case-by-case approach required too many human resources and often caused no change in result, it was unsatisfactory.[77]

A retrogressive reading of the purpose prong of Section 5 contradicts the creative goals of Congress in including the section in the Voting Rights Act. In the words of Justice Souter, Congress' goal in including Section 5 was the elimination of discrimination:

> This evil in Congress's sights was discrimination, abridgment of the right to vote, not merely discrimination that happens to cause retrogression, and Congress's intent to frustrate the unconstitutional evil by barring a replacement scheme of discrimination from being put into effect was not confined to any one subset of discriminatory schemes.[78]

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73. *See* H.R. REP. NO. 89-439, at 6-7 (1965); *see also* S. REP. NO. 94-295, at 11 (1975).

74. The Civil Rights Act of 1957 empowered the Attorney General to institute suits to protect against the deprivation of the right to vote based upon race or color, as well as to protect against threats or intimidation that interfered with the right to vote in federal elections. *See* H.R. REP. NO. 89-439, pt. 1, at 9 (1965).

75. The Civil Rights Act of 1960 empowered the Attorney General to inspect documents in custody of local voting registrars, and authorized that when a pattern or practice of discrimination was found in a particular area, a nonregistered African American resident could apply directly to the Federal court or a Federal voting referee for an order certifying him or her to vote. *See id.*

76. The Civil Rights Act of 1964

> provided for the expedition of voting suits . . . before a three-judge district court with a direct appeal to the Supreme Court. The 1964 statue also prohibited (i) the use of voting qualifications, practices, and standards different from those applied in the past under such law to other individuals; (ii) the rejection of applicants because of immaterial errors or omissions made by applicants filling out registration forms; and (iii) the use of literacy tests as a qualification for voting unless they are administered can conducted wholly in writing.

Id.

77. *See* H.R. REP. NO. 89-439, pt. 1, at 9–10 (1965).

78. *Bossier Parish II*, 120 S. Ct. at 889 (Souter, J., dissenting). Justice Souter sees this issue as a misinterpretation of "abridgment" rather than as a misinterpretation of "purpose." *See id.*

In light of Congress' intent in including Section 5 in the enforcement of the proactive Voting Rights Act, it is untenable to suggest that Section 5 was designed only to prevent backsliding. Further, a conjunctive reading of the purpose and effect prongs does not align with traditional methods of statutory interpretation. "Since the Act is an exercise of congressional power under Section 2 of that Amendment . . . the choice to follow the Amendment's terminology is most naturally read as carrying the meaning of the constitutional terms into the statute."[79] The language in the Act denotes Congress's standard for Section 5, which is that of the Fifteenth Amendment: "[t]he right of citizens . . . to vote shall not be denied or abridged . . . on account of race or color . . . ."[80] A plain reading of this language in Section 5 shows that one purpose forbidden by the statute is a purpose to act unconstitutionally.[81] Thus, the "constitutional import" interpretation, introducing Fourteenth and Fifteenth Amendment standards into the purpose prong, is a plausible reading of the meaning of Section 5.

III

The Court's holding in *Bossier Parish II* has significant implications for post-2000 census redistricting. By concluding that Section 2 violations will not prohibit Section 5 preclearance,[82] the Court creates an unorthodox understanding of Section 5. In effect, the Court is saying that a violation of federal law is not enough to prevent preclearance of a jurisdiction under the Voting Rights Act.

Section 2 of the Voting Rights Act was designed to prohibit voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups."[83] A voting practice violates Section 2 if, "based on the totality of the circumstances," the voting process is "not equally open" to minorities, in that minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representative of their choice."[84]

In *Bossier Parish II*, the Court interprets Section 5 as a tool to freeze election procedures, combating only retrogressive effects.[85] Unlike

79. *Id.* at 887 (citing South Carolina v. Katzenbach, 383 U.S. 301, 325–27 (1966); United States v. Kozminski, 487 U.S. 931, 945 (1988)).

80. U.S. Const. Amend. XV, § 1, *quoted in Bossier Parish II*, 120 S. Ct. 887 (Souter, J., dissenting).

81. *See Bossier Parish II*, 120 S. Ct. at 895 (Breyer, J. dissenting).

82. *See Bossier Parish I*, 520 U.S. at 485.

83. *Id.* at 479 (citing S. REP. No. 97-417, at 28 (1982)).

84. *Id.* (citing 42 U.S.C. § 1973(b)).

85. *See Bossier Parish II*, 120 S. Ct. at 876.

Section 2 jurisprudence, a retrogressive emphasis in Section 5 requires a determination of a jurisdiction's status quo. The Court explained that retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan, and necessarily implies that the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured.[86] In contrast, Section 2 uses as its benchmark for comparison in vote dilution claims a hypothetical, undiluted plan.[87] By focusing upon retrogressive effect for Section 5, the Court has ruled that covered jurisdictions have no responsibility to even consider hypothetical plans that would maximize the voting potential of minority voters. This understanding of Section 5, combined with an implicit rejection of the "constitutional import" interpretation, places Section 5 in doctrinal isolation from the rest of voting rights jurisprudence. Such an interpretation turns the section into little more than a perfunctory administrative process that entrenches the status quo.

Congress expressed its will for Section 2 to bear relevance upon Section 5 preclearance. The 1982 amendments to the Voting Rights Act of 1965[88] instructed the Attorney General to withhold Section 5 preclearance in light of a clear Section 2 violation.[89] This mandate aligns with the Attorney General's history of objecting to preclearance based upon potential Section 2 violations and unconstitutional voter-dilution. After *Bossier Parish II*, the Attorney General's incorporation of Section 2 and constitutional voter dilution standards to administer preclearance will not be a hurdle for recalcitrant district authorities.[90] Although the Attorney General's determination is not reviewable, a declaratory judgment by the District of Columbia District Court will override the Attorney General's decision.[91] In the past, few jurisdictions have sought preclearance after an

86. *See id.* at 874.

87. *See id.*

88. *See Bossier Parish I*, 502 U.S. at 503, *citing* 42 U.S.C.S. § 1973 et seq.

89. *See id.* at 502 n.4 (citing 28 C.F.R. § 51.55(b)(2) (1996) ("In those instances in which the Attorney General concludes that . . . a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold Section 5 preclearance.")).

90. As previously noted, Section 5 provides two alternatives to preclearance: the administrative authority of the Attorney General or a declaratory judgment action by the District Court of the District of Columbia. *See* ISSACHAROFF, KARLAN, & PILDES, *supra* note 62, at 313, 329.

91. *See id.* at 329.

objection has been imposed,[92] making the D.C. District Court an alternative that takes a more circumscribed reading of Section 5.

This alternate path and the Court's refusal to defer to the Attorney General's discretion raise separation of powers concerns. By casting its own interpretation of the purpose prong as distinct from Section 2, the Supreme Court has ignored a constitutionally valid congressional construction of "purpose" for use by the executive branch. This tension is likely to play out in the approaching wave of 2000 census redistricting, as the Attorney General's traditional preclearance standards will conflict with the more lenient standards for preclearance imposed by *Bossier Parish II*.

The decision limits the remedies that will be available to minority communities claiming discrimination in apportionment. Following *Bossier Parish II*, communities alleging discriminatory purpose will be forced to resort to the other arms of the Voting Rights Act, including Section 2, or to the Constitution itself to challenge discriminatory voting plans. For any of these claims, the private plaintiff suffers the burden of proof.[93]

Finally, the holding of *Bossier Parish II* effectively shifts the burden in Section 5 cases. The purpose of Section 5 was to place a high burden on the jurisdiction seeking preclearance, given their histories of avoiding compliance with voting rights laws:

> Section 5 was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the burden of proving that the new law, too, was discriminatory. . . . Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'[94]

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92. *See id.*

93. A plaintiff claiming vote dilution under Section 2 of the Voting Rights Act must establish that (i) the racial group is sufficiently large and geographically compact (ii) the group is politically cohesive (iii) and White racial block voting. The plaintiff must also demonstrate that the totality of the circumstances supports a finding of vote dilution. *See Bossier Parish I*, 520 U.S. at 480 (citing Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986); Johnson v. De Grandy, 512 U.S. 997, 1011 (1994)).

94. Beer v. United States, 425 U.S. 130, 140 (1978) (citing H.R. REP. No. 94-196, pt.1, at 57–58 (1975)).

The holding of *Bossier Parish II* lowers the burden of a jurisdiction seeking Section 5 preclearance to such an extent that the Court has practically shifted "'the advantage of . . . 'inertia'"[95] back to the violating jurisdiction. By requiring only that a requesting jurisdiction refute that its plan was enacted with the intention to place minorities in a worse position, the Court has designed a rebuttable presumption in favor of the jurisdiction's districting body. The pervasiveness of sophisticated forms of discrimination in today's society almost guarantee that even a violating jurisdiction will meet the low preclearance burden of *Bossier Parish II*, unless it is an "incompetent retrogessor."[96] Thus, the Court has placed the burden upon the state or private plaintiff to prove that a jurisdiction is in violation of Section 5, thereby removing the heavy burden that Congress intended for covered jurisdictions to bear.

CONCLUSION

The latest installment of *Reno v. Bossier Parish School Board* lends itself to the question: where will voting rights go in the year 2000? In light of voting right precedent, the dictates of *Beer*, and congressional purpose, the Court's collapsed reading of the purpose and effect prongs of Section 5 of the Voting Rights Act thrusts challengers of a preclearance process into uncharted legal territory. The Court has abandoned discriminatory purpose for a retrogressive touchstone.

Perhaps *Bossier Parish II* is part of the recent Supreme Court trend of cutting back on the expansive notion of voting strength that the Clinton administration's Department of Justice has developed,[97] expressing the Court's hesitancy to impose on jurisdictions the affirmative duty to maximize minority voting strength.[98] The Court avoids weighing the manner in which a jurisdiction with a history of discrimination, seeking preclearance, may intentionally deny minority voters full opportunity to participate in the voting process by refusing to increase their voting

95. *Id.*

96. *Bossier Parish II*, 120 S. Ct. at 873 (quoting Reply Brief for Federal Appellant 9).

97. The Center for Individual Rights, a conservative public interest law firm that represented Bossier Parish, said that the decision had "effectively ended the Clinton Justice Department's efforts to force localities to racially gerrymander under the Voting Rights Act." Linda Greenhouse, *Justices Say Redistricting Need Only Prevent Backsliding*, N.Y. TIMES, Jan. 24, 2000, at A18.

98. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 911-12 (1995) (stating that the use of race as a predominant factor in reapportionment should be presumed to be unconstitutional under the Equal Protection Clause of the Fourteenth Amendment); Shaw v. Reno, 509 U.S. 630, 642-43 (1992) (requiring strict scrutiny whenever race is the predominant factor, to the submergence of traditional redistricting principles, in the redistricting process).

strength. Instead, the holding of *Bossier Parish II* entrenches the status quo and effectively reads the purpose prong out of Section 5 of the Voting Rights Act. In the future, this case will place the burden upon challengers of preclearance to prove retrogression or to use avenues other than Section 5 to make a claim that a redistricting plan is discriminatory. Armed with the circumscribed reading of purpose in *Bossier Parish II,* jurisdictions will probably look to the District of Columbia District Court for vindication, making it easier for covered jurisdictions to bound over the one-time nearly insurmountable hurdle of Section 5.