

Saving Section 5: Reflections on *Georgia V. Ashcroft*, and Its Impact on the Reauthorization of the Voting Rights Act

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Introduction

In 2003, the U.S. Supreme Court decided the case of *Georgia v. Ashcroft*, 539 U.S. 461 (hereinafter, “*Ashcroft*”), interpreting Section 5 of the Voting Rights Act as it related to the 2001 Georgia redistricting,² and in so doing, changed the face of the Voting Rights Act.³ Prior to *Ashcroft*, redistrictings in jurisdictions subject to Section 5 were analyzed according to the standard enunciated in *Beer v. United States*, 425 U.S. 130 (1976), which held that Section 5 prohibits “retrogression,” or the reduction in minority voters’ ability to exercise their franchise effectively. For almost three decades, until the *Ashcroft* decision, the effective exercise of the franchise was defined by minority voters’ ability to elect candidates of their own choice. Thus, by freezing in place gains that minority voters had made in electing their candidates of choice, Section 5 helped contrib-

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² As discussed below, while the Supreme Court only considered the denial of preclearance to the Georgia State Senate redistricting plan, the District Court below considered two other plans—the congressional plan and the State House plan, in addition to the State Senate plan—to which preclearance was granted.

³ This piece was written before the Supreme Court’s decision in *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006).

ute to an environment where the number of black members of the House of Representatives rose from six in 1965 to forty-two today.

However, the *Ashcroft* decision changed this standard substantially. The Court, by a five to four margin, redefined the “effective exercise” standard, suggesting a “totality of the circumstances” test was more appropriate.⁴ Such a test, as derived by Justice O’Connor, suggested that a covered jurisdiction could comply with Section 5, even if it reduced the ability of minority voters to elect candidates of their choice, if the jurisdiction otherwise increased the number of “influence districts,” or districts which might elect candidates “sympathetic to the interests of minority voters.”⁵

Not one of the parties to the action suggested such a change in the standard, no briefs submitted to the Court advocated such a standard, and this new standard was not raised during oral argument. Indeed, when Congress renewed Section 5 of the Voting Rights Act in 1982, the *Beer* Section 5 standard had been in effect for six years, through a decennial redistricting cycle, and Congress did not choose to revise it. Nevertheless, in one of the most startling displays of judicial activism seen in voting rights jurisprudence, five members of the Court, led by Justice O’Connor, fundamentally altered thirty years of judicial and administrative interpretation of Section 5 and the very meaning of the Voting Rights Act.

Understandably, this decision resulted in a lot of serious concern among Voting Rights Act advocates. It was (and is) unclear what this decision would mean for the advances minority voters had made in the last forty years. Had minority voters really come so far that such a radical departure from established Voting Rights Act jurisprudence (particularly the consideration of influence districts) was warranted? Was it now possible, in covered jurisdictions, to replace minority voters’ candidates of choice (who were usually minorities themselves) with whites who were perceived by some standard to be somehow sympathetic to minority interests? How could one measure a candidate’s sympathy towards minorities? Could this “substantive representation” philosophy result in a blanching of legislative bodies in covered jurisdictions, and what would that mean for the minority constituencies they represent? Could unscrupulous jurisdictions draw district lines intentionally to reduce the effective ability of minority voters to exercise the franchise, while using the mantra of “influence districts” as a pretext to win preclearance under Section 5? Could such a nebulous standard be administered by the Justice Department and the District Court, and if so, how? And perhaps most importantly, does Justice O’Connor’s opinion render Section 5 toothless and meaningless in today’s political climate?

Several commentators, including Professors Samuel Issacharoff and Richard Pildes, have focused on variations of these questions, particularly the last two.⁶ Issacharoff has concluded that the *Ashcroft* standard is irredeemably com-

⁴ *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003).

⁵ *Ashcroft*, 539 U.S. at 479–84.

⁶ See Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004), and Richard H. Pildes, *Political Competition*

plex, particularly when compared to the pre-*Ashcroft* standard, which he perceives to have been so simple and mechanical as to be routinely mathematically applied.⁷ Additionally, Issacharoff openly questioned “whether Section 5 has served its purpose and may now be impeding the type of political developments that would have been a distant aspiration when the Voting Rights Act was first passed.”⁸ Both Issacharoff and Pildes reached the conclusion that political developments with regard to racial minorities had so improved in this country, in large part due to the success of the Voting Rights Act, that Section 5 as applied pre-*Ashcroft* could actually *harm* the rights of minority voters.⁹

Pildes has gone further, testifying before the Senate Judiciary Committee that Congress’ overturning of *Ashcroft* would be a “mistake, one that will harm the long-term interests of minority voters, frustrate the formation of interracial political coalitions in the South, and be damaging to the American democracy.”¹⁰ Furthermore, Pildes testified that application of the pre-*Ashcroft* “rigid understanding of the [Voting Rights Act] would have completely inverted the Act’s policies.”¹¹

This chapter will suggest that the concerns of commentators like Issacharoff and Pildes, while well-intentioned, are overstated and mistaken. I will assert that the views of those commentators who perceive simplicity in the pre-*Ashcroft* standard, and who question the continued utility of Section 5 (at least in the con-

and the Modern VRA, in THE FUTURE OF THE VOTING RIGHTS ACT (David Epstein, Rodolfo O. de la Garza, Sharyn O’Halloran, and Richard H. Pildes eds., 2006).

⁷ Issacharoff, *supra* note 6, at 1717 (“Justice O’Connor introduced a new test for Section 5 that decisively abandoned the prior reliance on a straight-line mathematical comparison of minority voting strength before and after.”)

⁸ *Id.* at 1710.

⁹ See Pildes, *supra* note 6, at 6 (“What a perversion of the VRA [the lower court’s decision in *Ashcroft*, declining to preclear the Georgia State Senate plan] would have been in Georgia.”), and Issacharoff, *supra* note 6, at 1731 (“What seems less unclear, however, is the mischief that Section 5 can play in stalling coalitional politics. . .”).

¹⁰ *The Continuing Need for Section 5 Pre-Clearance: Hearings before the Senate Comm. on the Judiciary*, 109th Cong., 2nd Sess. (May 16, 2006) (testimony of Richard H. Pildes, professor, NYU School of Law) http://judiciary.senate.gov/print_testimony.cfm?id=1888&wit_id=5353. (hereinafter “Pildes Testimony”). See also *Supplement to Original Testimony before Senate Judiciary Committee on May 16, 2006 Hearing Titled: “The Continuing Need for Section 5 Preclearance,”* 109th Cong., 2nd Sess. (May 16, 2006) (testimony of Richard H. Pildes, professor, NYU School of Law) <http://electionlawblog.org/archives/pildes3.doc>.

¹¹ *Id.* For differing views, see *The Continuing Need for Section 5 Pre-Clearance: Hearings before the Senate Comm. on the Judiciary*, 109th Cong., 2nd Sess. (May 16, 2006) (testimony of Theodore S. Arrington, professor of political science, University of North Carolina at Charlotte, http://judiciary.senate.gov/testimony.cfm?id=1888&wit_id=5352 and testimony of Pamela S. Karlan, professor, Stanford Law School http://judiciary.senate.gov/testimony.cfm?id=1888&wit_id=5350).

text of redistricting), are colored by misconceptions regarding the facts of the *Ashcroft* case and some possible misinterpretations of the opinions in that case.

In Part I of this chapter, I will contend that the pre-*Ashcroft* standard, as first established in *Beer*, was not nearly as rigid, mechanical or simple as some would suggest. Indeed, the pre-*Ashcroft* standard as applied predominantly by the Department of Justice (DOJ), and at times by the federal courts, was very complex, requiring the analysis of many diverse elements. In reality, neither the courts nor the DOJ have relied upon the simplistic, mechanistic approach that some perceive. While remaining true to *Beer*'s requirement that there can be no retrogression in minority voters' effective exercise of the franchise, as defined by their ability to elect candidates of their choice, the DOJ and the lower court in *Ashcroft* (as well as courts in other cases) reviewed massive amounts of evidence, including: expert testimony regarding voting patterns, racially polarized voting, and whether certain candidates (regardless of race) were the preferred candidates of minority voters; the demographic makeup of districts and the plans as a whole; the success of minority-preferred candidates in past elections; the approval or disapproval of minority legislators (as evidenced by not only their votes, but also their public statements expressed in the legislature and otherwise); and the expressed opinions of minority leaders, candidates, and voters regarding the plans.

In Part II, I will discuss the facts as applied to the law at the time of the *Ashcroft* case, correcting much of the misinformation that has permeated this discussion. In particular, I will discuss the actual electoral power of minority voters in Georgia, as testified to by expert witnesses, using both demographic measurements as well as other indications of voting clout. While many commentators have apparently relied *solely* upon the percentage of black voting age population in districts as a shorthand for the political power of black voters, I will demonstrate that the great variety of evidence introduced in the case helps to paint the full picture of minority voting rights in Georgia, albeit one not nearly as rosy as some have thought. Furthermore, I will attempt to lay bare the mistaken belief that black legislators were unanimous in their support of the Georgia state Senate plan, pointing out evidence that there was substantial dissent about the effect of the plan.

In Part III, I will discuss Justice O'Connor's opinion and offer answers to address some of the questions asked by many commentators. A critical analysis of the decision makes clear that the *Beer* standard, as applied pre-*Ashcroft*, is a far more effective standard for measuring true retrogression under Section 5, and Congress apparently agrees, having restored this standard when it reauthorized the Voting Rights Act. However, further thought about the feasibility of measuring influence may be helpful in demonstrating why the *Beer* standard is preferable and why the *Ashcroft* standard neither fully protects minority voters, nor reduces the burden on jurisdictions.

Finally, in Part IV, I will discuss the Voting Rights Act as amended recently by Congress, including the amendments overruling the *Ashcroft* decision and how the reauthorized Section 5 might be applied in the future. In particular, I

commend Congress for overwhelmingly voting to restore the comprehensive pre-*Ashcroft* standard. Furthermore, I believe new life can be breathed into this standard by clarifying that it protects both ability-to-elect districts and coalitional districts (which, in reality, are just another form of ability-to-elect districts), and addressing the concerns of those who believe, erroneously in my opinion, that such a standard could result in the unnecessary packing of minority voters into districts where they form supermajorities.

I.

There appears to be a great deal of misunderstanding about the retrogression standard as it existed pre-*Ashcroft*. In particular, many analysts seem to perceive the standard to have been a simplistic, mechanical mathematical calculation, which consisted of simply tallying up majority-minority districts in the pre-existing (or “benchmark”) plan and comparing that number to the total number of majority-minority districts in the proposed plan. Issacharoff refers repeatedly to the simplicity of the analysis pre-*Ashcroft*, calling it, for example, “sixth-grade arithmetic,”¹² “rigid,”¹³ and “a simple quantitative definition of minority concentrations in specified districts.”¹⁴

Prior to *Ashcroft*, the applicable standard in determining whether a redistricting plan violated Section 5 was first enunciated in the *Beer* case. In that case, the Supreme Court held that:

When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that “the standard [under Section 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting” H. R. Rep. No. 94–196, p. 60 . . . the purpose of [Section 5] has always been to insure that no voting-procedure changes would be made that would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.¹⁵

The Court expressly focused on the ability of minority voters to elect their candidates of choice, and in doing so, concentrated primarily on districts’ black

¹² Issacharoff, *supra* note 6, at 1713.

¹³ *Id.* at 1718.

¹⁴ *Id.* at 1722. Issacharoff also states that “the Court introduced *for the first time* to Section 5 the fine grained calculus of political influence versus descriptive representation.” *Id.* at 1720.

¹⁵ *Beer*, 425 U.S. at 141.

total population (“BPOP”) and black voter registration (“BREG”)¹⁶ in determining the ability to elect.¹⁷

Over time, until the *Ashcroft* decision, there were few published cases discussing the *Beer* standard. Most of the redistrictings submitted for preclearance under Section 5 went through the DOJ.¹⁸ However, the DOJ did develop guidance for analyzing redistricting plans pursuant to the *Beer* retrogression test.¹⁹ In its Guidance, the DOJ stated that:

Division staff . . . analyzes the proposed plan to determine whether it will reduce minority voting strength when compared to the benchmark plan, considering all of the relevant, available information. Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any retrogression analysis, our review and analysis will be greatly facilitated by inclusion of additional demographic and election data in the submission. [Citation omitted.] For example, census population data may not reflect significant differences in group voting behavior. Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect of a redistricting plan. This information is used to compare minority voting strength in the benchmark plan as a whole with minority voting strength in the proposed plan as a whole.²⁰

¹⁶ Note that the *Beer* Court did *not* look at black voting age population (“BVAP”), which many litigants, commentators and courts have used as shorthand for black voting power. See *Ashcroft*, 539 U.S. at 470–71 (discussing the number of majority-minority districts in the benchmark and proposed plans as measured solely by BVAP).

¹⁷ *Beer*, 425 U.S. at 136 (“[The plan at issue] produced Negro population majorities in two districts and a Negro voter majority (52.6%) in one district.”); see also *id.* at 141–42 (“Under the [benchmark plan] none of the five councilmanic districts had a clear Negro majority of registered voters, and no Negro has been elected to the New Orleans City Council while that apportionment system has been in effect. Under [the proposed plan], by contrast, Negroes will constitute a majority of the population in two of the five districts and a clear majority of the registered voters in one of them. Thus, there is every reason to predict, upon the District Court’s hypothesis of bloc voting, that at least one and perhaps two Negroes may well be elected to the council under [the proposed plan].”)

¹⁸ See Michael J. Pitts, *Georgia v. Ashcroft: It’s the End of Section 5 As We Know It (And I Feel Fine)*, 32 PEPP. L. REV. 265, 273 (2005).

¹⁹ Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42, U.S.C. 1973c, 66 Fed. Reg. 5412, *et seq.* (Jan. 18, 2001) [hereinafter *Guidance*].

²⁰ *Id.* (“The Section 5 Procedures identify a number of factors that are considered in deciding whether or not a redistricting plan has a retrogressive purpose or effect. These factors include whether minority voting strength is reduced by the proposed redistricting; whether minority concentrations are fragmented among different districts; whether minorities are overconcentrated in one or more districts; whether available alternative plans

Thus, contrary to the impression that many promote, a large number of factors informed the Section 5 retrogression analysis pre-*Ashcroft*.²¹ The DOJ did not simply focus on a mathematical calculation of the number of majority-minority districts—had that been the case, the DOJ would hardly have needed the full sixty days permitted under Section 5 to review even the most complex redistricting plans.

Failure to understand the *Beer* standard has led to some common misconceptions. First, *Ashcroft* did not “introduc[e] . . . broad-range review”²² under Section 5—broad-range review of multiple factors in determining whether there has been a reduction in the effective exercise of minority electoral power has been around since *Beer*.²³ As described below, such a broad and comprehensive review was at the heart of the DOJ’s case and the lower court majority opinion in *Ashcroft*. Indeed, the pre-*Ashcroft* standard was already a sort of “totality of the circumstances” test, in the sense that it involved the consideration of a multitude of factors to determine whether there was an actual reduction or retrogression in the ability of minority voters to elect their candidates of choice and was not simply a tallying of the number of majority-minority districts.

The pre-*Ashcroft* standard did not “hamper the very type of coalitional politics that traditional defenders of minority voting rights so adamantly fought to protect. . . .”²⁴ To the contrary, coalitional districts—districts in which minority voters did not make up a majority of all voters but where minority-preferred candidates were being elected—were consistently considered pursuant to the *Beer* standard and the Guidance. In other words, a district in which a number of white voters (no matter how small) consistently demonstrated their willingness to prefer the same candidates as minority voters, thus ensuring election of minority voters’ candidates of choice, was considered an “ability to elect” district pursuant to *Beer*, and the elimination of such a district would have raised serious problems under Section 5. Indeed, as discussed in detail below, the *Ashcroft* case included several such districts, and the lower court’s and the DOJ’s analysis of such districts in *Ashcroft* confirms not only that Section 5 was not “stalling

satisfying the jurisdiction’s legitimate governmental interests were considered; whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and, whether the plan is inconsistent with the jurisdiction’s stated redistricting standards.”)

²¹ See Pitts, *supra* note 18, at 273–76.

²² Issacharoff, *supra* note 6, at 1719.

²³ See *id.*, at 1722 (noting, in favorably comparing the analysis done in *Page v. Bartels*, 144 F. Supp. 2d 346 (D. N.J. 2001), that “the New Jersey court,” in apparent contrast to his perception of the lower court in *Ashcroft*, “assessed the electoral prospects of minority-preferred candidates under an intensely local examination of political conditions.”) As demonstrated below, the lower court in *Ashcroft* also conducted such an intense local examination.

²⁴ *Id.* at 1728.

coalition politics”²⁵ or “frustrat[ing] the formation of interracial coalition politics,”²⁶ but rather that Section 5 was instrumental in the development and protection of such productive coalitions.

The lower court in *Ashcroft* recognized the complexity of the *Beer* standard, analyzing a variety of factors to determine relative minority voting strength between the benchmark and proposed Georgia state Senate plans. In particular, it noted how the United States had “presented the court with a greater amount of and more detailed evidence [than the state], including voter registration data, precinct-level information, data and maps demonstrating exactly how district lines would be redrawn by the proposed plans, and testimony of numerous social leaders and local elected officials from the contested districts,” as well as expert testimony regarding the presence of racially polarized voting.²⁷ As an illustration of the pre-*Ashcroft* standard, let us review the evidence presented to and considered by the lower court.

A. Census Data

The lower court reviewed evidence regarding several types of census demographic data. The court determined that there were thirteen Senate districts with greater than 50% BPOP in both the benchmark and proposed plans.²⁸ The court also noted twelve Senate districts with more than 50% BVAP in the benchmark plan, compared to an apparent thirteen districts with more than 50% BVAP in the proposed plan.²⁹ In the benchmark plan, twelve districts had a BVAP of

²⁵ *Id.* at 1731.

²⁶ Pildes Testimony, *supra* note 10.

²⁷ *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 36–37 (D.D.C. 2002) (hereinafter, *Ashcroft Lower Court*).

²⁸ *Ashcroft Lower Court*, 195 F.Supp.2d at 55.

²⁹ *Id.* Note that there was an ongoing minor dispute between Georgia and the DOJ about how to calculate BVAP properly in the proposed plan. For the first time, the 2000 census permitted respondents to list multiple races on their forms, thus resulting in individuals who listed themselves as black in combination with one or more other races. The number of multiple-race respondents ended up being statistically irrelevant to the analysis of overall minority voting strength. To reduce the possibility of double-counting individuals for the purposes of analyzing redistrictings (i.e., counting someone twice who had listed themselves as both black and American Indian), the DOJ Guidance, published before Georgia redistricted, clearly stated that, for purposes of analysis under Section 5, the DOJ would count only those individuals as a member of a particular minority group who had responded that they were solely of that group or of that group in combination with white. See Guidance at 5414. In spite of the Guidance, Georgia calculated BVAP differently, totaling all those who indicated they were black in combination with any number of other races. Thus, Georgia calculated that there were thirteen BVAP majority districts in the proposed plan, with five of those districts being below 51%, while the DOJ calculated that there were only eleven BVAP majority districts in the proposed plan, with dis-

greater than 54%, while in the proposed plan, only seven districts were greater than 54% BVAP and six districts were less than 51.5% BVAP.³⁰ In the three Senate districts challenged by the DOJ—Districts 2, 12, and 26, in the Savannah, Albany, and Macon areas, respectively—evidence presented indicated that the BVAP went from 60.6, 55.4, and 62.5%, respectively, in the benchmark plan, to 50.3, 50.7, and 50.8%, respectively, in the proposed plan.³¹ The court further found that the overall BPOP in Georgia, according to the 2000 census, was just under 29% and the overall BVAP was just under 27%, both of which represented increases from the 1990 census.³²

B. Voter Registration Data

The lower court determined that at the time of the 2000 general elections, blacks constituted 25% of Georgia's registered voters statewide, up from approximately 22% in 1992.³³ Furthermore, the court admitted undisputed evidence that there were thirteen districts with BREG greater than 50% in the benchmark plan (all thirteen were in fact greater than 52.5% BREG) and only *eight* districts in the proposed plan with a BREG of greater than 50%—a reduction of five majority-black registration districts.³⁴ In Districts 2, 12, and 26, BREG decreased from 62.4, 52.5, and 62.8%, respectively, in the benchmark plan to 48.4, 47.5, and 48.3% in the proposed plan.³⁵

C. Election History

The evidence was undisputed that, in Georgia's history, black voters had been unable to elect their candidate of choice to an open Senate seat in a district that had less than 53% BVAP and only one black candidate of choice (an in-

districts 2 and 34 falling below 50% BVAP using the method dictated by the Guidance. While the DOJ thought that both measures should be considered by the court to facilitate the maximum understanding of the demographics and minority voting strength, Georgia sought to exclude the DOJ's BVAP measures. *See* Plaintiff's Motion in Limine to Exclude Evidence, (Jan. 18, 2002) (on file with author). The DOJ successfully opposed that motion, and the court considered both measures of BVAP, deferring at times to the Georgia measurement as that was the measure most favorable to the state (though Georgia held the burden of proof). *See* United States' Opposition to Plaintiff's Motion in Limine, (Jan. 24, 2002) (on file with author); *Ashcroft Lower Court*, 195 F.Supp.2d at 79–80.

³⁰ *Ashcroft Lower Court*, 195 F.Supp.2d at 56.

³¹ *Id.*

³² *Id.* at 38–39.

³³ *Id.* at 39.

³⁴ *Id.* at 56.

³⁵ *Id.*

cumbent) had ever won election to the Senate in a district with less than 50% BVAP.³⁶

In all of the districts challenged by the DOJ, the court heard detailed testimony and evidence regarding the presence of racially polarized voting, the prospects of black candidates of choice, and the electoral and racial climate.

In District 2, the court found that the black incumbent, who was the candidate of choice of black voters, had barely won the special election to her seat in 1999 (by a margin of fewer than seventy-seven votes) over a white candidate.³⁷ Furthermore, the court heard testimony from eleven witnesses and the DOJ's expert witness supporting its finding that voting in District 2 was severely racially polarized.³⁸

In District 12, black voters had never been able to elect their preferred candidates, even though they made up a majority of the registered voters.³⁹ Indeed, even when a well-known black candidate (who had served for many terms in the Georgia State House) ran for the open seat in 1998, he lost the Democratic primary by less than 3% of the vote to a white candidate (who had never run for office) preferred by white voters in an election typified by extreme racial polarization.⁴⁰ Several witnesses testified without dispute to the existence of extremely racially polarized voting in District 12 and that, while they were close to electing minority candidates in the benchmark plan, it would be impossible to elect their candidate of choice in proposed District 12.⁴¹

In District 26, several witnesses confirmed that, while the black incumbent in that district was fairly safe, there was substantial racial polarization in voting and serious doubts as to whether a nonincumbent black candidate of choice could be elected in the proposed district.⁴²

³⁶ Georgia's Exhibit 25, Appendix 1 (on file with author).

³⁷ *Ashcroft Lower Court*, 195 F.Supp.2d at 58.

³⁸ *Id.* at 58–59.

³⁹ *Id.* at 59–61. However, they had come very close, as indicated below. The changes to this district reversed the gains black voters had made by reducing BVAP to the point where no black-preferred candidate could be elected. While black voters had not yet demonstrated the consistent ability to elect candidates of their choice in this district, they had come very close, making this a “tossup” district, as discussed more fully below. Retrogression from a tossup district to one where minorities have no ability to elect a candidate-of-choice is not permitted pursuant to Section 5.

⁴⁰ *Id.* at 60.

⁴¹ *Id.* at 60–61.

⁴² *Id.* at 62.

D. Support of Minority Legislators

While the lower court expressly refused to consider the votes of black legislators as being dispositive regarding retrogressive effect,⁴³ the Supreme Court obviously gave these votes great weight while ignoring much undisputed evidence indicating that such support was ambivalent, at best. It is true that all but two black legislators voted for the proposed plan.⁴⁴ However, just before the vote on the plans, several members of the Georgia Legislative Black Caucus wrote a letter complaining that black legislators had been shut out of the process, and many other black legislators expressed serious reservations about the plan, including that the process “has resulted, among other things, in a legislative plan passing that has diluted majority-minority districts in both the House and the Senate.”⁴⁵ Indeed, at least two black senators (both of whom ended up voting for the plan) spoke from the well of the Senate to express concerns about the plan, with one going so far as to talk about the reductions in black voting strength in several Senate districts, including those challenged by the DOJ.⁴⁶ Finally, virtually every black legislator testified to the strong-arm tactics (both threats and promises) used by proponents of the plans to ensure their votes.⁴⁷

This is but a truncated summary of the evidence produced in the *Ashcroft* case. Indeed, the lower court opinion has thirty-five pages of findings of fact alone, clearly indicating something more than a simple “straight-line mathematical comparison.”⁴⁸ In addition, the parties submitted hundreds of pages of proposed findings of fact, evidence, and testimony. Had the standard been as simple as has been presumed, one can imagine that the only evidence required would have been the number of majority-minority districts in each plan. Nevertheless, the lower court engaged in the kind of comprehensive analysis of relative minority voting strength that *Beer* and the Guidance demanded.

II.

The *Ashcroft* case has been analyzed and re-analyzed, and many misconceptions about the legal standard and the facts surrounding this case have developed and multiplied. Indeed, in reaching their erroneous conclusions, many commentators purport to rely upon the facts in *Ashcroft*, while getting many of these facts wrong or providing an incomplete picture of the facts. Pildes compounds his misunderstanding to some degree with his testimony that he “would not rush to overrule [the *Ashcroft*] decision that is right on the facts and whose future appli-

⁴³ *Id.* at 89.

⁴⁴ *Id.*

⁴⁵ United States’ Proposed Findings of Fact, Nos. 59–80 (on file with author).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *Ashcroft Lower Court*, 195 F.Supp.2d at 36–71.

cation is unknown.”⁴⁹ Therefore, to understand the true implications of this case properly, certain factual myths must be dispelled.

A. Did Georgia Maintain the Number of Majority-Minority Districts?

The Supreme Court states that Georgia managed to maintain the same number of majority-minority districts in the proposed Senate plan as it had in the benchmark.⁵⁰ However, this statement is based solely on BVAP and ignores other demographic measurements of minority voting strength. If one looks to BREG, the same measure of black voting strength considered by the *Beer* court, the number of majority-minority districts actually fell from thirteen to eight—a net reduction of five.⁵¹

Additionally, it is a misnomer to use the term “majority-minority” as shorthand to indicate a district where, in the words of *Beer*, minority voters could “elect their choices to office.”⁵² Minority voting strength cannot be so cavalierly determined, as the facts in *Ashcroft* reveal.

It is often forgotten, but there were actually *three* different plans at issue in *Ashcroft*—the Georgia Senate plan (to which the DOJ opposed granting preclearance), as well as the Georgia congressional and state House plans (to which the DOJ had no objection). The lower court spent fourteen pages analyzing the congressional and state House plans.⁵³ Several of the districts in the plans that the DOJ did not oppose and to which the lower court granted preclearance are instructive here. For instance, the benchmark congressional plan contained only one district—District 5, represented by John Lewis—where the BVAP or BREG was greater than 50%.⁵⁴ Nevertheless, black voters demonstrated the ability to elect their candidates of choice (who were also black) in two other districts as well—District 2 in southwestern Georgia, where Sanford Bishop was getting elected in a benchmark district with 37.4% BVAP and 35.7% BREG, and District 4, in the Atlanta metropolitan area, which Cynthia McKinney represented with a 46.2% BVAP and a 49.1% BREG.⁵⁵ Neither of these districts was majority-minority, and yet there was no question that each of these black members of Congress were black voters’ candidates of choice.

Despite the fact that there was only one majority-minority district in the benchmark congressional plan, it cannot be disputed that the benchmark con-

⁴⁹ Pildes Testimony, *supra* note 10.

⁵⁰ *Ashcroft*, at 470–71. *See also* Issacharoff, *supra* note 6, at 1716.

⁵¹ *See Ashcroft Lower Court*, 195 F.Supp.2d at 56.

⁵² *Beer*, 425 U.S. at 141.

⁵³ *See Ashcroft Lower Court*, 195 F.Supp.2d at 42–55.

⁵⁴ *Id.* at 42. Congressman Lewis’s benchmark district was 58.9% BVAP and 60.3% BREG.

⁵⁵ *Id.* at 43.

tained three districts that satisfied the *Beer* standard for minority voting power—minority voters’ ability to elect candidates of their choice. Had the proposed plan eliminated any of these three districts—even one that was not technically “majority-minority”—*Beer* would have required that preclearance be denied. However, the state did an excellent job of complying with the *Beer* standard when it came to the congressional plan. The proposed plan increased the BVAP and BREG in both Bishop’s and McKinney’s districts,⁵⁶ and though Lewis’s district’s BVAP and BREG were reduced to 52.0% and 53.4%, respectively, there was no evidence that said reduction would affect the ability to elect black candidates of choice.⁵⁷

Thus, the term “majority-minority” has two fundamental flaws. First, there is no specification regarding which measurement of majority population is more relevant—BREG as used in *Beer*, or BVAP as used by most commentators and many courts. Often, these two measurements can conflict—Georgia’s proposed Senate plan had thirteen BVAP-majority districts, but only eight BREG-majority districts.⁵⁸ Second, the term “majority-minority” seems to be used as a shorthand to describe a district in which minority voters are electing their candidates of choice, when in actuality, the demographics of the district are but one factor—or, as the Guidance states, a “starting point”—in the complete analysis of minority voters’ effective exercise of the franchise.

Thus, I would suggest discarding the term “majority-minority” district altogether (except where explicitly referring only to the demographics of a district, not minority voting strength), in favor of the term “ability-to-elect” district.⁵⁹ As I use the term “ability-to-elect,” I include both those districts where minority voters, due to their demographic percentages, political cohesion, and turnout rates, are completely able to control the election of their candidates of choice regardless of any white crossover or coalitional voting, as well as those districts where minority voters cannot control such elections on their own, but where they benefit from consistent (nonsporadic) crossover and coalitional voting from whites and other minorities in favor of their candidates of choice such that those

⁵⁶ *Id.* at 44. Proposed District 2 contained 41.5% BVAP and 40.0% BREG, while proposed District 4 was drawn to contain 50.0% BVAP and 51.2% BREG.

⁵⁷ *Id.* Virtually all of the black population removed from Lewis’s district went into McKinney’s district to increase its BVAP and BREG. There was no evidence presented indicating that Congressman Lewis was put in the slightest danger by this small reduction in the black population in his district, and all the evidence indicated that he enjoyed substantial white crossover in his elections to the degree that he rarely had any serious challenger for the seat.

⁵⁸ While voter registration data by race is very useful in Georgia and elsewhere where it is available, and the degree to which a district contains 50% or more minority voter registration is very relevant, one must also look closely at turnout statistics to determine whether minority voters are truly able to express themselves as a minority in a jurisdiction or whether turnout among minorities is depressed relative to white voters.

⁵⁹ This term is not new, and others have used it as well.

candidates are consistently being elected.⁶⁰ Such was the way “ability-to-elect” was considered by the DOJ and the lower court in *Ashcroft*.⁶¹

B. Was Georgia Trying to “Unpack” Its Black-Majority Districts?

The Supreme Court routinely refers to Georgia’s “strategy of ‘unpacking’ minority voters in some districts to create more influence and coalitional districts.”⁶² Issacharoff also perceives an attempt by Georgia to unpack, claiming that “the new Senate plan sought to leverage black political strength, [as it] diminished the locked-in protections of the overwhelmingly black-concentrated districts.”⁶³ Pildes’s testimony to the Senate Judiciary Committee repeatedly refers to the state’s seeking “to unpack slightly three ‘safe minority districts.’”⁶⁴ However, to view the benchmark Senate plan as “packed” is to grossly misinterpret the undisputed evidence.

There were five Senate districts contested by any party—Districts 2, 12, and 26 (which the DOJ opposed), and Districts 15 and 22 (to which the intervenors, but not the DOJ, objected). Of these districts, not one had a benchmark BVAP above 63.5%, with District 12 having the lowest BVAP at just below 55%.⁶⁵ Whether such districts could qualify as “packed” is doubtful. However, even if the state could argue that it viewed these districts as seriously packed, it did not merely move what it viewed as the “extra” black population out of the district in order to enhance black voting power statewide as is the usual definition of “unpacking.” Instead, it shaved the black populations in these districts so danger-

⁶⁰ I do not equate “tossup” districts to “ability-to-elect” districts as I use the terms here, and as I define them below. A reduction in the number of ability-to-elect districts should not be offset by any increase in the number of tossup districts. However, tossup districts represent a different, lesser ability of minority voters to affect the election of their preferred candidates, and a reduction in the number of tossup districts should also be considered retrogressive. District 12 is such a tossup district, as discussed more fully below.

⁶¹ In reviewing the number of “ability-to-elect” districts in the Georgia Senate plan, the lower court expressly held that Georgia had not met its burden of proving that it maintained the number of “ability-to-elect” districts, and the Supreme Court did not hold that the lower court’s ruling on this discreet issue was erroneous. *Ashcroft*, at 486–87. Indeed, the Court acknowledged the diminution in “ability-to-elect” districts (Districts 2, 12, and 26 in particular), but held that any retrogression in those districts may have been offset by increases in influence in other districts.

⁶² *Id.* at 487.

⁶³ Issacharoff, *supra* note 6, at 1717. *See also id.* at 1716 (“Part of the [Georgia] Democrats’ strategy was not only to keep the same number of majority-minority districts, but to leverage black voting strength by diminishing the concentration of black voters in minority-dominated districts.”).

⁶⁴ Pildes Testimony, *supra* note 10.

⁶⁵ *See Ashcroft Lower Court*, 195 F.Supp.2d at 56.

ously low that it put the continued ability of black voters to elect the candidates of their choice in serious jeopardy. In the proposed plan, not one of these five districts possessed a BVAP higher than 51.5%, and only one (District 15) had a bare majority BREG.⁶⁶

This massive reduction in the number and percentage of black voters in the challenged districts was not slight,⁶⁷ as some seek to portray it—these five districts saw their BVAPs reduced by an average of 10.0%. Nor did these reductions put some black candidates of choice only modestly more at risk, as some have suggested. The undisputed testimony offered regarding several of the challenged districts demonstrates that these reductions were severe, putting the continued ability of black voters to elect their candidates of choice in serious peril.

In District 2, for instance, the DOJ presented evidence from a dozen witnesses, including Regina Thomas, the black senator representing this district who voted against the plan, indicating that reducing the BREG below 50% could put the continued election of black-preferred candidates at risk.⁶⁸ Georgia presented no evidence from any witness or expert regarding the continued viability of District 2 as a black ability-to-elect district. Similarly, in District 22, the black incumbent, Charles Walker, who served as Senate Majority Leader, lost by only 264 votes to a white Republican in the 2002 elections, after his district's BVAP was reduced from 63.5% to 51.5% and BREG dropped from 64.1% to 49.4%.⁶⁹ Had his district retained only 300 more black voters, or the BREG in the district been increased by only 1% to 50.4%, he almost certainly would have retained his seat in 2002.⁷⁰ Consequently, these severe reductions had much more than a marginal effect on the candidates elected.

This is not to say that *any and all* reductions in black percentages in these districts would be retrogressive or problematic. Some more moderate reductions could have actually enhanced black voting rights. As discussed above, where the state removed some black population from John Lewis's district and placed it in Cynthia McKinney's district, it certainly protected the ability of black voters in her district to continue to elect their candidate of choice without negative effects on black voters in Lewis's district. Had the state reduced the percentages in the challenged senate districts more modestly, it most likely would have had no

⁶⁶ *See id.* The BVAP percentages in Districts 2, 12, 15, 22, and 26 were reduced to 50.3, 50.7, 50.9, 51.5, and 50.8, respectively, while the BREG percentages in those districts were reduced to 48.4, 47.5, 50.3, 49.4, and 48.3, respectively.

⁶⁷ Pildes Testimony, *supra* note 10.

⁶⁸ United States' Proposed Findings of Fact, Nos. 186–282 (on file with author).

⁶⁹ http://www.sos.state.ga.us/elections/election_results/2002_1105/senate.htm. His defeat was largely, and likely correctly, attributed to his being accused by the federal government of corruption prior to the 2002 elections. He regained his seat in the 2004 elections by a comfortable margin. http://www.sos.state.ga.us/elections/election_results/2004_1102/senate.htm.

⁷⁰ It cannot be known whether, had Walker remained in office from 2002 to 2004, his leadership would have had an effect on the defection of four Democrats after the 2002 elections, which enabled the Republicans to take the majority in the state Senate.

negative effect on black voters' ability-to-elect. Indeed, when the state reduced the BPOP, BVAP, and BREG in twelve of the thirteen black-majority Senate districts, the DOJ only opposed the extraordinarily severe reductions in three of those districts. Furthermore, when the state offered a remedial plan for the 2002 elections after losing in the lower court, that plan also significantly reduced BPOP, BVAP, and BREG in twelve of the thirteen black-majority senate districts, but as the reductions were less severe in Districts 2, 12, and 26 than in the original proposed plan,⁷¹ the DOJ consented to preclearance of this remedial 2002 plan.⁷²

Thus, the key is not whether these districts were packed to start with (and to call a 63% BVAP district "packed" is questionable in this context), but rather whether the harsh reductions in black voting strength in each of these districts went far beyond what could be considered "unpacking." It strains credulity to suggest that reducing a 63% BVAP district to less than 50% BREG constitutes "unpacking" that district, particularly where, as was demonstrated in Georgia, severe racially polarized voting exists with virtually no white support for minority-preferred candidates. Indeed, if a jurisdiction with extremely polarized voting were to take even a 90% minority registration district and reduce it to 49% minority registration, such a reduction would appear to be the very definition of retrogression under *Beer*.

C. Did the *Beer* Standard Prevent the Building of Coalitional Districts?

The facts of the *Ashcroft* case make clear that not only did the pre-*Ashcroft* standard not impede the development of coalition districts, it actually aided in advancing coalitional politics. The benchmark congressional plan in Georgia contained at least two coalition districts—Sanford Bishop's District 2 and Cynthia McKinney's District 4—in which black voters made up less than 50% of the districts' voting age population and registered voters. However, in both districts, white voters demonstrated some willingness to vote for the black voters' candidates of choice (at least in congressional elections).⁷³ Thus, while black voters

⁷¹ In the remedial plan, the state reduced the BVAP in Districts 2, 12, and 26 to 53.9, 54.6, and 54.9%, respectively, down from 60.6, 55.4, and 62.5%, respectively, in the benchmark plan. Similarly, the state reduced BREG in those districts to 55.8, 51.6, and 54.7%, respectively, down from 62.2, 52.5, and 62.9%, respectively, in the benchmark plan. Note that these represent significant reductions, in all but one case bringing the percentages below 55%, and yet the DOJ did not contend these reductions were retrogressive.

⁷² United States' Response to Plaintiff's Application for the Issuance of a Declaratory Judgment for Its Revised Senate Plan (Apr. 24, 2002) (on file with author).

⁷³ The evidence suggested that in more localized elections in Congressional District 2 (such as State Senate and House elections), where voters were more likely to know the

could not control the election of their preferred candidate on their own, white crossover was substantial and consistent enough to create the very definition of a coalitional district.⁷⁴

Similar coalitional considerations were made in the Georgia Senate plan. In District 22, for instance, the BVAP fell from 63.5% to 51.5%, and the BREG fell from 64.1% to 49.4%.⁷⁵ Although BREG in this district was reduced to below 50%, there was substantial evidence of significant, if not overwhelming, white crossover in Senate elections in this district.⁷⁶ Therefore, despite the fact that blacks no longer made up a majority of the voters in this district, and consequently could not control the outcome of the election on their own, the DOJ did not challenge this district, and neither the lower court nor the Supreme Court found retrogression here, because the evidence suggested that a coalition of black and some white voters could consistently elect the black-preferred candidate.⁷⁷ The Georgia House plan, both benchmark and proposed, also contained such coalitional districts.

Notwithstanding the Supreme Court's suggestion that the *Beer* standard did not account for coalitional districts, or Issacharoff's suggestion that "it would be an irony of historic proportions if the VRA were to emerge as a brake on black political aspirations in the heart of the Deep South,"⁷⁸ the reality was far different. Where evidence demonstrated that nonminority voters in a district were routinely joining with minority voters to elect minority voters' candidates of choice, that district was considered an ability-to-elect district from which retrogression was impermissible under Section 5. Although they disagree whether such protection for coalition districts is positive, even Section 5 opponents, like Roger Clegg, acknowledge that coalition districts were protected by *Beer*, stating that there would be a "good chance" that a restoration of the pre-*Ashcroft* standard would result in:

freezing into place not only majority-minority districts, but also influence or coalitional districts. The latter will include districts, that is, in which a racial minority may make up a very small percentage of the voting population (for instance, Rep.

candidates personally, racially polarized voting among whites was much more prevalent. Senate District 12 was within Congressional District 2. See *Ashcroft Lower Court*, 195 F.Supp.2d at 60, 85–86.

⁷⁴ A similar situation was found in benchmark State House District 89, centered in Athens, where a black representative and candidate of choice was consistently being elected in a district with less than 40% BVAP and BREG, thanks to consistent white crossover.

⁷⁵ See *Ashcroft Lower Court*, 195 F.Supp.2d at 56.

⁷⁶ See *id.* at 64.

⁷⁷ Ironically, this conclusion ended up being premature. As discussed earlier, the black incumbent in Senate District 22, Charles Walker, who also served as Senate Majority Leader, was accused of corruption prior to the 2002 elections and lost to a white Republican by a very slim margin (0.8% of the total vote).

⁷⁸ Issacharoff, *supra* note 6, at 1717.

Martin Frost's district at issue now in the Texas redistricting case before the Supreme Court). After all, an influence or coalition district can be said to ensure that the voters in question are able "to elect their preferred candidates of choice. . . ."⁷⁹

Despite suggestions to the contrary, the *Beer* standard as applied adequately accounted for coalition districts.

D. Did Black Legislators Support the Plan?

The Supreme Court correctly notes that all but two of the black legislators in Georgia voted for the redistricting plans submitted for preclearance.⁸⁰ Issacharoff goes so far as to state that "[t]here was no mistaking that this was not a plan imposed on black elected officials. . . ."⁸¹ Similarly, Pildes speaks loftily of what he perceives to have taken place during the redistricting process:

Here were black and white legislators, willing to make their seats more dependent upon interracial voting coalitions. Yet the Act would have imposed on them more racially homogenous constituencies. . . . And here were black legislators, not demanding safer sinecures for themselves, as officeholders typically do, but taking risks, cutting deals, and exercising political agency to forge a winning coalition. Yet the Act would have denied these political actors the autonomy to make the hard choices at issue, even with partisan control of state government at stake.⁸²

The Supreme Court, and the lower court dissent, placed much weight purely on the votes of these legislators and three black legislators' (only two of whom voted on the plan) general testimony in favor of the plan. The Court looked particularly favorably on the testimony of Congressman Lewis, who, testifying only in a written affidavit, stated that the Senate plan would "give real meaning to voting for African Americans" because "you have a greater chance of putting in office people that are going to be responsive."⁸³ However, the mere facts that most black lawmakers ended up voting for the plans and that three black legislators testified on behalf of the state at trial, only tell part of the story—other undisputed facts of the redistricting process told a less sanguine tale.

⁷⁹ *Hearing on H.R. 9, "A Bill to Reauthorize and Amend the Voting Rights Act of 1965," Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 109th Cong., 2nd Sess., p. 17 (May 4, 2006) (testimony of Roger Clegg, President & General Counsel, Center for Equal Opportunity) (hereinafter, "Clegg Testimony")* <http://judiciary.house.gov/media/pdfs/clegg050406.pdf>.

⁸⁰ Ashcroft, 539 U.S. at 471.

⁸¹ Issacharoff, *supra* note 6, at 1716.

⁸² Pildes Testimony, *supra* note 10.

⁸³ Ashcroft, 539 U.S. at 489 (quoting Congressman Lewis's written testimony).

The record reflects that the state did not ask Congressman Lewis to submit any testimony directly related to any of the three Senate districts challenged by the DOJ, a fact not lost on the lower court. Indeed, with the exception of Senate District 26, not one of the black legislators testifying on behalf of the state rendered any testimony relating to a challenged district.⁸⁴ In a finding left untouched by the Supreme Court,⁸⁵ Judge Edwards, joined by Judge Sullivan, stated in his concurrence that:

[N]owhere do any of [the black politicians testifying for the state] purport to compare the proposed Senate plan with the existing apportionment scheme. Accordingly . . . their testimony simply does not address *retrogression*. . . . Nor do [they] address the polarization problem that is at the heart of the Court's decision to deny preclearance.⁸⁶

In fact, the state presented only one black witness who testified with any direct knowledge about minority voting strength in the three Senate districts with which the DOJ took issue,⁸⁷ while the DOJ offered testimony from dozens of black politicians and activists in each of those districts who specifically detailed

⁸⁴ The other black legislators testifying on behalf of the plan were Senator Charles Walker (District 22 and the Senate Majority leader) and Senator Robert Brown (District 26 and the vice-Chair of the Redistricting Committee, which drew the plan)

⁸⁵ The Court overturned only one specific lower court factual finding, holding that the lower court's "statement that Georgia did not 'presen[t] evidence regarding potential gains in minority voting strength in Senate Districts other than Districts 2, 12, and 26' is therefore clearly erroneous." *Ashcroft* 539 U.S. at 486. Indeed, the Court expressly stated that along with "the dissent, we accept the District Court's findings that the reductions in black voting age population in proposed Districts 2, 12, and 26 to just over 50% make it marginally less likely that minority voters can elect a candidate of their choice in those districts..." *Id.*

⁸⁶ *Ashcroft Lower Court*, 195 F.Supp.2d at 100. Judge Edwards notes that "neither Congressman Lewis nor Senator Walker had any direct knowledge of the demographics and voting patterns in the contested districts." *Id.* at 101. Indeed, Congressman Lewis, who was not a member of the Georgia Legislature, did not and could not vote on the plans.

⁸⁷ As indicated above, the state's sole witness with district-specific knowledge was Senator Brown, who testified regarding his own District 26. The lower court held that "the testimony of Senator Brown . . . leaves little doubt that he was speaking primarily as a loyal Democrat, interested in advancing the political fortunes of his own party.... While such considerations are not impermissible under the Voting Rights Act, they are certainly not sufficient to satisfy the demands of § 5." *Id.* at 101 (Edwards, J., concurring). Perhaps anticipating a racial gerrymandering claim pursuant to the *Shaw v. Reno*, 509 U.S. 630 (1993), line of cases, which held that while race could be taken into account in redistricting, it was impermissible for race to predominate over other traditional districting factors, the state and its witnesses all took the consistent position that it was partisanship, not race, which predominated over all other factors.

their concerns about reductions in minority voting strength in the plan. Judge Edwards made the lower court's undisturbed findings clear when he stated:

The Voting Rights Act does not protect minority incumbents; it protects minority voters. . . . The three politicians on whom the dissent relies represent but a small slice of the testimony presented regarding the attitudes of Georgia's African American political leadership to the proposed Senate plan. . . . The Senate plan, for whatever support it has received, cannot fairly be said to represent the unanimous preferences or desires of African American leaders in the State of Georgia.⁸⁸

While it is true that all but two of the black legislators voted for the plan, the votes in favor of the plans do not accurately represent the very serious doubts that black legislators had about retrogression, vote dilution, and discrimination in the Senate plan. In particular, less than a week before voting on the plan, six members of the Georgia Legislative Black Caucus ["GLBC"] wrote to the chairman of the caucus, stating that they were "concerned that the GLBC has not been involved in the redistricting process almost at all. This has resulted, among other things, in a legislative plan passing that has diluted majority-minority districts in both the House and the Senate."⁸⁹

Nevertheless, the Supreme Court, without reaching any factual conclusions, held that "it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new redistricting plan" to determine both retrogressive purpose and effect.⁹⁰ The lower court had considered these facts, and while determining that the court should not consider the "support of African American legislators as evidence of the actual *effect* of the Senate redistricting plan,"⁹¹ the court also recognized that a "vote for legislation is almost always a compromise of some sort, motivated by a complex intersection of self-interest and external pressures."⁹²

Of the three districts which were challenged by the DOJ, only one—Senate District 26—had the support of the black senator who represented "the very district created and protected by the Voting Rights Act."⁹³ In addition, there was

⁸⁸ *Id.* at 101–02.

⁸⁹ *Id.* at 46. In fact, the lower court noted that "the United States has presented extensive evidence of African-American senators' misgivings about the Senate plan." *Id.* at 89.

⁹⁰ *Ashcroft*, 539 U.S. at 484.

⁹¹ *Ashcroft Lower Court*, 195 F.Supp.2d at 89.

⁹² *Id.*

⁹³ District 2's black senator openly opposed the plan and voted against it, despite tremendous pressure from other Democrats, and District 12 was represented by a white senator who was not the candidate of choice of black voters, who voted for the plan. In addition, more than a dozen black politicians and leaders from these two districts testified

ample evidence of political horse-trading for the votes of other black legislators. The court heard undisputed testimony from black legislators that they always had a handler present when viewing the plan,⁹⁴ that their input on the plan and their own districts was ignored,⁹⁵ that the plan was withheld from their scrutiny until mere minutes before the vote,⁹⁶ that they were heavily pressured to vote for the plan by other Democrats,⁹⁷ and that they were promised that they could later have any changes to their districts they wanted if they voted for the plan.⁹⁸

Some even spoke openly in the well of the Senate of their concern about the vast reductions in black populations in their districts.⁹⁹ Senator Vincent Fort, the black senator who authored the letter from the GLBC complaining about the dilution in the plan, made the following statement from the well just days before the vote:

I've looked at the data district by district regarding race and black voting district [sic]. I know that ten out of thirteen of these majority black districts have lost black VAP. Eight out of thirteen have lost more than 10% of black VAP. And then even more importantly, there are four districts that are below 50% black voter registration. I don't know whether that's dilution or retrogression; that's going to be for others to decide who have more experience and learning on this issue. But the question is a valid question. . . . [T]here is something going on here in the thirteen districts throughout the state.¹⁰⁰

Senator Fort nevertheless voted for the plan, after being promised support for his bill outlawing predatory lending.¹⁰¹

Since the *Ashcroft* decision, several black legislators have come forward to clarify their position on the state Senate plan, the *Ashcroft* case, and Section 5 overall. At recent congressional hearings on renewal of the Section of the Voting Rights Act, Rep. Tyrone Brooks, a key black legislator who had voted for the plan, confirmed the difficulties black lawmakers had with the plan, stating that:

in opposition to the plan, while the state put on no witnesses who resided in these two districts.

⁹⁴ United States' Post-Trial Brief, pp. 11–12 (Feb. 19, 2002) (on file with author).

⁹⁵ *Id.* at 12–13.

⁹⁶ *Id.* at 14–15.

⁹⁷ *Id.* at 9.

⁹⁸ *Id.* at 21.

⁹⁹ *Id.* at 16–17.

¹⁰⁰ *Id.* at 17–18. Senator Fort also testified that it was “certainly” possible that the African-American candidate of choice could lose in Proposed Senate Districts 2, 15, 22, and 26, and that he had not been given the chance to look at data related to the plan. *Id.* at 19.

¹⁰¹ *Id.* at 20.

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

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

Most of the members of the Legislative Black Caucus voted for the senate plan as a way of maintaining Democratic control of the legislature and holding onto committee chairs, and because any reductions made in their own districts did not compromise their reelection or the ability of minority voters to elect candidates of their choice. . . . And while black caucus members agreed to the population reductions, they would never have agreed to the abolition of majority black districts. . . .

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

We fully supported the filing of the amicus brief by the civil rights groups. We voted for the state's plan for political reasons, but we were appalled by the arguments the state made in its brief in *Georgia v. Ashcroft*. There is no question that abolishing the majority black districts would turn the clock back. The preservation of the majority black districts is critical to minority office holding and minority political participation.¹⁰²

Interestingly, both Congressman Lewis and Senator Brown now favor reducing the impact of the *Ashcroft* decision, with Congressman Lewis finding himself in the unfortunate position of seeking to overturn a decision in which his testimony was used so unexpectedly to produce a result unfavorable to black voters.¹⁰³ In particular, Lewis has vigorously spoken out against those who would misuse his words to seek to keep the *Ashcroft* standard in place or worse, deny reauthorization of Section 5. In response to individuals such as Clegg, who somewhat cynically used Lewis's testimony to start off his testimony opposing reauthorization

¹⁰² *Hearings to Examine the Impact and Effectiveness of the Voting Rights Act, Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109th Cong., 1st Sess. (Nov. 9, 2005) (statement of Tyrone L. Brooks of the Georgia House of Representatives, Georgia Association of Black Elected Officials).

¹⁰³ Jonathan Tilove, *Voting Rights Act, at 40, Faces Reauthorization Amid Topsy-Turvy Politics*, Newhouse News Service, Aug. 4, 2005 (<http://www.newhousenews.com/archive/tilove080405.html>).

before the House Subcommittee on the Constitution,¹⁰⁴ Pildes,¹⁰⁵ who supported reauthorizing Section 5 but opposed overturning the *Ashcroft* decision, and Senator John Cornyn, who recited Lewis's written *Ashcroft* testimony at length during the Senate Judiciary Committee's hearings to insinuate that Section 5 was no longer necessary,¹⁰⁶ Lewis unequivocally stated:

I regret that some witnesses as well as Senators continue to quote a few words of my testimony in the [*Ashcroft* case], take them out of context, and improperly imply that I do not favor reauthorization of Section 5 of the Voting Rights Act or that my words justify their opposition to Section 5. I take issue with the use of my name to justify opposition to the renewal of Section 5 and assure you that I am a strong supporter of that provision. . . . [I]t is clear that the Voting Rights Act must be strengthened and reauthorized.¹⁰⁷

Accordingly, the lower court was quite right about the nature of political compromise, and the suggestion of nearly unanimous black support for the plan is rebutted by the weight of the evidence indicating black legislators' ambivalence, and even antipathy, towards the redistricting. The state presented virtually no evidence indicating that the black lawmakers viewed the plan as non-retrogressive prior to voting, and in fact, the evidence suggested that they voted for the plan in spite of serious questions regarding retrogression.¹⁰⁸

Issacharoff asks an interesting question related to this issue—"whether the protection of black voting interests was best left to the intervention of legal remedies or to the prospect of political trading and hauling, primarily through coalition politics within the Democratic Party."¹⁰⁹ The facts of the *Ashcroft* case suggest an answer to this question, at least as it relates to the state of Georgia (and likely other Section 5 covered jurisdictions): political trading and hauling, at best, protects only the interests of minority politicians and incumbents. To protect the rights of minority voters themselves, legal remedies, and Section 5 in particular, must be available. Thus, to read *Ashcroft* to suggest that 'black voters in Georgia have moved from a world of discrete status meriting protections external to the political system to a situation more closely approximating the nor-

¹⁰⁴ Clegg Testimony, *supra* note 79, (concluding "That's Not Me. That's John Lewis, in a sworn deposition in the *Georgia v. Ashcroft* litigation.")

¹⁰⁵ As indicated above, Pildes quoted Lewis's written *Ashcroft* testimony in his testimony before the Senate Judiciary Committee. See Pildes Testimony, *supra* note 10.

¹⁰⁶ *The Continuing Need for Section 5 Pre-Clearance: Hearings before the Senate Comm. on the Judiciary*, 109th Cong., 2nd Sess. (May 16, 2006). Lewis's letter was dated the day after Pildes and Cornyn both cited his testimony.

¹⁰⁷ Letter from Congressman John Lewis of Georgia, to Senators Arlen Specter of Pennsylvania and Patrick Leahy of Vermont, May 17, 2006 (which can be found at <http://electionlawblog.org/archives/lewis-letter.pdf>).

¹⁰⁸ Similarly, virtually every black legislator that supposedly supported the state's plan in *Ashcroft* has since divorced themselves from that position.

¹⁰⁹ Issacharoff, *supra* note 6, at 1724.

mal give and take of politics,”¹¹⁰ is to gravely misread the undisputed status of black voters in Georgia and perhaps in other covered jurisdictions.

Thus, while myths about the *Ashcroft* case have been pervasive, it is important to clarify and truly understand the nature of minority voting rights in Georgia, and in other covered jurisdictions, as Section 5 is enforced and defended in the future.

III.

The fact remains that Justice O’Connor’s *Ashcroft* opinion left many questions unanswered. First, was the Court’s focus on influence districts and substantive representation a necessary and natural result of Section 5’s success? To my mind, the answer is unequivocally no. As outlined earlier, Section 5 was not a “victim of its own success,” as Issacharoff suggests, but rather had *facilitated* the kind of descriptive *and* substantive representation that had effectively enfranchised so many minority voters. Section 5 encouraged and protected the kind of coalition-building that led to the election of black candidates (who were also candidates of choice of black voters) in Georgia in several legislative districts with BVAPs and BREGs less than 50%.¹¹¹ Rather than adapting Section 5 to changing conditions, as some suggest, the Court’s alteration of the *Beer* standard that had worked so well in producing such ability-to-elect districts put in jeopardy the very gains for which minority voters had fought so hard. Rather than “impos[ing] . . . more racially homogenous constituencies,”¹¹² the *Beer* standard had forced and protected the development of racially diverse coalitions.¹¹³ Indeed, I do not believe a single commentator has produced real evidence of a single coalitional district which the pre-*Ashcroft* standard allegedly put at risk—to the contrary, all the evidence from the *Ashcroft* case and others clearly outlines how Section 5 fostered such coalitional districts. To put to rest this myth, virtually every black politician whose testimony was used to support the *Ashcroft* decision has since distanced themselves from the decision, and supported amending Section 5 to restore the pre-*Ashcroft* standard.

What has brought about such recognition of the harms of the *Ashcroft* decision? I believe it is because those familiar with and indebted to the protections

¹¹⁰ *Id.* at 1730.

¹¹¹ While there were several coalition districts in Georgia, they were the exception rather than the rule. In most locations and in most elections, white crossover voting was so minimal as to be statistically insignificant, rendering the possibility of black candidates being elected by a coalition of black and white voters virtually nonexistent. The existence of such racially polarized voting, even in the year 2000, only highlights the continued need for Section 5.

¹¹² Pildes, *supra* note 6, at 6.

¹¹³ For instance, as discussed above, Section 5 had protected districts in which minorities were not in the majority, but were able to elect candidates of their choice.

of Section 5 realized the natural result of Justice O'Connor's decision. For instance, Issacharoff is quite correct to question how one is to measure "influence" districts, as promoted by Justice O'Connor. If one reads her opinion closely, it would appear she is ready to ascribe "influence" to any district where minority voters make up between 25% and 50% of the voting population.¹¹⁴ To anyone familiar with politics in Georgia, or those of other Section 5 covered jurisdictions, such a thought is incredible and frightening. In fact, after the 2002 elections in Georgia, under a plan virtually identical to the proposed plan and containing sixteen districts between 25% and 50% BVAP, almost half such districts were represented by white Republicans, all of whom were undisputedly *not* the candidates of choice of black voters.¹¹⁵ All of the sixteen districts were represented by whites.

To further document that such a doctrine of "influence" as measured by BVAP is not well grounded in political reality, one need look no further than the highly publicized vote to remove the Confederate battle emblem from the Georgia state flag. While the GLBC was unanimous in its support for the changing the flag, twelve white senators elected from districts with more than 25% BVAP voted in 2003 *against* the changing of the flag.¹¹⁶

How then to measure "influence"? Can it be measured? I believe that the best answer to this difficult question came from the DOJ, in its response to the lower court's Order to Show Cause on remand from the Supreme Court's decision. In that response, the DOJ suggested two key factors in establishing the presence or absence of influence in a particular district. First, expert testimony regarding past election results in districts the state claims are influence districts. Second, testimony from experts and lay witnesses regarding the willingness of legislators from alleged influence districts to take the interests of the minority community into account.¹¹⁷ Based on voting patterns, including racially polarized voting and analysis of legislators' actions, perhaps some degree of influence might be determinable.

However, an essential element to the determination of influence is the burden of proof. In *Ashcroft*, the entire Court expressly upheld the long-standing principle that the burden of proof in a Section 5 proceeding falls entirely on the

¹¹⁴ *Ashcroft*, 539 U.S. at 470–71.

¹¹⁵ United States' Response to Order to Show Cause, Attachment C, (Sept. 19, 2003) (on file with author). Seven of the 16 seats were held by white Republicans, with the other nine held by white Democrats. It is unclear whether *any* of the white Democrats was the candidate of choice of black voters, though in some districts black candidates ran unsuccessfully against these white Democrats in the Democratic primary.

¹¹⁶ *Id.* at 18. There was no apparent correlation between likelihood to vote to change the flag and a higher BVAP. Indeed, Sen. Meyer von Bremen, from District 12, which had the highest BVAP of any district electing a white candidate, voted against the change and against the wishes of the GLBC.

¹¹⁷ *Id.* at 15–16.

covered jurisdiction seeking preclearance.¹¹⁸ As the DOJ argued, this would mean that when a jurisdiction claims that a reduction in ability-to-elect districts is offset by an increase in influence districts, the burden is on the jurisdiction to prove (1) the increase in influence, and (2) that such an increase is sufficient to offset the losses in ability-to-elect districts. If applied properly, any difficulty in administering this standard would fall entirely upon the covered jurisdictions, for if they could not prove a sufficient increase in influence to offset losses in ability-to-elect, the *Ashcroft* standard would demand that preclearance be denied.

Thus, the only way it would have been possible to administer the *Ashcroft* standard would be to strictly impose the burden of proof on the covered jurisdictions.¹¹⁹ Ironically, therefore, while the decision purported to grant the states greater flexibility, in actuality the burden on those jurisdictions would become greater, as they would have to prove the existence of “influence.” Fortunately, however, as discussed below, Congress rejected this nebulous “influence” standard and restored the *Beer* ability-to-elect standard when it reauthorized the act.¹²⁰

IV.

On July 27, 2006, President Bush signed into law H.R. 9, the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006.¹²¹ After many hearings, with dozens of distinguished witnesses, and thousands of pages of written testimony, analysis, and documentation, both houses of Congress overwhelmingly passed this act.¹²² H.R.

¹¹⁸ *Ashcroft*, 539 U.S. at 471–72.

¹¹⁹ For two excellent discussions of the administrability of Section 5 under the *Ashcroft* standard, both written by alumni of the DOJ’s Voting Section familiar with the administration of Section 5, see Pitts, *supra* note 18, and Meghann E. Donahue, “*The Reports of My Death Are Greatly Exaggerated*”: *Administering Section 5 of the Voting Rights Act after Georgia v. Ashcroft*, 104 COLUM. L. REV. 1651 (2004).

¹²⁰ However, even if Congress had not restored the *Beer* standard, minority voters would have been better off with Section 5 than without it. Section 5 provides an additional, not an alternative, recourse and remedy for minority voters. Other causes of action, including constitutional claims and claims under Section 2 of the Voting Rights Act, are available after Section 5 review, but without Section 5, those claims would be the only means of addressing potential discrimination. Even with a flawed standard, or a standard that is harder to implement, Section 5 could be critical for minority voters because it places the burden of proof not on those voters to prove discrimination, but on the jurisdiction to prove the absence of retrogression.

¹²¹ H.R. 9, 109th Cong., 2nd Sess. (2006).

¹²² The Senate voted 98–0 in favor of the Act, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212, and the House voted 390–33 in favor, <http://clerk.house.gov/evs/2006/roll374.xml>.

9 reauthorized the expiring provisions of the Voting Rights Act, including Section 5, and made several amendments. H.R. 9 finds that:

The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by Section 5 of such Act.¹²³

Among other issues,¹²⁴ H.R. 9 amends the Section 5(b) criteria for declaratory judgment to state:

Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of *diminishing the ability* of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), *to elect their preferred candidates of choice* denies or abridges the right to vote within the meaning of subsection (a) of this section.¹²⁵

Does this amendment restore the standard that advocates of overturning the *Ashcroft* decision seek? In large part, I believe the answer is “yes”—this amendment will be successful in restoring the complex and effective pre-*Ashcroft* standard. Several commentators and witnesses have questioned the amendment's language and whether there will be any unintended consequences, and I will seek to address these concerns.

A. How Does One Properly Define the “Ability [of Minority Voters] to Elect Their Preferred Candidates of Choice”?

This may seem to be a simple question, given my earlier discussion, but there are some gray areas here. For instance, there are different types of “ability-to-elect” districts. In all of these instances, let us assume that racially polarized voting exists to a legally significant degree.¹²⁶

¹²³ H.R. 9, sec. 2(b)(6).

¹²⁴ Other changes include restoring the discriminatory purpose standard for Section 5 that existed before *Reno v. Bossier Parrish Sch. Bd.*, 528 U.S. 320 (2000), permitting victorious parties the recovery of expert witness fees in Voting Rights Act litigation, and alterations to the use of examiners and observers.

¹²⁵ H.R. 9, sec. 5(b) (*Emphasis added*).

¹²⁶ If racially polarized voting does not exist in a jurisdiction seeking preclearance, it will be very difficult, if not impossible, for the DOJ or the D.C. District Court to find retrogression in the ability to elect, since either minority voters are not cohesive for par-

Districts exist where minority voters demonstrably and consistently control the election of candidates on their own without any crossover or coalitional voting. Many have called these “safe” districts, and while I do not believe this is an entirely accurate moniker, for the sake of simplicity here, let us identify these districts as such. Examples of “safe” districts in Georgia are John Lewis’s Congressional District 5 and Robert Brown’s benchmark Senate District 26.

A somewhat different type of district is a district in which minority voters cannot control the election of their preferred candidates on their own, due to demographic factors (not a majority of voters) or electoral factors (turnout of minority voters lags behind white voters), but where a sufficient number of white voters or other minority voters consistently vote along with the predominant, or most numerous, minority to elect their candidates of choice. Many have called these “coalition” districts, and this is apt. These are districts that are electing the minority voters’ preferred candidate consistently, but where minority voters are dependent to some degree upon continued demonstrable crossover voting.¹²⁷ However, these are also districts, as many have pointed out, where the goals of the Voting Rights Act are beginning to show fruit—coalitions of white and minority voters are electing candidates together based on their joint preferences, rather than on the race of the candidate. Examples of coalition districts are Congressional District 4 (held in the 109th Congress by Cynthia McKinney) and David Scott’s Congressional District 13.¹²⁸

I would equate safe districts and coalition districts as the highest degree of minority voters’ effective exercise of the franchise since it is in these districts that minority voters are able to elect candidates of their choice. At this point, consistent with doing away with the term “majority-minority,” I believe it is proper to assess minority voting strength in terms of the consistent results that minority voters experience, regardless of whether they control the election on their own. Where white voters *consistently* vote in coalitions with their minority neighbors, such a district should be considered as strongly as a district where cohesive minorities make up 60% of the electorate. Thus, reasonable reductions of minority populations from packed districts could be made, so long as demonstrable coalitions existed in said districts to allow for the continued ability to elect candidates of minority choice. For the sake of clarity, let us refer to the combination of safe and coalition districts as “ability-to-elect” districts.

ticular candidates, or more likely, white voters are at least as willing to vote for minority-preferred candidates as vote against them.

¹²⁷ It is important to note that such crossover voting must be so consistent as to be almost automatic. Otherwise, minority voters are more precariously dependent upon the whim of white voters, turning such a district into more of a “tossup” district, as discussed below, than a “coalition” district.

¹²⁸ See *Ashcroft Lower Court*, 195 F.Supp.2d at 44. District 13 is south of Atlanta, and although it was created with a BVAP of only 38.2% and BREG of only 41.6%, consistently elects Congressman Scott, who is African American and a candidate of choice of black voters.

There are also districts I call “tossup” districts. These are districts in which minority voters sometimes, but not consistently, have the ability to elect their candidates of choice, or nearly demonstrate such an ability. These may be districts where white voters occasionally vote for a minority-preferred candidate, but only for a *particular* minority-preferred candidate, or where minority voters are so close to being able to elect their candidate that they are “knocking on the door,” but they have fallen just short. In such districts, minority voters have *some, lesser* ability to elect their candidates, but that ability is not “safe” or consistent, though it is substantially more than zero. An example of such a district in Georgia is Congressional District 2, where the black candidate of choice, Sanford Bishop, can consistently be elected thanks to substantial white crossover, but all evidence indicates that no other black candidate of choice could be elected to that position. Another example could be Michael Meyer von Bremen’s benchmark Senate District 12 in Albany, where black voters were almost able to elect their preferred candidate in the Democratic primary for the open seat in 1998.¹²⁹

Finally, there are white-controlled districts, where minority voters, regardless of their demographics and cohesion, have simply not demonstrated any ability to elect their candidates of choice. Most districts in Georgia, and in other Section 5 jurisdictions, fall into this category.

What of “influence” districts, one may ask? According to the Supreme Court an influence district is a district in which the minority candidate of choice is *not* being elected, where minority support was not essential to the winning candidate’s election, but where minority voters exert some influence on the successful candidate. After reviewing many redistricting plans over the duration of my service in the DOJ and since, I believe that such districts are extremely rare, if they exist at all. First, to the degree influence districts exist, they exist most likely only in statewide plans—in the dozens of plans I have reviewed, I have never seen something close to an influence district in a local plan (in a Section 5 covered jurisdiction). Second, as discussed above, many of the districts to which Justice O’Connor purports to ascribe influence are far from being responsive to minority voters—many of these districts’ representatives consistently oppose important legislation that minority voters cohesively favor, such as the changing of the Georgia state flag. To the degree that it can be demonstrated that such representatives are consistently responsive to the needs of minority voters, I believe a comprehensive analysis would reveal that those representatives actu-

¹²⁹ Both the lower court and the Supreme Court held that removing too many black voters from District 12, when those voters were so close to exercising their political influence, constituted retrogression from an ability-to-elect district. In some ways, retrogression from this type of district is more insidious than any other, since this is where minority voters, like Sisyphus, have over time labored to push the boulder to the peak of the hill, where they might finally enjoy the representation of their preferred candidate, only to have the jurisdiction push the boulder down the hill, forcing minorities to rebuild their political effectiveness from square one.

ally are the candidates of choice of minority voters, in which case these districts are more accurately labeled “coalition” districts.¹³⁰ Third and most importantly, even if a rare influence district does exist, I believe Congress is quite right that it was not and should not be Congress’ intent to encourage or discourage such districts, and that where polarized voting exists, the proper measure of minority voters’ effective exercise of the franchise is their ability to elect their preferred candidates, not to elect their second choice or to prevent the election of their least preferred candidate.¹³¹

B. How Should These Different Types of Districts Be Weighed When Assessing Retrogression under the Amended Section 5?

Thus, in my formulation, there are three categories of districts that should be considered when assessing the impact of Section 5 as reauthorized—ability-to-elect districts, tossup districts, and white-controlled districts. In ability-to-elect districts, minority voters have a greater ability to elect their candidates than in tossup districts, where minority voters have at least some ability to elect which is greater than zero, as exists in white-controlled districts. In the standard that I am suggesting should be applied under the renewed act, the calculus in determining retrogression should *not* be interchangeable between these different categories. In other words, a jurisdiction should not be able to offset losses in ability-to-elect districts with a greater number of tossup districts, nor should it be able to offset losses of either ability-to-elect or tossup districts with any supposed influence (white-controlled) districts.

¹³⁰ Confusion regarding these districts usually results when the representative in question is white and represents a district with a significant, but not majority, minority population. An example of such a district may be former Congressman Martin Frost’s District 24 in Texas, which he represented prior to the 2003 DeLay-led Texas redistricting. The district had substantial black and Hispanic populations who routinely voted cohesively for Frost. Had the minority populations been dissatisfied with Frost, they were sufficient in number in the Democratic primary that they could have run a candidate successfully against him. However, from at least 1992 to his last election in 2004, he never had opposition in the Democratic primary election. For election results, see <http://elections.sos.state.tx.us/elchist.exe>.

¹³¹ Some seem to argue that the Voting Rights Act should protect the rights of minority voters to be represented by the political party that they generally prefer. For example, the rights of black voters to elect Democrats. I believe such a formulation bastardizes the spirit and intent of the Voting Rights Act. Where minority voters show through their actual votes that they prefer a particular candidate (and admittedly, that candidate is almost always a Democrat), that choice should be protected by the act. However, where minority voters (*not* minority politicians) express by their votes that they do not prefer a particular candidate, that candidate should receive no special status *vis-à-vis* Section 5.

Consequently, under Section 5 a plan should at least maintain the number of ability-to-elect districts. Any reduction in the number of these districts should be held to be retrogressive. Similarly, a jurisdiction should at least maintain the number of tossup districts, unless it increases the electoral and demographic makeup of such a district to the point that it becomes an ability-to-elect district. Any net reduction of ability-to-elect districts to tossup districts or white-controlled districts or reduction of tossup districts to white-controlled districts would be a violation of Section 5. While a jurisdiction should always have the flexibility to increase minorities' ability-to-elect under Section 5, it should be prevented from decreasing that ability.

To illustrate, Georgia had twelve ability-to-elect districts in its benchmark Senate plan and one tossup district (District 12). Under my framework, Georgia could maintain these numbers or change the demographics in District 12 to turn it into an ability-to-elect district (though that would not be required under Section 5). Georgia could not, as it actually chose to do, change three to five ability-to-elect districts into tossup districts (without any offsetting increases) and reduce a tossup district to a white-controlled district.

C. Could Such a Standard Be Misused to Require the Maintenance of Packed Districts?

Many commentators are rightfully concerned about the Voting Rights Act being misused to pack voters into overly concentrated minority districts, thereby minimizing their voting power. However, these concerns are somewhat misplaced for two reasons.

First, Section 5 was not designed to be and has not been the primary method of preventing packing. Section 5 merely freezes the status quo in place, so if there are packed districts in the benchmark plan, then packing the same number of districts in a proposed plan would be compliant. Section 2 is the intended and best mechanism for preventing packing, which is one of the most common methods of diluting minority voting strength.

Second, as discussed earlier, nothing in Section 5 has ever required jurisdictions to maintain an artificially high level of minority voting strength, so long as reducing that level does not negatively impact minority voters' ability to elect candidates of choice. In other words, if a jurisdiction wanted to take an 80% BVAP district, where black voters were consistently electing their candidates, and reduce the BVAP to 55%, while demonstrating that black voters could still elect their candidates at that level, such a district would be completely unobjectionable (in a vacuum, without considering the plan as a whole) under Section 5. In fact, this is exactly what Georgia did in its state House plan, reducing the black percentages in several packed districts from 80% and higher (several were greater than 90%) to roughly the 55% to 63% level. In so doing, Georgia actually increased minority voting strength, while spreading minority voters a little more thinly. The DOJ and the courts had no problem with these reductions, and

Georgia is to be credited for attempting to find a way to facilitate and enhance minority voting strength in the House plan.

However, the concerns of those who worry about packing cannot be entirely dismissed and deserve to be addressed. There are concerns that there be protections against the drawing of plans, usually by Republicans, where minority ability-to-elect districts are maintained, but more minority voters are packed into them, thus bleaching the surrounding districts. These concerns are not without merit, as evidenced by the Texas re-redistricting in 2003. I believe that the consideration of coalition districts as protected ability-to-elect districts addresses this point, however. If the statute is applied so that such coalition districts are to be treated the same as safe districts, then it will be exceedingly difficult in a covered jurisdiction to move minority voters out of coalition districts, such as Martin Frost's District 24 in Texas, or David Scott's district in Georgia, in order to facilitate the defeat of a Democrat and the election of a Republican. I believe the language of H.R. 9 is consistent with such an interpretation.

Some also express apprehension that plan drawers who seek to unpack districts in order to spread out minority voting strength more effectively (usually Democrats) would find themselves locked into frozen minority percentages in ability-to-elect districts. Here, the concerns again are not without some merit. However, I believe equating coalition districts to safe districts also addresses this issue effectively, since jurisdictions would be free to reduce minority percentages in safe districts to create coalition districts, so long as the underlying ability to elect was not significantly impacted.¹³²

¹³² However, to further clarify this point, I would have advocated one slight modification to H.R. 9. There are experts in political science who have testified as to an exact "probability" to elect a candidate of choice in a particular district. While I believe these "probabilities" are largely illusory and based on improper data and analyses, and while to my knowledge no court has ever relied upon such analyses, it is not out of the realm of possibility that those who would oppose preclearance of certain plans would seek to introduce evidence to indicate that, for instance, a district that went from 60% BVAP to 55% BVAP experienced a drop in the probability to elect a minority-preferred candidate from, hypothetically, 99% to 90%. Such pseudo-science was offered in the *Ashcroft* case, was soundly rejected by both the lower court and the Supreme Court, and should be discouraged and have no weight in any Section 5 analysis. Therefore, I would have supported slightly altering the language in H.R. 9, Section 5(b) from "diminishing the ability . . . to elect their preferred candidates of choice" to "diminishing *in a legally significant way* . . . the ability to elect their preferred candidates of choice." While I believe H.R. 9 as passed adequately deals with this point, further clarification could have reduced the risks of such frivolous arguments.

Conclusion

As one looks more critically at the Court's decision and at the facts as determined by the lower court and upheld by the Supreme Court in *Ashcroft*, one begins to get a clearer picture of the reality of racial politics in this age. While advances have been made, without doubt, those advances have been compelled and nurtured by the Voting Rights Act and Section 5 in particular. Section 5 has never required the packing of minority voters, and indeed, the Voting Rights Act prevents such packing as a dilution of minority voting strength. Rather, the act requires that where minority voters have worked so hard to elect candidates of their choice, that work cannot be wiped away by the swipe of the governor's pen.

Perhaps most importantly, however, one must recognize the comprehensive nature of the pre-*Ashcroft* standard and its flexibility regarding the consideration of all types of ability-to-elect districts, including coalitional districts. Understanding this standard and its ability to promote positive developments in racial politics, including coalitional districts, will be an important factor in enforcing the amended Section 5.

It is essential to understand that Georgia, in an express attempt to maintain Democratic power in a state where such power was waning, sought to fortify white Democrats with black voters, at the expense of the black elected officials those black voters preferred.¹³³ Though Issacharoff contends that “[n]o longer are blacks political outsiders in the covered jurisdictions,”¹³⁴ and that “the Southern political process is highly attuned to black political claims,”¹³⁵ the *Ashcroft* case is actually proof that black voters continue to be traded, manipulated, and disappointed by the white power structure in covered jurisdictions, all in the name of partisan politics.¹³⁶ Perhaps this is the greatest lesson of *Ashcroft*—that the betrayal of minority voters cannot result in long-term electoral gains for any political party—a lesson that should be carefully considered while enforcing the Voting Rights Act and defending any constitutional challenges to the amended act.

¹³³ As Issacharoff correctly notes, there was no mistaking “the evident partisan objectives of the plan.” Issacharoff, *supra* note 6, at 1716.

¹³⁴ *Id.* at 1714

¹³⁵ *Id.*

¹³⁶ However, in the greatest irony, even this last-ditch effort to misuse black voters was not enough to keep the Democrats in power in the State Senate. After the 2002 elections, run in a plan virtually identical to the proposed plan at issue in *Ashcroft*, the Republicans held a 30–26 advantage in the Senate and held 34 seats in the 2005–2006 legislative session. Four white senators who had run as Democrats in so-called “influence” districts switched parties to Republican in the weeks following the 2002 general election, thereby permanently putting the Republicans into the majority. All three senators, who ran in Districts 2, 12, and 26 won re-election in 2002, including the two black incumbents, and continued to serve in the Senate through 2006.

