Turning Lemons into Lemonade: Making *Georgia v. Ashcroft* the *Mobile v. Bolden* of 2007

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Introduction

The Voting Rights Act of 1965[1] forever changed the face of electoral equality in the United States. Today, almost forty years later, the Act is considered one of the most pivotal pieces of federal legislation in our country's history and the "most successful piece of civil rights legislation ever enacted."[2] Congress has revisited various segments of the Act five times since its enactment.[3] A key 1982 amendment to Section 5 will expire in 2007,[4] setting the stage for an upcoming battle over its renewal.

Since 1982, Supreme Court decisions have chipped away at the strength of the Voting Rights Act (VRA) in general, and Section 5 in particular.[5] This Note argues that any effort to reauthorize the VRA must explicitly overturn limitations on its most effective provisions. It also examines the success of the 1982 reauthorization process as a guide to reaching similar results in 2007. The objective of this Note is to provide a framework for

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[1] Voting Rights Act (VRA) of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973–1973bb (2000)).

[2] Edward Still, *Voting Rights Act of 1965*, *in* Encyclopedia of American Law 459 (David Schultz ed., 2002) (quoting former Attorney General Nicholas Katzenbach), *available in slightly modified form at* http://www.votelaw.com/Vra.doc (last visited Mar. 18, 2004).

[3] The VRA was renewed and amended in 1968, 1970, 1975, 1982, and 1992.

[4] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 1, 96 Stat. 131 (codified at 42 U.S.C. § 1973 (2000)).

[5] *See, e.g.*, Reno v. Bossier Parish Sch. Bd., 528 U.S. 320 (2000) (holding that election law changes enacted with a discriminatory purpose should not be denied preclearance unless their purpose is to have a retrogressive effect on the electoral power of minority voters); Presley v. Etowah County Comm'n, 502 U.S. 491 (1992) (placing limits on the types of election law changes that require preclearance); Whitcomb v. Chavis, 403 U.S. 124 (1971) (rejecting a claim of vote dilution in part due to a lack of showing of intent to discriminate).

initiating a legislative response to the Court's narrow interpretations of Section 5, building on the lessons learned in previous efforts and adapting them to the unique challenges facing today's advocates.

There are two primary components to the VRA. Section 5 applies only to jurisdictions with the worst history of voting discrimination—states like Alabama, Georgia, Mississippi, and Texas and municipalities such as New York City.[6] Section 5 provides a "shield" to prevent the enactment of discriminatory voting procedures by requiring that all new election laws be "precleared" by the federal government. In order for "preclearance" to be granted, jurisdictions must show that their proposed changes will not have a "retrogressive" effect on their minority voters—in other words, that any change will not weaken the present voting power of the minority electorate.[7] This "retrogression" standard is not part of the text of the

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[6] *See* 42 U.S.C. § 1973c. In 1970, 1975 and 1982, Congress readopted and broadened the coverage of § 5, based upon a continued need for preclearance of new voting procedures. When states or political subdivisions subject to § 5 seek to change a voting requirement:

> such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made . . . .

Id.

[7] Constitutional scholar John C. Jeffries defines retrogression as allowing a jurisdiction to "extend protection beyond what the Constitution requires" but forbidding it to "retreat from that extension once made." John C. Jeffries, Jr. & Daryl J. Levinson, *The Non-Retrogression Principle in Constitutional Law,* 86 CAL. L. REV. 1211, 1211 (1998). He further explains:

> Preclearance thus depends on whether minority political power would decrease if the proposal went into effect. Existing minority political power constitutes the baseline, and non-retrogression describes the permissible direction of change. Section 5 does not require any absolute level of minority success or influence, nor does it condemn all disadvantageous electoral structures. Even the most burdensome of arrangements can remain in place if they predate the Act or a particular jurisdiction's inclusion in the coverage of the Act. Section 5 forbids only changes that would make minority success less likely.

Id. at 1213. For further discussion of the non-retrogression principle, see James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 U. VA. L. REV. 633, 683–88 (1983).

VRA but was articulated ten years after its enactment in the Supreme Court opinion of *Beer v. United States.*[8] In *Beer*, the Court specified that a district apportionment plan warrants preclearance if it enhances or leaves unchanged the current electoral position of minorities and thus is nonretrogressive.[9]

The second main component of the VRA is Section 2,[10] which is often referred to as the "sword" to Section 5's "shield." Section 2 applies to voting practices anywhere in the country and provides for challenges to potentially discriminatory election laws or practices. In its current form, it prohibits any voting "qualification . . . prerequisite . . . standard, practice, or procedure" that "*results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[11] This denial is referred to as "vote dilution."

Under the original wording of Section 2, which merely prohibited the imposition of any election law that was racially discriminatory,[12] the Court generally held that discriminatory effects constituted a constitutional violation, regardless of intent.[13] This interpretation changed in 1980, when the Court declared that any Section 2 challenge to an election procedure or law must include proof that the measure was enacted with the intent to dis-

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[8] 425 U.S. 130 (1976).

[9] *Id.* at 141.

[10] 42 U.S.C. § 1973. Section 2 reads:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id.

[11] 42 U.S.C. § 1973(a) (emphasis added).

[12] The original text of Section 2 stated, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437.

[13] *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971) (holding that districting schemes that operate to cancel out or minimize the voting strength of racial groups constitute impermissible vote dilution in violation of the Fifteenth Amendment, which Section 2 was enacted to enforce.)

criminate against voters on account of race or color.[14] Voting rights advocates considered this intent requirement to be a "lemon," weakening the protection of Section 2.[15] In 1982, soon after the *Bolden* decision, the VRA's reauthorization process focused on the intent requirement. After much maneuvering on the part of advocates, Congress passed an amended Section 2 that removed the intent requirement. In rejecting the Court's decision in *Bolden*, Congress made "lemonade" by explicitly providing that a discriminatory "result" constituted a violation of Section 2.[16] The Court later accepted the amended Section 2 in *Thornburg v. Gingles*.[17] The Court held in *Gingles* that plaintiffs bringing a Section 2 claim must prove only that a proposed election law or redistricting scheme "impair[s] minority voters' ability to elect representatives of their choice."[18]

Similarly, since 1976, most Section 5 claims have not relied on a showing of intent. Following *Beer*, courts typically use the number of majority-minority districts (districts where a single minority constituency comprises over 50% of the voting age population (VAP)[19]) as evidence of minority voting strength. Thus, a redistricting effort that reduced the overall number of majority-minority districts in a covered area, particularly where voting was racially polarized, was found to have a retrogressive effect on minority voters.[20]

In 2003, the Supreme Court weakened the *Beer* standard in the redistricting case of *Georgia v. Ashcroft*.[21] The Court confronted the question whether replacing majority-minority districts with a greater number of districts that had as little as 25% minority VAP, so-called influence districts, harmed the ability of minority voters to elect their candidates of choice.[22] In one of the most important cases arising under the VRA since the mid-1980s, the Court greatly weakened the enforcement provisions of

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[14] City of Mobile v. Bolden, 446 U.S. 55, 66–67 (1980).

[15] *See, e.g.*, SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 710 (rev. 2d ed. 2002) ("[V]oting rights lawyers responded to [*Bolden*] with despair and outrage. The decision was said to be devastating.")

[16] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973); *see also supra* note 11 and accompanying text.

[17] 478 U.S. 30, 35 (1986).

[18] *Id.* at 50. The three factors that the Court identified as "necessary preconditions" for plaintiffs to prove that a districting scheme violates § 2 are the presence of (1) racially polarized voting, (2) a geographically concentrated minority, and (3) an opposing racial bloc that interferes with the minority's electoral power. *Id.* at 50–51.

[19] The "voting age population" or "VAP" is the number of people in a district over the age of eighteen.

[20] *See, e.g.*, Georgia v. Ashcroft, 204 F. Supp. 2d 4, 10–11 (D.D.C. 2002) (noting that the measurement of the voting strength of African Americans "lies in the interplay between decreases in several majority-minority districts' [black voting age populations] and evidence of significantly racially polarized voting"). This is the lower court's opinion of the case described throughout this Note. Its holding was overturned by the Supreme Court in Georgia v. Ashcroft, 123 S. Ct. 2498 (2003).

[21] 123 S. Ct. 2498 (2003).

[22] The phrase "ability to elect candidates of choice" typically refers to the power of minority voters, as a bloc, to elect candidates who will effectively represent their interests.

Section 5 by holding that such a replacement would not hurt the electoral strength of those minority voters across the state as a whole.[23] The Court further held that other considerations, specifically whether minority legislators support the plan, could be relevant in deciding whether an apportionment plan is retrogressive in violation of Section 5.[24] The Court relied on a superficial analysis of a contentious and unresolved debate over whether influence districts enable minority voters to exert electoral strength as effectively as majority-minority districts have been proven to do. The holding also granted unprecedented deference to state governments in deciding a major voting rights issue.[25] Accordingly, it created two new "lemons": finding the replacement of majority-minority districts with influence districts to be nonretrogressive and giving greater deference to state legislators composing apportionment plans. Both parts of the holding are vast departures from the original intent of the Act.

The 2007 reauthorization of Section 5 creates a unique and timely opportunity for civil rights advocates to make "lemonade" out of these "lemons" by pressing Congress to amend Section 5 in response to the Court's decision in *Georgia v. Ashcroft*. In an effort to learn from similar historical endeavors that were successful, this Note will specifically examine how advocates reacted to the decision in *Bolden* and used the 1982 amendment process to overturn the Court's interpretation of Section 2. These lessons can assist today's advocates in their efforts to build a successful reauthorization strategy.

Part I analyzes the Supreme Court's decision in *Georgia v. Ashcroft* and its departure from previous longstanding interpretations of Section 5. Part II is an in-depth discussion of the "lemons" in the opinion. To establish the need for a congressional response to that decision, it looks at the dangers in allowing influence districts to replace majority-minority districts and the problems of deferring to legislators in shaping apportionment plans. Part III discusses a "lemon" of the past, the decision in *City of Mobile v. Bolden*,[26] and the subsequent effort by a coalition of civil rights advocates to overturn the decision in the legislative arena. Finally, Part IV examines some factors that led to the 1982 Congressional rejection of *Bolden*, such as prior case law and strong unity around one agenda, and relies on them to assess the prospect for a similar Congressional response

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[23] Georgia v. Ashcroft, 123 S. Ct. at 2511 ("[A] State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.").

[24] *Id.* at 2513 ("[I]t is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan.").

[25] *Id.* at 2515; *see also* Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 35 (2004) [hereinafter Karlan, *Retrogression of Retrogression*] ("The linchpin of the Court's analysis of the Georgia plan was . . . its repeated assertion that Georgia had acted in good faith.").

[26] 446 U.S. 55 (1980).

in 2007. It suggests a possible legislative response to *Georgia v. Ashcroft*, specifically arguing that amending Section 5 to clarify the retrogression standard is the most viable option for advocates seeking a legislative response that will protect the participation of minority voters in the electoral process.

I. *Georgia v. Ashcroft* and the Court's Re-interpretation of Section 5

On June 26, 2003, two days after upholding affirmative action in education,[27] and almost immediately after finding that state anti-sodomy laws violate the constitutional right to privacy,[28] the Supreme Court issued its opinion in *Georgia v. Ashcroft*.[29] While the earlier two decisions were declared as victories by the civil rights communities, the opinion in *Georgia v. Ashcroft* was just the opposite, since it dramatically altered the established legal test for evaluating whether certain election laws had a harmful effect on minority voters.[30]

The central question faced by the Supreme Court in *Georgia v. Ashcroft* was whether the Georgia State Senate districting plan, drawn by the state legislature following the 2000 census, had a retrogressive effect on African American voting strength.[31] Justice Sandra Day O'Connor's majority opinion rejected the district court's finding that the reduction of majority-minority districts had a retrogressive effect on African American voters.[32] Rather, the Court held that the state government of Georgia "likely met its burden of showing non-retrogression," reasoning that Section 5 allows states the flexibility to implement a plan that reduces the minority voting age population in some majority-minority districts "even if it means that in some of those districts, minority voters will face a somewhat reduced opportunity to elect a candidate of their choice."[33]

Georgia's apportionment plan drew 56 Senate districts, ten of which were majority-minority, with a Black voting age population (BVAP) of

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[27] Grutter v. Bollinger, 539 U.S. 306 (2003).

[28] Lawrence v. Texas, 123 S. Ct. 2472 (2003).

[29] 123 S. Ct. 2498 (2003).

[30] *See, e.g.*, Karlan, *Retrogression of Retrogression*, *supra* note 25, at 21 ("The Court's opinion [in *Georgia v. Ashcroft*] fundamentally alters the pre-clearance process in disturbing ways."). For deeper discussion of the case and its problematic re-interpretation of § 5, see *id.* at 36 (summarizing the holding as "itself a retrogression in minority voters' effective exercise of the electoral franchise").

[31] Georgia v. Ashcroft, 123 S. Ct. at 2504.

[32] *Id.* at 2509. The District Court for the District of Columbia found that the plan eliminated three majority-minority districts in areas where voting was racially polarized and greatly reduced the percentage of the Black voting age population (BVAP) in other majority-minority districts. *See* Georgia v. Ashcroft, 195 F. Supp. 2d 25, 77, 86 (D.D.C. 2002). Other districts where the majority of voters were Democrats saw the BVAP rise to levels between 25 and 50% of the entire district—slightly higher than the overall state average of 25.42% but less than a majority. Georgia v. Ashcroft, 123 S. Ct. at 2516.

[33] Georgia v. Ashcroft, 123 S. Ct. at 2516.

over 50%.[34] The 2000 census numbers indicated that the BVAP in Georgia had increased, with the result that twelve of the State Senate districts (as drawn in the baseline plan before the 2000 apportionment) had a BVAP exceeding 50%.[35] The new plan "unpacked" many of the majority-minority districts drawn in 1997 and created a number of influence districts.[36] In all, the legislature drew thirteen districts with a BVAP above 50%, thirteen additional districts with a BVAP between 30% and 50%, and four other districts with a BVAP between 25% and 30%. When compared with the districts drawn in the baseline plan, the new plan reduced the number of districts with a BVAP over 60% by five and increased the number of districts with a BVAP between 25% and 50% by four (leaving one district with a BVAP between 50% and 60%).[37]

Yet although the new plan reduced the number of majority-minority districts, the Court found that the Georgia State Senate plan did not "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[38] Although the new plan did away with some majority-minority districts, it created more majority-Democrat districts. Based on the reasoning that an elected Democrat was most likely to represent the interests of Black voters, regardless of the official's race or the demographics of her supporters, the Court reasoned that the legislature's purpose in drawing these district lines included protecting the interests of Black voters in Georgia.[39] As further evidence of the theory that increasing the number of Democratic Senate seats in the state helped minority voters, the Court pointed to the fact that several Black legislators—including the voting-rights hero and current United States Representative John Lewis (D-Ga.)—supported the plan, that "a substantial majority of black voters in Georgia vote Democratic," and

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[34] *Id.* at 2500.

[35] *Id.*

[36] *Id.* at 2515. This unpacking is even more problematic because minority constituencies generally have lower voter participation rates than white constituencies. Thus the ratio of registered voters is typically even more stark. A district where 40% of the voting age population is Black could also be a district where only 20% of the registered voters are Black. Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1404–05 (2001) (providing empirical evidence that white voters turn out in higher rates than Black voters and concluding that "the percent black needed to equalize black and white turnout is greater than 50% in most of these districts.") Often exacerbating this disparity is the fact that the counties with a large number of Black citizens are more likely to have higher-than-average rates of spoiled ballots (the number of ballots cast that are discarded due to voter or mechanical error). *See* CHRISTOPHER EDLEY, JR. ET AL., HARVARD CIVIL RIGHTS PROJECT, DEMOCRACY SPOILED: NATIONAL, STATE, AND COUNTY DISPARITIES IN DISENFRANCHISEMENT THROUGH UNCOUNTED BALLOTS 8 (2002) (finding that, in the general election of November 2000, counties with Black voting-age populations above the national average of 12% had a higher average spoiled ballot rate than counties where the voting-age population was less than 12% Black).

[37] Georgia v. Ashcroft, 123 S. Ct. at 2506.

[38] *Id.* at 2504 (citing Beer v. United States, 425 U.S. 130 (1976)).

[39] *Id.* at 2506.

that "all elected black representatives in the [Georgia State Legislature] are Democrats."[40]

This new interpretation of the retrogression standard is a vast departure from the standard employed in *Beer* and other Section 5 cases.[41] Instead of looking at the effects of an apportionment plan, this new interpretation evaluates the intent of its drafters. Rather than relying on the federal government's judgment that a plan hurts minority voters, this new standard defers to the judgment of a jurisdiction that, ironically, is covered by the Section 5 preclearance requirement because of its history of racially discriminatory voting practices. Specifically, the Court's holding in *Georgia v. Ashcroft* asks federal preclearance reviewers to analyze how the drafters of the state's apportionment plan tried to achieve or protect (1) the "ability of minority voters to elect their candidate of choice," (2) the extent to which the minority group has an opportunity to participate in the political process, and (3) "the feasibility of creating a nonretrogressive plan."[42] According to this scheme, as long as officials in the covered jurisdiction made some sort of visible effort to achieve—or even just respect—these goals, the plan would be deemed nonretrogressive under Section 5, especially if minority elected officials in the state supported it.[43]

The majority opinion, however, does not completely do away with the federal government's responsibility to provide guidance to states as to what is retrogressive. Stepping into the role of policy analyst, the Court relied on a handful of academic studies to emphasize the ineffectiveness of majority-minority districts in enabling voters of color to exercise meaningful policy influence, while lauding the benefits of influence districts.[44] These studies provided the backbone for the Court's new retrogression standard, which is that a districting plan should be upheld if it replaces majority-minority districts with influence districts, so long as the jurisdiction—or Black elected officials in the jurisdiction—believe it is in the best interests of the minority communities. In other words, even if the effect is an overall reduction in the election of candidates of choice by minority constituencies, the Court will not find retrogression if the jurisdiction can show that there is an increase in the "number of representatives sympathetic to the interests of minority voters,"[45] which is an ambiguous measure.

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[40] *Id.* at 2505; *see also id.* at 2513 ("[I]t is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new districting plan.").

[41] *See, e.g.*, Bush v. Vera, 517 U.S. 952, 955 (1996) (describing § 5 as a mandate that "the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions"); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 341 (1992).

[42] 123 S. Ct. at 2506.

[43] *Id.* at 2513.

[44] *Id.* at 2508–09.

[45] *Id.* at 2508.

II. How the Court's Opinion in *Georgia v. Ashcroft* Created "Lemons"

There are positive aspects to the Court's decision in *Georgia v. Ashcroft*. Primary among them is that it upheld the right of individuals to intervene in Section 5 cases[46]—an important asset for advocates and private parties wishing to bring claims against a jurisdiction attempting to install a retrogressive electoral law or districting change. The Court also acknowledged the importance of the direct representation of minority voters.[47] Thus, before embarking on a discussion of potential congressional responses to this case, it is important to explain further why the most problematic aspects of the decision should be considered "lemons." The following sections provide an overview of the debate over replacing majority-minority districts with influence districts and discuss the problems created by affording greater deference to state legislators who drafted apportionment plans.

A. The Continuing Need for Majority-Minority Districts

Even among civil rights advocates, significant debate exists over whether influence districts help or harm the effectiveness of minority voters. Leading voting rights scholars Bernard Grofman, Lani Guinier, and Pamela Karlan have generally supported the need for majority-minority districts to increase or sustain the election of minority candidates of choice,[48]

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[46] *Id.* at 2509–10.

[47] *Id.* at 2518.

[48] Grofman is a leading expert witness for civil rights organizations in voting rights cases. *See generally* Quiet Revolution in the South (Bernard Grofman & Chandler Davidson eds., 1994) (documenting the empirical and legal effects of the VRA); *see also* Minority Representation and the Quest for Voting Equality 134 (Bernard Grofman et al. eds., 1992); Grofman et al., *supra* note 36, at 1390–91.

Guinier is a professor at Harvard Law School and represented the Voting Rights division of the NAACP Legal Defense and Education Fund during the 1982 reauthorization of the Voting Rights Act. *See generally* Lani Guinier, The Tyranny of the Majority (1994) (arguing that, under the dominant winner-take-all-approach to U.S. elections, majority-minority districts are a necessary evil given the degree of racially polarized voting both within the electorate and among legislators).

Karlan is a professor at Stanford Law School and frequent commentator on the Voting Rights Act and other issues related to election law. *See, e.g.*, Penda D. Hair & Pamela S. Karlan, Advancement Project, Redistricting for Inclusive Democracy: A Survey of the Voting Rights Landscape and Strategies for Post-2000 Redistricting (2d prtg. 2000) (arguing for the use of majority-minority districts to protect voter turnout among minority voters), *available at* http://www.advancementproject.org/RFD.pdf (last visited Mar. 18, 2004); Karlan, *Retrogression of Retrogression*, *supra* note 25; Pamela S. Karlan, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting: Why Voting Is Different*, 84 Cal. L. Rev. 1201 (1996) [hereinafter Karlan, *Why Voting Is Different*]; Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, 39 Wm. & Mary L. Rev. 725, 740 (1998) ("Majority-black constituencies, however, allow black voters to circumvent the obstacle posed by racial block voting: as an electoral majority in some districts, they can elect some

whereas another group of scholars, including Carol Swain and Richard Pildes, has pushed for influence districts.[49] While each side of this debate makes strong arguments, an examination of empirical research indicates that majority-minority districts still play an important role in enabling minority communities to be fairly represented in our democracy.

The purpose of majority-minority districting schemes is to enable historically disenfranchised and geographically concentrated racial groups to have the power to elect candidates of their "choice." This result depends on the presence of racially polarized voting in various jurisdictions, particularly those areas covered by Section 5 of the VRA. When voting is racially polarized, as defined by the Supreme Court, "the race of voters correlates with the selection of a certain candidate or candidates."[50] Majority-minority districts were originally developed in response to these voting patterns, as a means of protecting and increasing the political power and representation of minority voters.[51]

Both sides of this debate generally agree that past extremes of racially polarized voting made majority-minority districts necessary to ensure that minority voters had an equal opportunity to elect candidates of their choice. When the 1990 redistricting efforts began, "[t]he majority of Southern states did not elect a single Black state legislator from any majority-White district."[52] This fact led Pildes to note the vital role of majority-minority districts:

> From 1972 to 1992, the probability of a majority-white congressional district electing a black representative remained at [a] negligible level regardless of a district's median family income,

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of the candidates of their choice.").

[49] Pildes is the most widely cited of a group of scholars including David Epstein, Carol Swain, Samuel Issacharoff, and Charles Cameron. *See, e.g.*, CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN-AMERICANS IN CONGRESS (1993) (suggesting that majority-minority districts hurt the careers of individual minority politicians because, although they may win seats in Congress, they fail to gather the broad interracial support required to reach higher office); Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794 (1996). Works by these authors were among those cited—but oversimplified—in the Court's opinion in *Georgia v. Ashcroft*, 123 S. Ct. at 2511 (citing, for example, Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself?: Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002) [hereinafter Pildes, *Is Voting Rights Law Now at War with Itself?*]).

[50] Thornburg v. Gingles, 478 U.S. 30, 62 (1986).

[51] Many scholars have noted both the theoretical and practical reasons for such a protection. *See, e.g.*, Charles Cameron et al., *supra* note 49, at 809 ("The appropriate representation of minorities was central to the debates at the founding of the American Republic. The Federalist 10 . . . warned against the dangers of majority tyranny and suggested ways to design institutions to offset this possibility.").

[52] Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1368–69 (1995) (analyzing statistics taken from QUIET REVOLUTION IN THE SOUTH, *supra* note 48); *see also* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1864–72 (1992).

> its percentage of high school graduates, the region of the country, or the proportion of residents who were urban, elderly, foreign born, or residents of the relevant state for more than five years. . . . [E]very majority black congressional district in the South (out of four) elected a black candidate to office; only one nonmajority black district in the South (out of 112) elected a black candidate.[53]

While Pildes and others now believe that a decrease in racially polarized voting makes it possible for communities of color to elect their candidates of choice by building coalitions with white voters,[54] Karlan argues it is still nearly impossible for minority candidates to elect the candidate of their choice outside of districts where more than 50% of the voting age population is a combination of minority groups.[55]

Karlan's arguments are supported by current empirical evidence.[56] One recent study examined congressional elections held between 1972 and 1994 and found that minority candidates of choice have an "86% chance of winning in districts that are 55% black . . . that contain no Latinos" and that "[t]he probability of victory drops quickly below this percentage unless the share of Latinos increases."[57] The same study found that between 1972 and 1994 Black candidates won in only seventy-two of 5079 elections held in districts where they were not a majority—and forty-five of those seventy-two victories were in districts where African Americans and Latinos together formed a majority.[58]

Recent data on Latino voting behavior reveals similar trends. A study conducted in 2000 by Professors Kim Geron and James Lai surveyed the "electoral pathways" of a representative sample of the nation's 1800 Latino elected officials, examining the factors that led to their election.[59] The

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[53] Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 49, at 1525–26. Bernard Grofman collected empirical evidence that led him to the same conclusion reached by Pildes. *See* Grofman et al., *supra* note 36, at 1390–91 ("In the South during the 1970s and 1980s, data . . . provided compelling evidence of racially polarized voting in numerous jurisdictions. Further, because a higher proportion of blacks than whites were not of voting age, and because black levels of political participation were less than those of whites, . . . districts with 65% black population were needed before African-American candidates could win [election]." (footnote omitted)).

[54] *See infra* note 63 and accompanying text.

[55] *See, e.g.*, Karlan, *Why Voting Is Different*, *supra* note 48, at 1231 ("As long as racial bloc voting persists, legislative integration will depend on the retention of majority-nonwhite districts.").

[56] *See, e.g.*, David Lublin, *Racial Redistricting and African-American Representation: A Critique of "Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?,"* 93 AM. POL. SCI. REV. 183 (1999).

[57] *Id.* at 183.

[58] *Id.* at 184.

[59] Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and Policy Priorities of Asian American and Latino Elected Officials*, 9 ASIAN L.J. 41 (2002).

data indicated that majority-minority districts are important for Black candidates but are even more crucial to the success of Latino and Asian American candidates, in part because of the continuing presence of racially polarized voting.[60] In 1998, for example, seventeen of the nineteen Latino members of Congress were elected from districts where Latinos were over 50% of the voting-age population (the other two representatives were elected from districts where a combination of Black and Latino voters together constituted over 50% of the VAP).[61] Finding that the average Latino population in districts where a Latino was elected was roughly 56%, the authors concluded that "[t]he concentration of Latinos into relatively compact electoral districts remains the primary means that Latinos will be elected to office."[62]

Majority-minority districts thus arguably remain a significant, if not decisive, factor in enabling communities of color to elect candidates of choice. Yet increasingly over the past decade scholars like Pildes have argued that the replacement of such districts with influence districts would not have a retrogressive effect on minority communities that previously benefited from a majority-minority district.[63]

The emergence of studies documenting a decrease of racially polarized voting patterns in the South has bolstered this argument. These studies have indicated that one-third of white voters regularly vote for Black candidates in primary and general elections for Congress in the South.[64] One study used by Pildes in support of influence districts found that, for congressional races in the South during the 1990s, "33% to 39% of a district's registered voters generally had to be black for a black candidate to be elected, substantially below the majority-black voter registration level that had been thought necessary on the eve of the 1990s redistricting."[65] Pildes notes that in 1992 "a southern district had to have on average a

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[60] *See id.* at 50 ("African American and Latino elected officials at the local, state, and federal levels mostly emerge from political districts in which they represent the majority or a substantial portion of the total population."); *see also* Rufus P. Browning et al., *Minority Mobilization in Ten Cities: Failures and Successes*, *in* RACIAL POLITICS IN AMERICAN CITIES 8, 16 (Rufus P. Browning et al. eds., 1990).

[61] Geron & Lai, *supra* note 59, at 50 (citing *The Growth of Latinos in the Nation's Congressional Districts: The 2000 Census and Latino Political Empowerment*, *in* NALEO RESEARCH BRIEF 5–8 (NALEO Educ. Fund ed., 2001)).

[62] *Id.* at 78. ("For those [Latino elected officials] who participated in the survey, the average Latino population in their districts was nearly 56 percent, which is a strong indicator that Latino population size still matters for electoral success.")

[63] *See* Cameron et al., *supra* note 49; Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 49.

[64] *See* Charles S. Bullock III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1213 (1999) (concluding that "these [black congressional] incumbents attract about one-third of the white general election vote, a result that is in line with levels of white support for white Democratic candidates for other federal offices in the South"); Grofman et al., *supra* note 36, at 1391 n.32.

[65] Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 49, at 1531.

38.5% black registered-voter population to elect a black representative; by 1998, that average had become 35.6%."[66]

Yet the study cited by Pildes does not conclude that influence districts can harmlessly replace majority-minority districts.[67] Indeed, as Pildes concedes in a footnote, the Grofman study found that various other factors—including incumbency and the presence of Latino voters—explained the election of Black candidates of choice in districts where the BVAP was under 50%: "The Grofman study does note . . . that for state legislative elections in South Carolina, black *incumbents* needed districts that were only 37% black to have an equal opportunity of victory, while black *non-incumbent* candidates needed 51% black voting-age population districts."[68] Another flaw in reading these studies as demonstrating that Black candidates are consistently able to be elected in districts where the BVAP is as small as 33% is that these studies only show that Blacks have a 50-50 chance of electing their candidates of choice in such situations, whereas majority-minority districts virtually guarantee that outcome. Again, Pildes acknowledges the weakness of this argument in a footnote.[69]

Another argument often set forth by proponents of influence districts is that those districts increase the "substantive" representation of minority communities even if they decrease the "descriptive" representation.[70] This is the strongest argument offered by proponents of influence districts and is a primary reason why Representative John Lewis (D-Ga.) supported the plan replacing majority-minority state legislative districts with influence districts in Georgia. Indeed, the Georgia plan at issue increased the number of Democratic-majority legislative districts, and the influence districts where Black candidates of choice have succeeded are predominantly Democratic.[71]

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[66] *Id.* at 1532.

[67] Grofman advocates a case-by-case analysis to determine the percentage of minority voters necessary to provide an equal opportunity for people of color to elect their candidates of choice. *See* Grofman et al., *supra* note 36, at 1423.

[68] Pildes, *Is Voting-Rights Law Now at War with Itself?*, *supra* note 49, at 1532 n.40 (emphasis added).

[69] *Id.* at 1538 n.57 ("The social science literature operationalizes 'can be elected' as the point at which a black candidate would be predicted to have a fifty-fifty probability of being elected based on past patterns of voter behavior.").

[70] Geron and Lai offer a brief but thorough comparison of these differing types of representation:

> Descriptive representation is the degree to which a representative reflects the characteristics of the constituents that he or she represents. Descriptive representation for people of color matches the race of the representative and his or her constituents . . . . The main component of substantive representation is policy responsiveness, which requires that legislators 'be aware of and sensitive to the policy preferences and wishes of the represented and implement policies that reflect their interests.'

Geron & Lai, *supra* note 59, at 43.

[71] Penda Hair and Pamela Karlan explain this theory in a recent report:

While this argument may support the creation of influence districts, it does not justify the replacement of majority-minority districts, where candidates of choice are practically guaranteed election, with districts where they have at best only a fifty-fifty chance of success. The replacement instead, as Karlan and Hair argue, restricts minority voters to a "virtual representation" where they may not exercise as much power as presumed: "Substantial research . . . indicates that even when African Americans are a significant percentage of a representative's constituents, they do not exercise significant influence over the policy positions of white elected officials in the South."[72] The replacement is also problematic when one recognizes that minority constituencies generally have lower voter participation rates than white voters.[73] And again, this effect is compounded even further when one recognizes the fact that minority voter turnout *decreases* when the concentration of minority voters in a district falls below a certain point.[74]

Finally, the Court's opinion in *Georgia v. Ashcroft* asserts that minority voters in influence districts are still able to maintain voting strength by building coalitions with willing white voters in order to support and elect candidates who will represent the interests of both races.[75] Empirical evidence, however, shows that successful coalition building in influence districts is not only rare,[76] it can also backfire to harm the minority candidate of choice.[77] One explanation for this phenomenon is that white vot-

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> The proponents of the bleaching hypothesis claim that creating majority-black districts comes at too high a price. Such districts concededly increase the likelihood that African-American voters will be able to elect the candidates of their choice, particularly if those candidates are African-American, as they often tend to be. Indeed, in large parts of the country, such districts are the *only* way African-American voters can elect African-American representatives . . . . But to the extent that voting power is measured in terms of the ability to enact favorable legislation, these critics think majority-black districts make African Americans worse off. They believe that African Americans have sacrificed influence over a broad array of legislators for control over only a few; and those few are too few to command legislative power.

HAIR & KARLAN, *supra* note 48, at 25.

[72] *Id.* at 26–27.

[73] *See* sources cited *supra* note 36.

[74] HAIR & KARLAN, *supra* note 48, at 4 ("Citizens who lack even a chance to elect the candidates of their choice may rationally opt out not only from the individual act of voting, but also from the broader process of civic participation.").

[75] Georgia v. Ashcroft, 123 S. Ct. at 452–53.

[76] Geron & Lai, *supra* note 59, at 70 ("Multi-racial coalitions among African Americans, white liberals, and Cubans have rarely been built . . . [in part because] in many areas, there are few white liberals with which [sic] to coalesce in electoral politics . . . . In El Paso and many other areas, Latino empowerment has come at the expense of Anglo politicians. This tradeoff rarely produced strong biracial liberal coalitions.").

[77] *Id.* at 79 ("After winning the largest number of votes in the Los Angeles mayoral election, Antonio Villaraigosa spent almost all of his efforts appealing to non-Latino voters in the run-off against the eventual winner James Hahn. He was unable to overcome a negative media campaign and the 'fear' factor among a majority of non-Latinos that Latinos

ers have little incentive to bargain or build coalitions with minority voters, because they already possess a critical mass of political strength.[78]

Further, the requirement of coalition building in influence districts places a unique burden on minority voters that is not required of white voters. If minority constituencies are expected to build coalitions with white voters in influence districts, why aren't white voters expected to do the same in majority-minority districts? In other words, the Court's argument assumes that minority voters should bear the burden of forming coalitions with white voters to elect their candidates of choice. Yet the same is not expected of white voters in majority-minority districts, even though scholars have found that to be a feasible possibility.[79] Justice Souter's *Georgia v. Ashcroft* dissent touches briefly upon this inconsistency but does not go far enough in questioning its fairness.[80]

The evidence and arguments discussed above suggest that majority-minority districts protect the ability of minority voters to elect their candidates of choice, while there is only a slim chance that the same will occur in influence districts. Replacing majority-minority districts with districts where minority voters constitute as little as 25% of the VAP will clearly harm the minority voters' ability to elect their candidates of choice and should clearly be considered a retrogressive change under Section 5. The fact that the Court in *Georgia v. Ashcroft* does not find retrogression in such a replacement thus marks a clear departure from the idea of retrogression set forth in *Beer*.

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were taking over Los Angeles.").

[78] This argument is advanced at length by Professor Heather Gerken. Heather Gerken, *Second Order Diversity*, _____ HARV. L. REV. _____ (forthcoming 2004) ("The influence and coalition district strategy . . . may be viewed as consigning all racial minorities to the permanent role of junior partners in every electoral decision, while guaranteeing that whites will always enjoy senior partner status.")

[79] Karlan, *Why Voting Is Different*, *supra* note 48, at 1231 ("[A]bsent special circumstances, the assignment of white voters to majority-black districts imposes no tangible injury" to white voters' ability to elect their candidates of choice.).

[80] Justice Souter writes:

> Before a State shifts from majority-minority to coalition districts . . . [it] bears the burden of proving . . . not merely that minority voters in new districts may have some influence, but that minority voters will have effective influence translatable into probable election results comparable to what they enjoyed under the existing district scheme. And to demonstrate this, a State . . . must show that the probable voting behavior of [white] voters will make coalitions with minorities a real prospect. If the State's evidence fails to [do so,] a reduction in supermajority districts *must be treated as . . . fatally retrogressive* . . . .

Georgia v. Ashcroft, 123 S. Ct. 2498, 2518 (2003) (Souter, J., dissenting) (emphasis added) (citations omitted).

B. Concerns About Deference to State Legislatures

While the possibility of replacing majority-minority districts with influence districts is clearly the most significant effect of *Georgia v. Ashcroft*, the large amount of deference the Court gives to state legislators is also cause for alarm. The Court essentially read a pseudo-intent requirement into Section 5 and found that if the intent of the legislature was to develop a plan that was nonretrogressive, then the plan should be deemed nonretrogressive regardless of its effects.

In finding that the Georgia legislators' intent was not to diminish the influence of Black voters but rather to attempt to increase the number of Democratic seats in the State Senate, the Court cited testimony from various state officials in Georgia on the good-faith effort made by the legislature to create a nonretrogressive plan.[81] The opinion even quoted Democratic Congressman John Lewis, who was a student leader of the marches that led to the enactment of the Voting Rights Act in 1965, as a supporter of the challenged plan.[82]

This reliance on a plan's support from legislators both contradicts the original intent of the VRA and ignores the political truth that many elected officials of all races have personal agendas. Section 5 provides for federal supervision of voting changes to ensure that state officials, regardless of their race, do not enact racially discriminatory electoral mechanisms.[83] To grant such great deference to the state officials in devising a districting scheme—and to indicate that evidence of a good faith belief that the plan will not hurt minority voters is highly relevant in the preclearance inquiry—is nearly the opposite of the VRA's original intent.

In addition, all elected officials have various allegiances that influence the redistricting schemes they support—many of these allegiances run

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[81] Georgia v. Ashcroft, 123 S. Ct. at 2506.

[82] Further irony lies in the fact that Congressman Lewis, representative of a majority-Black district, was elected in 1986 over fellow civil rights activist Julian Bond, largely due to the strong support he received from white voters. Election results and exit polls from that election show that Bond was the Black candidate of choice in that Congressional race. *See* Paul Ruffins, *Interracial Coalitions*, ATLANTIC MONTHLY, June 1990, at 28, *available at* http://www.theatlantic.com/politics/race/intracoal.htm (noting that white voters were the "swing vote" that swung the election to Lewis in "the bitter 1986 congressional race"). Lewis has previously been criticized for not supporting majority-minority districts. *See* Laughlin McDonald, *The Counterrevolution in Minority Voting Rights*, 65 MISS. L.J. 271, 299 (1995) ("Those who opposed integrated majority-minority districts during the 1990s got allies from a wholly unexpected quarter—a handful of black elected officials. No doubt reflecting the bad-for-Democrats argument, they questioned the concept of creating more majority-minority districts. One of the most visible was John Lewis, a hero of the civil rights movement and the highly respected representative from the majority-black Fifth Congressional District in Georgia.").

[83] *See* LAUGHLIN MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA (2003) (providing a comprehensive historical account of Georgia state legislators erecting electoral barriers to limit the political power of Black voters).

counter to the best interests of minority communities.[84] For example, Representative John Lewis, quoted in the *Georgia v. Ashcroft* opinion, had personal stakes in the outcome of the districting: a Democratically controlled state legislature would protect the lines around his own Congressional district when that redistricting process commenced. A Circuit Court judge in the lower court recognized this issue in more general terms, noting: "that Georgia's African American politicians sought to make their state safer for Democratic candidates does not establish (or even imply) that in so doing they did not make it worse for African American voters."[85]

Both of the above aspects of the decision in *Georgia v. Ashcroft* thus greatly weakened the effectiveness of Section 5's retrogression standard, much the same way that *Bolden* weakened Section 2 of the VRA. Before discussing how today's civil rights advocates can construct a response to *Georgia* that makes "lemonade" out of its "lemons," however, it is important to recognize the successful efforts of advocates who pushed Congress to overturn the *Bolden* decision during the 1982 reauthorization process.

III. Lemons of the Past: *Mobile v. Bolden* and the 1982 VRA Reauthorization

An examination of the 1982 Amendment process shows how civil rights advocates worked with previous case law interpreting Section 2, sympathetic dissenting opinions, a conservative political climate in Washington, and a consensus in the civil rights community to overturn *Bolden* and reinvigorate the VRA.

A. Section 2 and Mobile v. Bolden

Prior to *Bolden,* facially neutral election laws that had discriminatory effects had been found to violate Section 2. The most significant of

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[84] Karlan describes the interests of Democratic state senators in Georgia, which arguably had little to do with protecting the power of minority voters:

> From the perspective of individual Democratic senators, there were at least two interests in play. First, each senator had an aggregation-level interest in how his own district was constructed: he wanted a seat he could win. Second, each senator had a governance-level interest: his post-election power depended significantly on the overall composition of the senate, since his ability to obtain a committee chairmanship or to pass legislation with a partisan valence depended on there being a Democratic majority.

Karlan, *Retrogression of Retrogression*, *supra* note 25, at 25.

[85] Georgia v. Ashcroft, 195 F. Supp. 2d 25, 101 (D.D.C. 2002) (Edwards, J., concurring).

these cases was *White v. Regester*,[86] in which the court struck down an at-large system of elections on the grounds that the system had the effect of diluting the votes of minorities. *Regester* was decided shortly before *Beer* in 1975 and set the standard for proving Section 2 violations across the country.

That changed in 1980, when the Court held in *City of Mobile v. Bolden*[87] that a jurisdiction only violated Section 2 of the VRA if it acted purposefully and discriminatorily to deny or abridge the freedom to vote on account of race.[88] Though there was nothing in Section 2 that explicitly required the imposition of an intent standard, Justice Stewart broadly interpreted its legislative history to imply that such a showing was in fact required under Section 2.[89]

By mandating that plaintiffs show proof of purposeful discrimination in Section 2 claims of vote dilution, *Bolden* departed significantly from the precedents of previous cases like *Regester* and *Whitcomb v. Chavis*.[90] Only three other justices joined Justice Stewart's opinion, making it a plurality opinion,[91] a fact repeatedly emphasized by Justice Marshall in dissent. Marshall argued that a showing of discriminatory impact is sufficient to justify the invalidation of an election law, emphasizing that "the plurality's approach requiring proof of discriminatory purpose . . . is, then, squarely contrary to [*Regester*] and its predecessors."[92] And while a showing of discriminatory purpose had previously been held to be required for discrimination claims under the Fourteenth Amendment,[93] Marshall noted that voting was a "fundamental interest," thus requiring a greater degree of protection under the Equal Protection Clause and therefore "unaffected by *Washington v. Davis* and its progeny."[94]

Justice Marshall's dissent, as well as the previous opinions holding that a showing of intent was not required under Section 2 or the Fifteenth Amendment, provided a strong basis on which voting rights advocates could build a strategy to convince Congress to reject *Bolden* explicitly during the reauthorization process of 1982.

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[86] 422 U.S. 935 (1975) (holding that evidence that an apportionment plan had the result of removing the Black and Mexican American communities from the political process was sufficient to sustain an order invalidating the districting scheme).

[87] 446 U.S. 55 (1980).

[88] *Id.* at 60.

[89] *Id.*

[90] 403 U.S. 124 (1971).

[91] Justices Blackmun and Stevens submitted opinions concurring in the judgment, but they did not agree with Justice Stewart's interpretation of Section 2. *See Bolden*, 446 U.S. at 80 (Blackmun, J., concurring), 83 (Stevens, J., concurring).

[92] *Bolden*, 446 U.S. at 112 (Marshall, J., dissenting).

[93] *See, e.g.*, Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 262–66 (1977) (finding that neutral zoning laws with a clear discriminatory impact did not violate the Equal Protection Clause of the Fourteenth Amendment); Washington v. Davis, 426 U.S. 229, 239–41 (1976) (requiring evidence of discriminatory intent to prove a violation of the Equal Protection Clause).

[94] *Bolden*, 446 U.S. at 104 (Marshall, J., dissenting) (citation omitted).

B. The 1982 Reauthorization Effort

Civil rights advocates thus began mobilizing for their legislative battle, armed with a previous Supreme Court case supporting their position that discriminatory effect should be sufficient for a Section 2 violation[95] and a dissenting opinion from Justice Marshall that supported their argument. Unity of purpose among civil rights advocates and unchallenged evidence that the *Bolden* standard was unworkable on the ground also bolstered the case of those lobbying Congress to reinstate the pre-*Bolden* results standard.

There was a strong consensus among civil rights advocates that *Bolden* was incorrectly decided. Armand Derfner, a civil rights attorney who participated in the effort to amend Section 2, recalls, "The result of the [*Bolden*] decision was devastating. Dilution cases came to a virtual standstill; existing cases were overturned and dismissed, while plans for new cases were abandoned."[96] This caused voting rights advocates to rally behind a singular goal for the reauthorization process: overturning *Bolden*. Professor Guinier, who also played an important role as an advocate during the reauthorization process, recalls, "The civil rights groups met in 1981 and . . . decided that we were going to go for broke . . . . [W]e were going to overturn the Supreme Court decision in *City of Mobile v. Bolden* . . . . We were going to re-establish a results test in the Voting Rights Act."[97]

That singular agenda enabled advocates to overcome a conservative political climate in Washington and a Republican Senate elected in the Reagan landslide of 1980. Senator Strom Thurmond (R-S.C.), chairman of the Senate Judiciary Committee, and Orrin Hatch (R-Utah), chairman of the Judiciary Committee's Subcommittee on the Constitution that heard VRA testimony**,** did not initially appear sympathetic to those hoping to overturn *Bolden*. Case law preceding *Bolden*, Marshall's dissenting opinion in the case, and plenty of "virtually unchallenged" evidence that the *Bolden* standard was ineffective on a practical level[98] helped advo-

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[95] *Regester*, 422 U.S. at 935–36.

[96] Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, *in* MINORITY VOTE DILUTION 145, 149 (Chandler Davidson ed., 1989). Still, Derfner notes the outrage over *Bolden* did not reverberate far beyond an elite group of civil rights advocates and academics: "[A]part from minority voters, a small group of lawyers, and critical comments in law reviews, there was no widespread outcry about the *Mobile* decision . . . ." *Id.*

[97] David Kusnet, *Introduction* to VOTING RIGHTS IN AMERICA 2, 11 (Karen McGill Arrington & William L. Taylor eds., 1992).

[98] *See, e.g.*, William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 630 (1991) ("Hearings during the summer of 1981 yielded virtually unchallenged testimony from law professors, litigation groups, and groups in the civil rights coalition that *Bolden* was a radical departure from the Court's statutory, as well as constitutional, precedents and that *Bolden* had fashioned an approach to voting rights that was both confusing and counterproductive.").

cates to persuade conservatives and moderates that a legislative response to *Bolden* was necessary to protect the spirit and goals of the VRA.

Building on that case law, civil rights litigators and lobbyists were able to argue that they were not advocating a radical change in the legislation or in the established order. Rather, they were simply asking Congress to acknowledge that the Court had taken a wrong turn in *Bolden*, misunderstanding legislative intent. The advocates argued that if Congress were explicitly to remove the intent requirement of *Bolden*, it would merely be restoring the original meaning of Section 2.[99]

This effort to reassure moderate members of Congress that the amendment would merely return the VRA to the status quo before *Bolden* is further reflected by the choice to use the word "results" as opposed to "effects" in the final legislation. Derfner explains that:

> The term *result* was shorthand [for the *Regester* approach], and was chosen instead of the more familiar term *effect*, because *effect* had been the lightning rod [employed by Senator Orrin Hatch] for opposition to decisions in the highly controversial areas of employment and housing discrimination. The word *result* was chosen because it had not been so commonly used in this context and was thus a better candidate for an effort to define a term in precisely the way desired, without fear of confusion from other, seemingly analogous areas.[100]

Guinier also notes that this reflected a creative compromise between the litigators (who were looking for "explicit language") and the lobbyists ("seeking artful ambiguity"):

> [T]he lobbyists sought a bipartisan consensus to get the bill passed quickly by an overwhelming majority of the House in the hope that its passage would begin to assume an aura of inevitability. The litigators, on the other hand, wanted to make sure the record was there to support whatever Congress was about to do. . . . [T]he litigators' primary concern was that the record would exist to support the [VRA] Amendment and extension.[101]

Further support for the advocates' claim was provided by the large amount of evidence and by the large number of witnesses who testified to

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[99] *Id.* ("[T]he 1982 legislative override was accompanied by a congressional claim that it was defending the statutory status quo. Key legislators stated that the Court, not the Congress, had shifted policy direction; Congress was merely correcting the Court's erroneous interpretation.").

[100] Derfner, *supra* note 96, at 152.

[101] Lani Guinier, *Development of the Franchise: 1982 Voting Rights Amendments*, *in* VOTING RIGHTS IN AMERICA, *supra* note 97, at 104.

the ineffectiveness and impracticality of the *Bolden* rule. "The 1982 Congressional hearings became a stage on which critics of [*Bolden*] could parade its failings before Congress . . . [M]any witnesses testified as to how difficult, perhaps impossible, it now was to win vote dilution claims."[102] The Mayor of Richmond, Virginia, even testified that "[s]hould the intent standard prevail . . . it would be extremely difficult to prove voter discrimination absent a confession of intent by a voter official."[103] Such evidence made converts of the most unlikely Congressmen, such as the conservative Republican representative from Illinois, Henry Hyde. Referring particularly to Congressman Hyde, Guinier recalls: "[A]fter a hearing in Montgomery, Alabama, we saw a remarkable conversion when one of the primary opponents of the extension . . . became outraged about the conditions some of the witnesses described."[104] The advocates outflanked the Reagan administration. When Attorney General William French Smith presented his own report in opposition to the amendment, it was too late to be effective.[105]

The amended version of Section 2 passed the House of Representatives in a vote of 389 to twenty-four and the Senate by a vote of eighty-five to eight. In June 1982, nearly two years after the *Bolden* decision was announced, President Reagan signed the new version of Section 2 into law. At the same time, Section 5 of the Act was extended for twenty-five years, setting the stage for a 2007 battle.

IV. Opportunity To Make Lemonade: The 2007 Reauthorization of the VRA

The upcoming reauthorization of Section 5 offers Congress another "perfect opportunity"[106] to react to a problematic Supreme Court decision by enacting stronger protections for minority voters. Before discussing what such a standard might look like, it is important to discuss what lessons can be gleaned from the 1982 reauthorization process.

A. Lessons from Mobile v. Bolden

As in 1982, civil rights advocates currently face a largely conservative political climate and are armed with favorable precedent and supportive dissenting opinions that can help bolster their effort to overturn the decision in *Georgia v. Ashcroft*. The glaring difference, however, is the present lack of unity in the civil rights community.[107] Consensus must be built

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[102] Issacharoff et al., *supra* note 15, at 710.
[103] *Id.* at 710–11.
[104] Guinier, *supra* note 101, at 104.
[105] *Id.* at 105.
[106] Derfner, *supra* note 96, at 151.
[107] *See supra* Part II.A.

if the advocates of 2004 hope to be as successful as their predecessors were twenty-two years earlier.

There are strong parallels between the judicial interpretation and jurisprudence surrounding Section 2 and Section 5. *Bolden* and *Georgia v. Ashcroft* depart from an established line of case law around Sections 2 and 5, respectively.[108] Further, the standard articulated by Justice Stewart in *Bolden* for evaluating claims under Section 2 was based on loose interpretations of the statute.[109] In the same way, the retrogression standard in *Georgia v. Ashcroft*, originally articulated in *Beer*, is based on a loose view of the language and history of Section 5[110]—in *Beer*, Stewart lifted a single sentence out of Section 5's legislative history to create the retrogression principle.[111]

The fact that Justice O'Connor's opinion grew from Justice Stewart's original loose interpretation of Section 5 in *Beer*—one similar to his loose interpretation of Section 2 in *Bolden*—provides ammunition for arguments similar to those employed successfully by advocates in 1982. In particular, advocates argued that inserting the "results" language into Section 2 would enable a return to the original intent of the VRA drafters. This argument was particularly effective for advocates in 1982 seeking to gain support for their efforts from conservative legislators. In fact, the Republican-controlled Senate Judiciary Committee employed this rationale in explaining its amendments to Section 2:

> While the Committee finds that Congress did not seek to include an intent test in the original provision of section 2, a plurality of four justices in [*Bolden*] thought that it did. The Court is the ultimate interpreter of laws once enacted. But . . . there is no question that Congress may now decide that an intent requirement is inappropriate for section 2, and amend [Section 2] to make that point clearly.[112]

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[108] See *supra* Part III.A for discussion of how *Bolden* overturned the *White v. Regester* standard; see *supra* Part I for discussion of how *Georgia v. Ashcroft* departed from the *Beer* standard.

[109] *See Bolden*, 446 U.S. at 61 (citing H.R. REP. NO. 89-439, at 23 (1965); S. REP. NO. 89-162, pt. 3, at 19–20 (1965)).

[110] The retrogression standard relied on—but weakened—in *Georgia v. Ashcroft* was originally articulated by Justice Stewart in *Beer v. United States*, 425 U.S. 130 (1976). In *Georgia v. Ashcroft*, Justice O'Connor looked only to previous case law, all of which relied on the *Beer* standard, in interpreting § 5. *See* 123 S. Ct. at 2510.

[111] *Beer*, 425 U.S. at 140 ("Congress therefore decided, as the Supreme Court held it could, 'to shift the advantage of time and inertia from the perpetrators of the evil to its victim,' by 'freezing election procedures in the covered areas unless the changes can be shown to be nondiscriminatory.'" (quoting H.R. REP. NO. 94-196, at 57–58 (1965)); *see also id.* at 141 (interpreting the purpose of § 5 as being "to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise").

[112] S. REP. NO. 97-417, at 17 n.49 (1982); *see also id.* at 26 ("A fair reading of

Modern advocates can use the similar evidence of the loose interpretation of Section 5 in *Beer* and its looser interpretation in *Georgia v. Ashcroft* to build a case for clarifying Section 5 in 2007.[113]

Another parallel between 1982 and today that can be used to modern advocates' advantage is the presence of dissenting opinions that express support for legislative changes. Justice Thurgood Marshall's dissenting opinion in *Bolden* indicated support on the bench for efforts to clarify Section 2.[114] Similarly, Justice Souter sent a strong signal to Congress in his 1999 partial dissent in *Reno v. Bossier Parish School Board*.[115] Souter criticized the entire retrogression standard and explicitly emphasized that "Congress is always free to supersede [the Court's interpretation of Section 5] with new legislation."[116]

A further similarity between 1982 and the present, which may or may not be helpful to modern advocates, is the political landscape—staunch conservative control of both the executive and legislative branches. As described in Part III.B above, advocates in 1982 overcame this environment by combining supportive dissents in judicial opinions and previous precedents with strong evidence about the problems of litigating under *Bolden*'s standard. To employ the lessons of their predecessors, today's advocates must build a similarly powerful evidentiary record and link it with the signals sent by Justice Souter and better interpretations of Section 5—either pre-*Georgia v. Ashcroft* or pre-*Beer*—to win support for their proposals from both sides of the aisle.

This vital work, however, will be made more difficult by a troublesome dissimilarity from the 1982 effort—the lack of consensus within the civil rights community on how to construct and articulate a response to *Georgia v. Ashcroft*. After *Bolden*, civil rights and voting rights advocates agreed that the decision was wrong and a congressional response was necessary.[117] But in 2003, *Georgia v. Ashcroft* was largely overshadowed by two other significant civil rights decisions handed down by the

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[*Bolden*] reveals that the plurality opinion was a marked departure from earlier Supreme Court and lower court vote dilution cases."); *id.* at 27 ("The 'results' standard is meant to restore the pre-[*Bolden*] legal standard . . . .").

[113] Such clarification would explain whether a retrogression standard should be used in evaluating Section 5 preclearance, and if so, what it should look like.

[114] The effect of Justice Marshall's dissenting opinion on the 1982 effort is described *supra* Part III.B.

[115] 528 U.S. 320, 341 (1999) (Souter, J., concurring in part and dissenting in part).

[116] *Id.* at 363. Despite this clear signal from the bench for a congressional amendment of Section 5, it is important to note that the vast case law surrounding Section 5 also limits efforts to do away with the retrogression standard entirely. Though the first ten years of Section 5 saw a purely literal interpretation of the statute, *Beer* established the retrogression standard nearly thirty years ago and Congress has previously had two separate occasions to alter this interpretation. In not doing so, Congress arguably agreed to the interpretation, making it much more difficult to propose an abandonment without significant evidence that *Beer*'s interpretation has been unworkable. In light of this implicit ratification, Souter's opinion does, however, invite changes in the retrogression standard.

[117] *See supra* text accompanying notes 96–106.

Court.[118] Additionally, of the few dozen newspaper articles following the decision in *Georgia v. Ashcroft*, most overlooked the effects of the decision on Section 5 protections and painted the decision as merely a "change" in redistricting standards.[119] Only one major article discussed the dangerous implications of the decision for voting rights of minority communities.[120] And prominent voting rights scholars are still greatly divided over whether the *Georgia v. Ashcroft* decision will have positive or negative implications.[121]

The division among academics indicates that any effort by opponents of *Georgia v. Ashcroft* to lobby for a congressional response will require a great deal of empirical evidence, as well as academic research to challenge the assumptions underlying the decision and build a solid argument in favor of changing it. It is important for voting rights advocates to build a consensus within the academic and legal communities about the shape of reauthorization efforts and, specifically, the response to *Georgia v. Ashcroft*. This will require further research to explore what a strengthened Section 5 would look like. Such research could address the importance and benefits of majority-minority districts, detailing, for example, the negative effect that a move from a majority-minority district to an influence district might have on the turnout and registration of minority voters. Other research could document and discuss the dangers of relying on minority legislators to determine what constitutes a retrogressive plan.[122] There are various other research paths to pursue in this regard, and this list is by no means meant to be exclusive.

B. Constructing a Congressional Response to Georgia v. Ashcroft

While gaining the support of conservative organizations and members of Congress may be a challenge, there are some promising options for a solid congressional response to *Georgia v. Ashcroft* that could win their approval. Although an amendment to do away with the retrogression stan-

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[118] Lawrence v. Texas, 123 S. Ct. 2472 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

[119] *See, e.g.*, Adam Clymer, *Court Allows a New Approach to Redrawing Districts by Race*, N.Y. TIMES, June 27, 2003, at A20; Thomas Edsall, *High Court Orders Review of Redistricting Plan*, WASH. POST, June 27, 2003, at A17.

[120] Lani Guinier, *Saving Affirmative Action*, VILLAGE VOICE, July 8, 2003, at 46.

[121] *See* e-mail from Professor Heather Gerken, Harvard Law School, to author (Feb. 24, 2004) (on file with author) ("[T]he decision has caused a great deal of controversy and division within the academic community. Every time law of democracy scholars get together, we almost always end up debating the case at some point . . . . I've spent countless hours talking about the case, and I've yet to see a clear consensus emerging.").

[122] These dangers were seen most recently in relation to political identity when Pennsylvania Democrats supported a districting plan that hurt the Democratic Party in order to preserve their own district lines and political viability. *See* Vieth v. Pennsylvania, 241 F. Supp. 2d 478 (M.D. Pa. 2003), *prob. juris. noted sub nom.* Vieth v. Jubelirer, 123 S. Ct. 2562 (2003) (mem.).

dard entirely, as Justice Souter advocated in *Bossier Parish II*,[123] would be the best way to strengthen Section 5, a more politically practical response would instead entail an alteration of the retrogression principle rather than its abandonment.

Because much of the confusion about the retrogression standard established by Justice Stewart in *Beer* and furthered in *Bossier Parish II* has been over what constitutes retrogression, Congress can respond to *Georgia v. Ashcroft* by explicitly defining what electoral changes should be deemed to be retrogressive in purpose or effect, in violation of Section 5.[124] While such a definition would codify *Beer*, it would also give Congress the power to decide what a retrogressive effect or purpose would look like. Further, creating a clear federal standard would also address the concern over deferring to state legislators who are often motivated by principles other than protecting Section 5 when they redraw district lines.

An explicit retrogression standard that might win the support of conservative legislators would acknowledge the importance of influence districts, while also emphasizing the dangers of using them to replace majority-minority districts. This standard could state that a jurisdiction could reduce the minority voting age population from above 55% to under 55% only where it can prove either that racially polarized voting is nonexistent in the area or that turnout of minority voters will not decrease as a result of the change. Alternatively, Congress could mandate that Section 5 jurisdictions proposing any change must show that the change will not reduce registration or turnout of minority voters.

An even more viable clarification of retrogression would incorporate the vote dilution standards of Section 2 into Section 5,[125] which is to say that Congress could require a jurisdiction covered by Section 5 to show that a proposed change would not violate the vote dilution standards of Section 2 of the Voting Rights Act in order to obtain preclearance.[126] This change would have the best chance of withstanding a Supreme Court challenge because it would directly respond to Justice Kennedy's concern that a plan that could withstand preclearance under the Court's current interpretation of Section 5 might be rejected by the Court under Section 2 or the Fourteenth Amendment.[127] A countervailing concern is that the Court

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[123] *See supra* notes 115–116 and accompanying text.

[124] For further explanation of the nonretrogression principle, see, for example, Jeffries, *supra* note 7.

[125] Various scholars have proposed incorporating the provisions of § 2 into § 5. *See, e.g.*, Heather K. Way, Note, *A Shield Or A Sword? Section 5 Of The Voting Rights Act And The Argument For The Incorporation Of Section 2*, 74 TEX. L. REV. 1439 (1996).

[126] *See* Thornburg v. Gingles, 478 U.S. 30 (1986) (holding that the presence of three factors in an electoral plan—racially polarized voting, a geographically concentrated minority, and an opposing racial bloc that interferes with the minority's power—constitute necessary preconditions for proving a violation of § 2).

[127] Justice Kennedy writes:

> I agree that our decisions controlling the § 5 analysis require the Court's ruling

might respond by changing the standard under Section 2, thus weakening the entire VRA again.

Apart from the divisions within the voting rights community over how to react to *Georgia v. Ashcroft*, advocates for these reforms face various other potential pitfalls. Most significant are the constitutional concerns presented by the Court's decision in *City of Boerne v. Flores*.[128] Many examinations of this opinion have concluded that a Fourteenth Amendment challenge maintaining Congress lacked the power to enact Section 5 "should fail given the Court's endorsement of [Section 5] as an example of permissible legislation that passes [*Flores*'] congruence-and-proportionality test."[129] However, an alteration of the Section 5 standard could give the Court further reason to reject the statute under the *Flores* test.[130]

Conclusion

This Note has argued that civil rights advocates and sympathetic Congressional leaders can make *Georgia v. Ashcroft* the *Mobile v. Bolden* of 2007, and presents specific suggestions about how today's coalition can learn from past successes in shaping their strategy. In *Georgia v. Ashcroft*, the Supreme Court developed an interpretation of Section 5 that weakens the provision and deviates from the original intent of the Voting Rights Act and, much as it did in *Bolden*, greatly undermined one of the VRA's key provisions.[131] Congress has the power under Article I, and the Fourteenth and Fifteenth Amendments of the Constitution to respond to the Supreme Court's interpretation and create clear, meaningful protec-

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> here. The discord and inconsistency between §§ 2 and 5 should be noted, however; and in a case where that issue is raised, it should be confronted. There is a fundamental flaw, I should think, in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive.

Georgia v. Ashcroft, 123 S. Ct. 2498, 2517 (2003) (Kennedy, J., concurring) (citation omitted).

[128] 521 U.S. 507 (1997) (holding that congressional legislation passed in furtherance of the Fourteenth Amendment must be remedial, as well as congruent and proportional to the problem it is attempting to remedy).

[129] Victor Rodriguez, *Section 5 of the Voting Rights Act of 1965 After* Boerne*: The Beginning of the End of Preclearance?*, 91 Cal. L. Rev. 769, 775–76 (2003). *See also* Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After* Flores, *supra* note 48; Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act are Still a Constitutionally Proportional Remedy*, 28 N.Y.U. Rev. L. & Soc. Change 69 (2003). This issue has been discussed at greater length in other recent articles. For the purposes of this Note, it suffices to raise the issue as a "red flag" for consideration in constructing future amendments to § 5.

[130] *See* Rodriguez, *supra* note 129, at 805.

[131] For further discussion on how the Court's jurisprudence conflicts with the Congressional intent behind § 5, see Scott Gluck, *Congressional Reaction to Judicial Construction of Section 5 of the Voting Rights Act of 1965*, 29 Colum. J.L. & Soc. Probs. 337 (1996).

tions against changes in election laws that harm minority voters. As the time for the Act's reauthorization quickly approaches, Congress will also have the opportunity and the responsibility to clarify existing protections to ensure equal voting opportunities for all Americans. Voting rights supporters in government, academic, and advocacy sectors must unite behind a plan to ensure that this potential becomes a reality.