

2010

Redistricting and Discriminatory Purpose

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Recommended Citation

Pitts, Michael J. "Redistricting and Discriminatory Purpose." American University Law Review 59, no.6 (August 2010): 1575-1652.

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Redistricting and Discriminatory Purpose

Abstract

State and local governments covered by the preclearance provision in Section 5 of the Voting Rights Act will soon be submitting their redistricting plans to the federal government (most often the United States Attorney General) for approval. The Attorney General can deny preclearance to a redistricting plan by finding that the plan violates Section 5's discriminatory purpose standard. Currently, no detailed framework has been developed for determining when a redistricting plan fails to satisfy the discriminatory purpose standard. This Article fills that void by proposing such a framework - one built from judicial opinions, statutory language, legislative history, executive branch enforcement, and "politics as markets" theory. In addition, this Article argues that development of a manageable framework for enforcing the discriminatory purpose standard in the redistricting context is necessary in order to satisfy a Supreme Court that in *Northwest Austin Municipal Utility District No. 1 v. Holder* (2009) expressed deep skepticism about the future constitutional viability of Section 5.

Keywords

Voting Rights Act, Section 5, Preclearance, Redistricting, Discriminatory Purpose, Attorney General, Voting Rights, Politics As Markets

REDISTRICTING AND DISCRIMINATORY PURPOSE

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INTRODUCTION

A potential watershed moment has now come and gone for Section 5 of the Voting Rights Act. In 2006, Congress extended the preclearance provision for another quarter century—an extension that was (and perhaps still is) of debatable constitutionality.¹ Indeed, Section 5's constitutional

* © 2010. Associate Professor & John S. Grimes Fellow, *Indiana University School of Law*. Thanks to Bob Berman and Josh Douglas for helpful comments. Thanks to Matthew Neumann for research assistance.

1. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 [hereinafter VRARA]. Technically, Congress extended Section 4, but commentators commonly speak of extending Section 5 and this Article will proceed using that common parlance. Michael J. Pitts, *What Will the Life of Riley v. Kennedy Mean for Section 5 of the*

bona fides appeared on full display during the Supreme Court's October Term 2008 in *Northwest Austin Municipal Utility District Number One v. Holder* (NAMUDNO).² In that litigation, the Supreme Court's conservative majority had a chance to declare Section 5 an unconstitutional exercise of Congress' Fourteenth and Fifteenth Amendment enforcement powers.³ But the five conservative Justices engaged in what Yale's Heather Gerken vividly described as "arguably one of the most egregious judicial punts in recent memory."⁴ In an opinion authored by Chief Justice John Roberts and fully endorsed by eight of the nine Justices, the Court invoked the doctrine of constitutional avoidance and took the statutory way out,⁵ leaving Section 5 bloodied and weakened, but still very much able to come out of its corner for another round.

And the next round for Section 5 looms closely on the horizon. Redistricting will commence in 2011 and barring an unprovoked radical shift in the mindset of the Court's conservative majority, Section 5 will once again play a major role in redistricting. The preclearance provision impacts electoral line-drawing in sixteen States,⁶ and in each of the jurisdictions covered by Section 5 all levels of government⁷ must secure federal approval—typically from the U.S. Attorney General⁸—of any

Voting Rights Act, 68 MD. L. REV. 481, 482 n.5 (2009).

2. 129 S. Ct. 2504 (2009).

3. In *NAMUDNO*, the Court implied that the Fifteenth Amendment encompasses the sole source of Congress' power to extend Section 5 because at no point in the opinion does the Court mention the possibility of the Fourteenth Amendment enforcement power. *See id.* However, the preclearance requirement may also implicate Congress' Fourteenth Amendment enforcement power. *See* Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 275–76 (2003) [hereinafter Pitts, *Once and Future Remedy*] (discussing the possible importance of the Fourteenth Amendment enforcement power to the extension of Section 5).

4. Heather K. Gerken, *An Uncertain Fate for Voting Rights*, THE AMERICAN PROSPECT, June 23, 2009, http://www.prospect.org/cs/articles?article=an_uncertain_fate_for_voting_rights.

5. *NAMUDNO*, 129 S. Ct. at 2508 ("Our usual practice is to avoid the unnecessary resolution of constitutional questions. . . . [w]e therefore . . . do not reach the constitutionality of § 5.").

6. Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered by Section 5 in their entirety; parts of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota are also covered. 28 C.F.R. pt. 51 app. (2009). However, a few jurisdictions in states that are entirely covered, such as Virginia and Texas, have bailed out (i.e., exempted themselves) from Section 5 coverage. U.S. Dep't of Justice, Civil Rights Div. Voting Section, *Section 5 Covered Jurisdictions*, http://www.usdoj.gov/crt/voting/sec_5/covered.php (last visited May 21, 2010) (displaying a map of jurisdictions covered by Section 5, including those that have bailed out).

7. 28 C.F.R. § 51.6 (2009) ("All political subunits within a covered jurisdiction (e.g., counties, cities, school districts) are subject to the requirement of section 5."). Political parties can also be covered by Section 5. 28 C.F.R. § 51.7 (2009).

8. 42 U.S.C. § 1973c (2006). As an alternative to administrative preclearance by the Attorney General, a jurisdiction covered by Section 5 can secure preclearance by obtaining a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia. *Id.* However, relatively few Section 5 decisions are rendered by the district court. Pitts, *Once and Future Remedy*, *supra* note 3, at 233–34 ("Since the onset of

redistricting plan.⁹ The next major episode for Section 5, then, marks a switch from lofty questions about overall constitutional viability at One First Street to nuts-and-bolts questions about enforcement in the redistricting context that largely lie within the ambit of administrative actors in the Executive Branch.¹⁰

When it comes to nuts-and-bolts enforcement during the next redistricting cycle, there are a number of looming questions. There is, however, one important question that has yet to be sharply focused on by academic commentators, executive branch officials, judicial actors, or members of Congress. It is the question of how to enforce the Section 5 discriminatory purpose standard. Put differently, the important question is this: when should a redistricting plan be deemed to violate Section 5 because it fails to meet the provision's requirement that no *purposefully* discriminatory plan be precleared?

Pause for a second and consider how incredible it is that what constitutes discriminatory purpose¹¹ in the redistricting context remains a very much unsettled issue. Over the years, the Supreme Court has issued several rulings defining the parameters of discriminatory purpose both generally and in the specific context of voting rights.¹² For more than forty years, Section 2 of the Voting Rights Act has prevented purposeful voting discrimination.¹³ For decades the federal government enforced Section 5 in

Section 5, the vast majority of jurisdictions have opted to submit changes to the Attorney General rather than undergo the time and expense involved in federal district court litigation.”).

9. 28 C.F.R. § 51.13(e) (2009); *see also* Branch v. Smith, 538 U.S. 254, 262 (2003) (recognizing that Section 5 requires preclearance of redistricting plans).

10. It is, however, worth noting that as this Article was proceeding through the editing process, three additional challenges to Section 5's constitutionality had been filed. *See* State of Georgia v. Holder, No. 10 Civ 1062 (D.D.C. June 21, 2010); Laroque v. Holder, No. 10 Civ. 0561 (D.D.C. May 12, 2010); Complaint, Shelby County, Al. v. Holder, 10 Civ. 00651 (D.D.C. Apr. 27, 2010).

11. When it comes to Section 5 and the discriminatory purpose standard, it is important to note two different types of discriminatory purpose. The first type of discriminatory purpose is that which would violate the Fourteenth and Fifteenth Amendments to the U.S. Constitution—a so-called “unconstitutional discriminatory purpose.” The second type of discriminatory purpose is an intent to retrogress (i.e., a purpose to make minority voters worse off). *See* Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 528 U.S. 320, 324 (2000) (interpreting Section 5 to prevent voting changes adopted with an intent to retrogress minority voting strength).

Because the phrase “unconstitutional discriminatory purpose” is a bit awkward, this Article will use the terms “discriminatory purpose” or “purpose standard” to mean “unconstitutional discriminatory purpose” except when it is necessary to clarify the distinction between an unconstitutional discriminatory purpose and a discriminatory purpose that involves an intent to retrogress. It is, however, important to note that the two types of discriminatory purpose can overlap (i.e., an intent to retrogress likely violates the U.S. Constitution).

12. *See, e.g.,* Rogers v. Lodge, 458 U.S. 613, 617 (1982) (conducting discriminatory purpose analysis in the context of an electoral structure).

13. *See, e.g.,* City of Mobile v. Bolden, 446 U.S. 55, 60–61 (1980) (holding that Section 2 can be used to challenge the implementation of electoral rules that purposefully discriminate against minority voters).

a manner that denied preclearance to redistricting plans on discriminatory purpose grounds.¹⁴ And in 2006, Congress adopted an important amendment to the Section 5 discriminatory purpose standard.¹⁵ In short, one might instinctively think that the question of what constitutes discriminatory purpose in redistricting would be a bit passé.

There are several reasons, though, why what constitutes discriminatory purpose in the redistricting context remains up for grabs during the 2010 redistricting cycle. As an initial matter, discriminatory purpose analyses of any sort do not easily lend themselves to bright-line tests; when it comes to discriminatory purpose, specific facts and contexts can be quite important.¹⁶ Turning to the specific arena of voting and electoral structures, discriminatory purpose jurisprudence was short-circuited by the 1982 amendment of Section 2 of the Voting Rights Act that created an easier legal standard with which minority voters could challenge discriminatory redistricting plans.¹⁷ Narrowing the scope to an even finer level, the Attorney General's¹⁸ most recent Section 5 enforcement of the discriminatory purpose standard during a redistricting cycle was condemned by the Supreme Court,¹⁹ calling into question what might be considered the key "precedents" in the area. Finally, the Congress that extended and amended Section 5 in 2006 had little incentive to provide insight into how the discriminatory purpose standard should be administered because open debate on the purpose standard might have derailed the extension and amendment process.

14. See, e.g., *Busbee v. Smith*, 549 F. Supp. 494, 497 (D.D.C. 1982) (using discriminatory purpose grounds to deny a declaratory judgment to Georgia for its post-1980 congressional redistricting plan), *aff'd mem.* 459 U.S. 1166 (1983); 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, 276–77 (2005) [hereinafter Pitts, *End of Section 5*] (describing the Attorney General's enforcement of Section 5).

15. In 2006, Congress statutorily overruled the Supreme Court's decision in *Bossier Parish II*, which had temporarily (for about six years) halted the federal government's ability to deny preclearance to redistricting plans adopted with an unconstitutional discriminatory purpose. 528 U.S. at 325 (precluding the federal government from denying preclearance on the basis of an unconstitutional discriminatory purpose); see VRARA, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580–81 (2006) (restoring the test of unconstitutional discriminatory purpose to Section 5 analysis). These developments are discussed more fully later in this Article. See *infra* Part I.

16. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

17. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (allowing discriminatory electoral structures to be successfully challenged under a "results" test).

18. Technically, preclearance decisions have been delegated by the Attorney General to the Assistant Attorney General, Civil Rights. 28 C.F.R. § 51.3 (2009). For simplicity, this Article will use the words "Attorney General" to refer to decisions made by the Executive Branch in relation to Section 5 enforcement.

19. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 923–27 (1995).

This Article fills a vacuum in the discussion by proposing a framework for analyzing discriminatory purpose in the redistricting context.²⁰ While it is impossible to account for every possible scenario involving discriminatory purpose that might arise, the proposed framework pinpoints four instances where federal officials should intervene to deny preclearance on discriminatory purpose grounds when a redistricting plan fails to provide *additional* representation for minority voters:²¹ when direct evidence of discriminatory animus in the redistricting process has come to light; when the redistricting plan does not provide minority voters with *any* representation; when “minority” voters comprise a majority of the jurisdiction, but the redistricting plan prevents them from electing a majority of the seats on the governing body; and when the redistricting map clearly shows on its face that district lines have been grossly gerrymandered to preclude the ability of minority voters to elect a candidate of their choice. However, the proposed framework notably does not mandate federal intervention on discriminatory purpose grounds to compel the creation of additional districts that provide minority voters with an ability to elect candidates of their choice whenever such districts can be drawn—a type of federal enforcement of Section 5 that brought severe criticism from the Supreme Court during the 1990s redistricting cycle.

The framework for discriminatory purpose developed here has roots in both doctrine and theory. On one level, the framework proposed in this Article represents a pragmatic exercise that first briefly recounts the history of discriminatory purpose and redistricting (Part I) and then engages in the typical tools of legal analysis, such as precedent and legislative history, to develop a workable framework that can be administered by the federal government, particularly the Attorney General (Part II). On a second level, though, the framework proposed in this Article aims to stretch beyond the standard doctrinal tools and draw upon the theoretical “politics as markets” framework developed by New York University’s Sam Issacharoff and Rick Pildes.²² The politics as markets approach they have championed seems to

20. This Article will primarily focus on discriminatory purpose and redistricting in relation to Section 5 of the Voting Rights Act. However, in those areas of the United States not subject to Section 5 preclearance, discriminatory purpose can also be an independent claim under both the United States Constitution and Section 2 of the Voting Rights Act. *See supra* notes 12–13 and accompanying text. That said, in areas not covered by Section 5, discriminatory purpose analysis under the Constitution or Section 2 is unlikely to play a central role because the Section 2 “results” standard will be the primary tool used to challenge discriminatory redistricting plans. *See supra* note 17 and accompanying text.

21. Another situation where discriminatory purpose could be found occurs when a redistricting plan retrogresses minority voting strength. However, for reasons explained *infra* notes 125–129 and accompanying text, this Article will leave to one side detailed discussion of the discriminatory purpose standard and retrogression.

22. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998) [hereinafter Issacharoff & Pildes, *Politics As Markets*] (calling for an analytical perspective analogizing

be most definitively and comprehensively developed in the context of partisan gerrymandering.²³ Yet Professors Issacharoff and Pildes have also sought to re-think voting rights²⁴ in light of their approach that focuses on competition and accountability.²⁵ In this vein, their analyses have been most specific when it comes to the continued need for Section 5²⁶ and, more particularly, when it comes to application of the discriminatory effects standard by the Attorney General in the context of Georgia's post-2000 redistricting.²⁷ Their analyses, however, in other areas of voting rights, such as discriminatory purpose in the adoption of electoral structures, have been somewhat more tepid and less detailed.²⁸ The

democratic politics with robustly competitive business markets, formed with clear rules of engagement and competition).

23. See generally Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) [hereinafter Issacharoff, *Gerrymandering*]; Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 55–83 (2004) [hereinafter Pildes, *Foreword*] (extensively discussing a Supreme Court decision in the partisan gerrymandering context); Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253 (2006) [hereinafter Pildes, *Political Competition*].

24. See Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1619–21 (1999) [hereinafter Pildes, *Theory*] (discussing the application of politics as markets to minority voting rights); see also Issacharoff & Pildes, *Politics As Markets*, *supra* note 22, at 700–07 (analyzing vote dilution and minority voting rights through the politics as markets theory); Pildes, *Foreword*, *supra* note 23, at 83–101 (discussing politics as markets in relation to a Supreme Court decision involving minority voting rights).

25. See Issacharoff & Pildes, *Politics As Markets*, *supra* note 22, at 646 (“Only through an appropriately competitive partisan environment can one of the central goals of democratic politics be realized: that the policy outcomes of the political process be responsive to the interests and views of citizens.”) (emphasis added); Pildes, *Political Competition*, *supra* note 23, at 256 (describing the “basic mechanism of representative self-government” as the “electoral accountability of officeholders to voters”); see also Issacharoff, *Gerrymandering*, *supra* note 23, at 600 (“[A] core tenet of democratic legitimacy [is] accountability to shifting voter preferences.”); Pildes, *Foreword*, *supra* note 23, at 43 (“All theories of representative democracy require, at a minimum, that those who exercise power be regularly accountable through elections to those they represent; accountability is a necessary, even if not sufficient, condition of democracy. And just as meaningful personal autonomy requires a range of options from which to choose, electoral accountability can exist only when effective political competition generates genuine political choices.”).

26. See generally Samuel Issacharoff, *Is Section 5 A Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004) [hereinafter Issacharoff, *Own Success*] (questioning the necessity of extending Section 5).

27. See Issacharoff, *Own Success*, *supra* note 26, at 1716–17 (analyzing Georgia's redistricting process); Pildes, *Foreword*, *supra* note 23, at 83–101 (discussing *Georgia v. Ashcroft*, 539 U.S. 461 (2003)). See generally Richard H. Pildes, *Political Competition and the Modern VRA*, in *THE FUTURE OF THE VOTING RIGHTS ACT 1* (David L. Epstein et. al. eds., 2006) [hereinafter Pildes, *Modern VRA*] (analyzing what politics as markets may mean for the Voting Rights Act primarily through the lens of Section 5's retrogression standard).

28. See Pildes, *Modern VRA*, *supra* note 27, at 10 (“This [politics as markets] perspective is not meant to endorse specific solutions for future applications of the VRA. Instead, it is meant to offer a general framework for organizing analysis of the way legal ideas of rights and equality must be modified to account for the larger structural environment within which politics takes place.”); see also Issacharoff, *Own Success*, *supra* note 26, at 1731 (suggesting, but not definitively concluding, that Section 5 may no longer be necessary because of the “strengthened world of partisan competition”); Pildes, *Theory*, *supra* note 24, at 1620 (“Whether the changing dynamics of partisan competition in the newly emergent two-party South should affect judicial doctrine or statutory policy with

framework advanced here attempts to harmonize, to the extent possible, politics as markets theory with the discriminatory purpose standard.

In the end, criticisms may well be levied at the discriminatory purpose framework proposed here. Some may think it does too little to improve the substantive position of minority voters while others may think it goes too far in the extent to which it allows for federal intervention in the functions of state and local governments. Criticism, though, would be welcome because that would entail a wider dialogue about enforcement of the discriminatory purpose standard—a wider dialogue that needs to occur. Unless something unexpected happens, a conservative majority of the Supreme Court seems likely to hold the keys to Section 5’s fate for the next several years, and the *NAMUDNO* Court has already telegraphed its constitutional discomfort with Section 5.²⁹ The question then becomes what might push the Court’s conservative majority, particularly the key “swing” vote of Justice Anthony Kennedy, to completely dismantle Section 5. It would seem that the greatest threat to Section 5’s continued viability would be haphazard enforcement of the discriminatory purpose standard. Therefore, beyond the specific framework proposed here lies a call to at least have a debate over the meaning of the discriminatory purpose standard in the redistricting context before it is too late (Part III).

I. THE DISCRIMINATORY PURPOSE STANDARD: A BRIEF HISTORY

The broad historical outlines of the discriminatory purpose standard are relatively straightforward. For approximately a decade following initial passage of Section 5 in the mid-1960s, the discriminatory purpose standard had little independent value in preventing the implementation of redistricting plans. But this initial dormancy gave way when the federal government started to use the discriminatory purpose standard to compel state and local governments to adopt redistricting plans that increased minority voting strength. However, in the early 1990s, the Supreme Court expressed deep concern about the Attorney General’s implementation of the discriminatory purpose standard and, by 2000, the Court completely closed off the federal government’s ability to use the standard as a tool for improving the position of minority voters. In 2006, though, Congress legislatively overruled the Court through an amendment to Section 5 that re-established the federal government’s power under the discriminatory

respect to vote dilution would depend on many considerations—some theoretical, some empirical.”).

29. Joshua A. Douglas, *The Voting Rights Act Through the Justices’ Eyes: NAMUDNO and Beyond*, 88 TEX. L. REV. SEE ALSO 1, 4 (2009), <http://www.texaslrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSeeAlso1.pdf> (“The [NAMUDNO] Court, however, did not simply ignore the constitutional issue. Instead, it spent several pages speculating as to why Section 5 might be unconstitutional . . .”).

purpose standard. Even so, what the congressional amendment means for future enforcement of the discriminatory purpose standard remains very much up for grabs.

A. The Constitutional Purpose Standard: Now You See It, Now You Don't

Congress enacted Section 5 in the mid-1960s as part of a comprehensive response to the Deep South's massive resistance to the enfranchisement of African Americans.³⁰ In the years preceding passage of the Voting Rights Act, the United States Department of Justice attempted to enfranchise African Americans through case-by-case litigation.³¹ But experience demonstrated that even when litigation against one type of disfranchising tactic—such as the discriminatory application of a literacy test for voter registration—succeeded, state and local officials would then switch to new tactics of discrimination that had not been the subject of the litigation.³² To combat such recalcitrance to the basic participatory rights of African Americans, Section 5 required certain jurisdictions to secure pre-approval from the federal government (the Attorney General or the United States District Court for the District of Columbia) for any changes to election laws.³³ To obtain federal approval of a voting change, a jurisdiction had to prove that the change “[did] not have the purpose and [would] not have the effect of denying or abridging the right to vote on account of race or color.”³⁴

Section 5 activity was relatively quiet in the years immediately following passage of the Voting Rights Act because the federal government primarily focused its attention on enforcing the provisions of the Act most directly related to voter registration.³⁵ However, in the late 1960s and early 1970s, Section 5 activity rapidly increased—in part because of the Supreme

30. See Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 911–12 (2008) [hereinafter Pitts, *Era of Maintenance*] (describing the legislative birth of the Voting Rights Act as a result of intolerable Southern political resistance).

31. See generally BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE* (2007) (detailing the Department of Justice's pre-VRA voting rights litigation in three Alabama counties).

32. *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (“Even when favorable decisions [for African American voters] have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and [African American] registration.”).

33. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439.

34. *Id.*

35. Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 63 (1983) (noting that the “major emphasis in the Department of Justice under the Johnson Administration (1965–68) was on voter registration”); see also Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 578 n.244 (1973) (“For the first few years of the Voting Rights Act, there were few submissions [of voting changes to the Attorney General] and there was no set procedure for dealing with them.”).

Court's watershed decision in *Allen v. State Board of Elections*³⁶ that applied Section 5 to a broad swath of democratic activity, including electoral structures, and in part because the federal government became more interested in enforcement, as evidenced by the Attorney General's 1971 publication of guidelines for the Executive Branch's administration of Section 5.³⁷ Importantly, since these watershed events in the early years of the Act, the vast majority of Section 5 preclearance work has involved administrative review by the Attorney General rather than litigation in the D.C. District Court because state and local governments view administrative review as faster and cheaper.³⁸

While the 1965 Act authorized the rejection of voting changes that had either the "*purpose*" or "the *effect* of denying or abridging the right to vote on account of race or color,"³⁹ the distinction between the purpose and the effect standards was not of tremendous import during the first decade of Section 5 enforcement.⁴⁰ That changed in the mid-1970s when the Supreme Court's decision in *Beer v. United States*⁴¹ made the distinction between the two standards much more salient. In *Beer*, the City of New Orleans sought federal approval of a redistricting plan for its five single-member council districts.⁴² On its face, the city's redistricting plan represented an apparent increase in African American voting strength.⁴³ However, a three-judge panel of the D.C. District Court denied approval to New Orleans' redistricting plan, finding the plan to be discriminatory in effect because it failed to provide enough representation for African American voters.⁴⁴ Yet the Supreme Court reversed, holding that the effect standard of Section 5 only served to block the implementation of voting changes that retrogressed minority voting strength.⁴⁵ Put differently, the

36. 393 U.S. 544 (1969).

37. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 36 Fed. Reg. 18, 186 (Sept. 10, 1971) (codified at 28 C.F.R. pt. 51).

38. See *supra* note 8 and accompanying text.

39. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965) (emphasis added).

40. Peyton McCrary et. al., *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 292–99 (2006) (describing how most objections in the 1970s were based on "effect" and not "intent").

41. 425 U.S. 130 (1976).

42. *Id.* at 135–36.

43. The existing redistricting plan had one single-member district with an African American total population majority and no single-member district with an African American voter majority; the proposed redistricting plan had two single-member districts with an African American total population majority and one single-member district with an African American voter majority. *Id.* at 136–37.

44. *Beer v. United States*, 374 F. Supp. 363, 402 (D.D.C. 1974), *rev'd*, 425 U.S. 130 (1976).

45. See *Beer*, 425 U.S. at 141 (holding that the effects prong only served to block voting changes that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise").

effect standard only served to prevent voting changes that would make minority voters worse off.

By confining the effect standard to retrogressive voting changes, the Supreme Court closed the door on using the effect standard as a vehicle to compel state and local governments to enhance minority voting strength. Yet the Court seemingly left the door ajar to compel enhancement using the purpose standard. The *Beer* Court closed the door to the effect standard by noting that “a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the ‘effect’ of diluting or abridging the right to vote on account of race within the meaning of [Section] 5.”⁴⁶ However, in the next breath, the *Beer* Court said that “an ameliorative new legislative apportionment” could violate Section 5 if “the new apportionment itself *so discriminates on the basis of race or color as to violate the Constitution*.”⁴⁷ With this language the Court opened up the use of Section 5’s purpose standard to enhance minority voting strength because constitutional doctrine at the time allowed minority plaintiffs to use the discriminatory purpose standard to achieve additional representation.⁴⁸

The language from *Beer*, along with some other substantial hints from the Supreme Court,⁴⁹ cleared the way for nearly a quarter century of Section 5 enforcement where federal officials used the purpose standard to

46. *Id.*

47. *Id.* (emphasis added).

48. See, e.g., *White v. Regester*, 412 U.S. 755 (1973) (finding constitutional violation in the use of multi-member electoral districts). As mentioned previously, the focus of this discussion is Section 5. See *supra* note 20. There were, however, several important decisions from the Supreme Court during the 1970s and early 1980s that did not involve Section 5 and were related to electoral structures and the constitutional purpose standard. See *Rogers v. Lodge*, 458 U.S. 613 (1982); *Mobile v. Bolden*, 446 U.S. 55 (1980); *White*, 412 U.S. at 755; *Whitcomb v. Chavis*, 403 U.S. 124 (1971). The impact of these decisions on the discriminatory purpose standard going forward will be discussed later. See *infra* Part II.

49. See *Busbee v. Smith*, 459 U.S. 1166, 1166 (1983) (affirming the decision of the district court); Jurisdictional Statement of Petitioner at i, *Busbee*, 459 U.S. 1166 (No. 82-857) (requesting review as to whether a redistricting plan that did not “have the purpose of diminishing the existing level of black voting strength can be deemed to have the purpose of denying or abridging the right to vote on account of race within the meaning of Section 5 of the Voting Rights Act”); see also *Shaw v. Hunt*, 517 U.S. 912, 912–13 (1996) (reiterating that an ameliorative plan “cannot violate § 5 unless the new apportionment itself so discriminates on the basis of race or color as to violate the Constitution” and engaging in an analysis of the Attorney General’s interpretation of the purpose standard); *City of Pleasant Grove v. United States*, 479 U.S. 462, 471 n.11 (1987) (noting that a voting change motivated by a discriminatory purpose had “no legitimacy at all under our Constitution *or under the statute*.” (quoting *City of Richmond v. United States*, 422 U.S. 358, 378–79 (1975))) (emphasis added); *Pleasant Grove*, 479 U.S. at 474 (Powell, J., dissenting) (confirming the role of unconstitutional discriminatory purpose as part of the Section 5 analysis by asserting that previous Court decisions have made it “explicitly clear that for a city to have a discriminatory purpose within the meaning of the Voting Rights Act, it must intend its action to have a retrogressive effect on the voting rights of blacks”).

compel state and local officials to increase minority voting strength.⁵⁰ For example, even if a proposed redistricting plan retained the status quo (i.e., did not retrogress) in terms of minority voting strength, federal officials could (and would) demand the drawing of an additional district that provided minority voters an ability to elect a candidate of choice.⁵¹ Indeed, even if a proposed redistricting plan had already enhanced minority voting strength by creating an additional district for minority voters, federal officials would use Section 5 to compel the creation of even more such districts. And this enhancement of minority voting strength was primarily accomplished on a theory that even changes that retained the *status quo* or enhanced the position of minority voters could be found to violate the discriminatory purpose standard.⁵²

But in the early to mid-1990s, the Supreme Court expressed deep concern with the direction the Attorney General's enforcement of the purpose standard had taken. In the racial gerrymandering line of cases, the Court chastised the Attorney General for compelling state and local governments to create additional districts that provided minority voters an ability to elect candidates of choice.⁵³ While the import of these racial gerrymandering decisions for the future interpretation of the purpose standard will be discussed in greater detail in the next part of this Article, what is important for understanding the history of the purpose standard is how these cases served as an indictment of the Attorney General's enforcement. Put simply, the racial gerrymandering cases were a message from the Court warning the Attorney General to be much more judicious when using the purpose standard as a tool for expanding the electoral strength of minority voters.⁵⁴

50. DAVID LUBLIN, *THE PARADOX OF REPRESENTATION* 28 (1997) (“[T]he Justice Department used its power under Section 5 to deny preclearance to force states to draw new majority-minority districts.”).

51. See Pitts, *End of Section 5*, *supra* note 14, at 276 (describing the Attorney General's enforcement of Section 5).

52. In addition to using the purpose standard, the Attorney General also compelled the creation of additional districts for minority voters by folding the “results” standard from Section 2 into the Section 5 analysis. 28 C.F.R. § 51.55(b) (1996). However, when it came to the creation of additional minority voting strength, the Section 2 results standard played a secondary role to the purpose standard. McCrary et. al., *supra* note 40, at 297 (providing statistics on the number of denials of preclearance by the Attorney General based on discriminatory purpose and Section 2). Eventually, in the mid-1990s, the Supreme Court held that the Attorney General could not fold the Section 2 results standard into the Section 5 analysis. *Reno v. Bossier Parish Sch. Bd. (Bossier Parish I)*, 520 U.S. 471, 485 (1997).

53. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 924 (1995) (“[I]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts.”).

54. Indeed, the Attorney General seemed to understand the Court's message. Following the racial gerrymandering cases, the Attorney General eased up on enforcement of the purpose standard. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Rethinking Section 5*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 38, 50 (David L. Epstein et. al. eds., 2006).

By the onset of the first post-millennia redistricting cycle, though, the Court's message to the Attorney General to be more judicious in compelling the creation of additional districts for minority voters morphed into an outright prohibition on the Attorney General's authority. In *Reno v. Bossier Parish School Board (Bossier Parish II)*,⁵⁵ the Court dismissed as "pure dictum" its language from more than two decades earlier in *Beer* that provided the foundation for using Section 5 to prevent the implementation of redistricting plans that had an unconstitutional discriminatory purpose.⁵⁶ Instead, the Court held that Section 5's statutory language merely allowed federal officials to prevent the implementation of redistricting plans that were adopted with a retrogressive purpose.⁵⁷ Thus, unlike previous redistricting cycles when the federal government could use the purpose standard to increase minority voting strength, during the post-2000 redistricting cycle, the purpose standard only served to prevent the implementation of redistricting plans adopted with an intent to retrogress.

The predicted consequence of the *Bossier Parish II* decision was that the "new" purpose standard of an intent to retrogress would not add much to the effect standard. The intent to retrogress standard would likely only reach the so-called "incompetent retrogressor"—the state or local government that embarked on a redistricting plan with an intent to retrogress, but was too inept to actually accomplish the dirty deed.⁵⁸ Indeed, that is exactly what happened during the years immediately following *Bossier Parish II*. As one empirical study of Section 5 administrative enforcement has demonstrated, the purpose standard served as the sole reason for denying preclearance in fifty eight percent of the instances in which the Attorney General rejected a voting change during the 1990s.⁵⁹ In the 2000s, the purpose standard arguably served as the sole reason for denying preclearance to a redistricting plan in only a single instance.⁶⁰ While the purpose standard was used in conjunction with the

55. 528 U.S. 320 (2000). This version of the case is commonly known as *Bossier Parish II* because it was the second iteration of this litigation in front of the Supreme Court.

56. *Id.* at 338.

57. *Id.* at 341 ("[W]e hold that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.").

58. *Id.* at 332.

59. McCrary et. al, *supra* note 40, at 298.

60. *Id.* at 314–15. I use the term "arguably" because the sole denial of preclearance to a redistricting plan identified by the authors of this empirical study as "based *entirely* on the elusive concept of retrogressive intent" appears to me to also have a component of actual retrogressive effect. *Id.* at 314 (emphasis added). The preclearance denial in question involved a redistricting plan for Cumberland County, Virginia, where one of the single-member districts had its African American population reduced from 55.7% to 55.2%. Letter from Ralph F. Boyd, Jr., Assistant Att'y Gen., Civil Rights Div., to Darwin Satterwhite, Esq., Cnty. Att'y (July 9, 2002), available at http://www.justice.gov/crt/voting/sec_5/pdfs/l_070902.pdf. The letter denying preclearance described how the county "has not carried its burden of proving a lack of retrogressive intent." *Id.* However, in addition to the finding of retrogressive intent, the letter also

effect standard some of the time, the purpose standard had essentially no independent value when it came to preventing the implementation of redistricting plans. In short, when the 2000 redistricting cycle occurred, the Section 5 purpose standard had essentially been reduced to a nullity.

B. Restoring the Constitutional Purpose Standard, But in What Form?

Recently, the House and Senate engaged in a legislative process that culminated with President George W. Bush signing into law an extension and amendment of Section 5.⁶¹ During deliberation over the extension and amendment, the House and Senate held substantial hearings—receiving testimony from numerous witnesses and collecting thousands of pages of documents.⁶² What we know from the statutory language and legislative history surrounding the extension and amendment is that Congress wished to restore the ability of the Attorney General to prevent the implementation of redistricting plans adopted with an unconstitutional discriminatory purpose. What the language of the Act, the House and Senate Reports, and the numerous hearings do not tell us with any great specificity is how to differentiate between those redistricting plans that pass muster under the discriminatory purpose standard and those that do not.

The statutory text provides the obvious starting point for any discussion about interpretation of the purpose standard. The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA) commences with a statement of congressional purpose and findings, most of which are unsurprising. From this statement, we learn the VRARA was designed to “ensure that the right of all citizens to vote, including the right to register to vote and cast meaningful votes, is preserved and protected as guaranteed by the

included two statements that indicate a finding of retrogression. The first statement explained that “[W]e sought to determine whether there were illustrative plans that meet the county’s redistricting criteria, but which *did not result in the retrogression* evidenced by the proposed plan.” *Id.* (emphasis added). Similarly, the second statement explained, “[a]nd in each [alternative] plan, the black total and voting age populations is maintained and increased in District 3 and the *retrogression is eliminated*.” *Id.* (emphasis added). Thus, I would categorize this denial of preclearance as based both on an intent to retrogress and actual retrogression. To be fair, the authors of the empirical study recognize that, at the margins, room for debate can exist as to what constituted the legal grounds for preclearance denials by the Attorney General. McCrary et. al., *supra* note 40, at 292 n.84 (“Our coding decisions were, inevitably, based on textual interpretation. We believe that although knowledgeable observers might disagree occasionally with our coding of individual objections, the patterns we identify are beyond reasonable dispute.”).

61. Section 5 includes a sunset provision and every so often Congress must examine the statute and decide whether to extend it. Section 5 was scheduled to expire in August 2007. 42 U.S.C. § 1973b(a)(8) (2006). The extension and amendment was signed into law in 2006. VRARA, Pub. L. No. 109-246, 120 Stat. 577 (2006).

62. Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 402–03 (2008) (describing the volume of the Congressional record).

Constitution.”⁶³ We also learn Congress found that “[s]ignificant progress has been made in eliminating” some of the barriers to electoral participation and representation faced by minority voters.⁶⁴ However, “vestiges of discrimination in voting continue to exist,” with these continuing vestiges most notably demonstrated by the continued persistence of racially polarized voting and the vast amount of Voting Rights Act enforcement since 1982.⁶⁵

Most importantly for purposes of the current discussion, the Congressional findings also reflect the view that previous Supreme Court decisions incorrectly interpreted Section 5. Congress noted that “[t]he effectiveness of the Voting Rights Act of 1965 had been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*.”⁶⁶ Indeed, these decisions from the Court represented a misconstruing of congressional intent that improperly “narrowed the protections afforded by section 5.”⁶⁷ Accordingly, we learn that the Court’s statutory interpretation in *Bossier Parish II* was incorrect and that Congress set its sights on fixing the Court’s misapprehension of the statutory situation.

Beyond the prefatory statement of purpose and findings lies the actual language used to accomplish the task of legislatively overruling *Bossier Parish II*. In the VRARA, Congress undertakes the statutory heavy lifting by creating a new subsection (b) for Section 5 that reads:

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.⁶⁸

The crux of the matter, though, comes in newly developed subsection (c), where Congress defines the term “purpose” as used in Section 5 to “include any discriminatory purpose.”⁶⁹ The key here is the use of the word “any”: *Bossier Parish II* confined discriminatory purpose under Section 5 to an

63. VRARA, § 2(a).

64. *Id.* § 2(b)(1)–(4). The enforcement mentioned in the findings references, among other things, the hundreds of denials of preclearance as well as other Section 5 enforcement, the “continued filing of section 2 cases,” and litigation related to the electoral participation of language minority voters. *Id.* § 2(b)(4). The significance of the year 1982 is that, prior to the extension and amendment in 2006, the most recent extension and amendment of Section 5 had taken place in 1982. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

65. VRARA, § 2(b)(2)–(4).

66. *Id.* § 2(b)(6).

67. *Id.*

68. *Id.* § 5(b).

69. *Id.* § 5(c) (emphasis added).

intent to retrogress;⁷⁰ the VRARA allows for a broader-based Section 5 inquiry into the existence of “any” discriminatory purpose—including any discriminatory purpose that would violate the Fourteenth or Fifteenth Amendments.⁷¹

While the statutory language restores the constitutional discriminatory purpose standard to Section 5, that is about all the statutory language tells us. In particular, the statutory language fails to provide insight about how to determine whether a voting change passes muster under the discriminatory purpose standard. And most importantly for present purposes, the statutory language provides absolutely no guidance related to the biggest-ticket question: which redistricting plans should be rejected using the purpose standard?

Of course, the lack of congressional statutory guidance might be moot if an extensive cache of federal judicial opinions existed that clearly develop a framework for deciding questions of discriminatory purpose in the redistricting context. Unfortunately, there has been little recent guidance from the Supreme Court (or the lower federal courts) on this subject.⁷² *Village of Arlington Heights v. Metropolitan Housing Development Co.*⁷³ is the Court precedent that creates the basic matrix for deciding whether state action involves discriminatory purpose.⁷⁴ However, that case involved housing, not voting-related discrimination.⁷⁵ Moreover, the last time the

70. See 528 U.S. 320, 341 (2000) (explaining the limits of Section 5).

71. VRARA, § 5(c).

72. S. REP. NO. 109-295, at 13 (2006) (“Since 1982, six published cases have ended in a court ruling or a consent decree finding that one of the 880 covered jurisdictions had committed unconstitutional discrimination During that same time period, six cases have found that a non-covered jurisdiction committed unconstitutional discrimination against minority voters.”) Importantly, few, if any of these twelve cases identified in the Senate Report involved a redistricting plan. *Id.* at 65–70.

73. 429 U.S. 252 (1977).

74. The other major case that sets out the framework for assessing discriminatory purpose is *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). In a nutshell, *Mt. Healthy* provides a defense against allegations of discriminatory purpose in “mixed-motive” cases where an invalid purpose played a substantial role in a governmental decision but where other valid purposes may also have played a role in the decision. See *id.* at 287 (“Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a ‘substantial factor’—or, to put it in other words, that it was a ‘motivating factor’ in the Board’s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent’s employment status even in the absence of the protected conduct.”). However, *Mt. Healthy* has not had much of an impact on voting rights cases, as the Supreme Court has only cited it once in a majority opinion that involved felon disfranchisement, and twice in dissents that involved litigation related to electoral structures. See *Bush v. Vera*, 517 U.S. 952, 1058 (1996) (Souter, J., dissenting) (citing *Mt. Healthy* in dissent in a racial gerrymandering case); *Hunter v. Underwood*, 471 U.S. 222, 225 (1985) (citing *Mt. Healthy* in a felon disfranchisement case); *City of Mobile v. Bolden*, 446 U.S. 55, 138 (1980) (Marshall, J., dissenting) (citing *Mt. Healthy* in dissent in a challenge to at-large elections). In contrast, *Arlington Heights* has been cited in more than a dozen voting rights decisions.

75. Even though *Arlington Heights* did not involve voting discrimination, the Court has

Court issued a direct holding⁷⁶ as to the presence or absence of discriminatory purpose in an electoral structure was 1982's *Rogers v. Lodge*⁷⁷—a decision that involved an at-large, not single-member district, election system.⁷⁸ Perhaps the most significant recent judicial guidance can be found in the racial gerrymandering cases from the early 1990s, in which the Court rebuked the Attorney General's interpretation of the discriminatory purpose standard.⁷⁹ At the end of the day, though, few would likely describe judicial guidance on discriminatory purpose in the redistricting context as anything other than opaque.⁸⁰

held the case to be useful in making determinations related to purposeful discrimination in the voting context. See *Hunter*, 471 U.S. at 227 (noting, in a challenge to a felon disfranchisement law, that “[p]resented with a neutral state law that produces disproportionate effects along racial lines, the Court of Appeals was correct in applying the approach of *Arlington Heights* to determine whether the law violates the Equal Protection Clause of the Fourteenth Amendment”).

76. The Court also discussed discriminatory purpose in two other cases involving voting rights, but neither case involved electoral structures such as at-large elections or redistricting plans. *Hunter v. Underwood* involved Alabama's racially motivated adoption of a felon disfranchisement statute. 471 U.S. 222, 227–34 (1985). *Pleasant Grove v. United States*, involved an Alabama city employing an annexation policy that, essentially, denied annexation by African American persons but allowed annexation by white persons. 479 U.S. 462, 465–67 (1987).

77. 458 U.S. 613 (1982).

78. *Id.* at 614; cf. Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2282 (1998) (“[P]rior to the 1990s round of redistricting, the Supreme Court defined the concept of vote dilution claims exclusively in connection with challenges to at-large or multi-member district elections.”). True, there is an important decision from the D.C. District Court involving discriminatory purpose in redistricting that was summarily affirmed by the Supreme Court, but that case was decided in the early 1980s. *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

79. See *Abrams v. Johnson*, 521 U.S. 74, 85–90 (1997); *Shaw v. Hunt*, 517 U.S. 899, 912–13 (1996); *Miller v. Johnson*, 515 U.S. 900, 924 (1995). Two other major Court decisions have involved the Fourteenth and Fifteenth Amendments and redistricting. See *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (plurality opinion); *Wright v. Rockefeller*, 376 U.S. 52 (1964). However, the challenges brought in those cases did not allege a failure to provide additional districts for minority voters but were more akin to racial gerrymandering challenges. See *Davis v. Bandemer*, 478 U.S. 109, 119 (1986) (classifying *Wright* and *United Jewish Orgs.* as general equal protection claims, rather than claims involving diminishing the effectiveness of ballots cast by members of racial minority groups).

A bit of implicit guidance also appears in a recent statutory Section 2 case, *League of United Latin American Citizens v. Perry* (LULAC), 548 U.S. 399 (2006). It is true that decision may be of some use and will be referenced in the later discussion developing a framework for making determinations about discriminatory purpose. See *infra* Part II. However, the decision primarily involved retrogression of minority voting strength, rather than the failure to provide an additional ability for minority voters to elect candidates of choice.

80. Some might contend that the *Arlington Heights* decision provides adequate guidance for decision-making related to discriminatory purpose in any context. Under *Arlington Heights*, an analysis of discriminatory purpose is “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” 429 U.S. 252, 266 (1977). Factors to be considered in this “sensitive inquiry” include: (1) whether the impact of the official action bears more heavily on one race than another; (2) the “historical background of the decision, particularly if it reveals a series of official actions taken for invidious purposes”; (3) an inquiry into the “specific sequence of events leading up to the challenged

Beyond statutory language and judicial opinions, the other obvious place to seek instruction about how to enforce the purpose standard would be Executive Branch interpretations; but, here again, little concrete guidance exists. The *Attorney General's Procedures for the Administration of Section 5*⁸¹ have three important provisions presenting the framework used to evaluate whether a redistricting plan merits preclearance.

The first important provision applies to all voting changes, not just redistricting plans. Here, the considerations of the Attorney General are: the extent to which a reasonable and legitimate justification for the change exists; the extent to which the jurisdiction followed objective guidelines and conventional procedures in adopting the change; the extent to which the jurisdiction afforded members of minority groups an opportunity to participate in the decision-making process; and the extent to which the jurisdiction took into account the concerns of the minority group.⁸²

The second important provision provides a list of “background” factors to be considered when reviewing certain types of voting changes, including redistricting plans.⁸³ These “background” factors are: the extent to which minority residents have been denied an equal opportunity to participate meaningfully in the jurisdiction’s political process; the extent to which minority residents have been denied an equal opportunity to influence elections and the decision-making of elected officials in the jurisdiction; the extent to which voting is racially polarized and political activities are racially segregated; and the extent to which voter registration and election participation by minority residents have been adversely affected by current or historic discrimination.⁸⁴

The third important provision in the Attorney General’s guidance applies solely to review of redistricting plans. Here, the guidance states that the following will be considered:

- (a) The extent to which malapportioned districts deny or abridge the right to vote of minority citizens.

decision” including whether “[d]epartures from the normal procedural sequence” occurred and whether “[s]ubstantive departures” occurred; and (4) the “legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body.” *Id.* at 266–68. Of course, this summary of factors from the Court did not “purport[] to be exhaustive.” *Id.* at 268.

I do not think *Arlington Heights* does much to clarify the decision to be made in relation to redistricting. This multi-factored “test” (that is not even an exhaustive listing of factors) seems easily subject to manipulation and inconsistent results. Moreover, redistricting has been recognized by the Court as a unique form of government decision-making. *See Shaw v. Reno*, 509 U.S. 630, 646 (1993) (recognizing that “redistricting differs from other kinds of state decisionmaking”). Finally, to anyone who thinks *Arlington Heights* alone provides a clear framework for analyzing discriminatory purpose in the redistricting context, I would ask how *Arlington Heights* clearly resolves the numerous hypothetical situations set forth in Part II of this Article.

81. 28 C.F.R. § 51 (2009).

82. *See id.* § 51.57.

83. *See id.* § 51.58(a)–(b).

84. *Id.* § 51.58(b)(1)–(4).

- (b) The extent to which minority voting strength is reduced by the proposed redistricting.
- (c) The extent to which minority concentrations are fragmented among different districts.
- (d) The extent to which minorities are overconcentrated in one or more districts.
- (e) The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered.
- (f) The extent to which the 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.
- (g) The extent to which⁸⁵ the plan is inconsistent with the jurisdiction's stated redistricting standards.

In theory, the multiple factors in these three provisions (at least fifteen factors total) can all be relevant to deciding whether the discriminatory purpose standard has been met—which makes it a duck soup in the abstract. At least one of the factors—“the extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process”—is essentially a restatement of the Supreme Court's standard for discriminatory purpose in the context of electoral structures.⁸⁶ Two of the factors—the extent to which a legitimate reason for the voting change exists and “the extent to which malapportioned districts deny or abridge the rights of minority” voters—are mostly meaningless in the redistricting context.⁸⁷ Four of the factors basically describe the same thing: the impact of the plan on minority voters.⁸⁸ More fundamentally, no apparent hierarchy of factors exists. Is past discrimination more or less important than, say, the extent of racially polarized voting? Most fundamentally, how many of these factors does one need to find to conclude the discriminatory purpose standard has been violated: One? Two? Five? A majority? Without launching into a Chief Justice John Roberts-like game of forty questions,⁸⁹ these abstract concepts do not

85. *Id.* § 51.59.

86. *Id.* § 51.58(b)(1) (2009). *Compare with* *Rogers v. Lodge*, 458 U.S. 613, 624 (1982) (noting that the lack of any black candidate having ever been elected is “insufficient . . . to prove purposeful discrimination absent other evidence such as proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice”) (internal citations omitted).

87. These factors are mostly meaningless because nearly all redistricting is undertaken for the entirely legitimate purpose of complying with the equal protection mandate of one person, one vote, and even fewer redistricting plans that are developed fail to cure the malapportionment prohibited by the one person, one vote rule. *See* Black Political Task Force v. Galvin, 300 F. Supp. 2d 291, 294 (D. Mass. 2004) (describing redistricting designed to comply with one person, one vote after new population data becomes available as “standard operating procedure”).

88. Those four factors are: the extent to which malapportioned districts deny or abridge the right to vote of minority citizens; the extent to which minority voting strength is reduced by the proposed redistricting; the extent to which concentrations of minority residents are fragmented among different districts; and the extent to which minority residents are overconcentrated in one or more districts.

89. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2269–72 (2009) (Roberts, C.J., dissenting).

provide much that point to a standardization of discriminatory purpose review of redistricting plans.

These abstract factors, though, *were* implemented in specific contexts by the Attorney General for many years. For roughly two-and-a-half decades the Attorney General denied preclearance to redistricting plans that had failed to meet the discriminatory purpose standard. These denials of preclearance are embodied in letters the Attorney General wrote to state and local officials that set forth the legal rationales for the denials.⁹⁰ Here, then, one can look to see how these abstract concepts have led to on-the-ground decisions and, presumably, formulate a viable framework of what constitutes discriminatory purpose from the Attorney General's perspective.

However, the manner in which the Attorney General implemented the discriminatory purpose standard earned stinging Supreme Court criticism in the early 1990s.⁹¹ Accordingly, one cannot necessarily look at the Attorney General's decisions with regard to the purpose standard and say that these decisions provide a viable framework for future decisions. The Attorney General's administrative review is designed to mimic the decisions that the federal courts would make, as the Attorney General's own guidelines state that in conducting administrative review it sits as a "surrogate" for the federal courts.⁹² But it is obvious from the Supreme Court's racial gerrymandering decisions in the 1990s that the Court thought the Attorney General was not exactly doing a swell job as a "surrogate" when it came to making decisions related to the discriminatory purpose standard and redistricting. Unfortunately, though, other than saying the Attorney General got it horribly wrong, the Court provided little affirmative guidance about how to enforce the purpose standard.

In short, judicial guidance on the discriminatory purpose standard in the redistricting context is fairly limited, the Attorney General's guidelines for decision-making seem quite malleable, and the Attorney General's most recent concrete decisions under those guidelines were severely criticized by the Supreme Court.

90. See, e.g., Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., to John E. Pilcher, Esq. (May 1, 1992), in *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 388–90 (2005).

91. See *supra* notes 53–54 and accompanying text. Other advocates have also criticized the Attorney General's enforcement of the discriminatory purpose standard. See *Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the Subcomm. on the Constitution, Civil Rights and Prop. Rights of the S. Comm. on the Judiciary*, 109th Cong. 142 (2006) (testimony of Michael A. Carvin) ("It is well documented, however, that the Justice Department routinely finds discriminatory purpose every time the submitting authority fails to create the maximum number of minority opportunity districts.").

92. 28 C.F.R. § 51.52 (2009).

This brings us back to Congress in 2006. One might think that when considering restoration of the discriminatory purpose standard, Congress might have realized there was very little clear guidance on enforcement of the discriminatory purpose standard. Upon making this realization, Congress might have decided to provide detailed direction to the Attorney General about enforcement. Such direction might not have been added to the statutory language itself, but at least such direction might have been provided through substantial discussion in the House and Senate Reports, and during floor debates and hearings. Nevertheless, the legislative history is sparse.⁹³

The House Report spends about two-and-a-half pages—six total paragraphs—discussing the statutory reversal of *Bossier Parish II*.⁹⁴ The first paragraph merely explains the *Bossier Parish II* decision.⁹⁵ The second, third, and fourth paragraphs discuss the history of judicial and executive branch enforcement of the discriminatory purpose standard.⁹⁶ The fifth paragraph explains how *Bossier Parish II* reduced the purpose standard of Section 5 to a nullity and how continuing to follow *Bossier Parish II* would continue this trend.⁹⁷ Finally, in the sixth and final paragraph, the House Report recognizes that “[i]n amending the purpose prong to bar ‘any discriminatory purpose,’ the Committee is aware of the concerns by some that such a prohibition is ‘standardless’ and unadministrable.”⁹⁸ The House Report, though, addresses this concern with a single sentence:

[T]he Committee concludes that the factors set out in *Village of Arlington Heights et. al. v. Metropolitan Housing Development Corp. et. al.* provide an adequate framework for determining whether voting changes submitted for preclearance were motivated by a discriminatory

93. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 192 (2007) (“The differing views of policymakers and advocates as to what the law actually meant remained pushed to the background of the legislative debate . . .”); cf. J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 669 (2008) (“Never have there been so many proposals for comprehensive changes when the temporary parts of the Act have come up for renewal, and never has there been less serious debate about the Act in committees and on the floor of Congress.”). There is a bit of an incongruity in the fact that so little guidance was provided on how to interpret the purpose standard when the legislative record surrounding extension and amendment of Section 5 was described by Representative James Sensenbrenner as “one of the most extensive considerations of any piece of legislation that the United States Congress has dealt with in the 27½ years that I have been honored to serve as a Member of this body.” 152 CONG. REC. H5143 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

94. H.R. REP. NO. 109-478, at 66–68 (2006).

95. *Id.* at 66.

96. *Id.* at 66–67.

97. *Id.* at 67–68. To be sure, one can try to tease out, by implication, some guidance from these passages. To the extent possible, the framework presented in Part II will try to read between the lines.

98. *Id.* at 68.

purpose, including determining whether a disproportionate impact exists; examining the historical background of the challenged decision; looking at the specific antecedent events; determining whether such change departs from the normal procedures; and examining contemporary statements of the decision-maker, if any.⁹⁹

After providing this list of factors, the House Report concludes: “In weighing each of these factors, the Committee believes that a proper and fair determination may be made as to whether a voting change was motivated by discriminatory intent.”¹⁰⁰ In short, these six paragraphs in the House Report that contain little more than a single sentence of direct substantive guidance do not provide a lot with which to work.

Turning to the Senate Report, one finds a bit more direction. The Senate Report’s overarching goal seems to be to cabin the application of the discriminatory purpose standard as much as possible. In a three-page discussion, the Senate Report spends about half of its verbiage emphasizing that the amendment “merely reiterate[s] the constitutional standard” embodied in the Fourteenth and Fifteenth Amendments.¹⁰¹ The Senate Report then provides some guidance as to situations where the discriminatory purpose standard has or has not been met. The Senate Report states that “[o]ne traditional and important standard for identifying unconstitutional racial discrimination is . . . [when] the challenged action departs from normal rules of decision,” such as when “the State went out of its way to avoid creating such a majority-minority [district]—one that would be created under ordinary rules.”¹⁰² The Senate Report also notes a number of areas where a finding of discriminatory purpose should *not* occur:

- When the finding is based on a failure to create “so-called influence or coalition districts;”
- When the finding is based “in whole or part, on a failure to adopt the optimal or maximum number of majority-minority districts or compact minority opportunity districts;” and
- When the finding is “based on a determination that the plan seeks partisan advantage or protects incumbents.”¹⁰³

Thus, the Senate Report more substantially addresses the standard for discriminatory purpose, primarily by describing situations in which discriminatory purpose should not be found.

However, the Senate Report’s usefulness as an interpretive tool may be minimal, at best, because of its lack of support and odd timing. The main

99. *Id.* As previously noted, these factors do not seem to provide much analytical clarity. See *supra* note 80.

100. H.R. REP. NO. 109-478, at 68.

101. S. REP. NO. 109-295, at 17 (2006).

102. *Id.*

103. *Id.* at 17–18.

body of the Senate Report did not garner the endorsement of a majority of the Judiciary Committee,¹⁰⁴ and it contains a truly unique dissent penned by eight supporters of extension and amendment of Section 5.¹⁰⁵ In that dissent, these eight members noted that the Senate Report did not reflect their views “or those of scores of other co-sponsors.”¹⁰⁶ Moreover, the dissenters noted that the Senate Report was filed nearly a week after the Senate passed the extension and amendment of Section 5 and that “[a]t the time of the floor debate and consideration [of the legislation] . . . no draft Senate Committee Report was available to Senators.”¹⁰⁷ In closing, the dissenters noted that “after-the-fact attempts to re-characterize the legislation’s language and effects should not be credited.”¹⁰⁸ For these reasons, the Senate Report seems to have limited value.¹⁰⁹

Granted, maybe Congress did not see it as its place to define the contours of unconstitutional discriminatory purpose. The purpose standard might be something properly left in the hands of the federal judiciary. After all, the Supreme Court has opined in the *City of Boerne v. Flores*¹¹⁰ line of cases that while Congress possesses the power to pass legislation that enforces the promises of the Fourteenth and Fifteenth Amendments, the substance of constitutional rights lies within the ambit of the nine justices.¹¹¹ Indeed, the Senate Report recognized the danger of overstepping congressional authority by noting that “it would raise serious constitutional questions if we were to adopt a free-flowing definition of purpose.”¹¹² Moreover, in light of the fact that Congress was perhaps pushing the boundary of constitutionality by extending Section 5 in the first place,¹¹³ politically it may have made sense not to push the boundary even further by providing a

104. See James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 265–66 (2007) (detailing the genesis of the Senate Report).

105. See S. REP. NO. 109-295, at 54–55; Persily, *supra* note 93, at 178 (“Never before in American history, however, has a Senate committee that unanimously voted in favor of a law later published a postenactment committee report that was supported only by members of one party.”).

106. S. REP. NO. 109-295, at 54.

107. *Id.* at 54–55.

108. *Id.* at 55.

109. Additionally, several judges, including, most prominently, Justice Antonin Scalia, refuse to put any stock in legislative history. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (1997) (“I think it is time to call an end to a brief and failed experiment, if not for reasons of principle then for reasons of practicality. I have not used legislative history to decide a case for, I believe, the past nine terms.”).

110. 521 U.S. 507 (1997).

111. *Id.* at 519 (“The design of the [Fourteenth] Amendment . . . [is] inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States . . . [Congress] has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”).

112. S. REP. NO. 109-295, at 18.

113. See discussion *infra* Part III.

detailed explanation of what Congress thought the contours of the discriminatory purpose inquiry *should* be.

At the end of the day, though, the main point here is not that Congress *should* have provided more guidance about enforcement of the discriminatory purpose standard. Rather, the point is that no sufficiently detailed framework has been developed for making determinations about discriminatory purpose in the crucial context of redistricting. Part III of this Article will lay out several reasons why it is important to develop a framework for making determinations about discriminatory purpose prior to the onset of the next redistricting cycle. But for now what is necessary to understand is that no one has tried to synthesize what is out there—in terms of doctrine and theory—to establish a workable structure for decision-making. In some sense, what needs to occur before the next redistricting cycle is a restatement of the law of discriminatory purpose and redistricting. A restatement provides a synthesis of where the law is while simultaneously attempting to push the law to where it should be. The next Part proposes such a synthesis.

II. A PROPOSED FRAMEWORK FOR DISCRIMINATORY PURPOSE AND REDISTRICTING

While the three main actors—Congress, the Supreme Court, and the Attorney General—in the drama involving the discriminatory purpose standard have yet to put forward an affirmative, operable framework for decision-making in the crucial context of redistricting, it is important to recognize that creating such a framework presents no simple task. As the Court has previously noted, “[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available.”¹¹⁴ Indeed, in the specific context of electoral structures, Justice Stevens’ dissent in *Rogers v. Lodge* noted that the Court’s majority had failed to create “an acceptable, judicially manageable standard” for adjudicating discriminatory purpose.¹¹⁵ In short, discriminatory purpose can be difficult to pinpoint and it is probably impossible to create a framework that accounts for every possible situation.

Although it is likely impossible to create an absolutely all-encompassing framework for making decisions related to the discriminatory purpose standard, some paradigmatic redistricting scenarios arise that may lend themselves to the creation of clearer decision-making rules. Certainly one

114. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). In many respects, deciding when state action has been imbued with a discriminatory purpose has an “I know it when I see it” quality. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

115. 458 U.S. 613, 633 (1982) (Stevens, J., dissenting).

cannot turn discriminatory purpose analysis in the redistricting context into a mathematical formula, but one can make some decisions about how to proceed in some of the recurring situations that the Attorney General and the federal courts seem likely to confront in the coming years. While a comprehensive framework cannot be developed that defines the full range of permissible and impermissible redistricting behavior, “incomplete theorization” can still serve a quite useful purpose.¹¹⁶

Going forward, this Article presents some of the paradigmatic situations involving decisions that will likely need to be made under the discriminatory purpose standard. In developing each of these various scenarios, concrete examples will most often be used. While some of these examples will be hypothetical, many examples will come directly from actual determinations regarding discriminatory purpose made by the Attorney General during the 1990s redistricting cycle or, in the alternative, from prior federal judicial opinions.

However, before delving into specific scenarios, one needs to first recognize that discriminatory purpose in the context of electoral structures represents a combined focus on process concerns and on substantive electoral outcomes. On the one hand, discriminatory purpose is sometimes about what lies in the hearts of government actors in that they are targeting a group for disfavored treatment because of animosity toward that group.¹¹⁷ On the other hand, discriminatory purpose also contains a strong focus on substantive representational outcomes where there does not appear to be any obvious intentional racial or ethnic animosity on the part of government actors in the design of a plan.¹¹⁸ Put differently, sometimes discriminatory purpose is mostly about a deliberative process during which decision-makers harbored some sort of racial animus. At other times, discriminatory purpose is primarily about a pattern of electoral outcomes in which the votes of a minority group are consistently degraded.¹¹⁹ Admittedly, some might wish the Supreme Court to wholly select one perspective or the other,¹²⁰ but it seems likely that both perspectives will

116. See Pildes, *Theory*, *supra* note 24, at 1612 (“In theory and in doctrine, we can often identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right.”) (emphasis added).

117. See generally *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (plurality opinion) (implying that discriminatory purpose represents a search for direct evidence of racial animus on the part of government actors).

118. See generally *Rogers*, 458 U.S. 613 (finding discriminatory purpose in the maintenance of an at-large election system from a panoply of factors of which few, if any, were directly related to the motivations of government officials); *White v. Regester*, 412 U.S. 755 (1973) (same).

119. Of course, sometimes discriminatory purpose combines elements of both discriminatory animus and a pattern of negative electoral outcomes for minority voters.

120. See, e.g., Issacharoff, *Gerrymandering*, *supra* note 23, at 601 (suggesting that when it comes to the law of democracy, the court should “jettison the elusive search for improper motives altogether”); Richard H. Pildes, *Principled Limits on Racial and Partisan*

continue to inform discriminatory purpose doctrine for several years to come.

Another thing that needs to be recognized is that a few assumptions are at work in all of the scenarios described below. First, except where otherwise noted, the presence of racially (or ethnically) polarized voting is assumed. In other words, one should assume that when offered a choice between, for example, a white candidate and an African American candidate, white voters overwhelmingly support the white candidate and African American voters overwhelmingly support the African American candidate.¹²¹ Indeed, the presence of polarized voting might legitimately be described as the key evidentiary precondition for any legal claim involving minority voting rights and electoral structures.¹²² Second, in all of the scenarios below it is assumed that the jurisdiction in question has some history of discrimination. In the overwhelming majority of instances that history of discrimination will be related to the electoral process; after all, jurisdictions covered by Section 5 were subjected to the preclearance requirement in the first place because *prima facie* evidence of voting-

Redistricting, 106 YALE L.J. 2505, 2506 (1997) [hereinafter Pildes, *Principled Limits*] (“Whatever the merits of motive-based approaches to mediating group conflicts in other constitutional contexts, in the redistricting arena that approach will not be capable of sustaining constitutional doctrine in coherent, administrable, or useful form.”).

121. To be sure, voting can be polarized even if the candidates in a specific contest are from the same racial or ethnic group. *See generally* *Lewis v. Alamance County*, 99 F.3d 600, 605–11 (4th Cir. 1996) (describing how voters of different racial groups can have sharply different preferences in electoral contests that pit a white candidate versus another white candidate). However, courts consistently note that the most compelling evidence of racially polarized voting comes from inter-racial and inter-ethnic contests. *See* *Uno v. City of Holyoke*, 72 F.3d 973, 988 n.8 (1st Cir. 1995) (“[E]lections in which minority candidates run are often especially probative on the issue of racial bloc voting.”); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1128 (3d Cir. 1993) (“As a general matter, we believe that elections involving white candidates only are much less probative of racially polarized voting than elections involving both black and white candidates.”); *Westwego Citizens for Better Gov’t v. City of Westwego*, 946 F.2d 1109, 1119 n.15 (5th Cir. 1991) (“[T]he evidence most probative of racially polarized voting must be drawn from elections including both black and white candidates.” (quoting *Westwego Citizens for Better Gov’t v. City of Westwego*, 872 F.2d 1201, 1208 n.7 (5th Cir. 1989))); *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1028 (C.D. Ill. 1987) (“[A]nalysis of voting . . . demonstrates that in races where there is a black candidate, most blacks vote for the black. White voters overwhelmingly prefer white candidates in the same circumstances. *This is racially polarized voting.*”) (emphasis added); *see also* Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1394 (2010) (“One way courts attempt to . . . resolve the . . . issue of who is the minority community’s ‘candidate of choice’ [] is to focus on elections in which minority candidates oppose white candidates.”); 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, 1526 n.22 (2002) (noting that in analyzing racially polarized voting “[m]ost courts include all contests, but conclude that black versus white candidate races have greater ‘probative value’”).

122. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1837 (1992) [hereinafter Issacharoff, *Polarized Voting*] (describing how racially polarized voting is a major focus in voting rights litigation).

related discrimination existed.¹²³ In addition, a history of discrimination will likely be found outside of the voting context, such as in education and the provision of other government services, and this discrimination can often be linked to present-day continuing effects (e.g., in health, education, etc.) that can impact political participation.¹²⁴

Yet another thing that needs to be recognized is that the presence of discriminatory purpose when there is an actual retrogression of minority voting strength or an intent to retrogress will not be discussed for several reasons.¹²⁵ For starters, when actual retrogression occurs, there is already a basis for denying preclearance under the Section 5 effects standard.¹²⁶ In other words, discriminatory purpose analysis adds little to the mix when actual retrogression has occurred.¹²⁷ As for an intent to retrogress, such a situation is an outlier because it is rare that those who have an intent to retrogress fail to achieve the goal.¹²⁸ Thus, the concern to which the following pages are devoted is when the discriminatory purpose standard should be found to have been violated because a redistricting plan fails to *improve* the position of minority voters.¹²⁹

123. See *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 156–57 (1977) (plurality opinion) (describing how jurisdictions got covered by the preclearance provision “whenever it was administratively determined that certain conditions which experience had proved were indicative of racial discrimination in voting had existed in the area”).

124. See *LULAC*, 548 U.S. 399, 439–40 (2006) (finding a violation of Section 2 of the Voting Rights Act while implying discriminatory purpose existed and noting the importance to the Court’s analysis of a history of voting-related discrimination and “the political, social, and economic legacy of past discrimination”).

125. One could possibly make an argument that the plain language of Section 5 confines the purpose standard to redistricting plans that have “a purpose of diminishing the ability of . . . [minority voters] to elect their preferred candidates of choice.” 42 U.S.C. § 1973c(b). However, confining the interpretation of Section 5 in this manner would reduce to a nullity the textual congressional statement of purpose that expresses an intention to statutorily overrule *Bossier Parish II*. VRARA, Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 577 (2006). Moreover, such a plain language argument would be unavailing to anyone willing to take even a cursory peek at the legislative history. See H.R. REP. NO. 109-478, at 66–68 (2006).

126. *Supra* notes 41–45 and accompanying text (discussing the “effects” standard).

127. Moreover, relatively few redistricting plans will involve retrogression. McCrary et al., *supra* note 40, at 314 (showing that in the post-2000 Census redistricting cycle, the Attorney General denied approval to only fifteen districting plans using the retrogression standard). This is because Section 5 has a “strong deterrent effect” on redistricting actors. See MARK A. POSNER, *Post-1990 Redistrictings and the Preclearance Requirement of Section 5 of the Voting Rights Act*, in RACE AND REDISTRICTING IN THE 1990S 80, 94–96 (Bernard Grofman ed., 1998) (describing Section 5’s deterrent effect).

128. *Supra* notes 58–60 and accompanying text (discussing the rarity of the “incompetent retrogressor”).

129. Supreme Court doctrine and the legislative history surrounding VRARA allow for a finding of discriminatory purpose when an electoral structure fails to create an additional opportunity for minority voters. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982); *White v. Regester*, 412 U.S. 755 (1973); H.R. REP. NO. 109-478, at 67 (favorably mentioning *Busbee*—a case where discriminatory purpose was found when the redistricting plan failed to provide additional minority voting strength); S. REP. NO. 109-295, at 17 (“Courts and the Justice Department should ask whether the decision not to *create* a black-majority district departed from ordinary districting rules If the State went out of its way to avoid *creating* such a majority-minority [district]—one that would be *created* under ordinary

Finally, a word of caution with regard to the effort to use politics as markets as a theoretical framework to aid in decision-making related to the discriminatory purpose standard. Politics as markets would certainly like to entertain a wholesale doctrinal shift in many areas. For instance, politics as markets would lead to the Court taking a more aggressive stance against partisan gerrymanders and a less aggressive approach to racial gerrymandering.¹³⁰ Moreover, politics as markets might even like to see the total elimination of Section 5.¹³¹ I proceed, however, from the position that wholesale revolution will not arrive anytime soon. Indeed, even Supreme Court justices whom one might think inclined to embrace politics as markets seem cautious about the approach.¹³² In my view, what politics as markets might be able to do is influence the edges of voting rights enforcement rather than completely overhaul it. In some sense, the goal here is to combine some of the theory of politics as markets with the reality of the doctrinal and statutory landscape. This means there may be instances where the framework presented here diverges from a strict politics as markets view.

What is attempted in the pages that follow is the creation of a macro-level framework that can bring some measure of order to discriminatory purpose analysis in the redistricting context. The goal is to strip away all of the multi-factored tests to find the core fundamentals that should lead to a finding that the discriminatory purpose hurdle has or has not been cleared. In essence, the individual scenarios for redistricting always present unique independent facts and can involve multiple arguments for and against finding a violation of the discriminatory purpose standard. Nevertheless, at the end of the day, there seem to be four instances where a redistricting plan should be found to violate the discriminatory purpose standard because it fails to increase minority voting strength: when direct evidence of discriminatory animus in the redistricting process has come to light; when the redistricting plan does not provide minority voters with any representation; when “minority” voters comprise a majority of the jurisdiction, but the redistricting plan prevents them from electing a majority of the seats on the governing body; and when the redistricting map clearly shows on its face that district lines have been grossly gerrymandered to preclude the ability of minority voters to elect a

rules—that is unconstitutional racial discrimination.”) (emphasis added).

130. See generally Pildes, *Political Competition*, *supra* note 23 (arguing the Court should engage in more policing of partisan gerrymanders); Issacharoff, *Gerrymandering*, *supra* note 23 (arguing the Court should disengage from the racial gerrymandering inquiry).

131. See generally Issacharoff, *Own Success*, *supra* note 26; Pildes, *Modern VRA*, *supra* note 27.

132. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 351 n.5 (2004) (Souter, J., dissenting) (describing the politics as markets analogy to antitrust as “an intriguing one that may prove fruitful, though I do not embrace it at this point out of caution about a wholesale conceptual transfer from economics to politics”).

candidate of their choice. However, notably, the proposed framework does not mandate federal intervention on discriminatory purpose grounds to create additional districts that provide minority voters with an ability to elect candidates of their choice whenever such districts can be drawn—a type of federal enforcement of Section 5 that brought severe criticism from the Supreme Court during the 1990s redistricting cycle.¹³³

A. *Direct Evidence of Racial Animus*

In some instances, a state or local government will fail to provide an additional ability for minority voters to elect¹³⁴ a candidate of choice and direct evidence of racial animus will have been developed. In this situation, the failure to increase minority voting strength can be attributed to direct evidence of an intent to harm minority voters harbored by those who designed the redistricting plan. In such a scenario, the redistricting plan should be found to violate the discriminatory purpose standard.

The paradigmatic example of this scenario was Georgia's congressional redistricting in the early 1980s. In *Busbee v. Smith*,¹³⁵ a three-judge panel of the D.C. District Court rejected Georgia's plan even though it did not diminish minority voting strength and on its face appeared to slightly

133. See *infra* notes 220–23 and accompanying text (discussing the Supreme Court's criticism).

134. At this point, it may be useful to explain some of the redistricting terminology being employed in this Article. The Supreme Court has variously referred to at least five types of electoral districts: "safe," "majority-minority," "coalition," "cross-over," and "influence." See generally *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009); *Georgia v. Ashcroft*, 539 U.S. 461 (2003). For purposes of Section 5 and this Article, it makes the most sense to distinguish between two types of districts: "ability to elect" and "influence." An "ability to elect" district is what the Court might term a "safe," "majority-minority," "coalition," or "cross over" district. Cf. Pildes, *Modern VRA*, *supra* note 27, at 7 (noting that the Court has equated "safe" and "coalitional" districts when "coalitional districts offer the same likelihood of black electoral success"). In these "ability to elect" districts, minority voters control electoral outcomes either by being able to control the outcome (by forming a majority of the electorate) of both the primary and general election or by being able to control the outcome of the primary election and then having the candidate they selected in the primary go on to victory at the general election because of a predictable number of crossover votes from white voters. In ability to elect districts, minority voters almost always secure "descriptive" representation in that the winning candidate in the district will typically be of the same race or ethnicity as the minority voters who control electoral outcomes. See *Ashcroft*, 539 U.S. at 480–81 (O'Connor, J., concurring) (describing how "safe" districts operate); see also LUBLIN, *supra* note 50, at 46, 48 (providing statistics for United States House districts demonstrating that African American candidates usually win in African American majority districts and that Latino candidates usually win in Latino majority districts). In contrast, an "influence" district is one where minority voters do not have the ability to control the outcome (i.e., form a majority of the electorate) of either the primary or general election, but have a significant enough amount of the population that they might theoretically play a role in swinging an election one way or another. Issacharoff, *Own Success*, *supra* note 26, at 1716 (describing an "influence" district as one "where black voters [will] be able to exert a significant—if not decisive—force in the election process."). In these "influence" districts, what theoretically will happen is that a white Democrat wins in the primary and defeats a white Republican in the general election.

135. 549 F. Supp. 494 (D.D.C. 1982), *aff'd* 459 U.S. 1166 (1983).

increase minority voting strength.¹³⁶ The court held the plan to be purposefully discriminatory due to overt racial animus on the part of legislators who played a key role in shaping the plan.¹³⁷ In so holding, the court described one of the most influential leaders of the redistricting process as a “racist”¹³⁸ for using a racial epithet to describe his opposition to drawing a congressional district that would provide minority voters with the ability to elect a candidate of their choice.¹³⁹ The court also detailed how another leader in the process explicitly described his opposition to the creation of an ability-to-elect district in racial terms.¹⁴⁰ And it described how a third leader of the redistricting process, Georgia’s Speaker of the House, held a negative racial attitude toward African Americans.¹⁴¹ In short, the *Busbee* decision involved a situation where evidence of racial animus by decision-makers was plain.

Admittedly, overt evidence of racial hostility was not the only factor mentioned by the *Busbee* court that led to a finding of discriminatory purpose. In *Busbee*, the court also relied on the negative impact of the redistricting plan (in that it failed to create a district that provided minority voters with an ability to elect a candidate of choice), the history of discrimination, and the absence of a legitimate reason for failing to draw a district for minority voters.¹⁴² The *Busbee* court also detailed how legislators who supported creating a district for minority voters were marginalized during the redistricting process.¹⁴³ Moreover, *Busbee* involved a scenario where minority voters in Georgia did not have *any* ability to elect a candidate of choice to Congress—a potentially significant aspect of discriminatory purpose analysis that will be discussed in just a moment. For these reasons, one could read *Busbee* as a finding of discriminatory purpose based on something more than direct evidence of discriminatory animus by government officials.

Nevertheless, direct evidence of racial hostility seemed to do the majority of the heavy-lifting in the *Busbee* court’s discriminatory purpose analysis and Congress itself appears to have so interpreted the decision. The court itself mentioned that the “overt racial statements” provided “*only*

136. *Id.* at 516 (“[The District in the proposed plan] has a higher black population percentage than under the existing plan, there is no retrogression.”).

137. *Id.* at 517 (“Overt racial statements . . . mandates the conclusion that . . . [the redistricting plan] has a discriminatory purpose in violation of Section 5.”).

138. *Id.* at 500 (“Representative Joe Mack Wilson is a racist.”).

139. *Id.* at 501 (noting that Rep. Wilson said, “I don’t want to draw nigger districts”).

140. *Id.* at 507 (describing Sen. Hudson’s floor statement).

141. *Id.* at 509–10.

142. *Id.* at 516.

143. *See id.* at 509 (describing the makeup of the reapportionment conference committee as including only white members who overtly opposed any plan that would strengthen African American voting power, despite there being black members who qualified to serve).

one basis for a finding of discriminatory intent,”¹⁴⁴ hinting that the racial statements alone would have supported the court’s holding. Moreover, the 2006 House Report related to extension and amendment of Section 5 notes that when Congress initially enacted Section 5 it wanted to prevent voting changes made with “clear racial animus.”¹⁴⁵ It then goes on to describe how omitting the discriminatory purpose standard from Section 5 would have required preclearance of the redistricting plan in *Busbee* where “Joe Mack Wilson, the chief architect of redistricting in the house told his colleagues on numerous occasions, ‘I don’t want to draw nigger districts.’”¹⁴⁶ For Congress, too, *Busbee* seems to be a decision primarily grounded in clear, direct evidence of animus against minority voters by government actors.

Moreover, direct evidence of racial hostility likely will be accompanied by other evidence of discrimination. Where direct evidence of racial or ethnic animus exists, one is likely to find many of the other factors mentioned by the *Busbee* court—a racial impact to the decision in that minority voting strength could be increased, a history of discrimination, the absence of legitimate reasons for adopting the plan, and flaws in the redistricting process. In short, while direct evidence of racial hostility may not technically be the entire ballgame, it has previously been recognized as doing the lion’s share of the work and, regardless, where there is discriminatory smoke, there is likely to be discriminatory fire.¹⁴⁷

144. *Id.* at 516 (emphasis added).

145. H.R. REP. NO. 109-478, at 66 (2006).

146. *Id.* at 67 (quoting *Busbee*, 549 F. Supp. at 501).

147. An interesting situation could arise if there is direct evidence of discriminatory animus but absolutely no possibility for the redistricting plan to provide an improved position for minority voters. In other words, racial discrimination could be at work but no real remedy is available for minority voters other than passing a new plan absent the overt racial animus.

Under such a circumstance, it may not make much sense from a functional perspective to reject such a redistricting plan. On this score, some courts have taken the position that to succeed on a claim of intentional discrimination, plaintiffs need to show some impact on the minority group’s ability to elect a candidate of its choice. *See, e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990) (“Even where there has been a showing of intentional discrimination, plaintiffs must show that they have been injured as a result. Although the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, *some* showing of injury must be made to assure that the district court can impose a meaningful remedy.”). Indeed, Justice Stevens’ dissent in *Rogers v. Lodge* recognized that one flaw of discriminatory purpose analysis generally is that it can be used to strike down rules that otherwise do not seem to cause concrete injury. 458 U.S. 613, 641–42 (1982) (Stevens, J., dissenting) (“Under the Court’s [discriminatory purpose] analysis, however, the characteristics of the particular form of government under attack are virtually irrelevant. Not only would the Court’s approach uphold an arbitrary—but not invidious—system that lacked independent justification, it would invalidate—if a discriminatory intent were proved—a local rule that would be perfectly acceptable absent a showing of invidious intent.”); *see also LULAC*, 548 U.S. 399, 418 (2006) (expressing skepticism, in the context of partisan gerrymandering analysis, “of a claim that seeks to invalidate a statute based on a legislature’s unlawful motive but does so without reference to the content of the legislation enacted”).

There are also solid theoretical reasons for rejecting a redistricting plan where direct evidence of discriminatory animus existed because approving such a redistricting plan sends the wrong message. In light of the United States' long history of discrimination related to voting and other matters,¹⁴⁸ upholding a redistricting plan produced under a penumbra of racial or ethnic animus would further the idea that discriminatory motive is acceptable conduct for public officials. Indeed, in the context of the racial gerrymandering decisions, the Supreme Court has recognized the "pernicious" message that overtly racialized redistricting can send to voters and elected officials alike.¹⁴⁹

In sum, there is adequate foundation for denying preclearance to redistricting plans that fail to improve the position of minority voters due to racial animus on the part of redistricting actors. First, such enforcement conforms to a key precedent in the area. Second, such enforcement conforms with the legislative history of the 2006 amendment to Section 5. Third, such plans should be rejected because of the pernicious message they send.¹⁵⁰ Thus, redistricting plans that are the product of direct racial animus should be found to violate the discriminatory purpose standard.¹⁵¹

There might, however, be symbolic value to disapproving a plan adopted with racial animus but that did not negatively impact minority voters' ability to elect a candidate of choice. In some respects, this symbolic injury would be similar to the type of injury recognized in the racial gerrymandering context. *See infra* note 149 and accompanying text. Moreover, other language in Supreme Court opinions implies that the presence of a discriminatory purpose alone should result in a denial of Section 5 preclearance. *See, e.g., City of Pleasant Grove v. United States*, 479 U.S. 462, 469 (1987) ("Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent." (quoting *City of Rome v. United States*, 446 U.S. 156, 172 (1980))); *see also* Issacharoff, *Polarized Voting*, *supra* note 122, at 1836 (describing *Pleasant Grove* as allowing for Section 5 to reach "ill-motivated municipal annexation decisions even in the absence of any discriminatory impact"). In addition, the House Report accompanying the 2006 extension and amendment of Section 5 implies that a plan adopted with a clear racial animus is not entitled to federal approval, regardless of the effect. H.R. Rep. No. 109-478, at 66 ("Through the 'purpose' requirement, Congress sought to prevent covered jurisdictions from enacting and enforcing voting changes made with a clear racial animus, regardless of the measurable impact of such discriminatory changes.").

Undoubtedly, this debate might be one of great academic interest. However, a scenario where clear racial animus exists but no racial effect can be found seems more likely to exist in the world of Supreme Court Justice and law professor hypotheticals than in the real world. This is because persons who harbor an intent to harm minority voters are unlikely to give effect to that intent without affecting some substantive harm. As such, this Article won't pretend to definitively resolve what seems likely to be an outlier scenario.

148. *See generally* C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

149. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 647-49 (1993) (recognizing stereotyping and sending a "pernicious message" to elected officials as harms that stem from redistricting plans that "rationally cannot be understood as anything other than an effort to segregate voters into different districts on the basis of race . . . [without sufficient justification.]"); *see also* *Bush v. Vera*, 517 U.S. 952, 984 (1996) (plurality opinion) (recognizing that the problem with racial gerrymandering is an "expressive harm").

150. Application of politics as markets theory likely would not result in denials of preclearance because of evidence of racial animus as politics as markets seems to eschew a focus on the motives of redistricting actors. *See supra* note 120. However, as previously mentioned, my primary aim here is to create a relatively pragmatic framework that can be

B. Failure to Provide Any Minority Representation

The *Busbee* decision involved direct evidence of racial animus on the part of redistricting actors, but it also involved another key fact. In *Busbee*, there was not a single Georgia congressional district that provided minority voters with an ability to elect a candidate of choice.¹⁵² Put simply, minority voters lacked any representation. And in these types of situations—where it is possible to provide minority representation and yet the redistricting plan perpetuates a lack of representation¹⁵³—a denial of preclearance can be justified on doctrinal, statutory, and theoretical grounds.¹⁵⁴

implemented in the upcoming redistricting cycle and, as such, it does not seem feasible to reject an approach that denies preclearance to those redistricting plans where racial animus is plain.

151. To be sure, clear, direct evidence of animus likely will be absent in the vast majority of future redistricting processes. See *Hayden v. Patterson*, 594 F.3d 150, 163 (2d Cir. 2010) (“[D]iscriminatory intent is rarely susceptible to direct proof . . .”); *Uno v. City of Holyoke*, 72 F.3d 973, 984 (1st Cir. 1995) (“In this enlightened day and age, bigots rarely advertise an intention to engage in race-conscious politics.”). There are at least three reasons for this. First, members of our society are less likely to harbor “old school” racist sentiments than they were several decades ago. Antony Page & Michael J. Pitts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 MICH. J. RACE & L. 1, 22–23 (2009) (describing changing social mores in relation to racial discrimination). Second, government actors have become more sophisticated in the sense that even if they harbor racial animus, they are unlikely to express these sentiments in a manner that will end up as evidence in a judicial proceeding or administrative investigation. Third, and relatedly, the redistricting process itself is often incredibly secretive—redistricting perhaps more than anything in our current political culture evokes the image of hardball politics conducted in smoke-filled backrooms. Cf. Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667, 668 (2006) (describing redistricting as “insufficiently ‘political’ in the sense that it occurs too isolated from public engagements, too distant from public scrutiny, and too insulated from popular accountability”). Nevertheless, such direct evidence of animus still occasionally comes to light and might be found in the future. See Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?* 4 U. PA. J. CONST. L. 735, 750 (2002) (describing the 1990s redistricting process in Pennsylvania when a state legislator reacted to learning the minority percentage in his district would increase by saying: “Look, I’m a white mother-f--er from Philadelphia. And I don’t want no more blacks or Spics in my district.”); see also Clarke, *supra* note 62, at 406 (flagging litigation from 2002 challenging a redistricting plan where direct evidence of racial animus was presented).

152. See *supra* notes 142–144 and accompanying text (describing *Busbee*).

153. There are, of course, those who would argue that as long as minority voters can formally participate (i.e., register and vote), then any redistricting plan provides minority voters with representation. However, such a crabbed view of constitutional voting rights has never been endorsed by a majority of the Supreme Court. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”). Thus, as should be plain by this point, by a lack of “any minority representation,” I mean a situation where minority voters do not have the ability to elect a candidate of their choice. See *supra* note 134 (describing terminology used in this Article).

154. An example of such a discriminatory purpose analysis comes from the Attorney General’s 1992 denial of preclearance to the redistricting plan for the West Carroll Parish (Louisiana) school board. The parish was almost seventeen percent African American and voting was racially polarized. Letter from James P. Turner, Acting Assistant Att’y Gen., Civil Rights Div., to David A. Creed (March 30, 1993), in *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of*

Enforcement of the discriminatory purpose standard in this manner comports with the most recent Supreme Court precedent related to discriminatory purpose in the context of electoral structures. Although *Rogers v. Lodge* did not directly involve a redistricting plan, it is the clearest example of the Court being willing to find discriminatory purpose from an amalgamation of circumstances, the most important of which would seem to be a total lack of minority representation. In *Rogers*, the Court considered a challenge to at-large elections for the five-member board of commissioners in Burke County, Georgia, which at the time had a slight majority African American population.¹⁵⁵ Elections were marked by racially polarized voting, and in the history of Burke County, no African American candidate had ever been elected.¹⁵⁶ Under these circumstances, the Supreme Court upheld a lower court finding of discriminatory purpose.¹⁵⁷

To be sure, a lack of any representation in the context of racially polarized voting cannot be the sole factor related to a finding of discriminatory purpose.¹⁵⁸ For example, the *Rogers* Court carefully acknowledged other ingredients contributing to the decision: a history of discrimination in voting and other areas, such as education; the lingering effects of past discrimination on present-day political participation; an unresponsiveness to the concerns of African American citizens on the part of the white members of the board; and African Americans' depressed socio-economic status.¹⁵⁹ Admittedly, there was a bit more to the discriminatory purpose story in *Rogers*.

the H. Comm. on the Judiciary, 109th Cong. 1044–46 (2005). Despite requests from members of the African American community for a district that would provide minority voters with an ability to elect a candidate of choice, and despite the fact that an alternative redistricting plan had been developed that provided for such a district, the proposed redistricting plan perpetuated the lack of minority representation. *Id.* Thus, the Attorney General refused to preclear the school board's redistricting plan. *Id.*

155. *Rogers v. Lodge*, 458 U.S. 613, 615–16 (1982).

156. *Id.* at 615, 623 (noting that while no African American candidate had ever been elected, African American candidates had been on the ballot).

157. *Id.* at 616.

158. *Id.* at 624 (“Under our cases, however, such facts [as racially polarized voting and a lack of minority candidates elected] are insufficient in themselves to prove purposeful discrimination absent other evidence such as proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice.”). There is, of course, another working assumption in this particular analysis in that there has to be an ability to create a single-member district in which minority voters can control their own electoral destiny. If it is impossible to create such a district, there is no remedy for the harm except possibly through the adoption of an “alternative” election system such as cumulative voting. To date, though, courts have been extremely reluctant to order the adoption of alternative election systems to remedy violations of minority voting rights unless the alternative election system has been proposed by a defendant as a remedy following a finding of vote dilution. *See United States v. Vill. of Port Chester*, No. 06 Civ. 15173, 2010 WL 1326267, at *32–33 (S.D.N.Y. April 1, 2010).

159. *Rogers*, 458 U.S. at 624–26. The Court also noted that Burke County's system of at-large elections had several facets that enhanced its discriminatory impact, including: the

But it would seem that the lack of any representation in the context of racially polarized voting is what did the majority of the analytical work in *Rogers*. Indeed, the Court implied as much when it wrote that the lack of elected African Americans and the overwhelming evidence of racially polarized voting “[bore] heavily on the issue of purposeful racial discrimination.”¹⁶⁰ Moreover, when racially polarized voting exists and minority voters lack any representation in the governing body, one would expect to find a history of discrimination, lingering effects of that discrimination on political participation and socioeconomic status, and some evidence of a lack of responsiveness on the part of elected officials. Put differently, where minority voters comprise enough of the population to elect a candidate of their choice in a single-member district, voting is racially polarized, and minority representation is nonexistent, it will be relatively easy to discover an amalgamation of other circumstantial factors to support a finding of discriminatory purpose.¹⁶¹

Apart from judicial doctrine, the legislative history surrounding the 2006 extension and amendment of Section 5 provides implicit support for using the discriminatory purpose standard to reject a redistricting plan that fails to provide any representation to a cohesive and sufficiently numerous minority population. The House Report, although not a paradigm of clarity, quotes with approval testimony from a witness concerned about the absence of a purpose standard leading to the inability of federal decision-makers to employ Section 5 as a tool to address situations where no minority representation existed.¹⁶² The Senate Report, to the extent it has

fact that Burke County was unusually large (about two-thirds the size of Rhode Island), thus making it difficult for African American voters to reach polling places and African American candidates to campaign; and the use of numbered posts and a majority vote requirement. *Id.* at 627. These factors, though, would not likely play much of a role in the context of single-member districts because single-member districts substantially cut down on geographic sprawl and single-shot voting is not often a viable electoral strategy for minority voters in single-member districts.

160. *Id.* at 623 (emphasis added). In the context of a decision rendered under Section 2 of the Voting Rights Act, the Court seems to have similarly placed a lot of emphasis on a total lack of minority representation as one of the main foundations for finding a Section 2 violation. See *Johnson v. De Grandy*, 512 U.S. 997, 1012–13 (1994) (noting that finding a violation of Section 2 is much harder when the facts involve “not the chance for some electoral success in place of none, but the chance for more success in place of some”).

161. See generally *Rogers*, 458 U.S. at 623–25 (discussing factors such as historical discrimination, educational opportunity, and socio-economic status as evidence of discriminatory purpose). When describing a lack of any representation in a redistricting plan, it is implied that one is looking at a continuum of elections at which minority voters have been unable to obtain representation in the same way that one examines a continuum of elections to determine the presence or absence of racially polarized voting.

162. H.R. REP. NO. 109-478, at 67 (2006) (“[T]he Committee heard testimony that if the *Bossier II* standard is left unaddressed ‘all of the places where [we] did not have Black representation where the number of seats, members on the commission or county school board or city council were increased, we would stand to lose representation, all of those governing bodies, if the *Bossier II* standard is applied.’” (quoting *Voting Rights Act: Section 5—Preclearance Standards Before the Subcomm. on the Constitution of the H.*

any value as legislative history,¹⁶³ also implies that the discriminatory purpose standard should serve to prevent redistricting plans that “lock out racial and language minorities from political power.”¹⁶⁴

A strong theoretical basis also supports finding a violation of the discriminatory purpose standard when a redistricting plan does not provide any representation to minority voters.

For starters, having a minority member¹⁶⁵ of the governing body can change the debate within the governing body, and changing the debate can lead to substantive, positive legislative outcomes for minority voters. For example, Professor Kerry Haynie notes that legislators introduce bills to set the playing field for debate, and that African American state legislators are more likely to introduce legislation in the interests of African American constituents.¹⁶⁶ A simpler, more concrete example comes from United States Senator Carole Moseley Braun, an African American from Illinois, whose presence in that body led to the defeat of legislation that would have renewed a patent on the Confederate flag insignia held by the Daughters of the Confederacy.¹⁶⁷ Indeed, even Abigail Thernstrom—a fierce critic of drawing district lines to allow minority voters to elect candidates of

Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of Jerome A. Gray, State Field Director, Alabama Democratic Conference))).

163. See *supra* notes 104–09 and accompanying text (describing facts that point to the Senate Report as being of limited value as legislative history).

164. S.R. REP. NO. 109-295, at 16 (2006) (quoting Anita Earls). The Senate Report cites witness testimony that the discriminatory purpose standard covers redistricting choices that are “purposefully taken . . . to lock out racial and language minorities from political power.” *Id.* Of course, the words “purposefully taken” could be interpreted to suggest that direct evidence of racial animus on the part of key redistricting actors is necessary to reject a plan that fails to provide any representation to minority voters. Indeed, this interpretation receives added support from the Senate Report’s later reference to *City of Mobile v. Bolden*, 446 U.S. 55 (1980), a case that seemed to require direct evidence of racial animus as a condition of proving discriminatory purpose. S.R. REP. NO. 109-295, at 16 (citing *City of Mobile*). However, the Senate Report states that the goal of amending Section 5 to restore the constitutional purpose standard was to allow for rejection of plans that violate the Fourteenth or Fifteenth Amendment. *Id.* And judicial interpretation of the Fourteenth and Fifteenth Amendments has not required direct evidence of racial animus when minority voters are locked out from any representation. See *supra* notes 155–61.

165. Recall that a district that provides minority voters with the ability to elect a candidate of choice will nearly always lead to a situation where a member of that minority group achieves election to the governing body. See *supra* note 134.

166. See KERRY L. HAYNIE, AFRICAN AMERICAN LEGISLATORS IN THE AMERICAN STATES 29–31 (2001) (finding that African American legislators are more likely than white legislators to introduce legislation that is in the interests of African American constituents even after controlling for factors such as gender, party affiliation, legislative seniority, and racial composition of the district that elected the legislator). In addition to substantive legislation, such as spending bills, minority governing officials also play a significant role in the introduction and passage of “symbolic” legislation, such as the naming of a post office for a civil rights icon. See KATHERINE TATE, BLACK FACES IN THE MIRROR 103–04 (2003) (“[W]ithout Black members in Congress, it is doubtful that Blacks would obtain their fare share of symbolic legislation.”).

167. DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION 37 (1999).

choice—seems to admit that having some (as opposed to zero) minority representation at the table changes the nature of legislative debate.¹⁶⁸

Having some minority representation can also change the dynamic in terms of access to power for minority voters. For example, having a minority representative may mean that minority citizens get better results in terms of constituent services.¹⁶⁹ As one staffer of a newly elected minority member of Congress told Wisconsin's David Canon in the 1990s, "We have a very passive constituency. They very seldom write to us with their problems; they are not even aware of the basic resources offered by the federal government in many cases. So we have town meetings and radio call-in shows every week to try and get out the word."¹⁷⁰ Moreover, while minority elected officials will be more likely to reach out to minority constituents, minority constituents may be more likely to reach out to minority elected officials because they perceive minority officials to be responsive.¹⁷¹

There is also a symbolic aspect to having minority representation in terms of the message it can send both to minority and white citizens. On the one hand, minority representation sends the message to minority residents that they are not second-class citizens,¹⁷² it may inspire minority

168. See ABIGAIL TERNSTROM, *WHOSE VOTES COUNT?* 238–39 (1987). As Ternstrom has written:

There is no doubt that where "racial politics . . . dominates the electoral process" and public office is largely reserved for whites, the method of voting should be restructured to promote minority officeholding. . . . Whether on a city council, on a county commission, or in the state legislature, blacks inhibit the expression of prejudice, act as spokesmen for black interests, dispense patronage, and often facilitate the discussion of topics (such as black crime) that whites are reluctant to raise. That is, governing bodies function differently when they are racially mixed, particularly where blacks are new to politics and where racially insensitive language and discrimination in the provision of services are long-established political habits.

Id.

169. See LUBLIN, *supra* note 50, at 99–100 ("African-American voters often feel more comfortable approaching a black representative for constituent service or about a public policy concern.").

170. Canon, *supra* note 167, at 58.

171. See TATE, *supra* note 166, at 120 ("When asked if they had a problem that their representative could do something about, how helpful would that representative be, the vast majority (88.5 percent) of [African American survey respondents] represented by Black Democrats felt that their legislator would be somewhat helpful. . . . At the same time, 76.5 to 71% of those respondents believed that their White legislator, either Republican or Democrat, would be very or somewhat helpful."); Claudine Gay, *Spirals of Trust? The Effect of Descriptive Representation on the Relationship Between Citizens and Their Government*, 46 AM. J. POL. SCI. 717, 718 (2002) (noting that "black constituents . . . are more likely to contact black representatives").

172. See Chandler Davidson & Bernard Grofman, *Editors' Introduction to QUIET REVOLUTION IN THE SOUTH* 3, 16 (Chandler Davidson & Bernard Grofman eds., 1994) ("Tom McCain was one of the first blacks elected to office since Reconstruction in Edgefield County, South Carolina—home of racist firebrand Benjamin 'Pitchfork Ben' Tillman and of long-time opponent of desegregation J. Strom Thurmond. Speaking in 1981, McCain said, 'There's an inherent value in officeholding that goes far beyond picking up the garbage. A race of people who are excluded from public office will always be second

residents to have greater confidence in government,¹⁷³ and it may increase civic participation among minority residents.¹⁷⁴ On the other hand, having some minority representation also tells *whites* that minority residents are not second-class citizens,¹⁷⁵ and to the extent that whites have irrational views of minority competence in electoral office, having minority representation may help diminish the prevalence of such views.¹⁷⁶

class.”); TATE, *supra* note 166, at 15 (“Descriptive representation remains potently symbolic to Blacks today. It represents their inclusion in the polity, the progress achieved in America’s race relations, and their political power in the U.S. system.”); Pildes, *Modern VRA*, *supra* note 27, at 2 (“Particularly for groups long excluded from political power, guaranteed representation is an expressively important sign of equal political standing and citizenship, as well as a functional means of securing participation in power.”).

173. See LUBLIN, *supra* note 50, at 37 (“The election of African Americans and Latinos to Congress legitimates the political process for members of these previously powerless and excluded groups.”); TATE, *supra* note 166, at 151 (“Being descriptively represented in Congress had no bearing on whether Congress was doing a good job or not. . . . Still, Blacks who believed Blacks to be numerically strong in Congress had more positive views of Congress and greater trust than those Blacks who felt Blacks were numerically weak.”); TERNSTROM, *supra* note 168, at 239 (“Few would disagree that, in a heavily black southern city with a long history of police brutality, black confidence in the police force demands that it be integrated. The point applies in politics as well: where blacks have long been disfranchised and remain excluded from office, black confidence in government is in the public interest.”); KENNY J. WHITBY, *THE COLOR OF REPRESENTATION* 81 (1997) (“The social composition of a representative body is important from a symbolic perspective because it demonstrates to groups in society that they are taken seriously by the government. Sociological similarity (descriptive representation) helps to promote good representation and political stability by increasing members of the group’s faith and trust in government (symbolic representation).”); Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, 84 AM. POL. SCI. REV. 377, 383 (1990) (“Blacks in high-empowerment areas trust local officials more and expect to have greater influence with them than do blacks in low-empowerment areas.”).

174. See Bobo & Gilliam, *supra* note 173, at 387 (“Our results show, first, that where blacks hold positions of political power, they are more active and participate at higher rates than whites of comparable socioeconomic status.”); see also Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 785 (2008) (“Although empirical research on majority-minority districts for African-Americans is more mixed [than that for Latinos], the social science literature generally finds higher levels of political participation by African Americans in jurisdictions of minority empowerment.”); cf. TATE, *supra* note 166, at 141 (concluding that “political knowledge” increases among African Americans when they are represented by a person of their own race in the U.S. House of Representatives, but not finding an increase in other measures of voter participation).

175. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 54 (1994) (reporting that one African American state legislator worked to ensure the election of other African Americans to help dispel “the myth that some white kids might have that blacks can’t serve or shouldn’t be serving at the courthouse”); LUBLIN, *supra* note 50, at 100 (“The election of white ethnic representatives visibly symbolized their clout and status as well as their assimilation into the American polity. African-American efforts to elect blacks to public office are both utterly understandable and American.”).

176. HAYNIE, *supra* note 166, at 63 (“[T]he increased presence of African Americans in public policy-making institutions challenges the notion that African Americans cannot or should not be trusted in positions of authority and power.”); TERNSTROM, *supra* note 168, at 239 (“And where whites—and often blacks—regard skin color as a qualification for office (in part because no experience suggests otherwise), the election of blacks helps to break both white and black patterns of behavior. In the documentary film ‘Hands That Picked Cotton,’ a white store owner in a county supervisor race in Mississippi explains that he chose to run because he didn’t want the job to get in the hands of the ‘wrong person,’ someone who couldn’t manage money. In such a setting, the lesson that blacks are not

While there are solid doctrinal and theoretical reasons for federal intervention to provide some representation to minority voters when the redistricting plan provides no representation, one theoretical angle that has yet to be developed in detail is how politics as markets should treat such a scenario. Does this scenario amount to a situation where incumbent politicians have the system “locked up” in such a way that the political market does not function properly? In the view of New York University’s Sam Issacharoff and Rick Pildes, judicial intervention into the political process¹⁷⁷ becomes especially appropriate in the absence of robust partisan competition.¹⁷⁸ There are two forms of political lockups identified by Professors Issacharoff and Pildes. The first is “a precommitment pact among existing elites that frustrates easy penetration by outsiders.”¹⁷⁹ Here they provide *The White Primary Cases*¹⁸⁰ as an example, which they view as a “partisan tool to deter any internal party factions from seeking to forge destabilizing coalitions with black allies.”¹⁸¹ The second form is when incumbent parties “deploy state authority to raise entry barriers against potential third-party challengers.”¹⁸²

When it comes to the application of this theory in the voting rights context, particularly in the context of representation, Professors Issacharoff and Pildes suggest the absence or presence of competition between the two major parties may be the touchstone as to whether judicial intervention is necessary on behalf of racial minority groups.¹⁸³ They seem to view judicial intervention on behalf of minority voters in the 1970s and, perhaps,

necessarily the wrong people, that money can be safe in black hands, is one that only experience can teach.”).

177. Presumably, the Attorney General’s intervention into state and local political processes amounts to the functional equivalent of judicial intervention.

178. See Issacharoff & Pildes, *Politics as Markets*, *supra* note 22, at 648 (“Where there is an appropriately robust market in partisan competition, there is less justification for judicial intervention. Where courts can discern that existing partisan forces have manipulated these background rules, courts should strike down those manipulations in order to ensure an appropriately competitive partisan environment.”); Pildes, *Foreword*, *supra* note 23, at 98 (“If partisan competition is an effective means of realizing representational equality and if first-order mandates of equality can undermine competition and hence effective equality itself, courts would best ensure equality by policing the background conditions of competition.”); see also Pildes, *Modern VRA*, *supra* note 27, at 9 (“All this might suggest that the judicial role, in a mature regime of intense partisan competition, should shift from the first-order imposition of representational equality to the second-order task of securing the conditions of effective partisan competition itself.”).

179. Issacharoff & Pildes, *Politics as Markets*, *supra* note 22, at 651.

180. See SAMUEL ISSACHAROFF ET. AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 208–26 (3d. ed. 2007) (describing *The White Primary Cases* as a series of decisions by the Supreme Court involving the State of Texas and the Texas Democratic Party’s attempt to exclude African American voters from participating in the electoral process).

181. Issacharoff & Pildes, *Politics as Markets*, *supra* note 22, at 651.

182. *Id.*

183. See *id.* at 702 (“When there is a partisan lockup, courts should intervene both to enhance competition and to remedy vote dilution claims.”).

the 1980s as necessary¹⁸⁴ and justified because of the one-party stranglehold the Democratic Party had on the South.¹⁸⁵ However, by the 1990s, as the Republican Party grew in strength, they argue the South became much more “normal” in its politics and, therefore, that intervention on behalf of minority voters became less justified.¹⁸⁶ What they seem to think is that partisan competition forces racial considerations to take a back seat to partisan motivation and that, as a result, political actors will engage minority voters as a means of maximizing overall partisan gain.¹⁸⁷

However, it seems likely that in the context of a total lack of any representation for minority voters, the presence or absence of partisan competition will make little difference as to whether the political market becomes locked up by whites who seek to prevent competition from minority interests.¹⁸⁸ Perhaps the best way to engage in such an analysis is

184. See Pildes, *Theory*, *supra* note 24, at 1620 (concluding that the goal of political equality was “appropriately enforced in the 1970s through constitutional doctrine”); see also Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL’Y 119, 131–34 (2000) [hereinafter Pildes, *Diffusion*] (describing favorably judicial intervention on behalf of minority voters in Mobile, Alabama); Pildes, *Foreword*, *supra* note 23, at 87 (“By 1982, the VRA served as a rough but effective tool to destabilize this system of [racial] polarization and political monopoly.”).

185. See Issacharoff, *Own Success*, *supra* note 26, at 1713 (noting that one of the preconditions for the success of Section 5 was that “blacks in the historic Jim Crow South had no avenue of political redress” and “even if able to vote, they could never aspire to be influential swing voters in a one-party political environment”); see also Pildes, *Foreword*, *supra* note 23, at 87 (“Because the Democratic Party at that time faced no external competition from a strong alternative party, it had little incentive to respond to claims pressed by recently enfranchised black voters.”).

186. See Pildes, *Modern VRA*, *supra* note 27, at 4 (“In contrast to its days as a lazy monopolist, the Democratic Party [in the South] is now engaged in an intensely competitive partisan struggle for every inch of political terrain.”).

187. See Issacharoff & Pildes, *Politics as Markets*, *supra* note 22, at 702 (“But where there is intense partisan competition, disputes over the relative distribution of political power could be left to democratic politics itself”); Pildes, *Foreword*, *supra* note 23, at 97 (“Put in other terms, competition itself creates the incentives and provides the checks that most effectively realize representational equality.”); Pildes, *Theory*, *supra* note 24, at 1619 (“[When] two major parties, however, are contesting every electoral seat—especially where ‘the black vote is the bedrock upon which the Statewide Democratic [Party power] is anchored’—success in this struggle might discipline parties (or that party in which black voters are concentrated, if one exists) so that they cannot afford to draw election districts in ways that dilute black voting power. If competition forces partisan gain to be the overriding motivation, black voters will be distributed in ways that maximize that overall partisan goal.”) (footnotes omitted).

188. Cf. FRANCES FOX PIVEN ET. AL., *KEEPING DOWN THE BLACK VOTE* 16 (2009) (“In fact, the historical evidence shows that the argument that attributes the democratizing function of voter mobilization to competitive parties is sometimes right, but also often wrong. While party competition has on occasion led the parties to mobilize new voters, much of the time it has not, and it has certainly not led them to mobilize marginalized groups of nonvoters.”).

In an early article that pre-dated publication of *Politics As Markets*, Professor Issacharoff implied (in the context of describing federal jurisprudence related to at-large elections) that coalitions between white and minority voters would not necessarily occur just because minority voters could participate in the electoral process. Issacharoff, *Polarized Voting*, *supra* note 122, at 1875–76 (criticizing the idea that white voters will coalesce with minority voters when minority voters become a powerful “swing” vote). Professor

to review a couple of concrete hypothetical situations. In these situations, consider a city with the following basic political dynamic: five single-member districts, each with a twenty percent African American population, racially polarized voting, residence patterns that make it possible to draw a compact district that would provide African American voters with the ability to elect a candidate of their choice, and a lack of any district to provide African American voters with representation.

For starters, let us take a situation where no partisan competition exists—either because nonpartisan elections are the norm or because one political party, most likely the Democratic Party, represents the only game in town. Let us say that the current districts are all eighty percent white and twenty percent African American.¹⁸⁹ In such a situation, what can be done to break up such an entrenched white monopoly? Seemingly, very little. In the context of nonpartisan elections, there are no partisan cues to trump racial politics. In the context of one-party rule by Democrats, African Americans could try to form a separate political party, but the costs of creating a separate party are extraordinary. Moreover, formation of a separate party likely will be ineffective because the separate party, which presumably represents only about twenty percent of the population in each district, will be consistently defeated at the polls.

Instead of creating a separate party, though, African American residents could try to establish a coalition with a disaffected (read “losing”) white faction, but there are several barriers to such a coalition. First, white political leaders may view any attempt to coalesce with African American voters as political suicide.¹⁹⁰ In other words, even if it might seem rational to do so, the disaffected white faction might not be willing to coalesce with African Americans because the white faction does not want to risk antagonizing their base of support.¹⁹¹ Second, assume the disaffected

Issacharoff explained that “[i]t is striking that theories purporting to promote more effective minority electoral participation proffer no empirical support for the claim that white voters will indeed be more likely to coalesce with minority voters in the absence of judicial intervention”). *Id.* Professor Issacharoff also briefly recognized that judicial intervention to eliminate at-large election systems in situations where voting was racially polarized and minorities lacked representation exemplified the judiciary attempting to police “[p]olitical market failure.” *Id.* at 1870. In some sense, my aim here is to extend the analysis from at-large elections where coalitions are not forming to redistricting plans where such coalitions are not forming.

189. Admittedly, in the real world not all of the districts would be eighty percent white and twenty percent African American in terms of the demographic split. However, it is not likely that having districts with African American populations of, say, between ten percent and forty percent would substantially change the analysis presented here.

190. *Cf.* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE* 236 (2000) (describing the one-party Democratic South between 1920 and WWII and how “no white faction that dared to support black enfranchisement could hope to survive long enough to build a coalition with prospective African-American voters”).

191. *Cf.* FOX PIVEN ET. AL., *supra* note 188, at 16 (“Politicians . . . are reluctant to undertake the mobilization of new voters, even when the ‘logic’ of electoral competition suggests a new course. *This is especially the case when the new voters are drawn from*

whites and African Americans decide to join forces and run a slate of candidates (one in each district)—say, four whites and one African American. The problem here, though, is racially polarized voting. It is unlikely the disaffected whites will be able to convince their white supporters to support an African American candidate and unless they do convince a substantial number of white voters to cross over, the African American candidate will lose. Third, the disaffected whites could run an all-white slate with the promise to African American voters that, upon election to office, they will draw a single-member district to provide African American voters with representation. However, it is less likely African American voters will turn out strongly for an all-white slate. Moreover, even if elected, the new white incumbents will likely have to destabilize the districts under which they were elected and choose which of the white incumbents to “throw under the bus.” And, if racial polarization is the norm, those white incumbents will also have to take the blame at the next election for placing a racial minority in a seat of power. In short, when elections are nonpartisan or one political party rules, it is unlikely African American voters will win representation through the political process alone.

Now let us switch the hypothetical. Instead of one-party dominance or nonpartisan elections, let us assume partisan competition exists. In addition, assume African American residents vote overwhelmingly for the Democratic candidates—a likely event in this day and age. Moreover, assume white Democrats form a three to two majority of the council with districts that have minority populations of thirty percent, thirty percent, thirty percent, five percent and five percent. (To be clear, the white Democrats control the outcomes and achieve election in the thirty percent districts while the Republicans do likewise in the five percent districts.)

In this scenario, African American voters once again seem unlikely to gain representation. For starters, Democrats do not have much incentive to run an African American candidate in one of the existing districts because in the context of racially polarized voting, that is a sure loss. Democrats also do not have much incentive to draw a district to provide African American voters an ability to elect a candidate of their choice because drawing such a district would likely lead to a majority-Republican city council because of the loss of solid Democratic voters in the other districts.

Of course, Democrats *do* have an incentive to not lose their strong electoral base and Republicans do have an incentive to try and chip away at that strong electoral base (either through attracting votes or depressing African American turnout). However, unless African Americans switch

marginalized groups that risk antagonizing others in the party's electoral coalition.”) (emphasis added).

their allegiance substantially to Republicans (an unlikely event), Republicans are not going to provide representation for minority voters. In addition, Democrats have an incentive to provide some substantive representation to keep their base of support in the fold, but the benefits previously described above that flow from direct African American representation will never be achieved.¹⁹² In sum, where robust political competition exists, Democrats have a hold on power, and minority voters have no representation, it seems unlikely that the political dynamic will shift in such a way as to create representation for minority voters.

Now, again, let us switch the hypothetical but change the partisan dynamics. Again, let us assume partisan competition exists and again let us make the reasonable assumption that African American voters overwhelmingly support Democratic candidates. This time, however, let us assume Republicans form a 3-2 majority on the council with districts that have minority populations of ten percent, ten percent, ten percent, thirty-five percent, and thirty-five percent.

Again, African American voters seem unlikely to obtain representation. Presumably Republicans have some interest in expanding their one person majority on the council by, perhaps, drawing a safe African American district that bleaches one of the other Democratic districts in such a way to make it perform for a Republican. But there are likely to be strong disincentives to do so. For instance, drawing such a district may necessitate major revisions in the district lines, and the three incumbent Republicans are likely to opt for the safety of their own existing districts rather than make wholesale changes.¹⁹³ Moreover, drawing a safe district that leads to the election of an African American candidate may incur the wrath of the majority populace that votes along racial lines. Put simply, why would incumbent Republicans take the risk of destabilizing this system that has led them to success? In addition, it is quite possible that in a place where no representation for African American voters exists, there is a tacit understanding among whites of all political stripes that African American representation will not be allowed.

Indeed, a concrete example in which political competition existed between Democrats and Republicans but yet minority voters were denied any ability to elect their candidates of choice was seen in litigation involving the Los Angeles County Board of Supervisors. During the 1980 redistricting, a majority of the Board of Supervisors' seats were held by Republicans whereas a minority of the seats was held by Democrats—

192. See *supra* notes 166–76 and accompanying text (describing benefits of minority representation).

193. See FOX PIVEN ET. AL., *supra* note 188, at 16 (“Politicians seek the stability that makes electoral outcomes predictable and manageable, and manageable with limited effort.”).

seemingly a situation where a two-party, rather than one-party, system prevailed.¹⁹⁴ However, all sides (Democrat and Republican) worked together during the 1980 redistricting to fragment the Latino population.¹⁹⁵ So, while in theory partisan competition might change the political dynamic, at least in the context of Los Angeles County, it did not.

At the end of the day, in the context of a redistricting where racially polarized voting prevails and minority voters remain totally unrepresented, it seems unlikely that the presence or absence of partisan political competition will make a substantial difference. Each major political party likely has an interest in maintaining the racial status quo: a white lock-up on political power.

To be fair, Professors Issacharoff and Pildes may well agree with this analysis. In their explications of their theory of competition, they have often been tentative in their application of the theory to the question of racial and ethnic representation.¹⁹⁶ In addition, they have recognized that electoral competition may be only one of many competing values in formulating the framework of the law of democracy and that other justifications for providing minority representation exist.¹⁹⁷ Moreover, to the extent that they have advocated for a new view of minority voting rights based on partisan competition, the concrete examples they have provided have almost always been in reference to state legislative redistricting, rather than local government structures, and have also been in contexts where minority voters have some representation.¹⁹⁸ Nonetheless,

194. See *Garza v. County of Los Angeles*, 918 F.2d 763, 767–68 (9th Cir. 1990).

195. *Id.* (finding that Democratic board members agreed to transfer population distributions to maintain the elected status quo). Interestingly, bipartisan cooperation was needed to pass Los Angeles County’s redistricting plan. The board was split three-to-two with a Republican majority, but a supermajority of four votes was needed to pass a redistricting plan. *Id.* It is possible that the super-majority rules for redistricting provided strong incentives for retaining the status quo and that without the super-majority requirement, Republican members of the county board would have been more able to draw a Latino district at the expense of an incumbent Democrat.

196. See Issacharoff & Pildes, *Politics as Markets*, *supra* note 22, at 706 (“These perspectives on the VRA are offered in a speculative vein.”); Pildes, *Foreword*, *supra* note 23, at 98 (“This [politics as markets] perspective is not meant to endorse specific solutions for future applications of the VRA.”); Pildes, *Theory*, *supra* note 24, at 1620 (“Whether the changing dynamics of partisan competition in the newly emergent two-party South should affect judicial doctrine or statutory policy with respect to vote dilution would depend on many considerations—some theoretical, some empirical.”).

197. See Pildes, *Theory*, *supra* note 24, at 1620 (“Theoretically, the discussion would have to consider the precise values that underlie current vote dilution policy; there are different ways of understanding the reasons that vote dilution is banned, and some of these reasons might not be affected at all by whether partisan competition is robust or absent.”); see also Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 688 (2002) (“It is important to note, however, that the competition model is not intended to explain democratic governance or democratic legitimacy fully.”).

198. See Issacharoff, *Own Success*, *supra* note 26, at 1714 (describing how African Americans are no longer “political outsiders” in the Section 5 covered jurisdictions and how Southern legislatures are responsive to minority claims for representation); Issacharoff & Pildes, *Politics as Markets*, *supra* note 22, at 702–03 (focusing on state legislative

it is important to explicitly recognize that in the absence of existing minority representation, partisan competition alone will not inexorably lead to minority representation and that federal intervention can serve to bust up racial monopolies in the context of a functioning two-party structure, as well as when only a one-party structure exists.

In sum, a denial of preclearance on discriminatory purpose grounds when a redistricting plan fails to provide any representation to minority voters can be justified on a number of levels. First, as a matter of doctrine, the most recent Supreme Court case related to discriminatory purpose and electoral structures implies almost definitive emphasis on the total exclusion of minority voters from representation. And historically, total exclusion has led to judicial findings of purposeful discrimination.¹⁹⁹ Second, legislative history seems to endorse this interpretation. Third, as a matter of theory, numerous and substantial benefits inure to providing some minority representation where none exists. Fourth, with regard to politics as markets, situations where minority voters have no representation seem likely to result in the functional equivalent of a pre-commitment pack on the part of elites to exclude minority voters regardless of whether vibrant partisan competition between the major political parties exists. Put somewhat differently, in these situations, a racial, rather than partisan lockup of the market exists and intervention is justified to dismantle the lockup.

C. *Failure to Provide Additional Minority Representation*

Another common redistricting situation occurs when minority voters already enjoy some representation but it is possible to provide more representation. Here, several key points need to be made. First, the Attorney General commonly would deny preclearance in such instances during the 1990s redistricting cycle. Second, this sort of Section 5 enforcement by the Attorney General received severe criticism from the Supreme Court. Third, going forward, preclearance should not be denied using the discriminatory purpose standard when a redistricting plan fails to create additional minority representation when minority voters already enjoy representation absent other factors, such as direct evidence of racial animus.

redistricting in the South); see also Pildes, *Foreword*, *supra* note 23, at 88 ("Several changes in the larger structural context of democratic politics test whether principles of political equality and fair representation should be understood as general ideals or contingent functions of certain background structural conditions. First, due in part to the VRA itself, a substantial contingent of black elected officials, particularly in the South, now has a seat at the legislative table.").

199. Issacharoff, *Polarized Voting*, *supra* note 122, at 1844 (noting that many of the 1970s vote dilution cases addressed a pattern of "complete exclusion" of African Americans from elected office).

An example of this type of Section 5 enforcement—demanding additional minority representation when some minority representation already exists—occurred during the 1991 redistricting of the nine-member²⁰⁰ Catahoula Parish (Louisiana) Police Jury.²⁰¹ The Attorney General’s letter denying preclearance noted that the parish was twenty six percent African American, yet the proposed redistricting plan provided for only a single majority-minority district.²⁰² The letter also noted that it was possible to create an additional African American majority district by curing the overconcentration of African American population in one area of the parish as well as the fragmentation of African American population in another separate area.²⁰³ Finally, the letter noted that parish officials knew

200. See *About Counties: Catahoula Parish, LA*, National Association of Counties, http://www.naco.org/Template.cfm?Section=Find_a_County&Template=/cfiles/counties/county.cfm&id=22025 (last visited May 23, 2010).

201. See Letter from John R. Dunne, Assistant Att’y Gen., Civil Rights Div., to H. C. Peck, Jr., President, Catahoula Parish Police Jury (Oct. 25, 1991), in *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 972–73 (2005). The letter to Catahoula Parish is, perhaps, emblematic of one of the problems with the Attorney General’s enforcement of the discriminatory purpose standard during the 1990s redistricting cycle: the letters sometimes lacked a detailed, persuasive analysis as to why a redistricting plan did not merit preclearance. See *id.* (denying preclearance on discriminatory purpose grounds in a two-page, six-paragraph letter to Catahoula Parish that really contains only a single paragraph of three sentences setting forth the reasons why the plan was discriminatory in purpose). Indeed, such a letter stands in sharp contrast to, say, the federal district court’s findings in the paradigmatic discriminatory purpose case of *Busbee v. Smith*, 549 F. Supp. 494 (1982) *aff’d*, 459 U.S. 1166 (1983); see *supra* notes 135–44 and accompanying text (describing *Busbee*).

To be fair, the general nature of the administrative preclearance process—operating on short, sixty-day deadlines with limited resources—means that letters from the Attorney General cannot be as comprehensive as a federal district court opinion. Moreover, the problem of tight deadlines and lack of resources that apply to the administrative preclearance process at all times become particularly acute problems in the years immediately following the release of decennial census data when redistricting activity reaches its zenith. See *infra* notes 325–330 (discussing the nature of preclearance review). In addition, sometimes the Attorney General has evidence explaining the rationale for the denial of preclearance that does not make it into the letter. Nevertheless, at least going forward, the Attorney General should endeavor to explain the rationale for denials of preclearance based on discriminatory purpose better than the explanation provided in the 1991 letter to Catahoula Parish.

202. See Letter from John R. Dunne, Assistant Att’y Gen., Civil Rights Div., to H. C. Peck, Jr., President, Catahoula Parish Police Jury, *supra* note 202, at 972 (“We note at the outset that according to the 1990 Census, 26 percent of the population of Catahoula Parish is black, yet the parish’s proposed plan provides for only one black majority district.”).

203. *Id.* (“The parish’s black population is situated in such a way that readily available or discernible alternatives would include at least one additional black majority district, but this result seems to have been avoided through the overconcentration of black population into one district in the Jonesville area and fragmentation of black population concentrations in the Sicily Island area.”). It is unclear whether the letter contemplated creation of a district that linked populations from the Sicily Island area to the Jonesville area. Jonesville lies in the center of the parish and Sicily Island is a little more than 20 miles away in the parish’s northeast corner. In cases decided after this letter was written, the Supreme Court criticized linking African American populations that were not geographically and culturally compact. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 908 (1995) (“The Eleventh District lost the black population of Macon, but picked up Savannah, thereby connecting the black neighborhoods

African American residents desired “to have their voting potential better recognized” and that parish officials “failed to offer any persuasive explanation for its failure to cure the overconcentration and fragmentation of [the African American] population evident in the proposed plan.”²⁰⁴ For these reasons, the Attorney General denied preclearance on discriminatory purpose grounds.²⁰⁵

The Catahoula Parish example is fairly typical of the type of analysis in which the Attorney General engaged in the 1990s. A fair number of denials of preclearance on discriminatory purpose grounds by the Attorney General during this time period involved the following basic scenario: an increase in the proportion of minority population in the state or local jurisdiction; the ability to draw an additional district that would provide minority voters with an ability to elect a candidate of choice; a minority community request for an additional district, often including the presentation of at least one alternative redistricting plan creating such a district that was rejected by the state or local government; and the lack of a legitimate, non-racial explanation for the failure to adopt the alternative plan that would have provided additional minority representation.

There was, however, one additional, key wrinkle in some of these scenarios: incumbency protection. Redistricting actors sometimes confessed to having rejected a redistricting plan that increased minority representation because of a desire to keep incumbents in office. In this way, incumbency protection was offered as a legitimate, non-racial reason

of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture.”).

204. See Letter from John R. Dunne, Assistant Att’y Gen., Civil Rights Div., to H. C. Peck, Jr., President, Catahoula Parish Police Jury, *supra* note 202, at 972–73.

205. Another example of this type of analysis is the Attorney General’s denial of preclearance to the City of Griffin’s (Georgia) 1992 redistricting plan. Griffin, which had a 1990 Census population of 47.8% African American—a 5.3 percentage point increase since 1980—was governed by a seven member board of commissioners, with one member elected at-large and six members elected from single-member districts. See Letter from John R. Dunne, Assistant Att’y Gen., Civil Rights Div., to Andrew J. Whalen III, Esq. (Nov. 30, 1992), in *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 615–17 (2005). The existing redistricting plan allowed African American voters the opportunity to elect candidates of their choice in only two seats; the proposed plan preserved these opportunities but did not, as the city claimed, create an additional opportunity for African American voters to elect their candidate of choice in a third district—District 6. *Id.* The Attorney General noted:

[D]emographic analysis of the proposed plan reveals a significant area of minority population concentration has been fragmented by the line dividing proposed Districts 4 and 6. It appears that it would have been possible to reduce this fragmentation, and in the process create a third district in which black voters would have a clear opportunity to elect candidates of their choice. Indeed, one such alternative plan was presented to the board of commissioners for its consideration during the redistricting process. Although we have invited the city to address with more specificity claims that the city’s redistricting choices were motivated by the desire to limit minority electoral opportunity unfairly, the city has failed to do so.

Id.

for rejecting a plan that expanded minority voting strength. However, the Attorney General would reject incumbency protection as a legitimate reason for failing to create additional representation for minority voters and deny preclearance to the redistricting plan on discriminatory purpose grounds.

Indeed, many of the Attorney General's denials of preclearance to statewide redistricting plans that so exorcized the Supreme Court in the context of racial gerrymandering fell squarely into this analytical framework.²⁰⁶ Take, for example, North Carolina's 1991 congressional redistricting plan. The proposed plan contained one majority-minority district in the northeast region of the state.²⁰⁷ However, the Attorney General noted that the boundary lines in the south-central to southeastern part of the State "appear[ed] to minimize minority voting strength given the significant minority population in this area of the state."²⁰⁸ After noting that there was "significant interest on the part of the minority community in creating a second majority-minority district in North Carolina" and that alternative plans existed that would accomplish this result, the Attorney General wrote:

These alternatives, and other variations identified in our analysis, appear to provide the minority community with an opportunity to elect a second member of congress of their choice to office, but, despite this fact, such configuration for a second majority-minority district was dismissed for what appears to be pretextual reasons. Indeed, some commenters have alleged that the state's decision to place the concentrations of minority voters in the southern part of the state into white majority districts *attempts to ensure the election of white incumbents* while minimizing minority electoral strength. Such submergence will have the expected result of "minimiz[ing] or cancel[ing] out the voting strength [of black and Native American voters]." *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). Although invited to do so, the state has yet to provide convincing evidence to the contrary.²⁰⁹

206. *Supra* note 79 and accompanying text.

207. Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., to Tiare B. Smiley, Spec. Deputy Att'y Gen. for N.C. (Dec. 18, 1991) (on file with author).

208. *Id.*

209. *Id.* (emphasis added). The Attorney General's 1991 denial of preclearance to the redistricting plan for the police jury and board of education in St. Landry Parish (Louisiana) provides another example of this type of analysis involving incumbency protection. The 1990 Census showed that the parish was forty percent African American and that African American voters had three "safe" districts (out of thirteen), and a fourth district with "a bare black majority in population" that also "offered black voters some electoral potential." See Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., to E. Kenneth Selle, President, Tri-S Assocs., Inc. (Dec. 16, 1991), in *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 884–86 (2005). The Attorney General, however, found that "the choices made by the parish in these redistricting plans were calculated to minimize black voting strength"

Importantly, while not a part of the letter to North Carolina quoted above, the doctrinal citation provided by the Attorney General for these types of denials of preclearance where incumbency protection seemed to be the driving force behind adoption of the plan were two circuit court cases—the Seventh Circuit’s decision in *Ketchum v. Byrne*²¹⁰ and the Ninth Circuit’s decision in *Garza v. County of Los Angeles*.²¹¹

However, there are a number of reasons—doctrinal, pragmatic, and theoretical—why this type of discriminatory purpose enforcement should be a dead-letter going forward. For starters, the primary doctrinal foundation on which the Attorney General relied was weak. The two cases cited in the Attorney General’s correspondence during these years were from the Seventh Circuit and the Ninth Circuit, not the United States Supreme Court. Moreover, even discounting the lower court nature of the decisions, the underlying facts of these circuit court decisions were quite distinct from the contexts in which the Attorney General often employed these precedents.

The Seventh Circuit decision, *Ketchum v. Byrne*, was inapposite primarily because the decision involved incumbency protection in the context of a retrogression of minority voting strength.²¹² The analysis in

because the parish had rejected a “suggestion” to “provide a greater electoral opportunity for blacks” by creating one or two additional districts with a majority of African American population. *Id.* According to the Attorney General, the rejection of the “approach” that provided additional majority-minority districts “[had] not been satisfactorily explained on non-racial grounds,” noting:

Of particular significance in this regard is our understanding that the incumbents in [the potential majority-minority districts] were especially concerned that an increase in the black percentages in their districts might threaten their re-election chances. Although incumbency protection is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. *Garza v. County of Los Angeles*, 918 F.2d 763, [sic] (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); *Ketchum v. Byrne*, 740 F.2d 1398, 1408–09 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985).

Id. Notably, the letter contains an obvious typographical error by failing to provide a pin cite for the *Garza* decision. In other letters that reject incumbency protection as an adequate explanation for state and local redistricting choices, the citation provided for *Garza* is “918 F.2d 763, 771.” See, e.g., Letter from John R. Dunne, Assistant Att’y Gen., Civil Rights Div., to Neta J. Bowman, Clerk/Cnty. Manager, La Paz Cnty. Bd. of Supervisors (July 17, 1992), in *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1293–95 (2005) (emphasis added).

210. 740 F.2d 1398, 1408–09 (7th Cir. 1984).

211. 918 F.2d 763, 771 (9th Cir. 1990).

212. The use of *Ketchum* as support for the Attorney General’s discriminatory purpose analysis was also suspect for a couple of other reasons. First, the case involved a holding under the “results” test of Section 2 of the Act, not the constitutional prohibition on discriminatory purpose. 740 F.2d at 1406 (“We approve [the trial court’s] finding of a section 2 violation based on retrogression and on the manipulation of racial voting populations to achieve retrogression.”). Second, the best language supporting the proposition that non-minority incumbents cannot protect themselves by declining to draw districts that increase minority voting strength is *dicta* that approvingly quotes from a district court opinion. *Id.* at 1408 (“[U]nder the peculiar circumstances of this case, the requirements of incumbency [protection] are so closely intertwined with the need for racial

Ketchum hinged upon the fact that incumbency protection was used as an excuse to retrogress minority voting strength, not as an excuse for failing to enhance minority voting strength.²¹³ Importantly, unlike the facts in *Ketchum*, when the Attorney General declined to preclear redistricting plans solely on discriminatory purpose grounds, the Attorney General was not attacking plans that protected non-minority incumbents through retrogression; rather the Attorney General was declining to preclear redistricting plans that protected white incumbents by failing to improve the position of minority voters. The harm to minority voters was much greater²¹⁴ in *Ketchum* because it involved retrogression of existing voting strength rather than a failure to increase

dilution that an intent to maintain a safe, primarily white, district . . . is virtually coterminous with a purpose to practice racial discrimination.” (quoting *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982))).

213. *Ketchum*, 740 F.2d at 1407. The Court noted that there were several factors that provided “strong evidence of intentional discrimination”. *Id.* First, there was retrogression. *Id.* Second, there was manipulation of boundary lines to accomplish this retrogression. *Id.* That manipulation took the form of removing more African American voters from certain districts than was necessary to comply with the equal protection mandate of one person, one vote. *Id.* (“For example, before the 1981 redistricting, four wards . . . had population in excess of the [population] required under the redistricting plan. Population therefore, had to be moved out of those wards in order to accomplish the redistricting mandate. Three of the four wards had strong, but not overwhelming, black majorities. The fourth ward . . . had a strong black plurality. In order to accomplish the required redistribution of population, however, blacks were moved out of these wards in much greater numbers than their proportion of the population and in greater numbers than required to accomplish the necessary reduction.”).

Interestingly, it is worth noting that a judicial decision similar to *Ketchum* emanated from the post-2000 redistricting of the Massachusetts State House involving a judicial finding of a statutory violation of Section 2 of the Voting Rights Act. *See Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 294 (D. Mass. 2004). In finding the statutory violation, the Court attached “great importance” to the fact that minority voters were *removed* from a majority-minority district to protect a white incumbent. *Id.* at 313–15.

214. One might argue that theoretically there is no greater discrimination when a minority group has its voting strength targeted for purposes of incumbency protection by retrogression than when a minority group has its voting strength targeted for purposes of incumbency protection by a failure to create an additional opportunity for minority voters to elect a candidate of choice. The harm, however, to minority voters from the former scenario seems to be far greater than the latter scenario for several reasons. First, when minority voters lose an existing (or burgeoning) ability to elect a candidate of choice, a very visible harm will have occurred because it is highly likely that a minority candidate will be replaced by a white candidate. *See supra* note 134 (explaining the types of candidates who win office in ability to elect districts). Second, beyond visibility, there can also be a substantive harm to minority voters stemming from the elimination of an ability to elect district because minority candidates tend to substantively represent minority voters better than white candidates. LUBLIN, *supra* note 50, at 97 (“African-American representatives, who represent all of the voting-age majority black [House] districts but few non-majority-minority districts, provide the highest level of substantive representation in addition to descriptive representation.”). Third, from a psychological perspective, there is evidence demonstrating that most persons think losing something is worse than failing to gain something. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE* 33 (2009) (“Roughly speaking, losing something makes you twice as miserable as gaining the same thing makes you happy.”).

minority voting strength where some minority voting strength already existed.²¹⁵

The Ninth Circuit decision in *Garza v. County of Los Angeles*²¹⁶ was inapposite because it involved a situation where minority voters did not have *any* representation. To be sure, *Garza* did involve a situation where discriminatory purpose was found because incumbent politicians attempted to protect themselves by ensuring that no additional district for minority voters would be created.²¹⁷ However, a key aspect of *Garza* that distinguishes it from many of the Attorney General's denials of preclearance during the 1990s is that there was not a single district in the existing plan that provided Latino voters with the ability to elect a candidate of their choice.²¹⁸ In other words, the non-minority representatives had a complete lock-up on every seat on the Los Angeles County Board. In contrast, many of the denials of preclearance on discriminatory purpose grounds during the 1990s redistricting cycle were to redistricting plans that provided minority voters some ability to elect a candidate of choice. In short, the primary precedents behind a number of the Attorney General's decisions involving redistricting and the discriminatory purpose standard did not strongly support the Attorney General's Section 5 enforcement during the 1990s.²¹⁹

215. While not explicitly involving a decision under the Constitution, the Court's recent decision in *LULAC* implies that retrogression of minority voting strength in order to protect incumbents will lead to a finding of discriminatory purpose. 548 U.S. 399 (2006). In *LULAC*, the Latino share of the citizen voting age population in a Texas congressional district was reduced from 57.5% to 46%. *Id.* at 423–24. The reduction occurred while Latinos were “poised to elect their candidate of choice” and served to “undermine[] the progress of a racial group that ha[d] been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive.” *Id.* at 438–39. In this context, Justice Kennedy remarked that reducing the voting strength of Latinos in this district bore “the mark of intentional discrimination that could give rise to an equal protection violation.” *Id.* at 440; *see also* Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1153 (2007) (“Justice Kennedy signals, in addition, that in the particular circumstances of the Texas case, he believes District 23 essentially involved a case of *intentional* racial discrimination. . . . *LULAC* indicates only that the Court is prepared to find the VRA violated when a State *intentionally* manipulates election lines to deprive minority voters of the power they would otherwise have had the State simply left the lines intact.”).

216. 918 F.2d 763 (9th Cir. 1990).

217. *Id.* at 771 (“[T]he [district] court noted that the Supervisors appear to have acted primarily on the political instinct of self-preservation; the [district] court also found that they chose fragmentation of the Hispanic voting population as the avenue by which to achieve this self-preservation. The supervisors intended to create the very discriminatory result that occurred.”) (internal quotations and citations omitted).

218. *Id.* at 765 (“[Plaintiffs] sought redistricting in order to create a district with a Hispanic majority . . .”) (emphasis added); *see also id.* at 766–68 n.1 (detailing findings of fact by the district court related to the history of redistricting of the Los Angeles County Board of Supervisors).

219. Moreover, even apart from the shaky use of circuit court precedent, incumbency protection has long been recognized as a legitimate redistricting criterion by the Supreme Court. In the one person, one vote context, the Court recognized incumbency protection as a legitimate redistricting value at least as far back as the 1980s. *See Karcher v. Daggett*, 462

Moreover, the doctrinal foundations have only become weaker since the decisions the Supreme Court handed down in the racial gerrymandering cases. In *Miller v. Johnson*,²²⁰ the State of Georgia attempted to justify the creation of an additional majority-minority congressional district because of the need to secure preclearance from the Attorney General.²²¹ The

U.S. 725, 740 (1983) (recognizing “[p]reservation of] the cores of prior districts, and [the avoidance of] contests between incumbent Representatives” as state legislative policies that would be “consistent with constitutional norms”); *cf.* *Gaffney v. Cummings*, 412 U.S. 735, 751–54 (1973) (declining to find an equal protection violation when the redistricting plan was drawn with the purpose of providing “political fairness” between the two major political parties). In the racial gerrymandering context, the Court has recognized incumbency protection as “a legitimate political goal.” *Easley v. Cromartie*, 532 U.S. 234, 248 (2001); *Bush v. Vera*, 517 U.S. 952, 964 (1996) (“[W]e have recognized incumbency protection, at least in the limited form of avoiding contests between incumbents, as a legitimate state goal.”) (internal quotations and citations omitted); *see also* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 653 (2002) (“[W]hen confronted with the charge that race motivated the creation of a district, a jurisdiction can defend itself by saying that zealous attention to partisanship and incumbent protection, rather than race, was the real cause of the district’s shape.”); *cf.* *Hunt v. Cromartie*, 526 U.S. 541, 549–51 (1999) (noting that the creation of a safe Democratic district was a legitimate political objective). In a recent decision involving application of Section 2 of the Voting Rights Act, the Court recognized that incumbency protection could serve as a legitimate redistricting purpose so long as voters do not get *removed* from a district because they are likely to vote against the incumbent. *LULAC*, 548 U.S. at 441 (plurality opinion) (“If the justification for incumbency protection is to keep the community intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters.”). Finally, in the partisan gerrymandering context, the Court has recognized that “there *always* is a neutral explanation [for redistricting choices]—if only the time-honored criterion of incumbent protection.” *Vieth v. Jubelirer*, 541 U.S. 267, 300 (2004) (plurality opinion).

220. 515 U.S. 900 (1995).

221. The factual background of *Miller* is complicated by the back-and-forth nature of the Section 5 process in relation to the development of Georgia’s post-1990 congressional redistricting plan. The plan in place during the 1980s had ten congressional districts, one of which was majority African American. *Miller*, 515 U.S. at 906. The 1990 Census showed that Georgia was entitled to an additional (eleventh) congressional district, and the State subsequently developed a congressional redistricting plan that had two majority-minority districts and a third district with a little over thirty-five percent African American voting age population. *Id.* The Attorney General refused to approve the proposed plan, citing the need to create a third majority-minority district. Letter from John R. Dunne, Assistant Att’y Gen., Civil Rights Div., to Mark H. Cohen, Senior Assistant Att’y Gen. for Ga. (Jan. 21, 1992), in *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 703–08 (2005) (“A concern was raised with regard to the principle underlying the Congressional redistricting, namely that the Georgia legislative leadership was predisposed to limit black voting potential to two black majority districts.”). The State then drew another congressional districting plan that increased the African American population in all three of the districts in question. *Miller*, 515 U.S. at 907. Again, though, the Attorney General denied preclearance, citing the need for the State to develop a third majority-minority congressional district. Letter from John R. Dunne, Assistant Att’y Gen., Civil Rights Div., to Mark H. Cohen, Senior Assistant Att’y Gen. for Ga. (March 20, 1992), in *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 716–19 (2005) (“As you know, the state’s first proposed plan was rejected amid general concerns that the Georgia legislative leadership had been predisposed to limit black voting potential

Court, however, severely criticized the Attorney General's interpretation of Section 5's discriminatory purpose standard. The Court described the Attorney General's theory of discriminatory purpose as one in which preclearance would be denied if the State did not prove that there was a nondiscriminatory purpose for its refusal to create a third majority-minority district.²²² The Court dismissed this position as "insupportable," accusing the Attorney General of supporting a "policy of maximizing majority-black districts."²²³ In essence, the *Miller* Court seemed to reject the position that discriminatory purpose can be found when the state or local government does not put forward a legitimate reason for failing to provide minority voters with an additional ability to elect a candidate of choice.

Indeed, one might view the racial gerrymandering decisions as the flip side of the coin of the strain of discriminatory purpose analysis focused on the motivations of redistricting actors.²²⁴ What the Court has noted in the racial gerrymandering context is that those who claim the existence of racial gerrymandering must meet "a demanding" burden.²²⁵ Moreover, "those who claim that a legislature has improperly used race as a criterion . . . must show at a minimum that the 'legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'"²²⁶ Indeed, "[r]ace must not simply have been 'a motivation for the drawing of a majority-minority district, but the *predominant* factor motivating the legislature's districting decision.'"²²⁷ As

to two black majority voting age population districts. This concern continues with respect to the state's present redistricting plan." This led the State to adopt yet another version of its congressional plan, this time with three majority-minority districts, which finally received the Attorney General's imprimatur. *Miller*, 515 U.S. at 909 ("Georgia's plan included three majority-black districts, though, and received Justice Department preclearance on April 2, 1992.").

222. *Miller*, 515 U.S. at 924 ("The key to the Government's position, which is plain from its objection letters if not from its briefs to this Court, . . . is and always has been that Georgia failed to proffer a nondiscriminatory purpose for its refusal in the first two submissions to take the steps necessary to create a third majority-minority district.") (internal citations omitted).

223. *Id.*; see also *id.* at 926 (describing "[t]he Justice Department's maximization policy"). The Court rendered a similar decision in *Shaw v. Hunt*, 517 U.S. 899 (1996). In that case, the Court noted how the Attorney General alleged that "North Carolina, for pretextual reasons, did not create a second majority-minority district." *Id.* at 912. The Court, however, found the Attorney General's position "insupportable," noted that the Attorney General seemed to be "pursuing in North Carolina the same policy of maximizing the number of majority-black districts that it pursued in Georgia," and "again reject[ed] the Department's expansive interpretation of § 5." *Id.* at 912-13; see also *Abrams v. Johnson*, 521 U.S. 74, 85-90 (1997) (criticizing the Attorney General's enforcement of Section 5).

224. Recall, here, the discussion of the two strains of discriminatory purpose analysis discussed *supra* notes 117-19 and accompanying text.

225. *Easley v. Cromartie*, 532 U.S. 234, 241 (2001).

226. *Id.* at 241 (internal citations omitted).

227. *Id.* (citations omitted) (internal quotations omitted); cf. *United Jewish Orgs. v. Carey*, 430 U.S. 144, 161 (1977) (plurality opinion) ("[N]either the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and

the Court has noted, “consciousness of race” by redistricting actors and “intentional creation of majority-minority districts” does not suffice to support a successful claim of racial gerrymandering.²²⁸ What must be proved is that “other, legitimate districting principles were subordinated to race.”²²⁹

If the racial gerrymandering cases are the functional equivalent of what one might term the “invidious motivation” strain of discriminatory purpose analysis, then the line of analysis should be the same.²³⁰ The burden to prove discriminatory purpose in this context should similarly be a demanding one. And it should not be enough to show that redistricting actors were aware of race or that they consciously chose to create a district with a certain demographic skew. Instead, what should have to be shown is that race predominated over the redistricting process to the exclusion of other general districting principles.

Moreover, the overall message at the conclusion of the racial gerrymandering cases from the 1990s redistricting cycle was that the Court was looking for a way out of policing every redistricting choice of state and local actors.²³¹ After all, no racial gerrymandering claim was successful in the Supreme Court in the 2000s, and the success rate in the lower courts was equally poor.²³² It would be odd, then, for the Court to endorse the type of discriminatory purpose analysis employed by the Attorney General in the 1990s because that could further enmesh the federal judiciary in a “political thicket”²³³ that the Justices seem to be trying to escape.²³⁴

apportionment.”). As Justice William Brennan once observed, “[i]t would be naïve to suppose that racial considerations do not enter into apportionment decisions.” *Id.* at 176 n.4 (Brennan, J., concurring in part).

228. *Bush v. Vera*, 517 U.S. 952, 958 (1996) (plurality opinion).

229. *Id.* at 959.

230. The most recent extensive discussion of racial gerrymandering doctrine implied that its analysis extended beyond just the creation of majority-minority districts. *See Easley*, 532 U.S. at 241 (“The Court has specified that those who claim that a legislature has improperly used race as a criterion, in order, *for example*, to create a majority-minority district . . .”) (emphasis added). In other words, the implication might be that the racial gerrymandering analysis not only applies to attacks on the creation of districts for minority voters but also applies on attacks to redistricting plans that *fail* to create additional districts for minority voters.

231. *Cf. id.* at 242 (noting that “courts must exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race”) (citations omitted) (internal quotations omitted).

232. *See generally* Jocelyn Benson, *A Shared Existence: The Current Compatibility Between the Equal Protection Clause and Section 5 of the Voting Rights Act*, 88 NEB. L. REV. 124 (2009) (noting how there were very few successful claims of racial gerrymandering in the post-2000 redistricting cycle); *cf. Persily*, *supra* note 219, at 652 n.9 (noting that “not a single *Shaw* claim [was] currently on its way to the Supreme Court”).

233. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

234. There is very little in terms of compelling legislative history to help with this thorny problem. The House Report says nothing explicit about situations where minority voters have some representation but could be provided with additional representation and says nothing directly about incumbency protection. However, one could argue that the House Report implies a favorable view of the Attorney General’s prior enforcement of the purpose

Aside from doctrine, there may also be legitimate theoretical reasons for not creating additional minority representation when minority voters already enjoy some representation. Here, one starts with the premise that there are substantial representational benefits to creating some minority representation where none previously existed, but that there are diminishing returns from increasing minority representation. How much of a gain—from the perspective of civic participation—is there to be garnered from, say, having one minority member of a city council out of seven as opposed to two minority members out of seven? Will the conversation among councilmembers change that much more? Will minority members of the community feel that much more connected to the polis? In theory, adding representation where some representation already exists seems less likely to make a substantial difference.

There may also be diminishing returns on the level of substantive government outcomes.²³⁵ Here, one wanders into the debate between maximizing descriptive representation of minority voters on the one hand and maximizing the ability of minority voters to achieve substantive legislative outcomes.²³⁶ On one side are scholars who think that drawing districts that provide minority voters with the ability to control outcomes has the perverse effect of decreasing the ability of minority voters to get the substantive governing outcomes (i.e., legislation) they desire.²³⁷ The argument is that by assigning minority voters to districts where they control electoral outcomes, other “influence” districts in the plan are “bleached” and become more likely to elect white representatives hostile to the legislative interests of minority voters.²³⁸ On the other side are scholars

standard. H.R. REP. NO. 109-478, at 67 (2006) (“The effectiveness of the ‘discriminatory’ purpose requirement in barring discriminatory voting changes is reflected in the 83 objections that were imposed during the 1980s and in the 151 objections interposed in the 1990s solely on the basis of discriminatory purpose.”). On the other hand, the Senate Report clearly joins forces with the Supreme Court against the Attorney General’s “maximiz[ing] majority-minority districts at any cost” and notes that a finding of discriminatory purpose cannot be “based, in whole or part, on a failure to adopt the optimal or maximum number of majority-minority districts Nor does it permit a finding of discriminatory purpose based on a determination that the plan seeks partisan advantage or protects incumbents.” S. REP. NO. 109-295, at 17–18 (2006). Again, though, the Senate Report is likely of little interpretive utility. See *supra* notes 104–09 and accompanying text.

235. See WHITBY, *supra* note 173, at 133 (“The creation of majority-minority districts clearly suggests that there are representational trade-offs to increasing black descriptive representation. On the one hand, blacks do reap substantive benefits from having black membership in Congress because the race of the member matters on many important issues that run along racial lines. . . . On the other hand, if district lines are drawn in a way that would result in new conservative Republican districts and a Republican majority in the House, then blacks may well undermine their own substantive political interests.”).

236. See Pildes, *Foreword*, *supra* note 23, at 91 (briefly describing debate among social scientists and political actors).

237. See, e.g., Charles Cameron et. al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 795 (1996).

238. See David Epstein & Sharyn O’Halloran, *Measuring the Electoral and Policy Impact of Majority-Minority Voting Districts*, 43 AM. J. POL. SCI. 367, 369 (1999) (“A

who remain skeptical of the substantive benefits of trading “ability to elect” districts for influence districts.²³⁹

Without definitively choosing sides in this unsettled debate among political scientists,²⁴⁰ the fact that this debate exists cuts against federal intervention to increase minority representation where some representation already exists. The question, it would seem, is not entirely settled as to which type of representation better suits the interests of minority voters: more officials whose electoral accountability is solely controlled by minority voters or more officials whose electoral destiny is only partially controlled by minority voters. If this debate is unsettled, then it is not clear that federal intervention in the political market should resolve this debate. When no minority representation exists, a relatively clear market failure exists; when some minority representation is in place, the market failure seems much less apparent.

Finally, because politics as markets theory is being used to inform the discriminatory purpose framework presented here, it’s appropriate to mention how it might play a role. In the first instance, the type of enforcement engaged in by the Attorney General in the 1990s seems to be of the discriminatory motive variety. And politics as markets likely would

number of observers have claimed that these [majority-minority] districts may actually harm the overall representation of minorities by concentrating these populations too heavily, thereby marginalizing their policy concerns in surrounding districts. If this is true, then heavily gerrymandered districts may actually be counterproductive from a policy standpoint, allowing greater numbers of minorities to gain office but minimizing their influence in the political decision making process once they arrive.”).

239. See David T. Canon, *Renewing the Voting Rights Act: Retrogression, Influence, and the “Georgia v. Ashcroft Fix”*, 7 ELECTION L.J. 3, 8–9 (2008) (“[I]f an analysis of the more easily measured aspects of substantive representation shows that two white Democrats in influence districts provide the same level of substantive representation as one African American legislator in an ability-to-elect district, one could conclude that trading one ability-to-elect district for two influence districts is non-retrogressive *only* if descriptive representation is seen as having no additional value But nearly everyone who has examined the issue agrees that descriptive representation has *some* intrinsic value and some tangible but difficult to measure aspects.”); Bernard Grofman, *Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of Georgia v. Ashcroft: Social Science Perspectives on Minority Influence, Opportunity and Control*, 5 ELECTION L.J. 250, 275–81 (2006) (criticizing the ideas and methodology of social scientists who support trading districts that provide descriptive representation for influence districts).

240. The Supreme Court has also recognized the potential trade-off in several decisions. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 480 (2003) (“In order to maximize the electoral success of a minority group, a State may choose to create a certain number of ‘safe’ districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.”) (internal citations omitted); *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (“The practice challenged here, the creation of majority minority districts, does not invariably minimize or maximize minority voting strength. Instead, it can have either effect or neither. On the one hand, creating majority-black districts necessarily leaves fewer black voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, the creation of majority-black districts can enhance the influence of black voters.”).

eschew any attempt to determine the validity of a redistricting plan with a motive-based approach. However, as previously mentioned, the motive-based approach does not appear likely to entirely vanish anytime soon.

If the apparent first-order preference of politics as markets is not available, does politics as markets have anything to say in this area? Perhaps, but it's not entirely clear.

Politics as markets generally advocates the creation of competitive districts in order to hold incumbents accountable. In essence, politics as markets eschews redistricting plans "that favor only one party *or* all incumbents in a 'sweetheart gerrymander.'"²⁴¹ For this reason, politics as markets would prefer the establishment of "a prophylactic per se rule that redistricting conducted by incumbent powers is constitutionally intolerable."²⁴² Indeed, in part for this reason, Professor Issacharoff has been critical of racial gerrymandering jurisprudence because the racial gerrymandering cases allow incumbency protection to serve as a legitimate justification to stave off a charge that racial considerations predominated in the construction of a redistricting plan.²⁴³ Thus, it would seem that any approach that advocates the acceptance of incumbency protection as a legitimate redistricting goal could run afoul of politics as markets.²⁴⁴

On the other hand, other concerns also animate politics as markets. For starters, Professor Pildes has been among the most vociferous persons in the legal literature objecting to the creation of additional districts that provide minority voters with the ability to elect candidates of choice because of the deleterious impact it may have on substantive minority representation.²⁴⁵ Moreover, Professor Issacharoff criticizes the racial

241. Issacharoff, *Gerrymandering*, *supra* note 23, at 645 (emphasis added); *cf.* Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 280–81 (2001) ("The core of that [politics as markets] analysis was that there should be legal intervention when self-serving incumbent behavior threatens the competitiveness of that [political] process.").

242. Issacharoff, *Gerrymandering*, *supra* note 23 at 601, 645–48; *cf.* Pildes, *Foreword*, *supra* note 23, at 98 ("[I]f courts (and other institutions) minimize partisan gerrymandering and other anticompetitive practices, judicial deference to the outcomes of that competition . . . might not only be justified, but might also be more effective at ensuring equality itself.").

243. Issacharoff, *Gerrymandering*, *supra* note 23, at 637 ("[T]he Court's constitutional priorities in the *Shaw* cases appear to be backwards. The *Shaw* cases placed the Court in the awkward position of putting the Constitution on the side of protecting vested incumbent power, while prohibiting the redistribution of electoral opportunity to those out of power.").

244. Of course, from the perspective of statutory interpretation, it would be unlikely that Congress decided to endorse a reading of discriminatory purpose that did *not* allow for protection of incumbents to provide some legitimating role for redistricting choices. Indeed, the Senate Report, flawed as it may be, seems to want to provide the ability of incumbency protection to serve as a rebuttal to allegations of discriminatory purpose. *See supra* note 234.

245. *See* Pildes, *Foreword*, *supra* note 23, at 92 ("Here was a large contingent of black legislators who, now that they had entered the halls of legislative power, determined that they and their constituents would have more effective power as part of a Democratic senate; yet the Act would have required them to become the minority in the senate for the sake of a marginal potential gain in formal black representation."). *See generally* Pildes, *Modern*

gerrymandering cases for creating incentives for political actors to racialize their political disputes.²⁴⁶ In other words, in a world that more easily entertains claims of racial discrimination rather than political discrimination, political actors have incentives to bring claims of racial discrimination.

In light of these other concerns, one might then conclude that politics as markets supports the proposed framework on this point. Adopting a regime that rejected incumbency protection as a legitimate redistricting motive would lead to more opportunities to “over-racialize” redistricting—a move that would seem contrary to Professor Issacharoff’s desires. In addition, intervention to create an additional district for minority voters on discriminatory purpose grounds would not seem to resolve any accountability problems and might make the situation worse, as such intervention would seemingly necessitate the adoption of a “safe” district for minority voters. Put differently, federal intervention here would either shift the problem of accountability from safe white districts to safe minority districts or, perhaps worse, shift from competitive white districts to safe minority districts.²⁴⁷

VRA, *supra* note 27.

246. Issacharoff, *Gerrymandering*, *supra* note 23, at 637–41, 645–46 (“[T]he combination of the recognition that *something can go wrong* in redistricting with the absence of doctrinal tools to address that recognition leads to great pressure on antidiscrimination doctrine to fill the void. This in turn leads to the overracialization of redistricting law through the *Shaw* [racial gerrymandering] line of cases.”).

247. Section 5 poses a bit of a dilemma for the politics as markets approach in another way. Professor Pildes criticized federal intervention in Georgia’s post-2000 redistricting on behalf of minorities, specifically pointing to the forced retention of “safe” seats for African American incumbents. *See generally* Pildes, *Modern VRA*, *supra* note 27. Ironically, though, federal acquiescence would have been to what was well-recognized on a macro level as a Democratic political gerrymander. *Cf.* Pildes, *Foreword*, *supra* note 23, at 90 (“Because redistricting is generally still in the hands of existing officeholders largely free to pursue their own partisan ends, the Democrats sought to design districts that increased the likelihood of retaining their majority in the senate”). *See generally* *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (recognizing that the Georgia state legislative redistricting plan was designed to help the Democratic Party).

Presumably, though, this tension could be resolved in a couple of ways. First, one could say that federal authorities should not intervene on behalf of racial and ethnic minorities in the Section 5 context, but should intervene at a later date to prevent political gerrymandering on behalf of Democrats. *Cf.* Pildes, *Diffusion*, *supra* note 184, at 138 (“Any doctrine that seeks to single out racial gerrymandering without simultaneously addressing partisan gerrymandering is destined to be highly artificial, at best, and perhaps altogether unintelligible.”). Second, one could say that the core problem of partisan gerrymandering is not a lack of competition at the macro legislative level but at the individual district level.

On this second point, though, a few additional issues are raised. For starters, it is unclear whether politics as markets only aims at making elections competitive at the individual district level, institutional level, or both. It seems to me (and others) that politics as markets tends to focus on the individual level; however the approach also seems to be concerned with competition at the institutional level. *See* Persily, *supra* note 219, at 657 (describing “the aggregate partisan effects of gerrymanders” as “not Issacharoff’s *principle concern*”) (emphasis added); *see also* Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional*

In the end, the politics as markets approach does not provide a definitive answer but likely leans toward a hands-off approach in this context. Moreover, when combined with the doctrinal reasons for caution in this area, a discriminatory purpose should generally not be found when minority voters already enjoy some representation but the redistricting plan fails to provide them with additional representation. The Attorney General should accept incumbency protection as a legitimate, nondiscriminatory reason if presented with it.

Before moving on, though, it must be emphasized that the approach endorsed here does not mean that additional districts for minority voters should never be drawn on the theory of discriminatory purpose whenever minority voters already enjoy representation. In some situations, there might be direct evidence of racial hostility. In other instances (which will be discussed below), incumbent legislators might adopt lines that go out of the way to prevent the creation of additional districts for minority voters.²⁴⁸

Election, 68 OHIO ST. L.J. 1121, 1135 (2007) [hereinafter Issacharoff and Nagler *Protected from Politics*] (“[O]ur claim is only that gerrymandering has contributed to making this [shift in control of Congress] more difficult as more traditional swings in voter preference would likely have little or no effect on the partisan composition of the House.”); Samuel Issacharoff, *Oversight of Regulated Political Markets*, 24 HARV. J.L. & PUB. POL’Y 91, 95 (2000) [hereinafter Issacharoff, *Oversight*] (“There is little normative justification for permitting the sinecure of an entrenched unaccountable minority that cannot be dislodged [by the majority of voters] through the normal operation of the political process.”); cf. Pildes, *Political Competition*, *supra* note 23, at 260–61 (describing how the House is the “least responsive institution” and how partisan gerrymandering “frustrates change”) (internal citations omitted). In addition, even if the sole focus of concern is at the individual district level, there may be a disconnect in politics as markets because a plan such as Georgia’s trades some incumbent protection in order to increase other incumbents’ protection. Put more concretely, if the core issue is making individual districts less safe for African American incumbents in order to elect Democrats elsewhere, then presumably districts for white Democratic incumbents have been made safer. There is, then, a bit of a tension in endorsing a plan that attempts to reduce the safety of some incumbents to increase the safety of others, all with the goal of entrenching what would appear to be a minority faction in power.

248. In addition, when it comes to state legislative redistricting plans, there might need to be a slightly different approach to the determination of whether minority voters enjoy existing representation. In virtually all of the Section 5 covered states, minority voters enjoy existing representation in the state legislature. Absent other facts pointing toward a violation of the discriminatory purpose standard, the framework employed here would seem to ensure that preclearance would almost never be denied in the context of a statewide redistricting. However, it may be more appropriate to look at representation for minority voters in state legislatures from a regional perspective, rather than looking at the plan as a whole. In other words, even if minority voters enjoy some representation in a state legislature, if minority voters in a particular region of the State completely lack descriptive representation, a finding of discriminatory purpose might be appropriate. That said, when it comes to statewide redistricting, it would seem judicial doctrine is moving in the opposite direction of a regional approach. Compare *LULAC*, 548 U.S. 399, 437 (2006) (“We conclude the answer in these [statewide redistricting] cases is to look at proportionality statewide.”), with *Johnson v. De Grandy*, 512 U.S. 997, 1021–22 (1994) (leaving undecided whether proportionality in a statewide redistricting plan was to be referenced in relation to the statewide plan as a whole or in relation to specific regions of the State), and *Rural W. Tenn. African-American Affairs Council v. McWhorter*, 877 F. Supp. 1096, 1109–10 (W.D. Tenn. 1995) (engaging in an analysis of proportionality for a state legislative redistricting

Put simply, it's still possible in some circumstances to deny preclearance to a redistricting plan on discriminatory purpose grounds even if minority voters already enjoy some representation.

Further, Section 5 does not represent the only tool in the Voting Rights Act that can be used to increase representation for minority voters. Even if a jurisdiction covered by Section 5 obtains preclearance for its redistricting plan, that plan can still be challenged using the "results" test of Section 2.²⁴⁹ Section 2, while somewhat similar in terms of evidentiary application to the discriminatory purpose standard,²⁵⁰ presumably provides a slightly easier standard with which minority voters can stake their claim for additional representation. In short, rejection of additional representation when minority voters already enjoy representation does not totally foreclose the possibility of additional representation for minority voters.

D. Control of the Governing Body at Stake

There is, however, an important context in which preclearance should be denied when a plan already contains some districts that provide minority voters with an ability to elect. The context is a situation where "minority" voters would have control over the majority of the governing body but for a redistricting plan that entrenches a white minority. For a more concrete hypothetical, assume a five-member city council in a city with fifty-eight percent Latino citizens of voting age where councilmembers are elected from five single-member districts.²⁵¹ Assume that the existing plan

plan on a regional basis).

249. 42 U.S.C. § 1973 (2006).

250. See Michael J. Pitts, *Congressional Enforcement of Affirmative Democracy Through Section 2 of the Voting Rights Act*, 25 N. ILL. U. L. REV. 185, 206–07 (2005) (noting similarities between the Supreme Court's discriminatory purpose analysis and the Section 2 "results" test). One way Section 2 might play a role is where minority representation is starkly disproportionate. For instance, take a situation where Latinos make up forty percent of the citizen voting age population, there are ten districts and the redistricting plan provides Latinos with representation in only one of those ten districts. In such a situation, using the discriminatory purpose standard would not be proper under the framework presented here. However, a Section 2 finding of vote dilution that led to the creation of two or three additional districts for Latino voters might be proper.

251. There may be arguments over what the benchmark should be for determining whether "minority" voters comprise a majority within the jurisdiction. There are several different potential measurements, including total population, voting age population, citizen voting age population, registration, and turnout. In essence, the choices range from a formal majority (total population) to a theoretical majority (voting age and citizen voting age population) to a functional majority (registration and turnout). While each of these measurements has merit, doctrinally, courts have tended to favor citizen voting age population as a measure of voting strength. See, e.g., *LULAC*, 548 U.S. at 427–28 (using citizen voting age population in a Section 2 evaluation of whether Latinos could have constituted a majority of the population in a single member district and enjoyed an opportunity to elect a candidate of choice); see also *id.* at 434–38 (using citizen voting age population to assess whether a state redistricting plan provided proportionality to Latinos); cf. *Johnson*, 512 U.S. at 1021 n.18 (refusing to decide whether proportionality of minority

contains two districts providing Latinos with an ability to elect and three districts providing Anglos with an ability to elect, and that the incumbent Anglo councilmembers essentially draw a new plan that retains the same characteristics of the existing plan. Here, it is appropriate to find a violation of the discriminatory purpose standard.²⁵²

Indeed, some of the Attorney General's denials of preclearance during the 1990s redistricting cycle reflected just this type of situation. For example, take the 1992 denial of preclearance to the City of Selma's redistricting plan. The 1990 Census showed that Selma was 58.5 percent African American.²⁵³ The city had four single-member districts controlled by African Americans, four single member districts controlled by whites, and an at-large position controlled by whites.²⁵⁴ All together, whites held a 5-4 majority of the seats on a council in a city that was nearly sixty percent African American and proposed a redistricting plan designed to perpetuate the status quo. During the redistricting process, members of the African American community presented an alternative plan to provide for a fifth district controlled by African American voters.²⁵⁵ The members of the city council, however, rejected this proposal for "pretextual" reasons when the real motivation was a "desire to confine black population concentrations into a predetermined number of districts, and thus ensure a continuation of the current white majority on the council."²⁵⁶

Admittedly, one could look at such a situation and conclude that federal intervention should not occur. Indeed, the denial of preclearance in Selma was based on the same basic premise as the denials of preclearance by the Attorney General in the 1990s that caused such consternation by the Supreme Court. In Selma, there was racially polarized voting, and the city could have added an additional district for minority voters but did not do so because it wanted to preserve a white incumbent; therefore, a discriminatory purpose was at work. Why, then, should the situation where control of the council is at stake be treated differently?

representation should be measured with regard to total population or citizen voting age population).

252. One can duly recognize that public choice theorists would maintain that the idea of a true majority will is incoherent. Issacharoff, *Oversight*, *supra* note 247, at 93.

253. Letter from John R. Dunne, Assistant Att'y Gen., Civil Rights Div., to Philip Henry Pitts, Esq. (Nov. 12, 1992), in *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 391-93 (2005).

254. *Id.*

255. *Id.*

256. *Id.* I recognize that the above example raises questions in that there was an at-large seat that, perhaps, could have been won by the African American majority. There may, however, be compelling reasons to compensate for lower minority political participation (i.e., registration and turnout). Indeed, this may be especially true in a place like Selma, Alabama that has a quite visible and lengthy history of discrimination in voting.

The answer primarily lies in a structural analysis in that a political group should not be able to entrench itself when it does not enjoy the support of a majority of the electorate.²⁵⁷ One of the key values of representative government is that the majority should generally rule, and that governing bodies and elected officials should be responsive to the popular will. Indeed, this fundamental principal was recognized by the Supreme Court almost fifty years ago in the context of one person, one vote,²⁵⁸ and, a bit more recently, in the partisan gerrymandering context.²⁵⁹ If a majority of the populace cannot exert its influence at an election to switch the power in the legislative body, then why hold elections at all? True, debates can be held about the extent to which a majority should be able to garner the most seats in an election, and whether a super-majority of the popular will should be a prerequisite for certain governmental activity.²⁶⁰ However, when it comes to representation in a governing body, the members of that governing body should be accountable to the majority of the populace; otherwise, the members of the governing body will essentially have carte blanche authority to disregard the will of the majority.²⁶¹

While the structural theory may be sound, there are only small shades of doctrinal justification for finding a violation of the discriminatory purpose standard in a redistricting that perpetuates white control over a governing body despite the fact that “minority” voters now comprise a majority of the electorate. *City of Richmond v. United States*²⁶² involved an annexation that reduced the city’s African American population from fifty-two percent

257. Issacharoff, *Oversight*, *supra* note 247 at 95 (“There is little normative justification for permitting the sinecure of an entrenched unaccountable minority that cannot be dislodged [by the majority of voters] through the normal operation of the political process.”).

258. In the landmark case of *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court noted: [I]n a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will.

Id. at 565.

259. *Davis v. Bandemer*, 478 U.S. 109, 133 (1986) (plurality opinion) (noting that a constitutional violation for partisan gerrymandering can “be supported by evidence of continued frustration of the will of a majority of the voters”).

260. There are a couple of unique exceptions that spring easily to mind when it comes to American government. The first is the United States Senate. In the Senate, it is possible for the will of the majority of the American electorate to be thwarted by the fact that States with fewer persons, such as Wyoming, get the same amount of representation as States with substantially larger populaces, such as Florida. The second is the Electoral College.

261. *Cf.* Issacharoff & Nagler, *Protected from Politics*, *supra* note 247, at 1135 (“By any reasonable measure, agents who have less to fear from oversight will act in their own interests and will feel freer to disregard the will of their principals. That too is a cost of having increasingly insulated elected representatives.”).

262. 422 U.S. 358 (1975).

to forty-two percent.²⁶³ In remanding to the district court for additional findings as to whether the annexation was adopted with a discriminatory purpose, the Court entertained the viability of a theory that there could be an impermissible purpose in “perpetuating white majority power.”²⁶⁴ In addition, in commenting on the design of any remedy for a purposefully discriminatory annexation, the Court was loathe to create an electoral system that would allow African Americans to control a majority of the city council seats despite having only forty-two percent of the city’s population.²⁶⁵ In both instances, the Court highlighted its concern that electoral structures should be designed to allow for rule by the dominant racial group of the city.

More recently, Justice Breyer adopted this theme of the importance of majority rule in the context of partisan gerrymandering. In *Vieth v. Jubilerer*,²⁶⁶ Justice Breyer laid out the primary arena where the use of political factors amounts to serious abuse: “the *unjustified* use of political factors to entrench a minority in power.”²⁶⁷ In this context, “entrenchment” means “a situation in which a party that enjoys only minority support among the populace has nonetheless contrived to take, and hold, legislative power” and “unjustified” means “that the minority’s hold on power is purely the result of partisan manipulation.”²⁶⁸ The harm in this situation was self-evident to Justice Breyer in that he thinks the core value of representative government is that a majority should rule and there is no compelling countervailing justification for allowing the minority to rule.²⁶⁹

263. *Id.* at 363.

264. *Id.* at 373.

265. *Id.* at 373–74.

266. 541 U.S. 267 (2004).

267. *Id.* at 360 (Breyer, J., dissenting).

268. *Id.* Justice Breyer would not intervene in situations where a partisan minority was justifiably able to obtain power by “sheer happenstance, the existence of more than two major parties, the unique constitutional requirements of certain representational bodies, such as the Senate, or reliance on traditional (geographic, communities of interest, etc.) districting criteria.” *Id.* at 360–61.

269. Justice Breyer noted:

The need for legislative stability cannot justify entrenchment, for stability is compatible with a system in which the loss of majority support implies a loss of power. The need to secure minority representation in the legislature cannot justify entrenchment, for minority party representation is also compatible with a system in which the loss of minority support implies a loss of representation. Constitutionally specified principles of representation, such as that of two Senators per State, cannot justify entrenchment where the House of Representatives or similar state legislative body is at issue. Unless some other justification can be found in particular circumstances, political gerrymandering that so entrenches a minority party in power violates basic democratic norms and lacks countervailing justification.

Id. at 361.

Now, it is certainly true that Justice Breyer's theory did not command a majority of the Court in the partisan gerrymandering context primarily because the theory did not lend itself to a judicially manageable standard,²⁷⁰ but that does not necessarily mean that a majority of the Court would reject the theory in the context of race and redistricting. Indeed, in rejecting the import of the standard for racial gerrymandering into the partisan gerrymandering context, a plurality of the Court noted several differences between the two constitutional commands, including: racial redistricting problems are more rare than partisan gerrymandering problems, therefore requiring judicial intervention less often, and that the constitutional prohibition against racial discrimination has a clearer textual authority than the constitutional prohibition against political discrimination.²⁷¹ In short, the current rejection of the minority entrenchment theory by the Court in the partisan gerrymandering context does not necessarily mean the Court would reject the theory in the context of race and redistricting.²⁷² The protection of majority rule, a core democratic value, should lead to findings of discriminatory purpose whenever a white minority uses its control of the redistricting process to entrench itself.²⁷³

E. Clearly Gerrymandered Lines

Another instance where preclearance should be denied for failing to increase minority voting strength is when redistricting actors clearly go out of their way to avoid such an increase. This happens when the redistricting lines chosen by the governing body are so bizarre that they are inexplicable except as an effort to thwart additional minority voting strength.

The Attorney General's 1994 objection to the City of Minden's (Louisiana) redistricting plan provides an example of this type of behavior. In Minden, the minority population had risen steadily since 1970 and, by the 1990 Census, African Americans made up nearly half of the city's

270. *See id.* at 299–301 (plurality opinion) (“[W]e neither know precisely what Justice Breyer is testing for, nor precisely what fails the test.”).

271. *See id.* at 286 (“By contrast, the purpose of segregating voters on the basis of race . . . is much more rarely encountered. . . . Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial gerrymandering. Finally, courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear . . .”).

272. That said, one needs to recognize that intervention by the federal government in such a situation would seem to run counter to the conservative Justices trend toward “colorblindness” and limited federal intervention in state and local redistricting affairs. Nevertheless, if there is an area where the civil rights envelope should be pushed, this is it.

273. *Cf. Issacharoff, Gerrymandering, supra* note 23, at 606 (noting that frustration of the will of the majority “remains the core insight about the role of constitutional scrutiny in the political process”).

population.²⁷⁴ The existing plan had two safe white districts, two safe African American districts, and one district that was thirty percent African American.²⁷⁵ The city needed to redistrict so as to comply with the equal protection requirement of one person, one vote and could have easily cured the population imbalances among the districts with some minor tweaks in district lines.²⁷⁶ If the city officials had adopted such a “least-change” plan, the plain result would have been an increase in the proportion of African American population in the thirty percent district.²⁷⁷ Instead, the city chose to radically redraw its district lines, creating oddly shaped districts in the process and could provide no explanation for the decision to adopt such an unorthodox redistricting scheme.²⁷⁸

Finding a violation of the discriminatory purpose standard in this context stands on firm doctrinal footing. While all redistricting plans are ostensibly race-neutral, the Court has recognized that “[s]ometimes a clear pattern, inexplicable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.”²⁷⁹ The paradigm of this in the voting context being the City of Tuskegee’s gerrymandering of its boundary lines from a perfect square to an uncouth twenty-eight sided figure designed to fence out almost every single African American resident—an action that the Court condemned in *Gomillion v. Lightfoot*.²⁸⁰ So, too, in the racial gerrymandering context the Court has noted that the shape of district lines can present an essentially open-and-shut case of discrimination. In *Shaw v. Reno*,²⁸¹ the Court wrote:

[I]t seems clear to us that proof [of a racial gerrymander] sometimes will not be difficult at all. In some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to ‘segregate . . . voters’ on the basis of race.²⁸²

In short, the Court has held that sometimes boundary lines themselves present a clear story of purposeful discrimination.

There is also some legislative history, albeit weak, to support this sort of enforcement of the discriminatory purpose standard. While the House

274. Letter from Deval L. Patrick, Assistant Att’y Gen., Civil Rights Div., to Gary Joiner (Oct. 17, 1994), in *Voting Rights Act: Section 5 of the Act—History, Scope, & Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1093–94 (2005).

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); see also *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979) (“[T]here are cases in which impact alone can unmask an invidious classification.”).

280. 364 U.S. 339, 340, 347–48 (1960).

281. 509 U.S. 630 (1993).

282. *Id.* at 646–47.

Report does not directly speak of bizarre boundaries as a problem under the discriminatory purpose standard,²⁸³ the Senate Report seems to. The Senate Report notes:

One traditional and important standard for identifying unconstitutional racial discrimination is to ask whether the challenged action departs from normal rules of decision. Courts and the Justice Department should ask whether the decision not to create a black-majority district departed from ordinary districting rules. If a state has a large minority population concentrated in a particular area, ordinary rules of districting—following political and geographic borders and keeping districts as compact as possible—would recommend that those voters be given a majority-minority district. If the State *went out of its way* to avoid creating such a majority-minority—one that would be created under ordinary rules—that is unconstitutional racial discrimination.²⁸⁴

Of course, the most obvious manner in which a State can go “out of its way” to avoid creating a district for minority voters is by using bizarre boundaries. That said, it bears repeating that the Senate Report likely has limited utility.

There are, though, limits and possible objections to an approach focused on the shape of district lines. Regarding the limits, it is going to be relatively rare when the district lines alone can be deemed *res ipsa loquitur* evidence of a violation of the discriminatory purpose standard. Indeed, the Court has recognized this relative rareness in the racial gerrymandering context.²⁸⁵ Thus, bizarre lines are unlikely to form the basis for very many findings of a violation of the discriminatory purpose standard.²⁸⁶

283. One might find such enforcement of the discriminatory purpose standard implicit in the House Report comment that:

[T]he factors set out in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, et. al. provide an adequate framework for determining whether voting changes submitted for preclearance were motivated by a discriminatory purpose, including determining whether a disproportionate impact exists; examining the historical background of the challenged decision; looking at the specific antecedent events; determining whether such change departs from the normal procedures; and examining contemporary statements of the decision-maker, if any.

H.R. REP. NO. 109-478, at 68 (2006). Here, bizarre lines could be considered a “depart[ure] from normal procedures.”

284. S. REP. NO. 109-295, at 17 (2006) (emphasis added).

285. *Shaw*, 509 U.S. at 646–47 (“In some *exceptional* cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to segregate voters on the basis of race.”) (emphasis added) (internal quotations omitted); see also *Miller v. Johnson*, 515 U.S. 900, 913 (1995) (“In the *rare* case, where the effect of government action is a pattern unexplainable on grounds other than race, the evidentiary inquiry is relatively easy. . . . Patterns of discrimination as conspicuous as [Gomillion] are rare”) (emphasis added) (citations omitted) (internal quotations omitted).

286. Of course, even when bizarre lines do not in-and-of themselves provide a basis for a finding of discriminatory purpose, they might be combined with other evidence, such as lack of any ability to elect a candidate of choice or direct evidence of racial animus, to strengthen a finding of discriminatory purpose. Cf. *Miller*, 515 U.S. at 913 (“Shape is

Regarding objections, one of the primary criticisms of the racial gerrymandering doctrine created by the Court in the 1990s was its failure to identify a concrete injury.²⁸⁷ Moreover, relying on the bizarre shape of district lines has a standardless “I know it when I see it” feel. Nevertheless, most discriminatory purpose analysis in the redistricting context will result in difficult evidentiary decisions. The goal here is to identify a broader framework for determining whether the discriminatory purpose standard has been met, not to come up with specific parameters of what constitutes bizarre lines.²⁸⁸ In sum, for primarily doctrinal reasons, one instance where discriminatory purpose should be found is when bizarre lines have been drawn to avoid providing additional representation to minority voters.²⁸⁹

F. Coda: Proportionality

At the beginning of this discussion of a framework for enforcing the discriminatory purpose standard, I mentioned that in all the situations described above there were two prevailing evidentiary assumptions: racially (or ethnically) polarized voting, and a history of discrimination that would often be accompanied by a present-day reduced socio-economic status of the minority community.²⁹⁰ A third macro factor that necessitates discussion is proportionality—the idea that minority voters should have the same number of ability to elect districts as their relevant share of the population.²⁹¹

Proportionality has not been discussed much in the cases where the Supreme Court has opined on the presence or absence of an unconstitutional discriminatory purpose. In these cases, the Court’s

relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.”)

287. See generally Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287 (1996) (examining the doctrinal instability of wrongful districting claims).

288. It is possible to create a more quantitative approach to measuring bizarreness. See generally Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 495 (1993).

289. Politics as markets might also support rejection of a redistricting plan using the discriminatory purpose standard when based on the use of bizarre lines. This is because bizarre lines might be indicative of a market failure and incumbent self-dealing. Indeed, in an article published prior to more extensive development of the politics as markets framework, Professor Pildes advocated a focus on bizarre lines as a method for resolving racial gerrymandering claims—such claims being the flip side of the discriminatory purpose coin. Pildes, *Principled Limits*, *supra* note 120, at 2549–50; see also *id.* at 2556 (“A better, if less traditional, approach [to constraining racial redistricting] would be for courts to focus on specifying extrinsic and more objectively definable legal constraints.”).

290. See *supra* notes 121–124 and accompanying text.

291. See *Johnson v. De Grandy*, 512 U.S. 997, 1013–14 (1994) (discussing and defining proportionality).

discussion primarily amounts to forswearing any desire to constitutionally mandate proportionality or proportional representation. For example, Justice Potter Stewart's plurality opinion in *City of Mobile v. Bolden*²⁹² noted that the "fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation."²⁹³

What is absent from these discussions is any comprehensive guidance on how the existence of proportionality (or lack thereof) impacts the finding of discriminatory purpose. In other words, these cases do not provide a good answer to a question such as this: if direct evidence of racial animus exists and minority voters can be provided with additional representation but already enjoy proportional representation, is a judicial finding of discriminatory purpose appropriate?

Discussion of proportionality has, however, appeared in the related context of the Section 2 "results" test. In *Johnson v. DeGrandy*,²⁹⁴ the Court held that the existence or absence of proportionality should be considered in the analysis of whether a redistricting plan violates Section 2.²⁹⁵ There, the Court noted that proportionality would be a "relevant fact,"²⁹⁶ but would not provide a "safe harbor"²⁹⁷ against liability for a defendant accused of enacting a redistricting plan that "resulted" in discrimination.²⁹⁸ Put simply, proportionality is a factor in determining a Section 2 violation, but is by no means the entire ballgame.

When it comes to the discriminatory purpose standard, a similar rule should govern: the existence of proportionality should not serve as a safe harbor defense. Obviously, in contexts where minority voters do not have any ability to elect a candidate of choice, it is unlikely proportionality will be a defense. Proportionality will also not be available as a defense in a situation where "minority" voters are the majority and do not have the ability to elect a majority of the governing body. However, proportionality might be a viable defense when direct evidence of racial animus can be produced or

292. 446 U.S. 55 (1980).

293. *Id.* at 79; *see also* *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971) (describing how lack of proportional representation alone does not amount to "invidious discrimination"); *White v. Regester*, 412 U.S. 755, 765–66 (1973) ("To sustain such a claim [of unconstitutional racial discrimination], it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.").

294. 512 U.S. 997 (1994).

295. *Id.* at 1000.

296. *Id.* at 1017.

297. *See id.* at 1017–18 (explaining that a violation would be assessed "based on the totality of circumstances").

298. The Court later reiterated these sentiments in another Section 2 case. *LULAC*, 548 U.S. 399, 436–38 (2006).

when lines have been patently gerrymandered to avoid providing additional representation for minority voters.²⁹⁹ In these instances, proportionality should not serve as a defense against a violation of the purpose standard.

But proportionality is not entirely about a “safe-harbor” defense, as another side of the coin is what role a *lack* of proportionality should play in initially determining whether a discriminatory purpose is at work. In other words, what role should the fact that minority voters do *not*, but could, enjoy proportional representation play in the discriminatory purpose analysis?³⁰⁰ And the question becomes particularly thorny when there is some representation but not proportional representation. Take, for example, the following hypothetical: a nine-member governing body where Native Americans make up thirty-three percent of the population; Native American voters have the ability to elect a candidate of choice in one of the nine single-member districts in both the existing and proposed redistricting plans; it is possible to provide two additional seats (out of the nine) in which Native American voters would have the ability to elect a candidate of choice; there is no direct evidence of racial animus and no evidence that the lines were clearly gerrymandered to avoid the creation of another district for Native American voters; and the governing body has provided no reason for failing to draw the two additional districts other than, perhaps, incumbency protection which has been neutrally applied across the redistricting plan. What role should a lack of proportionality play in analyzing the presence or absence of discriminatory purpose?

Here, again, the Court provides little guidance in its discriminatory purpose decisions but has provided some discussion in a decision involving Section 2 of the Voting Rights Act. Unfortunately, even in the Section 2 context, the Court’s statements are not helpful in providing any clear direction. In *League of United Latin American Citizens v. Perry* (*LULAC*), the Court punted on whether the fact that Latinos were two districts shy of proportionality in Texas’ congressional plan “weigh[ed] in favor of a § 2 violation,” choosing instead to ground its finding of Texas’ Section 2 liability on other factors.³⁰¹

299. One should not, however, allow direct evidence of animus or clearly gerrymandered lines to lead to a situation where “minority” voters are given an additional seat that gives them control over a majority on the governing body if they do not comprise a majority of the electorate. In such an instance, majority rule should trump all else, just as it should trump all else if the situation was reversed.

300. Obviously, lack of proportionality plays a role in a couple of the scenarios mentioned in the posited framework for enforcement of the discriminatory purpose standard. Where minority voters have no representation or form a majority that lacks control over the majority of seats in the governing body, then lack of proportionality plays an important role.

301. *LULAC*, 548 U.S. at 438.

My answer, which can already be inferred from the framework presented, is that a lack of proportionality should play no role. The trick when it comes to the discriminatory purpose standard (and, in some sense, the Voting Rights Act generally) has been to thread the needle between providing an ability for minority voters to elect candidates of choice and not mandating proportionality. Put somewhat differently, the trick is to find a middle ground between “minimization” of minority voters’ ability to elect candidates of choice and “maximization” of that ability. In the above hypothetical, the difficulty lies in the fact that minority voting strength is not minimized but it might be possible to do something short of maximization by, say, drawing one additional district for minority voters instead of two. Here, the best course of action is to do nothing unless some other factor (direct evidence of racial animus, for example) can be found.

Moreover, there is another good reason to steer clear of any framework for the discriminatory purpose standard that would approach a mandate of proportional representation. Conservative Justices are likely to be very wary of such an approach, and the future of Section 5 may depend upon coming up with an enforcement framework for the discriminatory purpose standard that can satisfy a conservative Court. Indeed, the importance of developing a framework for discriminatory purpose to the future of Section 5 is a subject to which we now turn.

III. THE IMPORTANCE OF CREATING A FRAMEWORK FOR THE PURPOSE STANDARD

Creating a framework for Section 5’s discriminatory purpose standard presents an enormous challenge. Making determinations about discriminatory purpose in any context—whether it be employment or in the provision of government services or, as here, in the law of democracy—typically involves a fact-intensive analysis that does not easily lend itself to clear rules. Moreover, the redistricting context may be among the most difficult in which to make determinations regarding discriminatory purpose.

Redistricting often involves multiple motivations on the part of numerous elected officials, most of whom will likely be running for re-election under the redistricting plan they adopt. Indeed, the difficulty of creating a judicially manageable standard has led the Supreme Court to eschew engaging in a purpose-type analysis to determine whether a redistricting plan violates constitutional norms related to partisan gerrymandering.³⁰² In addition, when race and redistricting collide it can be difficult to determine the point at which racial considerations switch

302. See generally *Vieth v. Jubelirer*, 541 U.S. 267, 270–306 (2004).

from being legitimate to being illegitimate, for race is always a known factor when it comes to redistricting.³⁰³

There are, however, many crucial reasons for academic commentators and, perhaps more importantly, executive branch officials charged with administering Section 5 to think deeply about the purpose standard soon.

The foremost reason to create a workable framework for the discriminatory purpose standard is because doing so in a way that satisfies a conservative Supreme Court may be necessary to ensure the continued survival of Section 5. This Article commenced by recounting how Section 5's constitutionality was recently on clear display in the *NAMUDNO* litigation and how the conservative majority blinked when it declined to find Section 5 unconstitutional, instead opting to trim the provision through creative statutory interpretation.³⁰⁴ Yet in ducking the constitutional issue in *NAMUDNO*, the Court used the power of its dicta pen to opine about Section 5's potential constitutional infirmities. By my count, the *NAMUDNO* Court used eight paragraphs of dicta to discuss the "substantial federalism costs" of Section 5, focusing on, among other things, the broad application of Section 5, its targeting of certain states for coverage, and the fact that times have changed in the Section 5 covered areas.³⁰⁵

In the wake of the *NAMUDNO* dicta criticizing Section 5, several distinguished commentators suggested that the Court's opinion be interpreted as a message to Congress to fix Section 5 and that Congress should heed this message. Yale's Heather Gerken wrote that "it's hard not to read the decision as a shot across the bow, giving members of Congress a chance to fix the problem before the Court fixes it for them."³⁰⁶ New York University's Rick Pildes advised that following *NAMUDNO*, "Congress might conclude that it would be wise to update the act rather

303. See *Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("[R]edistricting differs from other kinds of state decision-making in that the legislature always is *aware* of race when it draws district lines . . ."); see also *id.* at 660 (White, J., dissenting) ("'Being aware,' in this context, is shorthand for 'taking into account,' and it hardly can be doubted that legislators routinely engage in the business of making electoral predictions based on group characteristics—racial, ethnic, and the like."); cf. *Bush v. Vera*, 517 U.S. 952, 995 (1996) (O'Connor, J., concurring) (describing racial gerrymandering doctrine as distinguishing between "the appropriate and reasonably necessary uses of race from its unjustified and excessive uses").

304. See *supra* notes 2–5 and accompanying text.

305. *NAMUDNO*, 129 S. Ct. 2504, 2511–13 (2009). In contrast, the Court wrote only a single paragraph of dicta on arguments for upholding Section 5, including deference to Congress' judgment in exercising its enforcement power, the legislative record amassed to justify extension, and the fact that Section 5 "quietly but effectively deter[s] discriminatory changes." *Id.* at 2513.

306. See Gerken, *supra* note 4; see also posting of Heather Gerken to Election Law Blog, *Can Congress Take a Hint?*, <http://electionlawblog.org/archives/013911.html> (June 23, 2009, 08:15 EST) ("To me, the fact that the four liberal Justices joined the opinion represents a pretty big hint that Congress needs to act. The question is whether Congress can take the hint.").

than remaining silent and leaving the next word to an obviously skeptical court.”³⁰⁷ Michigan’s Ellen Katz noted that the Court’s opinion “remands the VRA to Congress with a time limit and a warning . . . [putting] Congress on notice that the Court will scrap the statute in the next case, unless something significant about the statutory regime will have changed by then.”³⁰⁸

Of course, all these calls by commentators for Congress to step up to the plate and revise Section 5 are premised upon the idea that the Court would actually be willing to declare Section 5 unconstitutional in the next case. It would seem, though, that the votes do not currently exist to eliminate the preclearance provision.³⁰⁹ In *NAMUDNO*, the Court had Section 5 served up on an unconstitutional buffet, but decided to order off the statutory interpretation menu. Most likely, the lack of five votes to strike down Section 5 reflects the fact that the occupant of the Court’s “swing” seat, Justice Anthony Kennedy, does not desire to declare a significant portion of the Voting Rights Act null and void.³¹⁰

If these seemingly reasonable assumptions hold—that four members of the Court would declare Section 5 unconstitutional and Justice Kennedy does not want to provide the fifth vote—then the question becomes what would push Justice Kennedy over the edge? In other words, what change in events between now and the next case would cause Justice Kennedy to say *no mas* to Section 5?

One answer—the one offered by Professors Gerken, Katz, and Pildes—is Congressional inaction, but that seems unlikely. In this view, the *NAMUDNO* Court issued a polite, but firm invitation to Congress to revise Section 5, and if Congress declines to RSVP, then the Court could finally shut off the Section 5 spigot. The primary problem with this view is that the Court, including Justice Kennedy, issued this invitation to Congress for

307. Posting of Richard H. Pildes to N.Y. Times Room for Debate Blog, *A Warning to Congress*, <http://roomfordebate.blogs.nytimes.com/2009/06/22/the-battle-not-the-war-on-voting-rights/#richard> (June 22, 2009, 13:15 EST). For other commentary urging Congress to act, see Posting of Bruce Cain and Dan Tokaji to Election Law Blog, *Promoting Equal Participation: A Voting Rights Act for the 21st Century*, <http://electionlawblog.org/archives/013914.html> (June 23, 2009, 12:04 EST) (“Even though the [Voting Rights Act] has been left standing, at least for the moment, the current Congress should get to work”); Posting of Ellen Katz to Election Law Blog, *Roberts Didn’t Blink*, <http://electionlawblog.org/archives/013926.html> (June 24, 2009, 08:05 EST) (“The Chief Justice believes Section 5 of the Voting Rights Act is unconstitutional [The Court’s] contrived statutory holding remands the statute to Congress with a time limit and a warning.”).

308. Ellen D. Katz, *From Bush v. Gore to NAMUDNO: A Response to Professor Amar*, 61 FLA. L. REV. 991, 998 (2009).

309. David G. Savage, *A Rare Week of Harmony on High Court*, L.A. TIMES, June 29, 2009, at A10 (quoting Stanford University’s Pamela Karlan as saying that Chief Justice Roberts “didn’t have the votes” to overturn the Voting Rights Act).

310. *Id.*

more than a decade leading up to the 2006 extension of Section 5. From the line of cases in the 1990s dealing with racial gerrymandering³¹¹ to the 2000

Bossier Parish II decision undercutting the Section 5 purpose standard,³¹² to 2003's *Georgia v. Ashcroft*, which trimmed the sails of the Section 5 retrogression standard,³¹³ the Court as a whole, and particularly Justice Kennedy, has issued warning upon warning upon warning regarding Section 5's constitutional frailties.³¹⁴ Congress, though, responded in its 2006 extension of Section 5 not with conciliation toward the Court's concerns but by poking the Court in the eye—overruling *Bossier Parish II* and *Ashcroft*.³¹⁵ It would be strange for the Court and Justice Kennedy to think that this time—three years after Congress reconsidered Section 5—*NAMUDNO* would finally get the message through. Rather, it would have made much more sense for the Court to make good on its years of threats.

Instead of congressional inaction, haphazard and overly aggressive administrative enforcement by the Executive Branch seems far more likely to push the Court over the edge. The chief danger is enforcement by the Attorney General that intrudes on state sovereignty—particularly any action that is not suitably solicitous of the initial redistricting choices of state and local governments, and that pushes the envelope in the direction of maximization when it comes to the creation of additional districts that provide minority voters with an ability to elect candidates of their choice.³¹⁶

311. See, e.g., *Shaw v. Hunt*, 517 U.S. 899 (1996).

312. *Bossier Parish II*, 528 U.S. 320, 325–26 (2000).

313. *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003).

314. See *id.* at 491 (Kennedy, J., concurring) (“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.”); *Bossier Parish II*, 528 U.S. at 336 (declining to adopt a particular statutory interpretation of Section 5 that would “exacerbate the ‘substantial’ federalism costs that the preclearance procedure already exacts . . . perhaps to the extent of raising concerns about § 5’s constitutionality”) (internal citations omitted); *Bossier Parish I*, 520 U.S. 471, 480 (1997) (describing how interpreting Section 5 “[t]o require a jurisdiction to litigate whether its proposed redistricting plan also has a dilutive ‘result’ before it can implement that plan . . . is to increase further the serious federalism costs already implicated by § 5”); *Miller v. Johnson*, 515 U.S. 900, 926–27 (1995) (“We are especially reluctant to conclude that § 5 justifies [the Justice Department’s maximization] policy given the serious constitutional concerns it raises. . . . We need not, however, resolve these troubling and difficult constitutional questions today. There is no indication Congress intended such a far-reaching application of § 5, so we reject the Justice Department’s interpretation of the statute and avoid the constitutional problems that interpretation raises.”).

315. VRARA, Pub. L. No. 109-246, § 2(b)(6), 120 Stat. 577, 578 (2006) (finding that *Bossier Parish II* and *Ashcroft* had “misconstrued Congress’ original intent”). In a less fundamental move, Congress also overruled a Supreme Court decision that limited plaintiffs who prevailed in Voting Rights Act litigation from collecting expert witness fees from defendants. *Id.* § 6, 120 Stat. at 581 (amending Voting Rights Act to allow “reasonable expert fees, and other reasonable litigation expenses”).

316. One other major administrative enforcement avenue might also lead to the current Supreme Court striking down Section 5 as unconstitutional: an overly stringent interpretation of the criteria for escaping Section 5 coverage. On a technical level, a

At bottom, I think that future Executive Branch *action* rather than Congressional *inaction* most likely would serve as the tipping point for shutting down Section 5. Thus, the Court's *NAMUDNO* opinion might better be viewed as a shot across the Attorney General's bow rather than Congress'.³¹⁷

If Section 5's constitutional fate lies in the Executive Branch's hands, then it is important for the Attorney General to develop an orderly, non-maximizing framework for enforcing the discriminatory purpose standard. To be sure, when it comes to the Section 5 retrogression standard, an opportunity exists for inadequate deference to state and local government sovereignty, partisan intrigue, and strong race-based dictates that would be anathema

to a majority of the current Supreme Court.³¹⁸ However, the most "mischief" in administrative enforcement can spring from the more open-ended purpose standard.³¹⁹

Indeed, one need only take a thirty-thousand-foot overview of redistricting in the 1990s, where a retrogression standard and an unconstitutional purpose standard were in play, and redistricting in the 2000s, where retrogression was essentially the sole name of the Section 5

jurisdiction escapes coverage (i.e., bails out) from Section 5 by filing a declaratory judgment action in the D.C. District Court. 42 U.S.C. § 1973b(a)(1) (2006). In recent practice, jurisdictions have bailed out by first working with the Attorney General to ensure eligibility for bailout, and then filing a consent agreement along with the complaint seeking the declaratory judgment in D.C. District Court. See, e.g., *City of Winchester v. Ashcroft*, C.A. No. 1:00CV03073 (D.D.C. May 30, 2001), available at http://www.justice.gov/crt/voting/misc/winchester_cd.pdf (entering a consent decree and judgment). If the Attorney General makes this process overly difficult for jurisdictions, then the Court might be spurred to declare Section 5 unconstitutional. That said, I think overly stringent bailout determinations are less likely to lead to the complete elimination of Section 5 by the Court—although a combination of overly stringent bailout determinations in tandem with haphazard enforcement of the purpose standard might serve as a powerful motivator for the Court.

317. One of the potential criticisms of the framework for administering the discriminatory purpose standard proposed in Part II of this Article is that it fails to do more to create additional representation for minority voters. When it comes to the idea of limiting Section 5 enforcement to prevent a conservative Supreme Court from striking it down entirely, one response might be: "Go ahead and let them." However, such a view over-emphasizes the necessity of using Section 5 as a tool for additional representation. Rather, the greatest importance of Section 5 is as a tool to prevent the backsliding of minority voting rights. In short, just because Section 5 might need to be enforced in a way that makes it a more limited tool for the advancement of minority voters does not mean Section 5 has been rendered useless or impotent.

318. Cf. Persily, *supra* note 93, at 226 ("If the new law [concerning retrogression] is going to be successful (let alone upheld as constitutional), it cannot be seen as a tool for the systematic furtherance of certain partisan interests."); see generally Zachary J. Sullivan, *A Proposed Standard for Amended Section 5 of the Voting Rights Act of 1965 As Applied to Redistricting*, 85 N.D. L. REV. 1263 (2010) (proposing a framework for making decisions related to the retrogression standard).

319. Persily, *supra* note 93, at 217 n.165 ("It is quite possible that the *Bossier Parish* fix may turn out to be more important than the *Ashcroft* fix when it comes to (re)expanding DOJ authority.").

game, to see that this is the case. The 1990s saw a series of Court decisions excoriating the Attorney General for its many rejections of States' redistricting plans aimed at "maximization" for (although the Court did not explicitly say this, academic commentators have speculated in this fashion) partisan ends.³²⁰

In contrast, the 2000s saw one decision rebuking the Attorney General in a context where partisan forces might have been at play.³²¹ In short, if Section 5 is going to fall because of administrative enforcement that is anathema to the Court, it will likely be through implementation of the purpose standard.

Aside from Section 5's continuing constitutional survival, creating a framework for the purpose standard should also help reduce the opportunity for partisanship. One of the problems when it comes to a standard involving a "totality of the circumstances" is that it can allow partisan and ideological preferences to interfere in decision-making. For example, the University of Chicago's Adam Cox and Thomas Miles have demonstrated how the quite malleable totality of circumstances test from Section 2 of the Voting Rights Act seems to be manipulated to reach the preferred ideological position of judges in those cases.³²² Indeed, one of the major criticisms of the Supreme Court's decision in *Georgia v. Ashcroft* was that the new doctrinal test for Section 5 retrogression developed in that case was unclear and more susceptible to partisan chicanery.³²³ So, too, the discriminatory purpose standard provides greater discretion to political

320. See, e.g., Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 799 (2006) ("Some have speculated that partisan political considerations were, at least in part, responsible for the DOJ's aggressive enforcement of the VRA during the George H. W. Bush (Bush I) Administration.").

321. See generally *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (examining a Republican led Justice Department engaged in litigation against a Democratic gerrymander); *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (per curiam) (describing the extent of Democratic gerrymandering during the post-2000 Census state legislative redistricting process). Admittedly, it is also possible to view the Court's decision in *LULAC* as an indirect, implied indictment of the Attorney General's Section 5 analysis. See J. Gerald Hebert, *Von Spakovsky, Obama, and the "Race Card"* (Nov. 16, 2007), www.clcblog.org/blog_item_189.html ("[T]he Supreme Court of the United States ultimately found that the [Texas congressional redistricting] plan harmed Latino voters, exactly in the way the career [Department of Justice] staff had said it would."). *LULAC*, however, does not contain anything near the direct indictment of the Attorney General that the racial gerrymandering cases contained.

322. See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3 (2008) ("Using the party of the appointing President as a rough proxy for ideology, we show that Democratic appointees are significantly more likely than Republican appointees to cast votes in favor of the plaintiffs under Section 2 of the Voting Rights Act.").

323. See *Ashcroft*, 539 U.S. at 494 (Souter, J., dissenting) (describing the retrogression test created by the Court's majority as "practically unadministrable"); see also Tokaji, *supra* note 320, at 821 ("The absence of clear standards for assessing retrogression after *Georgia v. Ashcroft* further increases the opportunity for partisan manipulation of the preclearance process behind a veil of discretion.").

actors in the Executive Branch and lends itself to the potential for partisan manipulation.³²⁴ While it would be naïve to think that creating a framework for the purpose standard will eliminate all opportunity for partisanship on the part of the Attorney General, it is possible that *clearer* standards could lead to a reduction in political opportunism.

Creating a framework for the purpose standard also makes sense from an administrative enforcement perspective because of the compressed nature of Section 5 review. After the Attorney General receives a redistricting plan for administrative review, the Attorney General has only a limited amount of time—sixty days—to make a preclearance decision.³²⁵ If the Attorney General fails to make a decision within sixty days, then the redistricting plan will be deemed approved.³²⁶ While the Attorney General can extend the time period for another sixty days by making what is, essentially, an abbreviated discovery request to the state or local government seeking preclearance, the Attorney General has a maximum of 120 days for review.³²⁷

While it may seem that 120 days should be plenty of time to make a determination on a redistricting plan, one need only look at the larger picture of the Attorney General’s “caseload” to see that 120 days may not be as long as it seems. For starters, redistricting plans are the most complex voting changes analyzed by the Attorney General. The complexity arises from, among other things, the need to use sophisticated computer mapping software, to engage in statistical analysis of voting patterns to determine the extent to which elections are marked by racially polarized voting, and to interview the multiple actors and assess the various considerations that contributed to the development of the plan. In addition, these complex submissions come in a wave that occurs in the first few years following every redistricting cycle and thousands of jurisdictions—from states to counties to cities to school boards—engage in redistricting. Moreover, while redistrictings are the most complex voting changes reviewed by the Attorney General, they are not the only voting changes reviewed by the Attorney General. Indeed, the Attorney General, with a limited number of staff members devoted to Section 5, reviews between 15,000 and 24,000 changes per year.³²⁸ The Attorney General is also responsible for dealing

324. See Persily, *supra* note 93, at 217 n.165 (“There is a risk that the purpose inquiry will turn into another opportunity for partisan infection of the preclearance process—for example, with a Democratic-leaning DOJ determining that all Republican gerrymanders in jurisdictions with heavy minority populations have discriminatory purposes or finding that the failure to maximize the number of majority-minority districts constitutes discriminatory purpose.”).

325. 42 U.S.C. § 1973c (2006).

326. *Id.*

327. 28 C.F.R. § 51.37 (2009).

328. *Introduction to Section 5*, United States Department of Justice, Civil Rights

with jurisdictions seeking to exempt themselves (i.e., bail out) from Section 5 coverage.³²⁹ Finally, Section 5 amounts to only one aspect of the Attorney General's enforcement of federal election laws.³³⁰

In short, when you compile all the factors that create a time-crunch on administrative review, the need to develop a framework for the purpose standard appears even more urgent. Presumably, one wants a system where Section 5 "justice" is the same for the State of Texas' redistricting as it is for Atlanta's redistricting as it is for the Clay County, Alabama, School Board's redistricting and, theoretically, a framework developed ahead of time should lead to more consistent outcomes from preclearance decision to preclearance decision. Presumably, one also wants a system where the Attorney General focuses finite Section 5 resources on the redistricting plans most likely to violate the Section 5 rights of minority voters, and a framework should help the Attorney General perform the triage necessary to focus limited resources on the redistricting plans that matter most. Of course, a framework for discriminatory purpose review will likely not make enforcement of Section 5 perfect—in any large undertaking, inconsistencies and mistakes are bound to occur—but it should help improve the administration of Section 5.

Finally, creating a framework for Section 5's purpose standard also makes sense from a federalism perspective. Few, if any, commentators doubt the unique and substantial federalism intrusion presented by Section 5. Indeed, all nine Justices on the Supreme Court recently signed off on a passage in *NAMUDNO* that examined in detail many of these federalism costs.³³¹ In light of these costs, the Attorney General has always been necessarily concerned with striking a balance between protecting the fundamental democratic rights of minority voters while paying attention to the legitimate governance concerns of state and local entities. Indeed, part of what animated the Supreme Court's hostility toward the Attorney General's enforcement of Section 5 during the 1990s

Division, http://www.justice.gov/crt/voting/sec_5/about.php (last visited May 24, 2010).

329. 42 U.S.C. § 1973b(a)(1) (establishing bailout provision). Indeed, following *NAMUDNO*, the Attorney General may have to deal with an increase in the number of bailout applications. See *NAMUDNO*, 129 S. Ct. 2504, 2513–16 (2009) (interpreting the bailout provision to allow jurisdictions other than States and counties to seek a bailout). The Attorney General can also bring litigation against state and local governments who have failed to seek the necessary preclearance. 42 U.S.C. § 1973j(d). However, unlike requests for bailout and preclearance that the Attorney General has no ability to avoid, the Attorney General's affirmative litigation related to Section 5 is discretionary.

330. See generally *The Statutes We Enforce*, United States Department of Justice, Civil Rights Division, <http://www.justice.gov/crt/voting/overview.php> (last visited May 24, 2010) (identifying other voting-related statutes in addition to the VRA that the Attorney General enforces).

331. *NAMUDNO*, 129 S. Ct. at 2511–13.

was a lack of solicitude for the redistricting choices of state and local governments.

In striking this balance, one important measure the Attorney General can take to limit Section 5's intrusion on federalism is to provide the ground rules of the redistricting game to state and local governments before the opening pitch. When it comes to Section 5, the federal government intrudes into an area that some may consider to be the most fundamental function of state and local governments—the ability to establish the structural framework for representative government. This intrusion is minimized and is less of a burden on state and local actors if these actors have a clearer understanding of what will run afoul of federal law since they will theoretically spend fewer resources complying with the federal mandates because they will have an opportunity to get redistricting right in the first instance. Also, if state and local governments know the ground rules beforehand, it is less likely they will lose control of redistricting to (most likely federal) judicial actors in litigation. Granted, when it comes to the discriminatory purpose standard, there likely can be no absolutely clear rules, but certainly some framework for the purpose standard would help limit the federalism burden.

In sum, a number of reasons lead to the conclusion that it is important to develop a workable discriminatory purpose framework prior to the upcoming redistricting cycle. Moreover, it is important that the framework adequately protect the legitimate rights of minority voters to effective representation and fair electoral structures while not totally ignoring more conservative notions of federalism and discomfort with enforcement efforts that appear to maximize the number of districts drawn that provide minority voters an ability to elect candidates of choice. While such a framework may not be easy to develop, it is certainly worth trying.

CONCLUSION: NEXT STEPS

This Article tackles a difficult task—the creation of a framework for deciding which redistricting plans should be blocked from implementation for failure to meet Section 5's discriminatory purpose standard. There may be imperfections with this framework and criticism might come from many quarters. At the end of the day, the design of this Article is not necessarily to end the dialogue about enforcement of the discriminatory purpose standard but to spark the dialogue before it is too late.

The 2010 Census is on the verge of being released. Redistricting will commence in the spring of 2011. Administrative review and litigation involving redistricting plans will reach its peak in the months that follow. Yet the fixation up to this point has been on Section 5's overall constitutional survival rather than its enforcement in the upcoming

redistricting cycle. However, a linkage exists between the two. For Section 5 to survive, the Executive Branch needs to develop a suitable framework for enforcing the purpose standard in the redistricting context.

At the very least, the Attorney General should take steps to issue guidance on the subject of discriminatory purpose and redistricting. On the eve of the post-2000 round of redistricting, the Attorney General issued a notice in the Federal Register entitled *Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act*.³³² While this guidance was generalized, it served an important purpose. First, it provided some important notice for redistricting actors about what the ground rules would be. Second, it sent a message to judicial actors that the Attorney General was taking seriously its role as a surrogate for the D.C. District Court in making preclearance decisions. Importantly, this guidance may have helped change the Supreme Court's perception of administrative enforcement. The one post-2000 case in which the Court rejected the Attorney General's enforcement of Section 5 seemed less critical than the language of the Court's post-1990 decisions.³³³

Once again, it is important for the Attorney General to issue similar guidance concerning the purpose standard for the post-2010 round of redistricting. The future of Section 5 may depend upon it.

332. 66 Fed. Reg. 5412-14 (Jan. 18, 2001).

333. Compare *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (mildly rejecting the Attorney General's interpretation of Section 5) with *Miller v. Johnson*, 515 U.S. 900 (1995) (more forcefully rejecting the Attorney General's interpretation of Section 5).

As this Article was in the finishing stages of editing, the Attorney General released proposed revisions to the procedures for administering Section 5. Revision of the Procedures for the Administration of Section 5 of the Voting Rights Act, 75 Fed. Reg. 33205 (proposed June 11, 2010) (to be codified at 28 C.F.R. pts. 0, 51). Those proposed revisions, however, include very little clear or substantial guidance on how the discriminatory purpose standard will be implemented.