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# The Voting Rights Act: What Is the Basis for the Section 5 Baseline

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# THE VOTING RIGHTS ACT: WHAT IS THE BASIS FOR THE SECTION 5 BASELINE?

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*In 1965, Congress enacted section 5 of the Voting Rights Act to curb unconstitutional voting practices in the jurisdictions that had most egregiously violated the constitutional voting rights of minority citizens. Section 5 requires these "covered" jurisdictions to obtain federal preapproval, known as "preclearance," before implementing any changes related to voting to ensure that discriminatory practices are not enacted in these jurisdictions. Since its implementation, the preclearance inquiry has relied on the application of a dynamic baseline, where a proposed change is compared to the status quo—the relevant voting practice that is in effect when the proposed change is submitted for preclearance. However, in 2008, the Chief Justice of the U.S. Supreme Court hinted in* Riley v. Kennedy *that section 5 should be read to impose a static baseline. Under this approach, a proposed change would be compared only to the relevant practice that was in effect when a covered jurisdiction became subject to section 5, regardless of any intervening changes that have since been precleared and enacted. This Article argues that the Court should continue to interpret section 5 to impose a dynamic baseline because this interpretation is most consistent with the congressional intent behind section 5 of the Voting Rights Act. A contrary interpretation would undermine the purpose of section 5 and endanger the progress that has already been made since 1965.*

"*The right to vote is the most fundamental right in our democratic system of government because its effective exercise is preservative of all others.*" Report by the House of Representatives on the Reauthorization of the Voting Rights Act of 1965.[1]

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1. H.R. REP. NO. 109-478, at 6 (2006).

## I. INTRODUCTION

In 1965, Congress passed the Voting Rights Act[2] ("VRA") to "enforce the guarantees of the 15th amendment to the Constitution of the United States"[3] and to end discriminatory voting practices that disenfranchised racial minorities.[4] Such practices included poll taxes, literacy tests, and bureaucratic restrictions that prevented minority citizens from not only voting, but also from registering to vote.[5] The VRA was a radical departure from prior laws that Congress had enacted to eliminate discriminatory voting practices that had proved to be unsuccessful.[6] Dismayed that "[p]rogress has been painfully slow, in part because of the intransigence of State and local officials and repeated delays in the judicial process,"[7] Congress implemented a stronger remedy. Since its enactment, the VRA has been lauded as "the most effective civil rights legislation ever passed."[8] The U.S. Supreme Court has agreed that "[t]he statute was enacted to protect voting rights that are not adequately protected by the Constitution itself,"[9] and the Court has upheld the constitutionality of the VRA's core provisions on several occasions.[10]

Section 5 is one of the key provisions of the VRA.[11] This section requires that certain jurisdictions[12]—those in which

2. The Voting Rights Act is codified at 42 U.S.C. §§ 1973 to 1973aa-6 (2006).

3. H.R. REP. NO. 89-439, at 1 (1965) *reprinted in* 1965 U.S.C.C.A.N. 2437, 2437.

4. *Voting Rights Act (1965)*, http://www.ourdocuments.gov/doc.php?flash=false&doc=100 (last visited Sept. 24, 2009).

5. *Id.*

6. H.R. REP. NO. 109-478, at 7 (2006) (noting that the Voting Rights Act of 1965 was prompted by the failure of 1957, 1960, and 1964 civil rights laws aimed at enforcing the Fifteenth Amendment).

7. H.R. REP. NO. 89-439, at 2441.

8. S. REP. NO. 94-295, at 11 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 777.

9. Chisom v. Roemer, 501 U.S. 380, 403 (1991).

10. *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966); RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 121–29 (2003) (noting that the constitutionality of section 5 was subsequently challenged and upheld in *City of Rome v. United States*, 446 U.S. 156 (1980) and *Lopez v. Monterey County*, 525 U.S. 266 (1999)).

11. Section 5 of the VRA is codified at 42 U.S.C. § 1973c (2006).

12. The following jurisdictions became covered under section 5 in 1965: Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and selected counties in North Carolina (Anson, Bertie, Caswell, Chowan, Craven, Cumberland, Edgecombe, Franklin, Gates, Granville, Greene, Halifax, Hertford, Hoke, Lenoir, Nash, Northampton, Onslow, Pasquotank, Person, Pitt, Robeson, Scotland, Vance, Wayne, and Wilson). The following jurisdictions became covered in 1971:

discriminatory voting practices have been most prevalent—obtain preapproval from either the U.S. attorney general at the U.S. Department of Justice or the U.S. district court for the District of Columbia before they can change their voting practices.[13] This preapproval process, known as "preclearance,"[14] ensures that any change related to voting in these jurisdictions "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [language]."[15] Congress has considered section 5 to be its "front line defense against voting discrimination"[16] because it is designed to prevent, rather than just combat,[17] the emergence of discriminatory voting practices.

The critical issue in a preclearance inquiry is whether a proposed change to a voting practice is discriminatory in intent or impact.[18] To determine whether a proposed change merits preclearance, the U.S. attorney general or the U.S. district court for the District of Columbia must necessarily compare the proposed voting practice to the corresponding prior practice that it would replace. The corresponding prior practice is the *baseline* to which the proposed change must be compared to determine its compliance with the

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California counties (Kings, Monterey, and Yuba) and New York counties (Bronx, Kings, and New York). Several New Hampshire townships became covered in 1974 (Rindge, Millsfield, Pinkhams, Stewartstown, Stratford, Benton, Antrim, Boscawen, Newington, and Unity). The following jurisdictions became covered in 1975: Alaska, Arizona, Texas, another California county (Merced), and three Florida counties (Hardee, Hillsborough, and Monroe). A few additional jurisdictions became covered in 1966 and 1976. U.S. Department of Justice, *Section 5 Covered Districts*, http://www.usdoj.gov/crt/voting/sec_5/covered.php (last visited Sept. 24, 2009).

13. Jocelyn Benson, *Preparing for 2007: Legal and Legislative Issues Surrounding the Reauthorization of Section 5 of the Voting Rights Act*, 67 U. PITT. L. REV. 125, 143–44 (2005).

14. *Id.* at 126.

15. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 577, 580 (2006).

16. S. REP. NO. 94-295 (1985), *reprinted in* 1975 U.S.C.C.A.N. 774, 784. Section 5 most often protects voters from discriminatory practices at the local level (cities, counties, towns, school districts, and other local governing bodies) because roughly 90 percent of the submissions requesting preclearance are proposals to change local voting practices, and "local election abuses are most likely to go undetected and unremedied." SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 110 (2006).

17. Section 2 of the VRA generally proscribes voting practices that discriminate on the basis of race, color, or language. 42 U.S.C. § 1973(a) (2006). However, the burden to establish that a certain voting practice is discriminatory is on the challenger—the voters whose voting rights were infringed, or parties on behalf of such voters. *Id.* See *infra* Part VII.B for a discussion about the inadequacies of section 2 as compared to section 5.

18. *See* 42 U.S.C. § 1973c(a) (2006).

VRA. But, section 5 does not define this baseline; it does not clearly state to which prior corresponding practice the proposed change must be compared—the immediately preceding practice, or the prior practice that was in effect at the time that the specific jurisdiction became covered under section 5. The first alternative would provide what this Article terms a "dynamic baseline" pursuant to which a proposed voting change would be compared with the most recent relevant practice—the status quo. A dynamic baseline would shift with progress and would account for all precleared intervening changes since the jurisdiction's coverage date. The second alternative would provide what this Article terms a "static baseline" pursuant to which a proposed voting change would always be compared to the relevant voting practice that was in effect on the jurisdiction's coverage date—November 1, 1964, November 1, 1968, or November 1, 1972[19]—irrespective of any intervening changes that may have since been precleared and implemented. A static baseline would remain unaffected by progressive intervening changes, even if the original practice at the time of coverage is more discriminatory relative to the most current practice that has been precleared and enacted.

Traditionally, section 5 has been understood by the U.S. Supreme Court to impose a *dynamic* baseline that shifts each time a voting practice is approved in accordance with the VRA.[20] However, during the 2007 Term, the U.S. Supreme Court casually suggested in *Riley v. Kennedy*[21] that section 5 may be read to impose a static baseline.[22]

The facts of *Riley* are not simple, but most of its intricacies do not bear directly on the baseline issue. The dispute in *Riley* concerned the method that Mobile County, Alabama, uses to fill midterm vacancies on its county commission.[23] Alabama became covered under section 5 in 1965.[24] As of November 1, 1964,[25] the

19. Section 5 delineates these three coverage dates. *See* 42 U.S.C. § 1973c(a) (2006).

20. *See* discussion *infra* Part V.

21. 128 S. Ct. 1970 (2008).

22. *Id.* at 1982 n.7.

23. *Id.* at 1978.

24. *Id.*

25. Jurisdictions that became covered as of 1965 were required to submit all changes to their voting practices that were different from those in force or effect on November 1, 1964. 42 U.S.C. § 1973c(a) (2006).

county filled these midterm vacancies by gubernatorial appointment.[26] However, in 1985, the state passed a law—precleared by the U.S. attorney general—that required future midterm vacancies to be filled by special election.[27] Mobile County held its first special election in 1987 to fill one such vacancy,[28] but the Alabama Supreme Court later invalidated the state law pursuant to which the special election was held on the grounds that the law violated Alabama's state constitution. The court then ordered Mobile County to resume filling its midterm vacancies by gubernatorial appointment.[29] But, this change in procedure ordered by the Alabama Supreme Court was never submitted for preclearance or otherwise approved by either the U.S. attorney general or the U.S. district court for the District of Columbia.[30] After Alabama Governor Bob Riley used his appointment power to fill the midterm vacancy, three plaintiffs filed a complaint against Riley alleging that he violated section 5 because Alabama had not obtained preclearance for this change in voting practice mandated by the state court.[31] The district court held that the state must obtain preclearance for this state court-mandated change.[32] On appeal, a three-judge court agreed that without preclearance, this change violated section 5 of the VRA.[33]

On appeal, the U.S. Supreme Court reversed and remanded.[34] The Court in *Riley* held that the practice of filling midterm vacancies through special elections was never "in force or effect" for the purpose of section 5 preclearance.[35] The Court reasoned that in spite of the 1987 special election held by Mobile County in accordance with the law that was in effect at that time, this law did not actually change the voting procedure because it was subsequently invalidated

26. *Riley*, 128 S. Ct. at 1978.
27. *Id.*
28. *Id.*
29. *Id.* at 1979–80.
30. *Id.*
31. Kennedy v. Riley, 445 F. Supp. 2d 1333, 1335 (M.D. Ala. 2006).
32. *Id.* at 1337.
33. *See* Kennedy v. Riley, 2007 U.S. Dist. LEXIS 32123, at *1–2 (M.D. Ala. 2007).
34. *Riley*, 128 S. Ct. at 1982.
35. *Id.* at 1982.

by Alabama's highest court.[36] However, the Court's holding did not formally address the issue of whether Alabama had to seek preclearance to implement the order issued by Alabama's supreme court to change the method of filling midterm vacancies from special election to gubernatorial appointment. The Court simply passed on the opportunity to define or redefine the section 5 baseline.

The Court limited its holding to the specific facts of *Riley*,[37] but a significant and potentially far-reaching issue emerged. During oral arguments in *Riley*, Chief Justice John Roberts implied that section 5 called for a static baseline.[38] His "quaint fixation on the language of the statute"[39] prompted him to ask each attorney why Alabama had to apply for preclearance in the first place if the proposed change ordered by the state's supreme court would simply cause the county to revert to the same voting practice that was in effect on November 1, 1964.[40] Through his line of questioning, the Chief Justice suggested that an intervening change, such as the 1985 Alabama state law, should not alter the baseline analysis. Effectively, the Chief Justice proposed reinterpreting section 5 to impose a static baseline even though section 5 has always been interpreted to impose a dynamic baseline since the enactment of the VRA.

Ultimately, the Court's narrow decision in *Riley* avoided the baseline issue raised by the Chief Justice. Instead, the Court addressed the Chief Justice's suggestion to reinterpret the section 5 baseline only in a brief footnote:

> By its terms, § 5 requires preclearance of any election practice that is "different from that in force or effect on" the relevant coverage date—in this case, November 1, 1964. Governor Riley's opening brief suggested that this text could be read to mean that no preclearance is required if a covered jurisdiction seeks to adopt the *same* practice that was in force or effect on its coverage date—even if,

36. *Id.* at 1984. The Supreme Court reasoned that the following "extraordinary circumstance" compelled this conclusion: "The Act was challenged in state court at first opportunity, the lone election was held in the shadow of that legal challenge, and the Act was ultimately invalidated by the Alabama Supreme Court." *Id.*

37. *Id.* at 1986.

38. Transcript of Oral Argument at 54, *Riley*, 128 S. Ct. 1970 (No. 07-77).

39. *Id.*

40. *Id.* at 22–23, 43, 54–55.

> because of intervening changes, that practice is different from the jurisdiction's baseline. In response, Kennedy and the United States noted that the DOJ and the lower courts to consider the question have rejected this interpretation. We need not resolve this dispute because the result in this case is the same under either view.[41]

Although the Court left the baseline question undecided, it effectively questioned the settled interpretation and application of section 5. This Article squarely addresses the issue of the section 5 baseline and offers one modest proposal: section 5 should continue to be interpreted to impose a dynamic baseline. A dynamic baseline is most consistent with the purpose, legislative intent, and statutory text of the VRA. Most importantly, a dynamic baseline preserves the clearly articulated intent of Congress to protect and advance minority voting rights. A static baseline, on the other hand, drastically limits the protections of the VRA and would allow covered jurisdictions to backslide to the voting practices that were in effect on their respective coverage dates, even if intervening changes that advanced minority voting rights have since been precleared and implemented.

Part II demonstrates that there is sufficient textual evidence that section 5 imposes a dynamic baseline. Imposing a static baseline would render the text of section 5 and the rest of the VRA ambiguous and inconsistent. Part III explains that the broad purpose of the VRA and the goals of section 5 mandate the application of a dynamic baseline. Part IV discusses the congressional intent for section 5 to impose a dynamic baseline that is manifested in the VRA's extensive legislative history. Part V illustrates the consistent application of a dynamic baseline in judicial precedents. Part VI discusses the interpretation of section 5 and the application of a dynamic baseline by the U.S. Department of Justice and the U.S. attorney general. Finally, Part VII cautions about the detrimental policy implications of reinterpreting section 5 to yield a static baseline.

41. *Riley*, 128 S. Ct. at 1982 n.7 (citation omitted).

## II. THE TEXT OF THE VOTING RIGHTS ACT IS INCONSISTENT UNLESS SECTION 5 IMPOSES A DYNAMIC BASELINE

When it comes to statutory construction, the words of the statute are paramount.[42] Section 5 of the VRA requires a covered jurisdiction to obtain preclearance "[w]henever a State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or . . . November 1, 1968, or . . . November 1, 1972."[43] There are three distinct dates in the statute because a jurisdiction's coverage date—the date after which any change to a voting practice must be precleared before it may be enacted—depends on when the particular jurisdiction became subject to section 5.[44] The question is, what significance should be accorded to these dates? Should the language of section 5 be interpreted to impose a *static* or a *dynamic* baseline? A static baseline would require a constant comparison of a proposed change to the corresponding

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42. WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 849 (4th ed. 2007).

43. 42 U.S.C. § 1973c(a) (2006). Section 5(a) reads, in relevant part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or [language] . . . and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure . . . .

*Id.*

44. *See* U.S. Department of Justice, *supra* note 12 (listing the dates covered jurisdictions became subject to the section 5 preclearance mandate).

practice that was in effect on the given jurisdiction's coverage date—one of the dates listed above—regardless of intervening changes. A dynamic baseline would require the comparison of a proposed change to the status quo—the most recent practice that is in effect when the change is proposed.

At first blush, the text[45] of section 5 appears to suggest that section 5 imposes the use of a static baseline. A natural reading[46] of the first sentence of section 5(a) seems to indicate that the baseline in a covered jurisdiction is ascertained when a given jurisdiction becomes subject to section 5 preclearance, and remains permanently linked to the relevant coverage date for that jurisdiction. After all, the text states that a covered jurisdiction must submit a change for preclearance that is "*different from that in force or effect on November 1, 1964, or . . . November 1, 1968, or . . . November 1, 1972.*"[47] The specific reference to these dates seems to indicate that Congress intended the comparative baseline to reflect the voting practices that were in effect on one of these three dates. In a vacuum, this may seem to be a sound interpretation. But, the correct interpretation of section 5 cannot rest on a reading of this phrase in isolation because "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law."[48] Thus, the analysis cannot end with this single phrase and these three dates.

The problem with an isolated reading of section 5(a) is that it does not take into account the rest of the language in this subsection or the other sections of the VRA. Out of context, any interpretation of the baseline is suspect because "[s]tatutory construction . . . is a holistic endeavor."[49] A holistic analysis of the relevant provisions of the VRA provides compelling evidence that interpreting the baseline

45. A court's analysis of a statute begins with the text itself. *See* Medellin v. Texas, 128 S. Ct. 1346, 1357 (2008); Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 6–7 (2003); *see also* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 231 (2d ed. 2006) (stating that the plain meaning of the text is either the best evidence of legislative intent or the only authoritative basis for interpretation).

46. A natural, plain reading of a statute is based on the "obvious," "normal," or "ordinary" understanding of the words of the statute. Maxine D. Goodman, *Reconstructing the Plain Language Rule of Statutory Construction: How and Why*, 65 MONT. L. REV. 229, 240–42 (2004).

47. 42 U.S.C. § 1973c (emphasis added).

48. United States v. Boisdoré's Heirs, 49 U.S. 113, 122 (1850).

49. United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

as static is, at best, conclusory, and, at worst, wholly wrong. First, an analysis of section 5(a)—the subsection in which the dates appear and the sole basis for an interpretation that section 5 requires the use of a static baseline—suggests that the Chief Justice may have misinterpreted the significance of these dates. Second, an interpretation yielding a static baseline would necessarily ignore other provisions of section 5(a), which would result in the misapplication of the preclearance mandate. Third, a static baseline would be incompatible with the other three subsections of section 5 that were recently added to the statute in 2006. Finally, a static baseline would not comport with section 4[50] of the VRA, which is repeatedly referenced in section 5(a).

### *A. The Dates in Section 5(a) Define the Covered Jurisdictions, Not Their Baselines*

When section 5(a) is read as a whole, it is less clear that the three listed dates—November 1, 1964, November 1, 1968, and November 1, 1972—are actually intended to serve as three distinct and fixed baselines to be used every time covered jurisdictions seek preclearance for proposed changes to their voting practices. An alternative and more plausible interpretation is that these three dates should not be read in isolation of the phrases in which they reside. Instead of defining three permanent baselines, section 5(a) defines three sets of covered jurisdictions. The first set of covered jurisdictions ("Set 1") is described in the following phrase:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in [section 4(a)] based upon determinations made under the *first sentence of* [*section 4(b)*] are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . .[51]

Understanding the contours of Set 1 requires reference to section 4. Based on the first sentence of section 4(b),[52] jurisdictions in Set 1

50. Section 4 of the VRA is codified at 42 U.S.C. § 1973b.

51. *Id.* § 1973c(a) (emphasis added).

52. Section 4(b) states, in relevant part:

> The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained

were covered under section 5 beginning in 1965, the year that the VRA was initially enacted. Set 1 is composed of jurisdictions in which "less than 50 per centum of the persons of voting age residing therein were registered"[53] to vote as of November 1, 1964, or "voted in the presidential election of November 1964."[54] Thus, in Set 1 jurisdictions, all changes related to voting practices made after November 1, 1964 must be precleared by either the U.S. attorney general or the U.S. district court for the District of Columbia.

The second set of covered jurisdictions ("Set 2") is described in the following phrase:

> [W]henever a State or political subdivision with respect to which the prohibitions set forth in [section 4(a)] of this title based upon determinations made under the *second sentence of [section 4(b)]* of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968 . . . .[55]

Based on section 5(a) and the second sentence of section 4(b),[56] Set 2 includes jurisdictions in which "less than 50 per centum of the

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*on November 1, 1964*, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on *November 1, 1968*, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on *November 1, 1972*, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972. . . .

*Id.* § 1973b(b) (emphasis added).

53. *Id.*

54. *Id.*

55. *Id.* § 1973c(a) (emphasis added).

56. *See supra* note 52.

persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968."[57] Thus, November 1, 1968 marks the date after which all changes to voting practices in Set 2 jurisdictions must be precleared.

Finally, the third set of covered jurisdictions ("Set 3") is described in the following phrase:

> [W]henever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the *third sentence of section 1973b(b)* of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972 . . . .[58]

In concert with the third sentence of section 4(b),[59] section 5(a) describes Set 3, which includes jurisdictions in which "less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972."[60] Thus, November 1, 1972, marks the date after which all changes to voting practices in Set 3 jurisdictions must be precleared.

The requirements imposed on covered jurisdictions in Set 1, Set 2, and Set 3 are the same: a covered jurisdiction must obtain preclearance before it can lawfully enact a change to its voting practices. The only difference between Set 1, Set 2, and Set 3 is their respective starting points: Set 1 is subject to section 5 for all voting changes made after November 1, 1964; Set 2 is subject to section 5 for all voting changes made after November 1, 1968; and Set 3 is subject to section 5 for all voting changes made after November 1, 1972.

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57. 42 U.S.C. § 1973b(b). These jurisdictions became subject to section 5 in 1970, when Congress first amended the Voting Rights Act. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970).

58. *Id.* § 1973c(a) (emphasis added).

59. *See supra* note 52.

60. 42 U.S.C. § 1973b(b). These jurisdictions became subject to section 5 in 1975, when Congress again amended the Voting Rights Act. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975).

This interpretation of section 5(a) is appropriate for at least three reasons. First, the diction and syntax of section 5(a) indicate that Congress intended to list and define the jurisdictions that must comply with the preclearance mandate. The use of the disjunctive "or" to separate each of the three phrases suggests that each phrase should be read independently and in its entirety; each phrase is complete without reference to the other two, and each one independently defines one of the three sets of covered jurisdictions. Thus, the syntactical structure suggests that the dates are just part and parcel of a list describing Set 1, Set 2, and Set 3, and should not be interpreted to have independent significance.

Second, because section 5(a) incorporates and references section 4, any interpretation of section 5(a) must comport with the language in section 4. Section 4 explains the coverage formula and the significance of the three dates for each of the three sets of covered jurisdictions. Therefore, a proper interpretation of the dates in section 5(a) must be consistent with an interpretation of these identical dates in section 4(b) because "[a] term appearing in several places in a statutory text is generally read the same way each time it appears."[61] Based on the language in section 4, these dates signify only starting points for the enforcement of section 5 preclearance in a specific covered jurisdiction, depending on whether it is in Set 1, Set 2, or Set 3. There is no indication that Congress intended for these three dates to be interpreted differently in section 5(a).

Third, the entire first sentence of section 5(a) warrants a thorough analysis because it is extremely long and convoluted. Since "the most serious disease of language is ambiguity,"[62] and "the job of writing a clear statute remains formidable,"[63] a simplistic reading of section 5(a) that yields simply three fixed baseline dates would deny this subsection the thorough analysis it is due to ensure a correct interpretation. Undoubtedly, the first sentence of section 5(a), consisting of nearly 400 words, is far from clear. An interpretation of section 5(a) in its entirety is warranted because the Court should "give effect, if possible, to every clause and word of a

61. Ratzlaf v. United States, 510 U.S. 135, 143 (1994).

62. Reed Dickerson, *The Diseases of Legislative Language*, 1 HARV. J. ON LEGIS. 5, 6 (1964).

63. *Id.* at 6.

statute."[64] Admittedly, such a thorough analysis may render ambiguous section 5(a) and the significance of the three dates. However, the remaining provisions of section 5 and the other sections of the VRA provide clarity and bolster the interpretation that section 5 nevertheless is intended to impose a dynamic baseline.

### *B. A Static Baseline Fails to Ensure That Subsequent Changes Do Not Deny or Abridge the Right to Vote*

The precise significance of the dates in section 5(a) may be ambiguous. It is not certain that the dates establish a static baseline. But, the condition upon which the U.S. attorney general or the U.S. district court for the District of Columbia grants preclearance is not ambiguous. Section 5(a) states that a covered jurisdiction must obtain preclearance for a voting change if that "qualification, prerequisite, standard, practice, or procedure *neither has the purpose nor will have the effect of denying or abridging the right to vote* on account of race or color, or [language]."[65] This phrase lies at the heart of section 5 and embodies the chief protection that the preclearance mandate has extended to minority voters. A static baseline, however, would prevent section 5 from providing this protection.

The incompatibility between a static baseline and the preclearance prerequisite, though not readily apparent, is unavoidable. Imagine the following scenario: In 1964, Alabama's governor appointed the board of supervisors for each county in the state. In 1965, Alabama became subject to section 5 of the VRA, such that all changes to its voting practices after November 1, 1964 would have to be precleared.[66] Then in 1970, the Alabama legislature passed a precleared law that made county supervisors elected positions. It is now 2009 and Alabama voters have been electing their county board of supervisors for almost forty years. What if the Alabama legislature decided this year that it wanted the governor to once again appoint its county supervisors? Could Alabama enact this change?

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64. Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

65. 42 U.S.C. § 1973c(a) (2006) (emphasis added). Section 1973b(f)(2) protects language minorities from discriminatory voting practices. *Id.* § 1973b(f)(2).

66. U.S. Department of Justice, *supra* note 12 (noting Alabama's inclusion under section 5).

If section 5 imposed only a static baseline, then the legislature could unilaterally enact this change without even submitting it for preclearance because it would not constitute an actual change when compared with the practice that was in effect in 1964. Even if this change would purposefully or effectively deny or abridge a citizen's right to vote on account of race, color, or language[67]—in violation of the VRA—the Alabama legislature could still circumvent the preclearance mandate and reinstate a discriminatory voting practice that was in effect when Alabama became subject to section 5.

However, the application of a dynamic baseline would require the Alabama legislature to submit its proposed change for preclearance. If the change were deemed discriminatory, then it would not be precleared and Alabama could not legally empower its governor to once again appoint county supervisors. Thus, a dynamic baseline would advance the purpose of the preclearance mandate, while a static baseline would frustrate it.

### *C. A Static Baseline Is Incompatible with Subsections (b), (c), and (d) of Section 5*

In 2006, Congress amended and reauthorized the VRA, adding three new subsections to section 5.[68] An interpretation of section 5 is incomplete without an analysis of these other subsections because "[w]hen Congress acts to amend a statute, [the Court] presume[s] it intends its amendment to have real and substantial effect."[69] Even if section 5(a) could be internally reconciled, a static baseline would nonetheless be incompatible with the three new subsections. Each of the three subsections supports the proposition that Congress intended for section 5 to impose a dynamic baseline, even if subsection (a) alone lacks such clarity.

First, Congress added subsection (c) to the text of section 5 because it was dissatisfied with the U.S. Supreme Court's limited interpretation in *Reno v. Bossier Parish School Board (Bossier*

67. In 2000, 71 percent of Alabama's population was white. U.S. CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 CENSUS OF POPULATION AND HOUSING at 1 (2000), *available at* http://www2.census.gov/census_2000/datasets/demographic_profile/Alabama/2kh01.pdf.

68. 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 (2006).

69. Stone v. INS, 514 U.S. 386, 397 (1995).

*Parish II).*[70] This subsection clarifies that "any discriminatory purpose" is sufficient to justify the denial of preclearance.[71] Unlike the Court's incorrect interpretation in *Bossier Parish II*, an impermissible purpose need not be discriminatory *and retrogressive.*[72] By rejecting retrogression as the determinative factor in the preclearance analysis by way of subsection (c), Congress asserted that the focus of section 5 is to prevent covered jurisdictions from enacting discriminatory voting practices.[73] As illustrated by the Alabama hypothetical discussed in the preceding section, a static baseline would enable uncooperative jurisdictions to circumvent the preclearance mandate. Under a static baseline analysis, whether the voting practice that was in effect on a particular jurisdiction's coverage date was in fact discriminatory—and there is a strong probability that it was[74]—would not affect whether this practice would be considered to be the comparative baseline. A dynamic baseline, on the other hand, would allow section 5 to intervene and thwart the emergence of a discriminatory voting practice, as mandated by subsection (c), even if that practice resembled the practice that was in effect on the jurisdiction's coverage date. A static baseline would only prevent the emergence of discriminatory voting practices that were not in effect on the coverage date, but it would allow the reemergence of discriminatory voting practices that were in effect on the coverage date but had since been replaced. Therefore, this new subsection is persuasive evidence that a dynamic baseline—which would prevent the reemergence of discriminatory voting practices—is consistent with congressional intent.

Second, Congress added subsections (b) and (d) in response to the Supreme Court's overly expansive interpretation of section 5 in *Georgia v. Ashcroft.*[75] Subsection (b) defines the types of voting practices that would "deny or abridge" the right to vote.[76] The Court

70. 528 U.S. 320 (2000). *Bossier Parish II* is discussed in further detail in Part IV.D.1.

71. 42 U.S.C. § 1973c(c) (2006).

72. *See* discussion *infra* Part IV.D.1.

73. "The term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose." 42 U.S.C. § 1973c(c) (2006).

74. Given the basis for coverage discussed in Part II.A, the likelihood that any given voting practice was discriminatory is strong.

75. 539 U.S. 461 (2003). *Georgia v. Ashcroft* is discussed in further detail in Part IV.D.1.

76. 42 U.S.C. § 1973c(c) (2006).

in *Georgia v. Ashcroft* held that multiple factors are relevant to this analysis.[77] But, Congress disagreed and enacted subsection (b) to clarify the voting practices that violate the VRA and that section 5 was designed to prevent.[78] Subsection (b) defines an unacceptable voting practice as follows:

> 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 citizen of the United States on account of race or color, [or language] . . . to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) . . . .[79]

To ensure that its intent would not be misinterpreted, Congress added subsection (d) to clarify that "[t]he purpose of subsection (b) . . . is to *protect* the ability of such citizens to elect their preferred candidates of choice."[80] Returning to the aforementioned Alabama hypothetical, it becomes apparent that interpreting subsection (a) to impose a static baseline is incompatible with subsection (d). Changing the process by which county supervisors are chosen from special election to gubernatorial appointment would not protect the rights of minority voters to elect their preferred candidates of choice; in fact, the change would actually diminish—if not totally eliminate—the ability of minorities to elect their preferred candidates of choice, even though the hypothetical 1970 legislation discussed above already protected this right. In contrast, a dynamic baseline would require the proposed change to be compared with the status quo—the election of county supervisors—and accordingly, it would prevent the change to gubernatorial appointment, since this change would diminish the voting rights of minority citizens that subsections (b) and (d) were designed to safeguard.

Moreover, it is instructive that both of these subsections arose in the wake of a redistricting case.[81] The U.S. Census Bureau collects

77. *Georgia v. Ashcroft*, 539 U.S. 461, 479, 480–83 (2003).

78. *See* discussion *infra* Part IV.D.1.

79. 42 U.S.C. § 1973c(b) (emphasis added).

80. *Id.* § 1973c(d) (emphasis added).

81. Congress added subsection (b) and (d) in response to the Supreme Court's decision in *Georgia v. Ashcroft*. *See* discussion *infra* Part IV.D.1.

new census data every ten years,[82] and redistricting efforts follow each census report.[83] The implications of this decennial data collection system cannot be understated and must bear on the analysis of the section 5 baseline. First, a static baseline would require that the U.S. attorney general or the U.S. district court for the District of Columbia compare every redistricting proposal in a covered jurisdiction to either the 1964, 1968, or 1972 census data, depending on the coverage date of the given jurisdiction. Applying this methodology to Alabama, for instance, means that every redistricting proposal in this state—whether submitted in 1970 or 2010—would be compared to 1964 data. It is unlikely that Congress intended to permanently fix the comparative baseline for the assessment of redistricting proposals to demographic data that was applicable only in 1964.

The second consequence of applying a static baseline in the redistricting context is that it renders the 2006 amendments nonsensical. The addition of subsections (b) and (d) only makes sense if Congress determined there is something more to "protect," something that subsection (a) alone was incapable of protecting. These two subsections are evidence that Congress believed that in the absence of subsections (b) and (d), the right of minority citizens to elect their candidates of choice could be susceptible to diminution through subsequent state legislation. If Congress had operated under the presumption that section 5 imposed only a static baseline, then subsections (b) and (d) would only operate to the extent that a proposed practice did not resemble the relevant practice that was in effect on the given jurisdiction's coverage date. Thus, the application of a static baseline would render these subsections incapable of preventing the reemergence of discriminatory redistricting efforts; any ameliorative redistricting enactments would have no bearing on the relevant comparison for any subsequent

82. The mandate for collecting census data every ten years is rooted in the U.S. Constitution. U.S. CONST. art. I, § 2 ("Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers . . . . The actual Enumeration shall be made within three years after the first meeting of the Congress of the United States, *and within every subsequent term of ten years*, in such manner as they shall by law direct.") (emphasis added).

83. *See* U.S. Census Bureau, *The Constitution, the Congress and the Census: Representation and Reapportionment*, http://www.census.gov/dmd/www/dropin7.htm (last visited Sept. 24, 2009).

redistricting proposal because the only relevant inquiry would be focused on the state of affairs at the time the jurisdiction became covered under section 5. Perhaps one could argue that Congress had originally envisioned the application of a static baseline; but the 2006 amendments to section 5, which added subsections (b), (c), and (d), are compelling evidence that Congress currently intends section 5 to impose a dynamic baseline.[84]

### *D. A Static Baseline Is Inconsistent with Section 4 of the Voting Rights Act*

Interpreting section 5 to impose a static baseline is also inconsistent with section 4 of the VRA. Aside from the inconsistencies with section 4(b) discussed above,[85] a static baseline conflicts with the bailout provision of section 4, which provides an exit strategy for jurisdictions covered by section 5.[86] Logically, like two sides of the same coin—section 5 imposes the preclearance mandate and section 4 lifts the mandate—the interpretations of section 5 and section 4 must be compatible.

Under section 4, a covered jurisdiction can only obtain a declaratory judgment that releases it from the preclearance mandate if "during the ten years preceding the filing of the action,"[87] the covered jurisdiction did not engage in practices that denied or abridged a citizen's right to vote,[88] and demonstrated its compliance with the provisions of section 5.[89] These requirements are

84. *See* 42 U.S.C. § 1973b (2006).

85. *See* discussion *supra* Part II.A.

86. "Bailout" refers to the process by which covered jurisdictions can seek to be released from the section 5 preclearance mandate. The bailout provision is codified at 42 U.S.C. § 1973b(a)(1).

87. 42 U.S.C. § 1973b(a)(1) (2006).

88. *Id.* § 1973b(a)(1)(A). There are also other requirements delineated in section 4. *Id.* § 1973b(a)(1) (requiring that "no final judgment of any court of the United States . . . has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the [covered jurisdiction] . . ."; "no Federal examiners or observers . . . have been assigned to [the covered jurisdiction]"; "the Attorney General has not interposed any objection"; and "[a covered jurisdiction has] eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process . . . engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights [to vote]" and "engaged in other constructive efforts . . . at all stages of the election and registration process").

89. Section 1973b(a)(1)(D) states, in relevant part:

> [S]uch State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement

inextricably related. To assess a covered jurisdiction's eligibility for bailout, the U.S. attorney general must assess how well the jurisdiction has protected the rights of minority voters during the ten years immediately preceding the bailout application date; no other date is relevant to the bailout analysis.

But, if section 5 is interpreted to impose a static baseline, then it is conceivable that a covered jurisdiction would be unable to satisfy both of the aforementioned bailout requirements. This incompatibility would arise in the event that a covered jurisdiction seeks to reenact a voting practice that resembles the relevant practice that was in effect on the jurisdiction's coverage date. This problem is amplified if the jurisdiction had already precleared and enacted an improvement to the voting practice that was in effect on the coverage date, which it is now seeking to change, sometime during the past decade prior to the bailout application. Under a static baseline, the covered jurisdiction would not violate section 5 if it enacted this change; but because the change would result in a diminution of minority voting rights in the past ten years, it would certainly disqualify the covered jurisdiction from bailout under section 4. This incompatibility between the bailout provision and the application of a static baseline—the fact that a covered jurisdiction could comply with section 5 preclearance and still remain ineligible for section 4 bailout—demonstrates that these two standards are at odds with each other. However, if the interpretation of section 5 includes the application of a dynamic baseline, then compliance with the preclearance mandate under section 5 would be sufficient to enable a covered jurisdiction to apply for bailout under section 4.

There may be some textual evidence that section 5 could be interpreted to yield a static baseline. But, in context, this scant evidence is unconvincing. While "courts must presume that a legislature says in a statute what it means and means in a statute what it says there,"[90] this presumption is only valid "[w]hen the words of a

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that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the U.S. District Court for the District of Columbia has denied a declaratory judgment . . . .

*Id.* § 1973b(a)(1)(D).

90. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (citations omitted).

statute are unambiguous."[91] Section 5(a), which is the only indication of a static baseline, is not unambiguous. Although its latent ambiguity may not be readily apparent, in conjunction with section 4 and the rest of section 5, it becomes clear that a static baseline can only be the result of a preliminary and simplistic interpretation of section 5(a). Furthermore, to the extent that the text of section 5 was ambiguous before 2006, the amendments to the VRA that year provide additional evidence that Congress intends section 5 to impose a dynamic baseline for the purpose of the preclearance analysis. Altogether, the textual evidence in the VRA supports the proposition that a covered jurisdiction's compliance with section 5 should be assessed through the use of a dynamic baseline.

## III. THE PURPOSE OF THE VOTING RIGHTS ACT AND THE GOALS OF SECTION 5 REQUIRE THE USE OF A DYNAMIC BASELINE

Interpreting section 5 to impose a dynamic baseline is most consistent with the purpose of the VRA and the goals of section 5. According to the U.S. Supreme Court,

> courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.[92]

Because "[i]t is dangerous . . . to rely exclusively upon the literal meaning of a statute's words divorced from consideration of the statute's purpose,"[93] ignoring the express intent of Congress as it applies to the VRA and its provisions inherently entails the risk that the VRA will be misinterpreted.

The broad purpose of the VRA and the specific goals of section 5 demonstrate that Congress intended this section to impose a dynamic baseline. The Supreme Court has recognized that "Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of 'ridding the country of racial discrimination in

91. *Id.* at 254.

92. SEC v. Joiner, 320 U.S. 344, 350–51 (1943).

93. FCC v. NextWave Pers. Commc'ns, Inc., 537 U.S. 293, 311 (2003) (Breyer, J., dissenting).

voting.'"[94] This broad remedial purpose is evidence that Congress intended for the VRA to have a real, substantial, and permanent impact on the status of minority voting rights. Accordingly, courts should construe the VRA and its provisions liberally to enable it to achieve its broad goal of eliminating discriminatory voting practices.[95]

An interpretation of section 5 that yields a static baseline would actually narrow the protections of section 5 by lowering the preclearance threshold. Under a static baseline, a covered jurisdiction could obtain preclearance for a proposed voting practice as long as the change would be deemed an improvement in comparison to the voting practices that were in effect on the jurisdiction's coverage date in 1964, 1968, or 1972. Any intervening change—even an improvement in an existing voting practice—would not raise the preclearance threshold and thus would have no bearing on the section 5 analysis. Thus, a proposed change to a voting practice would be entitled to preclearance as long as the change is not more discriminatory than the practice it seeks to replace as it existed in 1964, 1968, or 1972. Intervening progress would be irrelevant; a proposed voting practice would still be compared only to the relevant practice that was in effect on the coverage date, even if that practice was no longer in effect at the time that the change is proposed and had long been replaced by one that advanced the goals of the VRA. Consequently, the application of a static baseline would make it impossible for section 5 to fulfill the broad purpose of the VRA, unless Congress had expected to eliminate discriminatory voting practices with one broad stroke.

It is more likely, however, that Congress anticipated slow but steady progress,[96] which only a dynamic baseline is equipped to accomplish. Under the auspices of a dynamic baseline, once a jurisdiction eliminates and replaces a discriminatory voting practice with a less discriminatory practice, the baseline shifts to record this progress and prevent reversion. A static baseline, on the other hand,

94. Chisom v. Roemer, 501 U.S. 380, 403 (1991) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966)).

95. The Supreme Court acknowledged the breadth of the Voting Rights Act when it announced that "the Act should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Id.* at 403 (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)).

96. *See* H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2441.

would undermine the progress that the VRA has been tasked to promote because it would enable a covered jurisdiction to revert to a discriminatory voting practice that had been in effect on the jurisdiction's coverage date. The application of a static baseline entails the risk of this phenomenon because a static baseline effectively creates a "safe harbor" for covered jurisdictions seeking to reinstate prior discriminatory voting practices: a voting practice that is discriminatory but resembles one that was in effect on the jurisdiction's coverage date is nonetheless exempt from the preclearance requirement because it would not be deemed a change requiring such preclearance. Ultimately, a static baseline would enable a covered jurisdiction to legally return to discriminatory voting practices even if the jurisdiction had already made progressive changes in accordance with the goals of the VRA. Yet, it is unlikely that Congress had intended to create this perverse loophole.[97]

A contrary intent is even more convincing in light of the 2006 amendments to the VRA. Concerned about the possibility of backsliding,[98] Congress announced that the purpose of the VRA is "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 Constitution."[99] Thus, Congress explicitly announced its intent to preserve any progress that has already been made. A static baseline that permits a covered jurisdiction to return to prior practices without the obligation to seek preclearance for its change does not protect intervening progress. But, a dynamic baseline that shifts with every intervening change would preserve "the significant gains made by minorities in the last 40 years"[100] and would prevent the backsliding which Congress obviously aimed to prevent. Whereas a dynamic baseline could facilitate the purpose of

97. On the contrary, there is evidence that Congress intended to prevent covered jurisdictions from reenacting discriminatory voting practices. H.R. REP. NO. 91-397 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3281 (noting that Congress aimed to prevent covered jurisdictions from being able to "reimpose the voting and registration requirements that first gave rise to the [VRA]"). *See also* discussion *infra* Part IV.C.

98. *See* discussion *infra* Part IV.C.

99. 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, 577 (2006) (emphasis added).

100. Pub. L. No. 109-246, 120 Stat. at 578.

the VRA, a static baseline would only frustrate and undermine its efficacy.

## IV. LEGISLATIVE HISTORY ILLUSTRATES THAT CONGRESS INTENDED SECTION 5 TO IMPOSE A DYNAMIC BASELINE

Although the interpretation of a statute starts with the words of the text, it does not end there. If the meaning of a statute's text is plainly discernible, then the "plain meaning rule" prohibits reliance on legislative history or any other forms of extrinsic evidence.[101] But, the bare text of section 5—the plain meaning—is not plainly discernible.[102] As discussed above, there is ample evidence in the text that suggests section 5 was aimed to impose a dynamic baseline,[103] yet the references to the coverage dates and their inclusion in subsection (a) create some ambiguity as to their precise meaning and utility. It is precisely this ambiguity that should prompt the Supreme Court to look beyond the words of the statute in an effort to discern the congressional intent behind section 5 of the VRA. A strictly literal interpretation of a statute entails the risk that the statute, and Congress's intent in enacting it, will be misinterpreted:

> In the domain of statutory interpretation, Congress is the master. It obviously has the power to correct our mistakes, but we do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it 'to take the time to revisit the matter' and to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error. As Judge Learned Hand explained, statutes are likely to be imprecise.[104]

Courts traditionally use legislative history in their interpretation of statutes instead of relying exclusively on the bare words of the

101. ESKRIDGE ET AL., *supra* note 42, app. B at 19; *see, e.g.*, Massachusetts v. EPA, 127 S. Ct. 1438, 1459–63 (2007).

102. *See* discussion *supra* Part II.

103. *See* discussion *supra* Part II.

104. W. Va. Univ. Hosps. v. Casey, 499 U.S. 83, 115 (1991) (J. Stevens, dissenting). Stevens's concern was justified because Congress clearly disagreed with the Supreme Court's limited interpretation of that provision. Three years after *Casey*, the Court noted in an opinion by Justice Stevens that Congress had since amended the relevant statute in response to *Casey* to clarify its broader intent. Landgraf v. USI Film Prods., 511 U.S. 244, 250 (1994).

text.[105] Under this approach—the "soft plain meaning rule"—the plain meaning of the text is considered to be just one among several sources of evidence used to discern the legislative intent of a statute.[106] A comprehensive analysis of the section 5 baseline should consider the legislative history of the VRA because it provides evidence of what Congress intended to accomplish when it enacted and amended the statute.[107]

The legislative history of section 5 provides compelling evidence that Congress actually intended to establish a dynamic baseline. First, the broad goals of the VRA and the categorical mandate to preclear all voting changes in covered jurisdictions are inconsistent with the application of a static baseline. Second, the purpose of stating the coverage dates in section 5 is to freeze, not to exempt, existing practices, and to ensure that covered jurisdictions obtain preclearance for any changes that are made after their section 5 coverage date. Third, Congress's concern that covered jurisdictions may revert to prior discriminatory voting practices suggests a congressional preference for a dynamic baseline because it would safeguard prior gains and promote further progress. Finally, Congress has implicitly ratified Supreme Court precedents that have consistently applied a dynamic baseline in section 5 cases, even though Congress had several opportunities to change the statute if it wanted to alter the Court's future application of the section 5 baseline.

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105. *See* Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 452–53 (2002); *see also* William N. Eskridge, Jr., *Symposium on Statutory Interpretation: Legislative History Values*, 66 CHI.-KENT L. REV. 365, 376 (1990) (explaining that the original intent of a statute can be more objectively and reliably revealed by the text and the legislative history, as opposed to the text alone, because such history provides context).

106. ESKRIDGE ET AL., *supra* note 45, at 233. Although the "old soft plain meaning rule has become harder" since the Supreme Court began subscribing to new textualism, the Court still consults extrinsic legislative history. WILLIAM ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 226–27 (1994). [hereinafter ESKRIDGE, INTERPRETATION].

107. ESKRIDGE, INTERPRETATION, *supra* note 106, at 235 ("Legislative history [is useful to] explain the reasons for enacting the statute, the structure of the statutory regime and why it was set up that way, and what at least some original legislators expected the statute to accomplish."); *see also* Eskridge, *supra* note 105, at 369–70, 392 (stating that the Supreme Court considers authoritative statements in the legislative history to ensure that the law is interpreted in accordance with congressional intent).

### *A. Congress Intended to Eliminate All Discriminatory Voting Practices*

The legislative history of the VRA suggests that Congress envisioned the application of a dynamic baseline in section 5 preclearance cases. When the VRA was initially proposed and discussed in Congress, its original purpose was to "eradicate once and for all the chronic system of racial discrimination which has for so long excluded so many citizens from the electorate because of the color of their skin, contrary to the explicit command of the 15th Amendment."[108] Congress affirmed this goal during subsequent VRA extensions and amendments.[109]

Congress intended for section 5 to apply broadly to *all* changes related to voting. In 1965, the Senate Judiciary Committee announced that section 5 required preclearance whenever a state or political subdivision attempted to enforce "a *new or changed* requirement."[110] The Committee reinforced this broad application of section 5 in 1985, explaining that "covered states must preclear *all* laws which may affect the electoral process in any way."[111] Most recently in 2006, Congress again announced that section 5 "requires [covered] jurisdictions . . . to preclear *all* voting changes before they may be enforced."[112] These legislative expectations with respect to the VRA are relevant to its interpretation.[113]

If section 5 were interpreted to impose a static baseline, then a covered jurisdiction would not have to submit all voting changes for preclearance. A change that would simply be a reversion to a practice that had been in effect on the jurisdiction's coverage date would not need to be precleared because it would not be deemed a change when compared to the practice in effect on the coverage date. Thus, a static baseline would create an exemption from the

108. S. REP. NO. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2540.

109. *See* H.R. REP. NO. 109-478, at 69 (2006); H.R. REP. NO. 91-397 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3278.

110. S. REP. NO. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (emphasis added).

111. S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 291 (emphasis added).

112. H.R. REP. NO. 109-478, at 21. The Senate agreed: "Section 5 provides that if a jurisdiction is covered under section 4(b), then all voting laws in that jurisdiction must be pre-approved either by the Justice Department or the federal district court for the District of Columbia." S. REP. NO. 109-295, at 5 (2006).

113. Eskridge, *supra* note 105, at 375.

preclearance mandate and consequently violate the categorical mandate that all voting changes in covered jurisdictions must be submitted for preclearance.

In fact, Congress considered but ultimately rejected creating such a "safe harbor" for proposed changes that would reinstate a voting practice that was in effect on the jurisdiction's coverage date. The Senate Judiciary Committee specifically noted that the broad scope of section 5 meant that "a change in the voting practice or procedure may also retain some feature of the previous system, and all aspects of such a change are within the reach of section 5."[114] Thus, no voting change in a covered jurisdiction is intended to be exempt from the preclearance inquiry given that the "comparative analysis under section 5 is intended to be specifically focused on whether the electoral power of the minority community is *more, less, or just as able* to elect a preferred candidate of choice after a voting change *as before*."[115] The fact that Congress envisioned a proposed change to be compared to the status quo during the preclearance inquiry indicates that it intended section to impose a dynamic baseline.

### *B. The Coverage Dates Were Meant to Freeze, Not Exempt, Existing Voting Practices*

The legislative history of the VRA suggests that Congress never intended to exempt the voting practices that were in effect on the coverage dates from subsequent preclearance inquiries just because it mentioned these coverage dates in section 5(a). Such an exemption would imply that Congress approved of these voting practices. But, in fact, it was the existence of these practices that spurred Congress to enact the VRA, especially section 5, because it deemed prior voting rights legislation to be inadequate when it came to sufficiently combating discriminatory voting practices.[116] In response to the bleak voting conditions prior to the enactment of the VRA, the House Judiciary Committee announced, "The burden is too heavy—the wrong to our citizens is too serious—the damage to our national conscience is too great not to adopt more effective measures than

114. S. REP. NO. 94-295 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 785.

115. H.R. REP. NO. 109-478, at 71 (emphases added).

116. S. REP. NO. 89-162 (1965), *reprinted in* U.S.C.C.A.N. 2508, 2544–45.

exist today." [117] Clearly, Congress was dissatisfied with the voting conditions in 1965. Thus, it is illogical and implausible to suggest that Congress intended to allow covered jurisdictions—the most egregious violators of the Fifteenth Amendment—to return to 1965 voting practices in the face of intervening changes that may have already improved the voting conditions for minority citizens. Yet, a static baseline would enable exactly such an outcome.

It is more likely that by including the coverage dates in section 5(a), Congress intended to denote the three sets of covered jurisdictions and the dates when all voting practices in these jurisdictions were frozen pending approval. After its relevant coverage date, no covered jurisdiction could lawfully change (or unfreeze) its existing voting practices without preclearance. Subsequent legislative history affirms this interpretation. In 1975, the Senate Judiciary Committee explained that "Section 5 preclearance provisions applied to *all changes* relating to voting which were to be *implemented after* November 1, 1964." [118] But, the application of a static baseline would subvert this legislative intent because it would allow covered jurisdictions to bypass the preclearance mandate and revert to potentially discriminatory voting practices.

### *C. A Dynamic Baseline Addresses Congressional Concern About Backsliding*

The legislative history of the VRA demonstrates Congress's constant concern about backsliding in the voting rights arena. Congress has repeatedly expressed its intent to protect and preserve any gains already facilitated by the VRA. [119] Congressional intent to preserve this progress implies it is vulnerable. This concern about backsliding is strong evidence that Congress intended section 5 to encompass a dynamic baseline that would prevent regression to prior discriminatory practices that have since been eradicated in covered jurisdictions.

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117. H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2442.

118. S. REP. NO. 94-295, at 778 (emphasis added).

119. *See, e.g.*, 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, 577 (2006) (stating that the purpose of the VRA is to preserve and protect constitutional voting rights).

Congress drafted section 5 to prevent covered jurisdictions from attempting to "reimpose the voting and registration requirements that first gave rise to the Act," [120] and thereby "restoring the pre-1965 status quo." [121] A dynamic baseline is consistent with Congress's aim to protect minority voters in covered jurisdictions that may seek to reinstate discriminatory voting practices that were in effect before the enactment of the VRA. A static baseline, on the other hand, would enable a covered jurisdiction to circumvent the preclearance requirement, and to revert to prior discriminatory practices despite explicit congressional goals to the contrary.

A dynamic baseline also comports with Congress's recognition that gains with respect to voting rights are still fragile, even decades after the enactment of the VRA, and any progress in this area is difficult to sustain in recalcitrant jurisdictions. [122] Congress has continuously extended the VRA since its initial enactment in 1965 because it was "concerned about the risk of losing what progress has already been won." [123] For instance, Congress extended the VRA in 1982 to "insure that the hard-won progress of the past is preserved and that the effort to achieve full participation for all Americans in our democracy will continue in the future." [124] But, a static baseline would jeopardize the fragile gains already made because it would permit unfettered reversion to prior discriminatory practices. Ultimately, the application of a static baseline could potentially wipe out post-1965 progress. A dynamic baseline, on the other hand, would ensure that covered jurisdictions maintain the improvements in their voting practices, and would require covered jurisdiction to build on these improvements.

### *D. Subsequent Legislative History Shows Congress's Intent to Continue the Use of a Dynamic Baseline*

Thus far, section 5 has been interpreted to impose a dynamic baseline, and the VRA's subsequent legislative history supports the continued application of a dynamic baseline. [125] First, the Supreme

120. H.R. REP. NO. 91-397 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3277, 3281.

121. *Id.*

122. *See* S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 187.

123. *Id.*

124. *Id.* at 181.

125. *See* HASEN, *supra* note 10, at 32.

Court has consistently interpreted section 5 to impose a dynamic baseline,[126] and Congress has not once amended section 5 to alter this interpretation of the baseline. Thus, congressional silence on this issue indicates that, at the very least, Congress has acquiesced to the Court's interpretation of the section 5 baseline. Second, although Congress has amended and reenacted the VRA on several occasions, the text addressing the actual baseline in section 5 remained unchanged every time the VRA was amended.[127] Congress's decision not to amend this text is evidence that Congress has ratified the Court's interpretation that section 5 imposes a dynamic baseline.

1. Congress Acquiesced to a Dynamic Baseline

The Supreme Court has consistently interpreted section 5 to impose a dynamic baseline.[128] Congressional silence on the Court's interpretation of a statute is tantamount to congressional approval with respect to this issue.[129] By not amending the VRA to alter the way in which the Court interprets and applies the section 5 baseline, Congress has implicitly acquiesced to this interpretation of the baseline.[130] If Congress had disagreed with the Court's determination that section 5 imposes a dynamic baseline, it would have duly amended the VRA to indicate its disapproval of this interpretation and to redefine the section 5 baseline.

In fact, it is not unusual for Congress to take such decisive action with respect to section 5. Congress has previously reacted to the Court's misconstruction of the VRA,[131] and it is conceivable that Congress would have reacted similarly if it deemed the Court to have misinterpreted the section 5 baseline. To date, Congress has disapproved of three Supreme Court decisions concerning the VRA.

126. *See* discussion *infra* Part V.

127. *See, e.g.*, Georgia v. United States, 411 U.S. 526, 533 (1973) (noting that Congress made no substantive changes in 1970 when it extended section 5 for five more years).

128. *See* discussion *infra* Part V.

129. The acquiescence rule was followed by the Supreme Court in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 629 n. 7 (1987) and *Flood v. Kuhn*, 407 U.S. 258, 279 (1972).

130. HASEN, *supra* note 10, at 32.

131. *See, e.g.*, Georgia v. Ashcroft, 539 U.S. 461 (2003); Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 528 U.S. 320 (2000); City of Mobile, Ala. v. Bolden, 446 U.S. 55 (1980).

In 1982, Congress overrode the Court's limited construction of section 2[132] of the VRA in *City of Mobile, Alabama v. Bolden*.[133] In *Bolden*, the Court raised the burden of proof for plaintiffs alleging the existence of discriminatory voting practices in violation of section 2 of the VRA. Before *Bolden*, a plaintiff only needed to demonstrate that the challenged voting practice was discriminatory in *effect*.[134] After *Bolden*, however, such proof was no longer sufficient; a plaintiff seeking to prevail on a section 2 cause of action also had to establish that the voting practice was the result of a discriminatory *intent*.[135] The Court's reassessment of section 2 in *Bolden* made it significantly harder for plaintiffs to prevail on a claim pursuant to section 2 because of the difficulty of proving intent.[136] Following *Bolden*, however, Congress amended section 2 to restore its original function[137] and "to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation."[138] To prevail on a section 2 claim, a plaintiff could establish that the allegedly discriminatory practice was discriminatory in either effect or intent.[139]

More recently, Congress disapproved of two Supreme Court decisions that weakened the impact of section 5[140]—*Bossier Parish II* and *Georgia v. Ashcroft*—in the course of amending and reauthorizing the VRA in 2006.[141] According to the House Judiciary

132. S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 178–79.

133. 446 U.S. 55. For further discussion of *Bolden*, see HASEN, *supra* note 10, at 2, 18, 31.

134. *Bolden*, 446 U.S. at 71.

135. *Id.* at 66.

136. S. REP. NO. 97-417, at 193 ("The Committee has concluded that this intent test places an unacceptably difficult burden on [minority] plaintiffs.").

137. *Id.* ("Requiring proof of a discriminatory purpose is inconsistent with the original intent and subsequent legislative history of section 2.").

138. *Id.* at 205. A plaintiff could either establish intent or prove that the challenged practice had a discriminatory result by denying minority access to political process or diluting the minority vote. *Id.* at 205–06. Section 2 currently reads, in relevant part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote . . . .

42 U.S.C. § 1973(a) (2006).

139. S. REP. NO. 97-417, at 200 ("Thus, it is clear that, prior to *Bolden*, plaintiffs in dilution cases could prevail by showing either discriminatory results or intent . . . .").

140. H.R. REP. NO. 109-478, at 65 (2006).

141. *Id.* at 5.

Committee Report, these two decisions "sharply conflict with the intent of Congress,"[142] and the 2006 amendments were drafted to specifically restore the original function of section 5.

In *Bossier Parish II*, the Court limited the scope of the preclearance inquiry by holding that "Section 5 prevents nothing but backsliding."[143] Congress disagreed with the Court's interpretation, explaining that preclearance of a voting change that is "not technically retrogressive" but is nevertheless discriminatory is "inconsistent with the clear purposes of the Voting Rights Act."[144] Congress amended section 5 accordingly to clarify that "any discriminatory purpose"[145] would violate the preclearance provision because "[v]oting changes that 'purposefully' keep minority groups 'in their place' have no role in our electoral process and are precisely the types of changes Section 5 is intended to bar."[146]

In *Georgia v. Ashcroft*,[147] the Court again limited the protections of section 5, and Congress again explicitly disapproved of this construction. In this case, the Court held that section 5 permits a covered state to determine for itself whether a proposed voting change will have a retrogressive effect on minorities by considering the impact of the proposed change on the state's chosen theory of effective representation.[148] The Court explained that a state may evaluate effective minority representation by examining either the number of majority-minority districts—where the election of a minority group's preferred candidate is "virtually guaranteed"—or the number of influence districts—where minority voters may not be able to elect their preferred candidate but can "play a substantial, if not decisive, role in the electoral process."[149] Based on its chosen theory of representation, a covered state can assess the impact of a redistricting proposal on either its majority-minority districts or its influence districts. The Court emphasized that section 5 does not require a covered state to use either of these measures, and instead

142. *Id.* at 65.

143. Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 528 U.S. 320, 335 (2000).

144. H.R. REP. NO. 109-478, at 67.

145. 42 U.S.C. § 1973c(c) (2006).

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

147. 539 U.S. 461 (2003).

148. *Id.* at 479, 480–483.

149. *Id.*

"gives the States the flexibility to choose one theory of effective representation over the other." [150] By dismissing the importance of majority-minority districts in the preclearance inquiry, the Court effectively decided that preclearance no longer depended on the impact that a voting change would have on a minority group's ability to elect its preferred candidates of choice. [151]

But, Congress disagreed and intervened. In 2006, Congress amended section 5 [152] to also emphasize that a minority group's ability to elect its preferred candidate of choice "*is* the relevant factor to be evaluated when determining whether a voting change has a retrogressive effect." [153] To explain its decision to amend section 5, Congress noted that "the gains made by minority communities in districts represented by elected officials of the minority communities' choice would be jeopardized if the retrogression standard, as altered by the Supreme Court in *Georgia*, remains uncorrected." [154] Accordingly, Congress amended section 5 to reflect this correction.

Therefore, subsequent legislation with respect to the VRA demonstrates that Congress does not silently acquiesce to the Supreme Court's interpretations of this statute if it deems them to be incorrect. Yet, Congress has not intervened to alter the Court's interpretation of the section 5 baseline. The absence of Congress's disapproval is evidence that the application of a dynamic baseline is an accurate reflection of congressional intent concerning section 5.

### 2. Congress Ratified a Dynamic Baseline

Congress has not only acquiesced to the Court's interpretation of the section 5 baseline, but it has also effectively ratified this interpretation through subsequent reenactments of the VRA. When Congress reenacts a statute, it incorporates settled interpretations of the statute by default. [155] Unless it expresses a contrary intention,

150. *Id.* at 482.

151. *Id.* at 479, 482.

152. Section 5 gained three subsections in the 2006 amendments, subsections (b), (c), and (d), codified at 42 U.S.C. §§ 1973c(b), (c), and (d) (2006), respectively. For the text of subsections (b), (c), and (d), see *supra* notes 73, 79, and 80 and accompanying text.

153. H.R. REP. NO. 109-478, at 71 (2006) (emphasis added).

154. *Id.* at 70.

155. ESKRIDGE ET AL., *supra* note 42, app. B at 26 (noting that the reenactment rule of interpretation is to incorporate settled interpretations Congress did not expressly change).

"Congress, by its *positive inaction*, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively." [156] The implicit incorporation of established interpretations is especially evident when Congress has spoken numerous times on a given statute and thus had numerous opportunities to revise the Court's existing interpretations. [157]

Thus far, Congress has reenacted the VRA four times, and each time it has declined the opportunity to alter the Court's established baseline interpretation. If "Congress disagreed with the interpretation of § 5 . . . , it had ample opportunity to amend the statute." [158] But, because Congress did not address the Court's application of a dynamic baseline, Congress implicitly incorporated this interpretation of section 5 in the course of reenacting the VRA. [159]

Congress's inaction is especially compelling given that the most recent reenactment of the VRA was supported by "one of the most extensive legislative records in the Committee on the Judiciary's history," [160] but did not address the baseline issue at all. [161] There is no legislative history to suggest that the section 5 baseline was even a topic for deliberation. Thus, through its affirmative inaction, Congress enacted the Court's interpretation of the section 5 baseline. [162]

The authoritative clout of legislative history is generally debatable. But, given the evolution of the VRA, its extensive

156. Flood v. Kuhn, 407 U.S. 258, 283–84 (1972).

157. ESKRIDGE, INTERPRETATION, *supra* note 106, at 243–44.

158. Georgia v. United States, 411 U.S. 526, 533 (1973) (noting that Congress made no substantive changes in 1970 when it extended section 5 for five more years).

159. *See* HASEN, *supra* note 10, at 32 ("As for whether the Court properly interpreted the scope of section 5 of the act, Congress amended the Voting Rights Act a number of times without amending section 5, suggesting that at least subsequent Congresses were not dissatisfied with the Court's approach in *Allen*.").

160. H.R. REP. NO. 109-478, at 5 (2006).

161. ESKRIDGE ET AL., *supra* note 42, app. B at 28 (stating that the canon referred to as "[t]he dog didn't bark" presumes that the prior legal rule should be retained if the rule was not mentioned in legislative deliberations and if no changes to the rule arose).

162. *But see* Alexander v. Sandoval, 532 U.S. 275, 292 (2001) (questioning ratification arguments if Congress "has not comprehensively revised a statutory scheme but has made only isolated amendments").

legislative history merits consideration.[163] The VRA's legislative history is replete with evidence that Congress intended for section 5 to apply to all proposed voting changes in covered jurisdictions. There is no evidence that Congress intended to exempt any proposed changes from the preclearance mandate. Furthermore, congressional acquiescence and ratification of the Court's use of a dynamic baseline is persuasive evidence that Congress deemed this interpretation of section 5 to be the correct interpretation.[164] If the Chief Justice ignores the VRA's legislative history, he risks announcing an incorrect interpretation of the section 5 baseline.[165]

## V. THE U.S. SUPREME COURT HAS CONSISTENTLY APPLIED A DYNAMIC BASELINE IN SECTION 5 CASES

The Supreme Court has never squarely addressed the issue of whether the baseline in section 5 of the VRA is static or dynamic. But, the Court has consistently applied a dynamic baseline in section 5 cases. Thus, the Court's adjudication of section 5 cases suggests that the Court has presumed that section 5 imposes a dynamic baseline.[166] First, the Court has provided in dicta guidelines about the application of section 5 that presume a dynamic baseline. Second, the Court has looked to the most recent voting practices

163. ESKRIDGE ET AL., *supra* note 42, app. B at 27 (noting that statutory history—or the formal evolution of a statute as Congress amends it over the years—is always potentially relevant); ESKRIDGE, INTERPRETATION, *supra* note 106, at 252–56.

164. The Supreme Court previously resorted to legislative history to aid in its interpretation and application of section 5. *See, e.g.*, Dougherty County, Ga., Bd. of Educ. v. White, 439 U.S. 32, 47 (1978) ("[A] fair reading of the legislative history compels the conclusion that Congress was determined in the 1975 extension of the Act to provide some mechanism for coping with all potentially discriminatory enactments whose source and forms it could not anticipate but whose impact on the electoral process could be significant."); Allen v. State Bd. of Elections, 393 U.S. 544, 570 (1969) ("[The Court is] compelled to resort to the legislative history to determine whether, in light of the articulated purposes of the legislation, Congress intended that the statute apply to the particular cases in question.").

165. Eskridge, *supra* note 105, at 375 (explaining that legislative history is useful as an authoritative context that enables the Supreme Court to choose the correct interpretation of a statute among alternative meanings).

166. The interpretation of statutes by the Supreme Court is afforded a very strong presumption of correctness. William N. Eskridge, Jr., Overruling Statutory Precedents, 76 GEO. L. J. 1361, 1362 (1988). Unlike the Constitution, a statute can be more readily changed by Congress if it determines that the Supreme Court has misinterpreted the purpose of the statute. *Id.* ("The Court applies a relaxed, or weaker, form of that presumption when it reconsiders its constitutional precedents, because the difficulty of amending the Constitution makes the Court the only effective resort for changing obsolete constitutional doctrine. Statutory precedents, on the other hand, often enjoy a super-strong presumption of correctness.").

when determining whether preclearance of a given voting change is appropriate. Third, the non-retrogression standard that the Court created to determine whether a change merits preclearance is consistent with a dynamic baseline.

### *A. The Supreme Court's Preclearance Analysis Presumes a Dynamic Baseline*

Although the Court has never decided the issue of whether the section 5 baseline is static or dynamic, it has addressed the baseline in dicta while resolving multiple section 5 cases.[167] Collectively, such dicta provide strong evidence that the Court has presumed section 5 to impose a dynamic baseline.

First, the Court has emphasized the significance of the status quo in the preclearance analysis. The Court explained that "the baseline *is* the status quo that is proposed to be changed."[168] Accordingly, the Court explained that pursuant to section 5, "[t]o determine whether there have been changes with respect to voting, [the Court] must compare the challenged practices with those in existence *before* they were adopted."[169] This approach by the Court is consistent with the application of a dynamic baseline. A static baseline, on the other hand, would likely conflict with the Court's approach to preclearance cases because it would require a comparison between a proposed practice and the practice that was in effect on the given jurisdiction's coverage date. Unless the practice that was in effect on the jurisdiction's coverage date has not changed and is still the status quo when the proposed change is submitted for preclearance, a static baseline would require a comparative analytical approach that differs from the one that the Court has already announced and applied in section 5 cases.

Second, the Court's inquiry into intervening changes to voting practices during its preclearance analysis also indicates that the Court has presumed the existence of a dynamic baseline. In the absence of a dynamic baseline, the Court would have no reason to examine an intervening change to a particular voting practice that has been precleared and enacted; a static baseline would only require the

167. *See, e.g.*, Reno v. Bossier Parish Sch. Bd. (*Bossier Parish II*), 528 U.S. 320 (2000); Presley v. Etowah County Comm'n, 502 U.S. 491 (1992).

168. *Bossier Parish II*, 528 U.S. at 334 (emphasis added).

169. *Presley*, 502 U.S. at 495 (emphasis added).

Court to consider whether the proposed change was different from the practice that was in effect in 1964, 1968, or 1972. However, the Court has explained that section 5's "date of November 1, 1964 often . . . is not directly relevant, for *differences* once precleared . . . become part of the baseline standard."[170] The Court even emphasized that "[a]bsent relevant intervening changes, the [VRA] requires [the Court] to use practices in existence on November 1, 1964, as [its] standard of comparison."[171] Thus, the relevant voting practice on a jurisdiction's coverage date is only used as the baseline in the absence of applicable intervening changes.

Finally, the Court announced in the most recent VRA case, *Northwest Austin Municipal Utility District Number One v. Holder*,[172] decided during the 2008 Term, that section 5 should be broadly interpreted to apply to all proposed changes that relate to voting in covered jurisdictions. Specifically, the Court declared that "Section 5 goes beyond the prohibition of the Fifteenth Amendment by suspending *all* changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C."[173] The fact that the Court considers section 5 to have suspended all voting practices that were in effect on a covered jurisdiction's coverage date pending federal approval necessarily implies that these practices cannot serve as permanent comparative benchmarks; after all, these practices, too, are subject to the mandates of section 5. Thus, the application of a static baseline would be at odds with the Court's most recent articulation of the function of section 5.

### *B. The Supreme Court Consistently Compares a Proposed Change to the Status Quo*

Since the enactment of the VRA, the Supreme Court has consistently looked to the most recent practice that is in effect when

170. Young v. Fordice, 520 U.S. 273, 281 (1997) (emphasis added).

171. *Presley*, 502 U.S. at 495 (emphasis added).

172. 129 S.Ct. 2504 (2009). Most of this Article was written before the Supreme Court decided this case. Although the Court had the opportunity to decide more broadly the constitutionality of the VRA, the Court instead held that the covered jurisdiction at issue—the utility district—had an independent right to seek bailout from section 5 coverage because "the Voting Rights Act permits all political subdivisions, including the district in this case, to seek relief from its preclearance requirements." *Id.* at 2508, 2516–17.

173. *Id.* at 2511.

a proposed voting practice is submitted for preclearance. Looking to the most recent practice at issue is predicated on the presumption that the section 5 baseline is dynamic.

The Court's focus on the status quo was especially evident in *City of Monroe v. United States*.[174] The issue in this case was whether city elections should be based on a majority or a plurality vote.[175] The city had become subject to section 5 in 1965,[176] and on its coverage date, plurality voting was the practice that was in effect in this jurisdiction.[177] However, a 1968 Georgia state law established a default rule that required majority voting in cities that did not specify in their charters a preference for plurality voting.[178] This law was precleared and enacted, and it applied to the City of Monroe because its charter did not specify a preference for plurality voting.[179] Then, in 1990, the City of Monroe submitted a request for preclearance to add the majority-vote requirement to its city charter, but the attorney general refused to preclear this proposed change.[180] On appeal, the Supreme Court used the precleared 1968 code as the baseline and, based on this comparison, held that the City of Monroe was entitled to preclearance.[181] However, had the Court applied a static baseline, it would have compared the proposed change to the practice that was in effect on Monroe's coverage date—plurality voting.

Additionally, the Court's application of a dynamic baseline is particularly significant in redistricting cases. Changes that alter the composition of districts and shift boundaries have an impact on voting and thus must be precleared before they can take effect. Redistricting usually occurs once every ten years, following the decennial census report.[182] If section 5 were to impose a static baseline to redistricting proposals, then each proposal that is submitted after 1965 would have to be compared to the 1964, 1968,

174. 522 U.S. 34 (1997).
175. *Id.* at 35–37.
176. *Id.* at 35.
177. *Id.*
178. *Id.* at 35–37.
179. *Id.*
180. *Id.* at 36–37.
181. *Id.* at 38–39.
182. *See supra* notes 82 and 83 and accompanying text.

or 1972 population data and resulting voting-district plans. Yet, the Court has never applied a static baseline to redistricting proposals. On the contrary, the Court has presumed without discussion that the appropriate preclearance analysis of redistricting proposals requires a comparison between the proposed redistricting plan and the current voting-district plan.

In *Abrams v. Johnson*,[183] for example, the Court decided that a 1982 plan was the appropriate benchmark to which a new redistricting plan should be compared.[184] More recently, in *Georgia v. Ashcroft*,[185] the Court determined that Georgia's proposed redistricting plan should be compared to the prior 1997 district plan.[186] In fact, the issue of whether the 1965 district plan should be considered did not arise at all: "All parties . . . *concede[d]* that the 1997 plan [was] the benchmark plan for this litigation because it was in effect at the time of the 2001 redistricting effort."[187] Thus, in redistricting cases, the Court automatically applies a dynamic baseline without hesitation. The Court's application of a dynamic baseline in these cases is significant beyond the redistricting context because there is no indication that a different baseline analysis should apply to voting changes that do not implicate voting districts.

### *C. The Supreme Court's Non-Retrogression Standard Is Consistent with a Dynamic Baseline*

About ten years after the enactment of the VRA, the Supreme Court announced in *Beer v. United States*[188] that the purpose of the VRA "has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise."[189] The purpose of this prohibition against retrogression is to preserve the gains that had already been made in the area of minority voting rights,[190] and "to maintain the voting

183. 521 U.S. 74 (1997).

184. *Id.* at 97.

185. 539 U.S. 461 (2003).

186. *Id.* at 469.

187. *Id.*

188. 425 U.S. 130 (1976).

189. *Id.* at 141 (emphasis added).

190. Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 922 (2008).

strength of minority voters at its present level in the sixteen states covered in whole or in part by § 5."[191] The Court adopted this non-retrogression standard to determine whether a covered jurisdiction is entitled to obtain preclearance for any given change related to voting that it seeks to enact.[192]

The Court's implementation of the non-retrogression standard illustrates that the preclearance analysis is actually bifurcated. First, the Court uses the baseline to determine if a proposed practice triggers the section 5 inquiry and must be precleared; section 5 requires preclearance only if the proposed practice represents a *change* from the prior practice. Second, the Court uses the baseline to determine if the proposed change merits preclearance; only a non-retrogressive change may be precleared. The Court has only articulated the standard for assessing the second of these two prongs: "Retrogression, by definition, requires a comparison of a [covered] jurisdiction's new voting plan with its existing plan."[193] But, by defining the hurdle that a covered jurisdiction must overcome to establish that its proposed change to a voting practice is entitled to preclearance—demonstrating non-retrogression—the Court has simultaneously established the trigger for a preclearance inquiry—when a proposed change in a voting practice is a *change* that must be precleared. The Court's use of a non-retrogression standard "necessarily implies that the [covered] jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured."[194] Thus, to assess the second prong, the Court must look to the status quo and apply a dynamic baseline. It follows that the first threshold prong requires the same analysis.[195] Congress has never overturned the non-retrogression standard,[196] so it remains

191. *Id.* at 937.

192. *Id.*

193. Reno v. Bossier Parish Sch. Bd. (*Bossier Parish I*), 520 U.S. 471, 478 (1997).

194. *Id.*

195. A static baseline would not permit a comparison of the proposed practice with the existing practice, or a comparison of its effects on the existing levels of minority representation. In fact, this approach would only allow the Supreme Court to focus on the relevant practices in effect on the jurisdiction's coverage date.

196. Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot., 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.") (citing Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266–67 (1979)).

integral to the preclearance analysis and its use affirms the application of a dynamic baseline.

Accordingly, judicial precedents demonstrate that the Supreme Court has presumed that section 5 imposes a dynamic baseline. This presumption is apparent in the Court's explanation of the preclearance inquiry and its consideration of the status quo and intervening changes. This presumption is also apparent in the non-retrogression standard that the Court created to assess whether proposed changes merit preclearance. The Chief Judge's reinterpretation of section 5 to impose a static baseline would depart from the Court's settled adjudication of preclearance cases.

## VI. THE U.S. DEPARTMENT OF JUSTICE CONSISTENTLY APPLIES A DYNAMIC BASELINE IN SECTION 5 CASES

Section 5 of the VRA requires a covered jurisdiction to obtain preclearance for any change to a voting practice that it seeks to enact. To obtain the necessary preclearance, a covered jurisdiction can either seek a declaratory judgment from the U.S. district court for the District of Columbia, or alternatively, submit its change to the U.S. attorney general at the U.S. Department of Justice.[197] The VRA empowers the U.S. attorney general to administer section 5. To ensure the consistent application of section 5 in every preclearance case,[198] the Department of Justice has published guidelines for the administration of the preclearance process by its attorneys general. These guidelines have been codified in the Code of Federal Regulations.[199] The interpretation by the Department of Justice directs the attorney general to apply a dynamic baseline, and this interpretation is entitled to deference by the U.S. Supreme Court.

### *A. The Preclearance Guidelines Followed by the Attorney General Direct the Application of a Dynamic Baseline*

The preclearance guidelines established by the Department of Justice that interpret and implement section 5 of the VRA instruct the

197. 42 U.S.C. § 1973c (2006).

198. Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179, 1215 (noting that the Voting Rights Act requires the attorney general and the district court for the District of Columbia to apply the same section 5 preclearance standard).

199. The preclearance guidelines are codified at 28 C.F.R. pt. 51 in the Code of Federal Regulations as Procedures for the Administration of Section 5 of the Voting Rights Act of 1965.

attorney general to use what can only be described as a dynamic baseline when determining whether a proposed change to a voting practice is entitled to preclearance.

First, the attorney general must use the last legally enforceable practice as the comparative benchmark for determining preclearance eligibility. Pursuant to the guidelines, the attorney general compares "the submitted change to the voting practice or procedure in effect at the time of the submission" [200] to determine whether a change will be retrogressive. The guidelines instruct the attorney general to use as its benchmark "the last legally enforceable practice or procedure used by the jurisdiction." [201] The attorney general cannot use a fixed baseline—the baseline is necessarily determined at the time that a proposed change is submitted for preclearance. On the contrary, the guidelines instruct the attorney general to consider the status quo when assessing the retrogressive impact of a proposed change, such that the attorney general must also use the status quo to determine whether a proposed change requires preclearance in the first place. This presumption is bolstered by the fact that under certain circumstances, a covered jurisdiction is required to submit to the attorney general "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose . . . the difference between the prior and proposed situation with respect to voting." [202] Thus, whenever a covered jurisdiction seeks to obtain preclearance for a proposed voting practice, the attorney general focuses only on the most recent practice that corresponds to this change, not the relevant voting practice that was in effect on the jurisdiction's coverage date. This analysis is consistent with the application of a dynamic baseline.

Second, the guidelines by the Department of Justice state that covered jurisdictions must submit for preclearance all changes with respect to voting made after their respective coverage dates. [203]

200. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 28 C.F.R. § 51.54(b)(1) (1987).

201. *Id.*

202. *Id.* § 51.27(c).

203. *Id.* § 51.4(b) ("Section 5 requires the preclearance of changes affecting voting made since the date used for the determination of coverage. For each covered jurisdiction that date is one of the following: November 1, 1964; November 1, 1968; or November 1, 1972.").

Accordingly, any change to a voting practice is subject to section 5 preclearance, including "[a]ny change affecting voting, even though it appears to be minor or indirect, returns to a prior practice or procedure, ostensibly expands voting rights, or is designed to remove the elements that caused objection by the Attorney General to a prior submitted change."[204] This categorical mandate leaves no room for exceptions, and no exceptions are listed in the guidelines.

Third, the Department of Justice implicitly rejects the use of a static baseline that is based on the jurisdiction's coverage date by explicitly prohibiting a covered jurisdiction from reenacting a voting practice that was in effect on the jurisdiction's coverage date unless the proposed reenactment is precleared. Because a voting change must still be precleared "even though it . . . returns to a prior practice or procedure,"[205] this change is not exempt from the preclearance requirement, as it is administered by the attorney general. When these guidelines were revised, the Department of Justice clarified that the non-exempt status of these prior voting practices is intended "to make explicit that a voting change that returns a jurisdiction to a practice that was previously in effect (e.g., to that in use on November 1, 1964) is subject to the preclearance requirement."[206] Accordingly, the application of a static baseline would be inconsistent with the guidelines that the attorneys general apply when administering section 5.

### *B. The Interpretation of Section 5 by the Department of Justice Merits Judicial Deference*

The interpretation and application of section 5 by the Department of Justice, manifested in the preclearance guidelines, merits judicial deference. The seminal case that established how the Supreme Court evaluates the propriety of an agency's interpretation of a statute that it is instructed to administer is *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[207] In *Chevron*, the Supreme Court adopted a two-pronged test to determine whether an

204. *Id.* § 51.12.

205. *Id.*

206. Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (Jan. 6, 1987) (codified at 28 C.F.R. pt. 51 (1987).

207. 467 U.S. 837.

agency's interpretation merits judicial deference.[208] First, the court must determine if Congress has "directly spoken to the precise question at issue"[209] which the agency has purported to answer through its interpretation. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress,"[210] and any interpretation by the agency that is contrary to the expressed congressional intent is unacceptable. But, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute."[211] Thus, if the congressional intent of a statute is not clear, then the Court should defer to the agency's reasonable interpretation.[212]

The guidelines promulgated by the Department of Justice would survive judicial scrutiny under either test. First, there is persuasive evidence of Congress's intent for section 5 to impose a dynamic baseline. As discussed above, the text of section 5, as well as its purpose and legislative history, collectively demonstrate this intent.[213] Accordingly, the guidelines merit judicial approval because they are consistent with congressional intent.

Second, to the extent that the Court determines that Congress has not spoken clearly on the issue of the section 5 baseline, the guidelines by the Department of Justice merit judicial deference because they embody a permissible construction of section 5. As discussed above, the text of section 5 alone is arguably ambiguous with respect to the preclearance baseline.[214] Thus, whether intentional or implicit, there may be a legislative gap that must be filled. If "Congress . . . delegated policy-making responsibilities"[215] to an agency, and a statute has authorized the agency to adjudicate or create rules to implement the statute's provisions, the agency's

208. *Id.* at 842–43.

209. *Id.* at 842.

210. *Id.* at 842–43.

211. *Id.* at 843 (emphasis added).

212. *Id.*

213. *See* discussion *supra* Parts II, III, and IV.

214. *See* discussion *supra* Part II.

215. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

interpretation of this statute warrants consideration.[216] Section 5 specifically instructs the attorney general to implement the preclearance process by examining submissions, assessing objections, and granting preclearance when appropriate.[217] By entrusting the attorney general to implement the preclearance mandate, Congress has granted the Department of Justice policy-making authority to guide its attorneys general in the administration of section 5.

Even if the Court disagrees with this interpretation, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[218] In fact, the Court has declared that it favors deference to an agency's reasonable interpretation even if it entails resolving an ambiguity or conflict in the statute, and this interpretation should not be disturbed "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[219] Here, there is ample evidence that Congress intended section 5 to impose a dynamic baseline, such that an interpretation by the Department of Justice that is consistent with this intent is sufficiently reasonable and warrants judicial deference. Thus, the Court may not substitute the Chief Justice's reinterpretation of section 5 that yields a static baseline in place of the dynamic baseline applied by the attorneys general in accordance with the guidelines established by the Department of Justice.

It is noteworthy that the Court has already acknowledged the propriety of deferring to the interpretation of section 5 by the Department of Justice. Although a dynamic baseline enables a broad application of section 5, the Court has previously explained that "[g]iven the central role of the Attorney General in formulating and implementing § 5, [its] interpretation of [the VRA's] scope is entitled to particular deference."[220] Since the enactment of the VRA, the Court has also upheld other interpretations by the Department of Justice that are relevant to the preclearance inquiry, thereby according this agency substantial deference with respect to its

216. *Id.*

217. 42 U.S.C. § 1973c(a) (2006).

218. *Chevron*, 467 U.S. at 844.

219. *Id.* at 844–45 (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)).

220. Dougherty County, Ga., Bd. of Educ. v. White, 439 U.S. 32, 39 (1978).

interpretation of section 5.[221] Therefore, the interpretation of the section 5 baseline by the Department of Justice merits judicial deference.

## VII. THE UNFAVORABLE IMPLICATIONS OF REINTERPRETING SECTION 5 TO IMPOSE A STATIC BASELINE

A reinterpretation of section 5 that imposes that use of a static baseline carries with it unfavorable policy implications. Section 5 of the VRA is considered to be one of the most influential civil rights statutes because it has "contributed to the gains thus far achieved in minority political participation."[222] But, it has not yet outgrown its usefulness. During the 2006 reauthorization of the VRA, Congress affirmed the continued utility of section 5 in "protecting minority voters from devices and schemes that continue to be employed by covered States and jurisdictions."[223] Extensive research has revealed that rampant and ongoing discrimination against minority voters has persisted in covered and uncovered jurisdictions since 1982.[224] Examples of such discriminatory practices in covered jurisdictions include the following: harassment of African-American voters by white poll managers;[225] a limit imposed by county officials on the number of voter registration forms provided to Native Americans;[226] the consolidation of multiple voting precincts at an all-white civic club;[227] and a town mayor's refusal to provide required registration forms to African-American city council candidates.[228] This evidence illustrates the continued need for a rigorous preclearance procedure

221. *See, e.g.*, Lopez v. Monterey County, 525 U.S. 266, 281 (1999). In *City of Rome v. United States*, 446 U.S. 156, 171 (1980), the Supreme Court supported a liberal interpretation of section 5 regarding the sixty-day deadline for the attorney general to object to a covered jurisdiction's proposed change: "We agree with the Attorney General that the purposes of the Act and its implementing regulations would be furthered if the 60-day period provided by 28 C.F.R. § 51.3(d) were interpreted to commence anew when additional information is supplied by the submitting jurisdiction on its own accord." *Id.*

222. S. REP. NO. 94-295 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 785; *see also* OVERTON, *supra* note 16, at 94, 98 ("Perhaps the most important part of the act, however, was the Section 5 preclearance provision. . . . Section 5 worked wonders.")

223. H.R. REP. NO. 109-478, at 21 (2006).

224. Ellen Katz et. al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 678–91 (2006).

225. *Id.* at 678–80.

226. *Id.* at 680–82.

227. *Id.* at 683.

228. *Id.* at 683–84.

in covered jurisdictions that is well-equipped to address and curb such ever-present discrimination against minority citizens. But, the use of a static baseline would reduce the protective scope of section 5 and would jeopardize the progress that has already been made since 1965. Moreover, if section 5 is narrowed in scope, then minority citizens will have to rely more extensively on section 2 to protect their Fifteenth Amendment right to vote.[229] Unfortunately, section 2 cannot sufficiently protect minority citizens from contemporary discriminatory voting practices.[230]

### *A. A Static Baseline Would Weaken Section 5 and Endanger the Progress Already Made*

The Supreme Court recognized early on that "[t]he Voting Rights Act is aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race."[231] Congress is still concerned that the "vestiges of discrimination in voting" continue to exist long after the "first generation" barriers have been addressed.[232] Second-generation discriminatory practices typically include vote dilution attempts by covered jurisdictions to limit the voice of minority voters through such methods as redistricting and at-large elections.[233] But, a static baseline can only address first-generation discrimination.[234] The more subtle and invidious second-generation barriers could still pass preclearance scrutiny as long as they are deemed to be no more discriminatory than the relevant practice that was in effect on the jurisdiction's coverage date. Of course, a dynamic baseline would facilitate the denial of preclearance for any discriminatory voting practice in a covered jurisdiction that still seeks to prevent minority voters from fully participating in the electoral process.

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229. *See* H.R. REP. NO. 109-478, at 57 (2006).

230. *See id.* (discussing Congress's concern about the inadequacy of section 2 to sufficiently protect minority voters).

231. Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969).

232. 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, 577 (2006).

233. Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 6–7 (2007).

234. H.R. REP. NO. 109-478, at 12–18 (noting the progress that the Voting Rights Act made regarding first-generation barriers, including increased voter registration and turnout, and an increased number of African-American elected officials).

Moreover, the use of a static baseline would enable the reemergence of the discriminatory voting practices that were in effect when a jurisdiction became covered under section 5, even if those practices have since been eradicated and replaced by non-discriminatory alternatives. As discussed above, a static baseline would create a "safe harbor" for these practices and exempt them from the preclearance inquiry in the event that covered jurisdictions seek to reinstate such practices.[235] Ironically, covered jurisdictions were selected for section 5 coverage precisely because they most egregiously violated the voting rights of minority citizens.[236] Allowing these chronic offenders of the Fifteenth Amendment to reenact voting practices that caused them to be subject to section 5 preclearance in the first place defies reason. It also defies the broad policy goals that Congress intended section 5 to meet.[237] By enabling covered jurisdictions to revert to prior discriminatory voting practices, a static baseline has the potential to unravel years of progress, leaving minority voters in no better position than they were in when the VRA was first enacted in 1965.

### *B. Section 2 Cannot Sufficiently Protect Minority Citizens from Discriminatory Voting Practices*

If section 5 were to be reinterpreted to impose a static—instead of a dynamic—baseline, then minority voters would have to rely more heavily on section 2 to combat the ongoing discrimination that has yet to be eradicated, as well as the subtle discriminatory voting practices that have emerged in the wake of the VRA. These discriminatory voting practices would likely remain unaddressed if section 5 were to impose only a static baseline. Unfortunately, section 2 is not equipped to address these residual issues as well as section 5 is intended and able to—but only to the extent that section 5 imposes a dynamic baseline.

Congress is completely aware of the inadequacies of section 2. While reenacting the VRA in 2006, Congress emphasized its doubts about the ability of section 2 to sufficiently protect minority voters from ever-present discrimination.[238] Unlike section 2, section 5 is a

235. *See* discussion *supra* Part IV.A.

236. *See* discussion *supra* Part IV.B.

237. *See* discussion *supra* Part III.

238. H.R. REP. NO. 109-478, at 57.

prospective measure that places the burden on covered jurisdictions to show that proposed changes related to voting would not discriminate against minority voters. Consequently, section 5 has proven to be an effective deterrent against discriminatory voting practices. It is precisely these functions that distinguish section 5 from section 2, and make section 5 (and its imposition of a dynamic baseline) indispensable to the enforcement of the Fifteenth Amendment.

1. Section 5 Prevents Discriminatory Practices

Section 5 prevents the emergence of discriminatory voting practices because it is inherently a prospective measure. Section 5 was enacted to "allow the Federal Government and courts to stay one step ahead of jurisdictions with a documented history of discrimination against minority voters."[239] Its aim is to prevent the emergence or reemergence of discriminatory practices, not to remove them after they have already been implemented and have violated the voting rights of minority citizens. This is because a covered jurisdiction must seek preclearance *before* it can legally implement a voting practice. Section 5 protects minority voters *ex ante* from the implementation of unconstitutional voting practices. For this reason, Congress has hailed section 5 as one of the VRA's "vital prophylactic tools, protecting minority voters from devices and schemes that continue to be employed by covered States and jurisdictions."[240]

Section 2, by contrast, is a retrospective measure. Although it is not limited to covered jurisdictions, the primary function of section 2 is to provide individual plaintiffs with a cause of action against jurisdictions that employ discriminatory voting practices. The protections of section 2 are not triggered until after a discriminatory voting practice has been implemented and its use has allegedly violated the voting rights of minority citizens. A section 2 claim is necessarily predicated on the assertion by an individual plaintiff or a class of plaintiffs, or alternatively, by the Department of Justice,[241]

239. *Id.* at 35.

240. *Id.* at 21.

241. *See, e.g.*, http://www.usdoj.gov/crt/voting/litigation/caselist.php#sec2cases (listing cases filed by the United States against jurisdictions that have allegedly violated section 2) (last visited Sept. 24, 2009).

that the challenged practice denies or abridges the voting rights of minority citizens.[242] But, the VRA does not provide the same remedy for a section 2 violation as for a section 5 violation;[243] the court is left to fashion its own remedy if a jurisdiction is found to have violated section 2, which may or may not lead to the eradication of the discriminatory voting practice.

In fact, Congress specifically included section 5 in the VRA because it deemed prior legislation resembling section 2 to be an insufficient method of effectively removing discriminatory voting practices.[244] Congress recognized that the laws that preceded the VRA and facilitated case-by-case litigation had resulted only in the "barring of one contrivance [that] has too often caused no change in result, only in methods."[245] Such case-by-case litigation had proved to be a costly, time-consuming, and ineffective means of combating widespread discriminatory voting practices because "[t]he practices that can be used are virtually infinite,"[246] and each one had to be challenged individually. Because each voting practice had to be addressed separately, a jurisdiction could easily replace an invalidated discriminatory practice with another not-yet-invalidated discriminatory practice; and unless the new practice was successfully challenged by a prevailing plaintiff, the practice would remain in effect.[247] Consequently, the section 5 preclearance mandate was aimed to prevent recalcitrant jurisdictions from unilaterally switching from one discriminatory voting practice to another. Unlike section 2, section 5 was aimed to prevent the emergence of discriminatory voting practices that, once enacted, could only be challenged under section 2.[248] Of course, section 5 can continue to meet this goal only

242. H.R. REP. NO. 109-478, at 10.

243. 42 U.S.C. § 1973 (2006).

244. H.R. REP. NO. 109-478, at 7.

245. S. REP. NO. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2543.

246. *Id.* at 2544–45.

247. Even if a plaintiff were to establish that a voting practice is discriminatory, it is possible that a court would permit the practice to stand, finding that the practice was still facially valid and only discriminatory in its application to the specific plaintiff who brought the suit.

248. Section 2 is narrower than section 5 because a cause of action under section 2 necessarily pertains to a specific, existing practice that is being challenged. In his concurrence in *Holder v. Hall*, Justice Thomas explained that section 5 is broader in its scope and reach than section 2, and that the broad construction of section 5 should not be adopted under section 2. 512 U.S. 874, 895–96, 930 (1994).

if it continues to impose a dynamic baseline, which is the interpretation that has defined section 5 since its inception.

2. Section 5 Places the Burden on Covered Jurisdictions

Given its prospective nature, section 5 places the burden of demonstrating that a proposed voting change is not discriminatory on the jurisdiction that seeks preclearance for this change. Under section 5, a covered jurisdiction must prove that its proposed change lacks "the *potential* for discrimination."[249] Thus, the covered jurisdiction bears the costs of submission to the Department of Justice, litigation in the U.S. district court for the District of Columbia, and any potential appeals.

Conversely, section 2 places the burden of showing that an alleged voting practice is discriminatory on the party that is challenging the practice. If the Department of Justice files a section 2 complaint against a jurisdiction, then it must substantiate this claim with proof of the violation. If minority citizens allege that a given practice has denied or abridged their right to vote, then they must demonstrate this discrimination. In either situation, the plaintiffs bear the burden of proving that the alleged voting practice violates section 2. Section 2 provides minority citizens with only a cause of action against a jurisdiction that enforces an allegedly discriminatory voting practice. The burden of proof for this cause of action is borne by the plaintiff.[250] To meet this burden, the plaintiff must demonstrate that the challenged practice "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [language]."[251] The plaintiff also bears the costs of litigating this cause of action. Although the Department of Justice may be capable of sustaining the burden of proof and the costs of litigation, a minority voter or a class of minority voters could easily find both of these hurdles to be prohibitively burdensome.

Most recently, Justice Clarence Thomas emphasized in his concurrence and dissent in *Northwest Austin Municipal Utility District Number One v. Holder* that

249. NAACP v. Hampton County Election Comm'n, 470 U.S. 166, 181 (1985).

250. Unlike section 5, which has a non-litigation alternative in the form of a submission to the attorney general, section 2 has no such alternative. All section 2 claims must be in the form of a complaint and are adjudicated by the district court. 42 U.S.C. § 1973(a) (2006).

251. *Id.*

> Section 5 'was a response to a common practice in some jurisdictions of staying one step ahead of the federal courts by passing new discriminatory voting laws as soon as the old ones had been struck down. That practice had been possible because each new law remained in effect until the Justice Department or private plaintiffs were able to sustain the *burden of proving* that the new law, too, was discriminatory.[252]

Under section 2, the defending jurisdiction that is sued for using an allegedly discriminatory voting practice has no affirmative burden to demonstrate that the challenged practice does not discriminate against minority citizens. Section 5, on the other hand, reverses these burdens. However, if section 5 is redefined to impose a static baseline, then a covered jurisdiction will have a much lower burden of proof, having to show nothing more than that the proposed change to a voting practice is the same as or no more discriminatory than the relevant practice that was in effect on the jurisdiction's coverage date. The untenably low threshold that results from this calculus explains why the continued efficacy of section 5 requires the application of a dynamic baseline.

### 3. Section 5 Deters Discriminatory Practices

Congress has hailed section 5 as an unparalleled deterrent to unconstitutional barriers to voting in covered jurisdictions because its existence prevents these jurisdictions "from even attempting to enact discriminatory voting changes."[253] The fact that section 5 is a prospective measure and places the primary burden on the covered jurisdiction contributes to its success.

Congress emphasized that section 5's "strength lies not only in the number of discriminatory voting changes it has thwarted, but can also be measured by the submissions that have been . . . altered by jurisdictions in order to comply with the VRA, or in the discriminatory voting changes that have never materialized."[254] To

252. Northwest Austin Mun. Utility Dist. No. One v. Holder, 129 S. Ct. 2504, 2520–21 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting Beer v. United States, 425 U. S. 130, 140 (1976)) (emphasis added).

253. H.R. REP. NO. 109-478, at 24 (2006).

254. *Id.* at 36. In support of this conclusion, Congress used the 2005 redistricting efforts in Georgia as an example, noting that the state legislature adopted resolutions to comply with section 5 before proposing any changes. *Id.* at 24.

ensure their compliance with section 5, covered jurisdictions often consult with the attorney general regarding proposed changes before submitting a preclearance request.[255] These consultations are aimed to ensure that their submissions do not violate section 5 and will likely receive preclearance.[256] A request by the attorney general for more information concerning a submission usually signals that the change, as submitted, is not likely to be precleared.[257] Such a request often prompts the jurisdiction that submitted the change to resubmit a modified version of the proposed practice or withdraw its submission altogether.[258] During its 2008 Term, the Supreme Court highlighted this effect, noting that "the record 'demonstrat[ed] that section 5 prevents discriminatory voting changes' by 'quietly but effectively deterring discriminatory changes.'"[259]

Section 2, however, unlike section 5, does not deter a covered jurisdiction from enacting or reenacting discriminatory voting practices that have not yet been struck down pursuant to the VRA. However, if section 5 would be reinterpreted to impose a static baseline, it would no longer be able to deter covered jurisdictions from reenacting discriminatory voting practices. This less potent version of section 5 would necessarily entail the risk that progress in the voting rights arena would be stalled or reversed. But, even as recently as 2006, Congress emphasized that section 5 has not yet outlived its usefulness.[260] Unfortunately, in the event that section 5 would no longer impose a dynamic baseline, section 2 would be incapable of making up for the lost progress.

## VIII. CONCLUSION

In the area of political access and participation, the VRA has proven to be a driving force of change. Congress has attributed much of the progress in voting rights to the impact of section 5 and the way in which it has been interpreted and implemented. To now

255. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 200–01 (2007).

256. *Id.*

257. *Id.* at 200.

258. *Id.* at 200.

259. Northwest Austin Mun. Utility Dist. No. One v. Holder, 129 S. Ct. 2504, 2513 (2009) (quoting Northwest Austin Mun. Util. Dist. No. One v. Mukasey, 573 F. Supp. 2d 221, 264 (D.D.C. 2008)).

260. H.R. REP. NO. 109-478, at 21 (2006).

reinterpret section 5 to impose a static instead of a dynamic baseline for the purpose of the preclearance analysis is unwarranted and dangerous. First and foremost, this interpretation would conflict with the text of section 5 and other relevant provisions of the VRA. A static baseline would also hinder the purpose of section 5 and defy the congressional intent that underlies this provision. Moreover, a static baseline would clash with the established application of section 5 by the Supreme Court and by the Department of Justice. But, the greatest danger is that the use of a static baseline would render section 5 almost impotent in its ability to prevent the reemergence of discriminatory voting practices. Under the application of a static baseline, covered jurisdictions could, at any given moment, reenact the same discriminatory voting practices that they had used when they became covered under section 5 in 1964, 1968, or 1972. Consequently, minority citizens would have no recourse to prevent the reemergence of such voting practices, and would have to bear the burdens of affirmatively challenging these practices at their own expense and with no guarantee of success. Ironically, reinterpreting section 5 to impose a static baseline could undo much of the progress that has already been made pursuant to the VRA. Undoubtedly, the effect of this reinterpretation on minority voters in covered jurisdictions could be devastating. Considering the adverse consequences of reading section 5 to impose only a static baseline, it is unlikely that this interpretation of the preclearance provision is sound. Admittedly, a cursory scan for fixed dates in a dense provision may appear to be an easier task than to constantly ascertain the status of a fluid baseline that shifts every time progressive voting practices are enacted. However, in light of all the circumstances, this easier interpretation is unlikely to be the right one, and with so much at stake, the Court cannot afford to be wrong.