### *F. Voting Rights Act of 1965*

*Need for Preclearance.* — Despite promising the full benefits of citizenship to black Americans, the Fourteenth and Fifteenth Amendments remained little more than taunts for nearly a century. The Fifteenth Amendment explicitly prohibits the use of race in determining voting eligibility, so the systematic denial of the ballot to Southern blacks was particularly cruel. Between Reconstruction and the mid-twentieth century, white Southerners devised countless means — literacy tests, poll taxes, and other devices — to exclude blacks from the franchise.[1] The pattern was well established: The states would find some apparently nonracial test by which to disenfranchise blacks, the restriction would be challenged in court, the plaintiffs would occasionally win, and the states would always devise a new restriction just as effective as the last one.[2] The Voting Rights Act of 1965[3] changed this dynamic in dramatic fashion, "shift[ing] the advantage of time and inertia from the perpetrators of the evil to its victims."[4] Section 5 of the Act required that the Attorney General or a federal court approve any future change to election practices in those states and counties where blacks had been excluded from voting, a practice known as preclearance.[5] While the Supreme Court has upheld the Voting Rights Act, the post-1965 history of the Act has been "[s]trange[ly] . . . [i]ronic."[6] Federal courts, which before 1965 were the sole refuge for voting rights, have steadily chipped away at the Voting Rights Act, even as

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[1] *See* Cristina M. Rodríguez, *From Litigation, Legislation: A Review of Brian Landsberg's* Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act, 117 YALE L.J. 1132, 1134–35 (2008) (book review); *see also* J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 22–38 (1999) (describing devices used between Reconstruction and the early twentieth century to deny blacks the franchise); ROBERT A. CARO, THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE ix–xi (2002) (describing the use of tests and other devices to prevent black Alabamans from registering to vote in 1957).

[2] Grandfather clauses were too obviously aimed at the descendants of former slaves. *See* Guinn v. United States, 238 U.S. 347, 364–65 (1915). Literacy tests were not. *See* Lassiter v. Northampton Co. Bd. of Elections, 360 U.S. 45, 52–53 (1959). All-white state-sponsored primaries were forbidden. *See* Nixon v. Herndon, 273 U.S. 536, 541 (1927). But for a time, privately organized primaries that excluded blacks were perfectly acceptable. *See* Grovey v. Townsend, 295 U.S. 45, 55 (1935). The Civil Rights Acts of 1957, Pub. L. No. 85–315, § 131, 71 Stat. 634, 637 (1957), and 1960, Pub. L. No. 86–449, § 601, 74 Stat. 86, 90 (1960), sought to upturn the dynamic by allowing the Department of Justice, not just individual plaintiffs, to bring these lawsuits. Yet the vicious pattern remained fixed. *See* J. Morgan Kousser, *The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007*, 86 TEX. L. REV. 667, 680 (2008); Rodríguez, *supra* note 1, at 1135.

[3] Pub. L. No. 89-110, 79 Stat. 437 (1965).

[4] South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966).

[5] 42 U.S.C.A. § 1973c (West 2003 & Supp. 2007).

[6] *See* Kousser, *supra* note 2.

they continue to uphold its core provisions.[7] With the Supreme Court at its most conservative in decades,[8] many fear that the Court's long skepticism toward the Act, which has so far only led to a reduction in the Act's effective range, could be transformed into hostility that might lead to the Act's invalidation.[9]

Last Term, in *Riley v. Kennedy*,[10] the Court decided a point of law of agonizingly minute dimensions: that a state need not receive preclearance to revert to an old method of filling seats on a local governing body after the new method has been invalidated by the state supreme court.[11] *Riley* did not discuss the constitutionality of Section 5, which Congress reauthorized in 2006,[12] and there is some reason to think *Riley* provides little guidance as to the Court's current view of Section 5. Still, to the extent *Riley* has predictive value, the case indicates that the post-1965 dynamic of the Court's interaction with the Voting Rights Act[13] remains intact: The Court appears set to continue upholding the Act[14] while also continuing to limit the Act's reach, despite indications from Congress in the 2006 reauthorization that it intends the Act to be read broadly.

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[7] *See* Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140–42 (2007).

[8] *See* Jeffrey Rosen, *The Dissenter*, N.Y. TIMES, Sept. 23, 2007, § 6 (Magazine), at 50 ("Including myself . . . every judge who's been appointed to the court since Lewis Powell . . . has been more conservative than his or her predecessor. Except maybe Justice Ginsburg." (quoting Justice Stevens) (internal quotation marks omitted)).

[9] *See* Richard H. Pildes, *Political Avoidance, Constitutional Theory, and the VRA*, 117 YALE L.J. POCKET PART 148, 153–54 (2007), http://yalelawjournal.org/images/pdfs/614.pdf; Posting of Rick Hasen to Election Law Blog, http://electionlawblog.org/archives/010904.html (May 27, 2008, 09:25) (noting worries about "the constitutionality of the renewed section 5" in the wake of *Riley v. Kennedy*).

[10] 128 S. Ct. 1970 (2008).

[11] *Id.* at 1976, 1978.

[12] 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, 580–81 (2006) (codified at 42 U.S.C.A. 1973c (West 2003 & Supp. 2007)).

[13] *See* Georgia v. Ashcroft, 539 U.S. 461, 480–83 (2003) (allowing preclearance of redistricting plans that reduce the number of districts minorities control, as long as minorities' overall influence on the political process improves); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 336 (2000) (holding that discriminatory, but not retrogressive, *intent* is an insufficient ground upon which to deny preclearance); Beer v. United States, 425 U.S. 130, 141 (1976) (holding that discriminatory, but not retrogressive, *effect* is an insufficient ground upon which to deny preclearance).

[14] The issue will likely be decided this term. *See* Notice of Appeal, Nw. Austin Mun. Util. Dist. No. One v. Mukasey, No. 1:06-CV-01384 (D.D.C. July 8, 2008); Supreme Court of the United States, Docket for 08-322, http:// supremecourtus.gov/docket/08-322.htm (last visited Oct. 5, 2008); *see also* Jurisdictional Statement, Nw. Austin Mun. Util. Dist. No. One v. Mukasey, No. 08-322 (U.S. filed Sept. 8, 2008), 2008 WL 4181890.

The facts of *Riley* defy easy summary.[15] The dispute concerned how two midterm vacancies on the Mobile, Alabama, County Commission were filled over a two decade period. Prior to 1985, the Governor appointed a new commissioner to fill out the term when a commissioner's seat opened between elections.[16] In 1985, the Alabama legislature enacted a law calling for a special election to fill a seat on the Mobile County Commission when one opened with more than a year left on the term.[17] The Attorney General precleared this change,[18] presumably because a switch from appointment by a statewide official to election by the local community was viewed as enhancing blacks' access to the political process. However, the 1985 law applied only to Mobile County — every other county commission in Alabama still had to rely on gubernatorial appointments to fill midterm vacancies. When the first midterm vacancy occurred after the law's enactment, a Mobile County voter filed suit in state court to enjoin the election because he believed the law violated a state constitutional provision that said no "local law . . . shall be enacted in any case which is provided for by a general law."[19] The state trial court denied the injunction and the plaintiff immediately appealed to the Alabama Supreme Court, which denied a request to stay the special election pending the appeal.[20] The election went forward, resulting in the election of Samuel Jones in June 1987. But fourteen months later the state supreme court ruled the 1985 law was unconstitutional.[21] To avoid the controversy that might otherwise ensue, the Governor appointed Jones to the commission seat.[22]

In 2004, the Alabama legislature passed a law allowing "local laws" calling for special elections to pre-empt the "general law" calling for gubernatorial appointment to fill midterm vacancies on county commissions.[23] The next year, Jones was elected mayor of Mobile, creating another midterm vacancy.[24] Despite the 2004 law, the Governor proposed to fill the opening by appointment.[25] Three Mobile County voters sued to force the Governor to hold a special election, claiming that the 2004 law had cured the infirmity in the 1985 law and made special

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[15] *Cf.* More Soft Money Hard Law Web Update, http://moresoftmoneyhardlaw.com/updates/voting_rights_act_redistricting_issues.html?AID=1271 (May 28, 2008) (describing the popular press's reception of *Riley*, "when noticed at all," as "with a yawn").

[16] *Riley*, 128 S. Ct. at 1978.

[17] *Id.*

[18] *Id.*

[19] *Id.* (quoting ALA. CONST. art. IV, § 105) (internal quotation marks omitted).

[20] *Id.*

[21] *Id.* at 1978.

[22] *Id.* at 1979.

[23] *Id.*

[24] *Id.*

[25] Riley v. Kennedy, 928 So. 2d 1013, 1015 (Ala. 2005).

elections the required method of filling midterm vacancies in Mobile County.[26] The state trial court agreed and ordered an election.[27] While the Governor appealed this decision to the state supreme court, the Department of Justice precleared the procedures for the special election scheduled for January 2006.[28] In November 2005, the state supreme court ruled that the 2004 Act applied prospectively only and did not revive the 1985 special election statute, and the Governor promptly made the appointment.[29]

The plaintiffs in the failed state court suit then sued in federal court, claiming the state supreme court decisions in 1988 and 2005 themselves amounted to changes to state election practices that required preclearance under Section 5.[30] Because the two decisions did change election procedures that had been approved by the Department of Justice, the district court ruled that the state supreme court decisions should have been precleared before being put into effect.[31] The state appealed to the U.S. Supreme Court.

The Supreme Court reversed. Writing for the Court, Justice Ginsburg[32] held that because the 1985 law was never "in force or effect" within the meaning of Section 5, the state supreme court decisions did not represent changes in election practice that required preclearance.[33] Sections 4 and 5 apply to states or political subdivisions, known as "covered jurisdictions," that the Attorney General determines have a history of using "test[s] or device[s]," such as literacy tests, to disenfranchise otherwise eligible voters, and where less than half the citizen voting-age population is registered or voted in the most recent presidential election before it was designated a covered jurisdiction.[34] Covered jurisdictions need preclearance whenever they "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 the jurisdiction's designated coverage date.[35]

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[26] *Riley*, 128 S. Ct. at 1979.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Kennedy v. Riley, 445 F. Supp. 2d 1333 (M.D. Ala. 2006).

[31] *Id.* at 1336.

[32] Justice Ginsburg was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, and Alito.

[33] *Riley*, 128 S. Ct. at 1984–85.

[34] 42 U.S.C.A. § 1973b(b) (West 2003 & Supp. 2007).

[35] *Id.* § 1973c(a). The statute seems explicitly to require comparison between the changed practice and the practice in force on the coverage date. However, many courts have interpreted Section 5 to prevent changes that would retrogress from current practice, regardless of the practice on the coverage date. In his dissent, Justice Stevens wrote that Section 5 does act as a ratchet. *Riley,* 128 S. Ct. at 1988 (Stevens, J., dissenting). Chief Justice Roberts expressed skepticism of this interpretation several times at oral argument. Transcript of Oral Argument at 22–23,

Alabama is a covered jurisdiction. The Court framed the question presented, therefore, as whether the change from special election to appointment, mandated by the two state supreme court decisions, represented a change from a law "in force or effect."[36]

Because the Alabama Supreme Court is the definitive interpreter of Alabama law, the majority concluded that the special election system had never been "in force or effect" — the special election law had merely been a "temporary misapplication of state law."[37] Because the special election law had never been in effect, reinstating gubernatorial appointment did not amount to a change, and there was thus nothing to preclear.[38] Nevertheless, the majority, in dicta, indicated that state court actions have no special immunity from Section 5 review.[39] Furthermore, the outcome of the case might have been different had the misapplication of state law been longstanding, so as to gain de facto legitimacy.[40] Here, because the changes were immediately challenged on their first use, the Court found that the special election law had never been "in effect."[41]

Justice Stevens dissented.[42] He began by noting that Congress's recent reauthorization of Section 5 indicates that the Court ought to give the section its "broadest possible" reading[43] and that Section 5 ought to be read as a ratchet, applying to any change, not just any change from a practice that existed on a jurisdiction's coverage date.[44] On whether a change has occurred, Justice Stevens wrote, "It is difficult to say that the special election practice was never 'in force or effect' with a straight face."[45] He concluded that because Mobile County clearly switched from gubernatorial appointment to special elections and actually held an election, the switch back to gubernatorial appointment should have been precleared.[46] Justice Stevens admitted that the majority acknowledged that state court actions are subject to Section 5 preclearance, but he suspected the majority was

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43–44, 46, 54–55, *Riley*, 128 S. Ct. 1970 (2008) (No. 07-77); *see also* Election Law Blog, http://electionlawblog.org/archives/010809.html (May 15, 2008, 10:55). However, the majority opinion that he joined takes no position on the issue, noting that this case could be decided without reaching that issue. *Riley*, 128 S. Ct. at 1982 n.7 (majority opinion).

[36] *Riley*, 128 S. Ct. at 1982.

[37] *Id.* at 1984 (quoting Young v. Fordice, 520 U.S. 273, 282 (1997)).

[38] *Id.* at 1985.

[39] *Id.* at 1987 n.13.

[40] *Id.* at 1986.

[41] *Id.* at 1985.

[42] Justice Stevens was joined by Justice Souter.

[43] *Id.* at 1987 (Stevens, J., dissenting) (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)) (internal quotation mark omitted).

[44] *Id.* at 1988.

[45] *Id.* at 1989.

[46] *Id.* at 1990.

giving greater deference to the Alabama Supreme Court than would normally be accorded to a state legislature.[47] Justice Stevens found this disjunction inappropriate, particularly given the Alabama court's historical role in perpetuating discriminatory voting practices.[48]

*Riley* represents the decision of a Court no longer interested in giving the Voting Rights Act its "broadest possible" interpretation. The Court's tortured reading of the Act,[49] which allowed the Court to find that special elections, which did indeed occur, were never an election practice "in force or effect," provides insight into how the Court views the Act more broadly. The Court will soon decide a facial challenge to Section 5. Because the Court appears to minimize the significance of the preclearance requirement, some fear that the Court will no longer see it as a constitutional means of enforcing the Fifteenth Amendment.[50] However, precisely because *Riley* and cases like it will circumscribe the effective range of the Act, the Court is likely to continue to uphold the statute.

The Court will face the issue when it soon hears the appeal of *Northwest Austin Municipal Utility District No. One v. Mukasey*.[51] In *Northwest Austin*, the federal district court for the District of Columbia upheld the 2006 reauthorization of Section 5 against a constitutional challenge.[52] In prior cases, the Supreme Court had conducted only rationality review when the constitutionality of the Voting Rights Act was challenged,[53] though there is widespread belief that the Court will now adopt a stricter standard of scrutiny for the Act.[54] In *Northwest Austin*, the district court believed Section 5 continued to be subject only to rationality review, but, adopting a belt-and-suspenders approach, also decided the case under the stricter standard: whether Section 5 was "congruent and proportional" to the constitutional harm it sought to prevent.[55] The district court concluded that the congressional findings, developed in a series of hearings, had established that discrimination continued to exist with regard to voting and that Sec-

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[47] *Id.* at 1991.

[48] *Id.* at 1991–93.

[49] Chief Justice Roberts, in the *Riley* majority, acknowledged in the first question at oral argument that there was some absurdity in the position he eventually endorsed: "It's pretty hard to argue something wasn't in force and effect when they have an election under it, isn't it?" Transcript of Oral Argument at 4, *Riley*, 128 S. Ct. 1970 (No. 07-77).

[50] *See* sources cited *supra* note 9.

[51] 557 F. Supp. 2d 9 (D.D.C. 2008). Appeals from three-judge district court panels under the Voting Rights Act are to the Supreme Court. 42 U.S.C.A. § 1973b(a)(5) (West 2003 & Supp. 2007).

[52] *Nw. Austin Mun. Util. Dist. No. One*, 557 F. Supp. 2d at 65.

[53] *See, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966).

[54] *See* Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 HARV. C.R.-C.L. L. REV. 385, 387–88 (2008).

[55] 557 F. Supp. 2d at 66–67 (citing City of Boerne v. Flores, 521 U.S. 507 (1997)).

tion 5 was both rationally related to the goals of the Fifteenth Amendment and was congruent and proportional to the harms it sought to remedy.[56]

Less clear is whether the Supreme Court will be as easily impressed by the congressional record. *Riley* suggests it may not be. Both the rationality standard and the congruent and proportional standard require a careful examination of the purposes of the Fifteenth Amendment, the conditions that exist with regard to voting, and the means the Voting Rights Act uses to rectify those conditions.[57] The district court in *Northwest Austin* examined a broad range of data in the legislative history, such as the number of minority elected officials and the percentage of election changes that were denied preclearance, to determine that Congress was responding rationally to a real problem.[58]

Such analysis requires a broad understanding of Congress's purposes in passing the Act, something that appeared to elude the Court in *Riley*. For example, when the *Riley* majority tried to explain how requiring preclearance here would amount to a more severe impingement on states than typical Section 5 preclearance, it said that requiring preclearance "would effectively preclude Alabama's highest court from applying to a state law a provision of the State Constitution entirely harmonious with federal law."[59] The Court claimed doing so would be "a burden of a different order" from ordinary Section 5 intervention when a state is prevented from enacting a statute.[60] Yet this argument is entirely circular. This application of the state constitutional provision is only "harmonious with federal law" because the Court said so. And the Court said so because it saw Section 5 intervention here as remote from the original purposes of the Fifteenth Amendment and the Voting Rights Act. The Court did not recognize, as the dissent did, that facially neutral voting procedures often impact minority access to the political process.[61]

At first blush, this attitude may reflect a reluctance by the Court to continue to uphold the Voting Rights Act. After all, why should Congress impose such "'substantial' federalism costs"[62] when the result is only to tinker with a racially neutral election practice? However, be-

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[56] *Id.* at 76.

[57] *Id.* at 24–30.

[58] *Id.* at 36–65.

[59] *Riley*, 128 S. Ct. at 1986.

[60] *Id.*

[61] Though race was not directly at issue in the voting procedures at stake here, it is clear that the decision to switch between gubernatorial appointment and a local election does affect minorities' influence on the political process. *See* Posting of Rick Hills to PrawfsBlawg, http://prawfsblawg.blogs.com/prawfsblawg/2008/05/civil-rights-la.html (May 30, 2008, 07:50).

[62] Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 336 (2000) (quoting Lopez v. Monterey County, 525 U.S. 266, 282 (1999)).

cause *Riley* and other cases have limited the reach of the Voting Rights Act, what is left of the preclearance doctrine is the task of blocking those election changes that most directly affect the core goals of the Fifteenth Amendment and the Voting Rights Act. The Court is likely to conclude that this stripped-down Voting Rights Act is constitutional. The voluminous record developed during ten hearings before the House Judiciary Committee's Subcommittee on the Constitution demonstrated that real hurdles to effective voting persist for racial minorities and that the Act is a rational remedy for these harms.[63]

Still, the unusual legislative history of the bill gives reason to doubt the Act's future in the Court. Congress did not provide as persuasive a case for the Act's continued constitutionality as it could have. First, it is not clear that the Senate Judiciary Committee's report on the bill will be given any credit by the Court because it was issued *after* the Senate approved the bill, 98-0.[64] Second, the Congressional debate and record that does exist does not reflect the kind of deliberation that some believe the Court should require. The Voting Rights Act radically changed the electoral landscape, dramatically increasing the number of minority office holders and virtually eliminating the explicit denials of ballots to minorities that were common before 1965.[65] Yet the new Voting Rights Act does not reflect any of the original Act's successes. Professor Richard Pildes has speculated that the Court may be reluctant to uphold an act that continues to prescribe a 1965 remedy for 2008 racial inequity.[66] Professor Pildes, however, seems not to acknowledge "the conundrum of the prophylactic effect of Section 5":[67] that America may have changed because of Section 5. State and local officials may be less willing to enact racist voting restrictions, knowing they will not be precleared. Therefore, the reduction in racist behavior may not be a reason to modify the Voting Rights Act, as Professor Pildes seems to suggest, but a reason to continue it.

The outcome in *Northwest Austin* will depend on, among other issues, how the Court weighs the benefits of Section 5 and its federalism costs and how carefully the Court believes Congress needs to tailor the Act.[68] *Riley*, a 7-2 opinion by Justice Ginsburg, may provide little insight into these contested questions. However, *Riley* does suggest the Court is willing to interpret the Voting Rights Act's federalism costs

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[63] *See* Clarke, *supra* note 54, at 387; James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 217–18 (2007).

[64] Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 186 (2007).

[65] Rodríguez, *supra* note 1, at 1138–39; *see also* H.R. REP. NO. 109-478, at 18 (2006).

[66] *See* Pildes, *supra* note 9, at 153.

[67] Kousser, *supra* note 2, at 768.

[68] *Id.* at 768–69.

pragmatically. Specifically, the Court was willing to rule out preclearance because it believed requiring preclearance would impose too great a burden on an otherwise legitimate state court proceeding. Yet the Court declined to rule out preclearance beyond the particular situation presented in *Riley*. The metastory of *Riley* suggests the Court is not eager to impose stricter scrutiny on Section 5. In avoiding the debate about whether Section 5 acts as a ratchet or merely prevents retrogression from the conditions existing on the coverage date — even Chief Justice Roberts, who expressed repeated doubt about the ratchet theory at oral argument, did not bother to file a concurrence raising the issue[69] — *Riley* reflects a Court willing to avoid some battles for the sake of comity, at least with regard to Section 5.[70] The Court therefore seems unlikely to scrutinize the legislative record more strictly than the district court in *Northwest Austin* did. The Court likely would either accept that only rationality review applies to Section 5 or that if congruent and proportional review is applicable, the legislative record is sufficient to meet this standard.

*Riley* reflects a Court that is eager to bend — not break — the Voting Rights Act in response to the Court's concern with maintaining the harmony of the federal system. Even though the most significant changes made in the 2006 reauthorization of the Act were intended to overturn Supreme Court decisions that would limit the effectiveness of Section 5,[71] *Riley* indicates that the Court is likely to continue reading restrictions into the Voting Rights Act.

Though *Northwest Austin* will likely not provide the vehicle for doing so, the Court must interpret two substantive changes to the preclearance standard in the 2006 reauthorization, intended to repeal both *Reno v. Bossier Parish School Board*[72] and *Georgia v. Ashcroft*.[73] The *Bossier Parish* fix is quite direct. While *Bossier Parish* said preclearance can only be denied based on the intent of the change if that intent reflects a desire to make voting harder for minorities than it currently is, that is, "retrogressive intent,"[74] the 2006 act said any discriminatory intent — retrogressive or otherwise — is sufficient to deny preclearance.[75]

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[69] *See supra* note 35.

[70] This apparent desire for comity in *Riley* is reflected both in the absence of a concurrence by Chief Justice Roberts and in the unusual line-up of the Justices. If there is to be coming drama surrounding the Act, the Justices apparently decided that *Riley* was not to be its vehicle. One must therefore be guarded about drawing too many inferences from what the Justices may have viewed as a fairly inconsequential case.

[71] *See* Persily, *supra* note 64, at 207–08.

[72] 528 U.S. 320 (2000).

[73] 539 U.S. 461 (2003); *see also* Persily, *supra* note 64, at 207–08.

[74] *Bossier Parish Sch. Bd.*, 528 U.S. at 328.

[75] 42 U.S.C.A. § 1973c(c) (West 2003 & Supp. 2007).

The *Georgia v. Ashcroft* fix is more open to interpretation. The Court's desire to limit the Act, reflected in *Riley*, is instructive. *Georgia v. Ashcroft* held that a redistricting that reduces the number of districts a minority group controls need not always be deemed retrogressive.[76] The Court held that Section 5 gives states flexibility to create district maps that include both districts that minorities control and districts where minorities have significant influence, and that a plan that reduces the total number of minority-controlled districts is not necessarily retrogressive if the plan does not, overall, represent a reduction in minority influence.[77] In the 2006 reauthorization, Congress purported to repeal *Georgia v. Ashcroft* by stating that preclearance should be denied to any change in election practice that "has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice."[78] Clearly such open-textured language does not present as explicit a repeal of *Georgia v. Ashcroft* as the *Bossier Parish* fix did for that case. Indeed, interpreting the "ability to elect their preferred candidates of choice" language represents a "central question concerning the proper operation of the amended Voting Rights Act."[79] Even though the committee reports were quite fractious, this language was clearly intended to prevent the preclearance of maps that trade control for influence districts.[80] However, political scientists have been unable to reach a consensus on what constitutes an influence district.[81] States may be able to trade off control for coalition districts — where a minority does not control the district but can get its preferred candidates elected with the votes of like-minded whites. The houses of Congress are divided on the issue.[82] Ambiguous statutory language is an opportunity for the Court to reimpose its will on an unruly Congress, especially when contradictory legislative history indicates Congress did not agree on what the statute means. *Riley* indicates that, given this room to roam, the Court will refashion Section 5 in a less expansive form.

*Riley*, then, is an ambiguous result for supporters of the Voting Rights Act. *Riley* provides an indication that Section 5 will survive, but that, despite the efforts of Congress to the contrary, it may be a more limited Section 5. The Court appears poised to uphold the reau-

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[76] 539 U.S. at 479–80.

[77] *See id.* at 479–85.

[78] 42 U.S.C.A. § 1973c(b).

[79] *See* Persily, *supra* note 64, at 217.

[80] *Id.* at 235.

[81] *See* Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539–40 (2002).

[82] *See* S. REP. NO. 109-295, at 21 (2006) (saying such districts are not protected under Section 5); H.R. REP. NO. 109-478, at 71 (2006) (saying such districts are protected).

thorization, but also unbowed in its efforts to limit the situations that require preclearance.

## IV. ORIGINAL JURISDICTION

*Controversy Between States — Border Dispute* — For several hundred years, New Jersey and Delaware have quarreled over ownership and control of the Delaware River. In 1905, the states finally formed a compact[1] resolving several contested issues regarding the river, and in 1934 the Supreme Court put the ownership dispute to rest by defining the exact interstate boundary line.[2] Nevertheless, the states clashed again recently, this time concerning Delaware's authority to regulate wharves extending from New Jersey's shore. As a result, the Supreme Court reentered the centuries-old dispute last Term in *New Jersey v. Delaware*[3] (*New Jersey III*), ruling that Delaware could prevent a large wharf from being built into the river from New Jersey. The Court upheld Delaware's authority to regulate riparian[4] structures extending out from the New Jersey shore but limited this authority to situations of extraordinary character. The Court's moderate extraordinary character test is a doctrinal novelty, but in practice it may lead to more socially desirable uses of the river than either of the options offered by the dissenters.

The history of the Delaware River conflict is as colorful as it is long. The origins of the dispute go back at least as far as 1682, when the Duke of York, the heir to the throne, delivered a deed to William Penn for a parcel of land along the Delaware River.[5] King Charles II owed Penn's late father a large debt, and repaying it to Penn with land in North America was a cheap option.[6] For his part, Penn had wanted to establish a colony to the west of the Delaware River, and so the land

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[1] 23 Del. Laws 12 (1905); 1905 N.J. Laws 67. The 1905 Compact was ratified by Congress and codified as Act of Jan. 24, 1907, ch. 394, 34 Stat. 858.

[2] New Jersey v. Delaware (*New Jersey II*), 291 U.S. 361, 385 (1934).

[3] 128 S. Ct. 1410 (2008).

[4] A riparian landowner is one whose property abuts the water's edge. Beyond having the normal rights incident to land ownership, riparians can also take advantage of the water source in a variety of ways. Most frequently, riparians use the water for crop production, household usage, and various industries. A minority of riparians also exercise their right to wharf out to navigable water for commercial purposes. *See* JOHN M. GOULD, A TREATISE ON THE LAW OF WATERS, INCLUDING RIPARIAN RIGHTS, AND PUBLIC AND PRIVATE RIGHTS IN WATERS TIDAL AND INLAND § 148, at 297 (3d ed. 1900), cited in Expert Report of Professor Joseph L. Sax at 3, *New Jersey III*, 128 S. Ct. 1410 (2008) (No. 134, Orig.) [hereinafter Sax Report] (defining riparian rights as they existed around the time of the 1905 Compact).

[5] *New Jersey II*, 291 U.S. at 364.

[6] *See* JOHN A. MUNROE, HISTORY OF DELAWARE 35 (5th ed. 2006); Expert Report of Carol E. Hoffecker, Ph.D. at 6–7, *New Jersey III*, 128 S. Ct. 1410 (2008) (No. 134, Orig.) [hereinafter Hoffecker Report].