

What Will the Life of *Riley v. Kennedy* Mean for Section 5 of the Voting Rights Act?

Michael J. Pitts

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Election Law Commons](#)

Recommended Citation

Michael J. Pitts, *What Will the Life of *Riley v. Kennedy* Mean for Section 5 of the Voting Rights Act?*, 68 Md. L. Rev. 481 (2009)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol68/iss3/3>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

MARYLAND LAW REVIEW

VOLUME 68

2009

NUMBER 3

© Copyright Maryland Law Review 2009

Articles

WHAT WILL THE LIFE OF *RILEY v. KENNEDY* MEAN FOR SECTION 5 OF THE VOTING RIGHTS ACT?

MICHAEL J. PITTS*

I. INTRODUCTION

Section 5 of the Voting Rights Act of 1965¹ requires certain state and local governments to submit changes in their voting practices to the federal government for approval prior to implementation (i.e., for preclearance) so that the federal government can block changes that discriminate against minority voters.² *Riley v. Kennedy*³—decided by the Supreme Court of the United States during the 2007 Term—is an unusual Section 5 case involving whether the State of Alabama had to secure preclearance for a switch in the method of filling vacancies on the Mobile County Commission. The most basic oddity of *Riley*—at least from the standpoint of Section 5—was that the switch in the method of filling vacancies did not come about through legislation or executive order, but through a judicial decree from the Alabama Su-

Copyright © 2009 by Michael J. Pitts.

* Associate Professor, Indiana University School of Law—Indianapolis; John S. Grimes Fellow. Thanks to Bob Berman, Donald Jacobsen, Bob Kengle, and Florence Roisman for helpful thoughts and comments during the development of this Article. Thanks also to Susan Boland of the Ruth E. Lilly Law Library at Indiana University School of Law—Indianapolis for research assistance.

1. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (codified as amended at 42 U.S.C.A. § 1973c (West Supp. 2008)).

2. Technically, political parties in state and local governments covered by Section 5 are also subject to the preclearance requirement. 28 C.F.R. § 51.7 (2008). However, in many instances in this Article I will use the phrase “state and local governments” to avoid use of the Section 5 jargon term “covered jurisdiction.”

3. 128 S. Ct. 1970 (2008).

preme Court. Ultimately, a seven-Justice majority held that the switch did not need to be submitted for preclearance.⁴ The question, though, remains: What does *Riley* mean for the future of Section 5?

One way to interpret *Riley* is as an unusual case likely to have only a minimal impact on the ability of Section 5 to fulfill its central mission of preserving and protecting the fundamental rights of voters from racial and language minority groups. This view of *Riley* would consider the decision an outlier constrained to a particular set of facts not likely to be found in the everyday, core, federal decision-making related to Section 5. Indeed, Justice Ruth Bader Ginsburg's opinion for the Court's majority appears to be an intentional attempt to constrain any future application of *Riley* by focusing on the particularized facts related to the two-decade evolution regarding how vacancies on the Mobile County Commission would be filled. On this view, *Riley* may not be such a bad loss for minority voters protected by Section 5.

Then again, *Riley* could be a very dangerous decision for minority voters residing in places covered by Section 5 because it may represent the first stage of a new strategy from the conservative majority on the Supreme Court for curbing Section 5's vitality. To see how *Riley* might represent a new strategy, one has to understand a few things that will be developed in far greater detail in the main body of this Article. First, Section 5 has a procedural aspect and a substantive aspect. Second, the Supreme Court's Section 5 jurisprudence since the early 1990s was largely positive for minority voters when it came to the procedural side of Section 5 and uniformly negative for minority voters when it came to the substantive side of Section 5. Third, in 2006, Congress not only extended Section 5⁵ but amended it in a way that sharply rebuked the Supreme Court's substantive interpretations of the provision.⁶ Fourth, it is likely that the conservative majority on the Supreme Court still desires to reduce the reach and effectiveness of Section 5. Fifth, *Riley*—the first post-extension Section 5 decision from the Court—represents a rare procedural loss for minority voters.

4. *Id.* at 1976, 1982.

5. Technically, Congress did not extend Section 5 but rather extended Section 4 of the Voting Rights Act. Section 4 is the portion of the Act that designates the state and local governments subject to Section 5 coverage. 42 U.S.C.A. § 1973b(b) (West Supp. 2008). In common parlance, however, most commentators describe what Congress did as the extension of Section 5, not Section 4. See, e.g., 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, 385–86 (2008) (discussing the “recently reauthorized Section 5 provision”).

6. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, §§ 2(b)(6), 5, 120 Stat. 577, 578, 580–81 (codified at 42 U.S.C.A. § 1973c (West Supp. 2008)).

Sixth, *Riley* might represent the first in a series of decisions that limit Section 5's procedural reach. Seventh, limitations on Section 5's procedural reach have a significant impact on the fundamental right to vote because such limitations constrain the provision's ability to deter state and local governments from adopting voting laws that harm minority voters.

In the pages that follow, I will develop in detail the two potential paths the life of *Riley* might take. The first (shorter) Part of this Article will make the case for the narrow application of *Riley*.⁷ The second (lengthier) Part will adopt the view that *Riley* represents a much more dangerous decision for the vitality of Section 5 than it may seem at first glance.⁸ This Part develops the idea that *Riley* marks the first step in a new Supreme Court strategy to make Section 5 less effective in protecting the fundamental rights of minority voters through the trimming of the procedural side of Section 5. This Part also describes in detail two additional areas where the Court might, in the future, trim Section 5's procedural scope. Finally, the Article will conclude with a call for Congress to take action to ensure that *Riley* remains a narrow opinion and not the harbinger of something much, much worse.

II. RILEY AS NOTHING MORE THAN A BLIP ON THE SECTION 5 RADAR SCREEN

Even though *Riley* represents a loss for minority voters in the first post-extension Section 5 decision rendered by the Supreme Court, it is possible to view the case as representing only a moderate negative for minority voters who reside in areas covered by Section 5. As will be explained below, *Riley* no doubt harms minority voters protected by Section 5 because the decision opens up an additional avenue for state and local governments to engage in voting-related discrimination against minority voters. That acknowledged, because *Riley* represents such a unique set of factual circumstances and because Justice Ruth Bader Ginsburg appears to have intentionally crafted her opinion for the Court's seven-Justice majority in a narrow manner, *Riley* may not represent a very significant inroad into the protections afforded minority voters by Section 5.

7. See *infra* Part II.

8. See *infra* Part III.

A. *The Convoluted History of Filling Vacancies on the Mobile County Commission*

The enactment of Section 5 of the Voting Rights Act of 1965 represents perhaps the most appropriate starting point for describing the saga of *Riley* because Section 5's enactment formed the baseline against which to judge all further voting changes adopted by the State of Alabama for Mobile County. The enactment of Section 5 froze into place the voting laws as they existed in Alabama (and several other state and local areas) as of November 1, 1964.⁹ Among the thousands of voting laws frozen into place in Alabama at that time was a law providing that vacancies on county commissions would not be filled through special election but would, instead, be filled through gubernatorial appointment.¹⁰ In other words, if a member of any one of Alabama's sixty-seven county commissions resigned from office before his or her term expired, the governor, not the electorate, had the exclusive ability to select the replacement commissioner to close out whatever time remained in that term of office. Notably, the provision for gubernatorial appointment in the event of a county commission vacancy applied statewide, without exception.¹¹ And, with the enactment of Section 5, any change the state desired to make to its method of filling vacancies on county commissions would need to be reviewed and approved, or "precleared," by the federal government (either the United States Attorney General or a three-judge panel of the United States District Court for the District of Columbia) prior to implementation to ensure that Alabama did not employ any discriminatory changes.¹²

9. 30 Fed. Reg. 9897 (Aug. 7, 1965); *see also* 28 C.F.R. § 51 app. (2008) (listing coverage determinations for the preclearance requirement of Section 5). Currently, Section 5 applies to all or parts of sixteen states. *Id.* When Section 5 was initially adopted in 1965, the entire States of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia were covered, along with forty counties in North Carolina and a few other counties in Arizona, Hawaii, and Idaho. S. REP. NO. 94-295, at 12 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 774, 778.

10. ALA. CODE § 12-6 (1959). Alabama later recodified this provision without changing its substance: "In case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he is appointed." ALA. CODE § 11-3-6 (LexisNexis 1975) (repealed 2007). Gubernatorial appointment when a vacancy occurred in a county commission has roots that began nearly a century prior to November 1, 1964. *See* Brief for Appellant at 6, *Riley v. Kennedy*, 128 S. Ct. 1970 (2008) (No. 07-77). Prior to 1868, Alabama law allowed county commissions to fill their own vacancies by appointment. *Id.* In 1868, Alabama's Reconstruction Legislature enacted a law allowing for the governor to fill county commission vacancies. *Id.*

11. ALA. CODE § 11-3-6 cmt.

12. *See* 42 U.S.C.A. § 1973c(a) (West Supp. 2008).

When Section 5 first came into existence, the Mobile County Commission represented no exception to the general rule in the State of Alabama that commission vacancies would be filled by gubernatorial appointment. However, Mobile County's lack of exceptionalism changed in the mid-1980s. In 1985, the Alabama state legislature adopted for Mobile County an exception to the general rule of gubernatorial appointment.¹³ Instead of gubernatorial appointment, a special election would be used to fill commission vacancies.¹⁴ Of utmost importance, though, was the manner in which the Alabama legislature chose to make this switch in the method of filling vacancies. To enact this change, the Alabama legislature passed a "local law," a law that operates only for a particular county rather than statewide.¹⁵ Of course, because of the existence of Section 5, passage of state legislation did not mark the last step Alabama needed to take in order to implement the switch from filling vacancies on the Mobile County Commission through gubernatorial appointment to filling vacancies through special election. Alabama had to, in the vivid words of Justice Hugo Black, go "hat in hand begging for permission"¹⁶ from the federal government to enforce the law. And that is exactly what Alabama did, ultimately receiving permission for the switch from the United States Attorney General in June 1985.¹⁷

A couple of years after securing Section 5 approval from the Attorney General, a vacancy arose on the Mobile County Commission that sparked state court litigation. The vacancy occurred in District 1, a district that was majority African-American and that had been the product of a litigative struggle for African-American voting rights in Mobile County.¹⁸ Following the dictates of the local act that had been

13. Act of Apr. 8, 1985, No. 85-237, § 1, 1985 Ala. Laws 137.

14. *Id.* Technically, the 1985 Act did not mandate that every vacancy on the county commission be filled by special election, but only those vacancies that occurred with twelve or more months remaining in the term. *Id.*

15. The Alabama Constitution defines three types of laws. A "general law" is "a law which in its terms and effect applies either to the whole state, or to one or more municipalities of the state less than the whole in a class." ALA. CONST. art. IV, § 110. A "special or private law" is a law that "applies to an individual, association or corporation." *Id.* A "local law" is "a law which is not a general law or a special or private law." *Id.*

16. *Allen v. State Bd. of Elections*, 393 U.S. 544, 596 (1969) (Black, J., dissenting).

17. Letter from Wm. Bradford Reynolds, Assistant Attorney Gen. for Civil Rights, to Lynda K. Oswald, Esq., Assistant Attorney Gen. (June 17, 1985) (on file with author).

18. Brief for Appellees at 11–13, *Riley v. Kennedy*, 128 S. Ct. 1970 (2008) (No. 07-77); see Posting of Pam Karlan to Balkinization, <http://balkin.blogspot.com/2008/06/rick-hills-marshall-mcluhan-moment.html> (June 4, 2008, 7:31 EST). Professor Pam Karlan has concisely described the litigation history behind District 1:

A few years after the initial passage of the Voting Rights Act, black citizens in Mobile County, represented by Jim Blacksher, brought suit in federal court. In a

passed by the state legislature and had received Section 5 approval, Alabama Governor Guy Hunt called a special vacancy election to be held in June 1987.¹⁹ But several months prior to the conduct of that special vacancy election, litigation was commenced in state court. In April 1987, Willie H. Stokes, a registered voter in Mobile County, filed a state court lawsuit contesting the validity of conducting a special election.²⁰ Stokes argued that the Alabama Constitution prevented the local law, which allowed for a special election in Mobile County, from trumping the general state law that required gubernatorial appointment.²¹ Stokes's argument went nowhere at the state trial court level.²² Yet Stokes did not go away quietly; he appealed immediately and sought an order to stay the special election pending a decision from the state's highest judicial authority, the Alabama Supreme Court.²³ But Stokes's request for a stay was denied, the special election went ahead as planned, Sam Jones won the contest, and Jones assumed his place on the Mobile County Commission in July 1987.²⁴

Even though it declined to prevent the special election from going forward, the Alabama Supreme Court was not done with the case. More than a year after Sam Jones's election to the Commission,²⁵ the Alabama Supreme Court opined that the state trial court had incorrectly decided the question of whether the local law providing for special vacancy elections conformed to the dictates of Alabama's Constitution.²⁶ Yet, despite the fact that the Alabama Supreme Court found the local law to be unconstitutional and, therefore, had called

decision from which the county did not appeal, the district court held that the use of at-large elections unconstitutionally diluted black voting strength because the system had been adopted, modified, and maintained with the purpose of preventing black voters from electing a candidate of their choice. The court then ordered a plan to elect the commissioners from districts. One of those districts was majority black, and it has consistently elected a black candidate to represent it.

Id.

19. *Riley*, 128 S. Ct. at 1978.

20. *Stokes v. Noonan*, 534 So. 2d 237, 237-38 (Ala. 1988).

21. *Id.* at 238 ("Stokes contends that the subject of local Act No. 85-237 is subsumed by a general law, § 11-3-6, Code of 1975, and therefore, under Art. IV, § 105, Constitution 1901, and this Court's decision in *Peddycoart v. City of Birmingham* is unconstitutional." (citation omitted)).

22. *See id.* at 237 (noting the prior history of the case).

23. *Riley*, 128 S. Ct. at 1978.

24. *Id.*

25. The *Stokes* decision was issued on September 30, 1988. *Stokes*, 534 So. 2d at 237. The specific reasoning behind the Alabama Supreme Court's decision is not important for purposes of this Article.

26. *See id.* at 238 ("[W]e are convinced that Act No. 85-237 clearly offends § 105 of the Constitution of 1901.").

into question the validity of the special vacancy election that had already been conducted more than a year earlier, the court's opinion did not provide clear guidance as to whether Jones should be removed from office. Further controversy over Jones's status as a county commissioner was avoided, though, when Governor Hunt sprang into action by using his newly reinstated gubernatorial appointment power to follow the will of the voters at the special election and seat Jones on the Commission.²⁷ In the end, then, the Alabama Supreme Court's decision had no immediate impact on the type of representation the citizens of Mobile County Commission District 1 received.

With Governor Hunt's swift move to avert controversy and the Alabama Supreme Court's decision having no obvious on-the-ground impact, nothing more happened in the immediate aftermath of the court's decision. This lack of action, especially in relation to Section 5, was crucial. To concisely sum up the chain of events so far: the State of Alabama had passed a law switching the method of filling vacancies on the Mobile County Commission from gubernatorial appointment to special election; the state had received Section 5 approval from the Attorney General for the switch; the state had actually implemented the change at a special vacancy election; and the Alabama Supreme Court had found the legislation mandating a special vacancy election to be inconsistent with the state constitution, thus reverting the method of filling vacancies back to gubernatorial appointment. With this chain of events, the state's lawyers might have decided to seek Section 5 approval for the action spawned by the Alabama Supreme Court's decision to reinstate gubernatorial appointment as the method of filling vacancies on the Mobile County Commission. The state's lawyers, however, did not seek Section 5 review.²⁸

27. *Riley*, 128 S. Ct. at 1979.

28. It is unsurprising that no effort was taken to secure Section 5 approval for the reversion to gubernatorial appointment after Governor Hunt appointed Sam Jones to the Mobile County Commission. The state likely thought no change had occurred that necessitated federal approval. After all, that was the state's position in *Riley*. See Brief for Appellant at 8, 51, *Riley*, 128 S. Ct. 1970 (No. 07-77) (arguing that *Stokes* and *Riley* involved no "changes" in state practices for Section 5 purposes because those cases "merely reaffirmed the propriety of gubernatorial appointments"). Even more fundamentally, no one had an incentive to bring litigation to force the state to secure Section 5 approval. Jones, the party who stood to personally lose the most from the Alabama Supreme Court decision, had retained his seat, and the voters who supported Jones were also presumably pleased with the final outcome. As for those voters who did not support Jones, Section 5 submission of the change from special election to gubernatorial appointment was not going to bring about any different outcome as to who would hold the seat in District 1.

Action related to the method of filling vacancies on the Mobile County Commission remained dormant for more than fifteen years until the Alabama state legislature started a new round of controversy by passing another law related to the filling of vacancies on county commissions in the state. In 2004, Alabama enacted legislation providing that vacancies on all county commissions in the state were to be filled by gubernatorial appointment “[u]nless a local law authorizes a special election.”²⁹ What the Alabama legislature essentially did was re-enact the default statewide law for filling vacancies through gubernatorial appointment but, in addition, explicitly authorized itself to adopt localized exceptions to the default practice. As in 1985, though, there remained an additional step to implementing the new legislation: the need to secure Section 5 approval. The state’s lawyers submitted the 2004 legislation to the United States Attorney General, who granted preclearance on September 28, 2004.³⁰

With the passage of the 2004 legislation, its Section 5 preclearance, and another vacancy occurring in the Mobile County Commission, a second state law debate erupted over the manner in which commission vacancies would be filled. In October 2005, Sam Jones (yes, the same Sam Jones) was elected mayor of the City of Mobile, causing another vacancy to occur in District 1’s Commission seat.³¹ Following the election of Jones as mayor, it appeared that Governor Bob Riley would move to fill the District 1 vacancy by exercising

29. Act of May 14, 2004, No. 2004-455, § 1, 2004 Ala. Laws 809 (“Unless a local law authorizes a special election, in case of a vacancy, it shall be filled by appointment by the governor, and the person so appointed shall hold office for the remainder of the term of the commissioner in whose place he or she is appointed.”). One element of *Riley* that raises confusion is the slippery, formalistic nature of the Alabama Constitution’s ban on local legislation. In *Stokes v. Noonan*, the Alabama Supreme Court held that a local law could not trump general state law unless the general state law allowed for local laws to be passed. *Stokes*, 534 So. 2d at 238–39. Because the general law required vacancies to be filled by gubernatorial appointment and the legislature then passed a separate law mandating that vacancies in Mobile County be filled by special election, a violation of the Alabama Constitution occurred. *Id.* However, if the legislature were to adopt a general law requiring vacancies to be filled by gubernatorial appointment unless a local law authorized a special election and then subsequently adopted a separate law mandating that vacancies in Mobile County be filled by special election, no violation of the Alabama Constitution would occur. *Id.* at 239; *see also* Baldwin County v. Jenkins, 494 So. 2d 584, 587 (Ala. 1986) (holding that because the statute at issue allowed a contrary local law to take effect, the local law was constitutional). In short, Alabama’s constitutional ban on local legislation appears to have a significant loophole and to be primarily formalistic in nature.

30. Letter from Joseph D. Rich, Chief, Voting Section, Civil Rights Division, U.S. Dep’t of Justice, to Charles B. Campbell, Esq., Assistant Attorney Gen., State of Ala. (Sept. 28, 2004) (on file with author).

31. *Riley v. Kennedy*, 928 So. 2d 1013, 1014 (Ala. 2005).

his apparent power of gubernatorial appointment.³² Seeing what was coming, several registered voters and state legislators filed an action in state trial court, seeking an injunction to prevent Governor Riley from filling the vacancy and seeking a writ of mandamus directing a Mobile County probate judge to conduct a special vacancy election in District 1.³³ The registered voters and state legislators argued that they were entitled to this relief because the 2004 Act, allowing for local laws that authorize special vacancy elections, had revived the previously dormant 1985 Act.³⁴ Put differently, they argued that the 2004 Act resolved the 1985 Act's state constitutional infirmities identified by the Alabama Supreme Court nearly two decades earlier. The trial court granted the relief sought, ordering that a special election had to occur,³⁵ and the county scheduled a special vacancy election for January 2006.³⁶ In November 2005, however, the Alabama Supreme Court reversed the trial court decision and held that the 2004 Act did not revive the 1985 Act.³⁷ Governor Riley then appointed Juan Chastang—an African-American Republican—to fill the vacant seat.³⁸

But the controversy over filling vacancies on the Mobile County Commission did not conclude with Governor Riley's appointment of Juan Chastang; instead, the dispute shifted to federal court. A claim was brought in federal court by many of the same plaintiffs who had unsuccessfully litigated the state law case seeking revival of the 1985

32. *See id.* at 1015 (“According to the complaint, Governor Riley, through his legal advisers, had made public statements indicating that he would fill by appointment the vacancy created when Jones resigned his seat on the county commission to assume the office of mayor.”).

33. *Id.* at 1014. The plaintiffs in the state law case were three registered voters—one former state legislator and two current state legislators. *Riley*, 128 S. Ct. at 1979; *see also* Posting of Pam Karlan to Balkinization, <http://balkin.blogspot.com/2008/06/rick-hills-marshall-mcluhan-moment.html> (June 4, 2008, 7:31 EST) (providing background on current and former legislators who served as plaintiffs).

34. *See Riley*, 928 So. 2d at 1015 (noting the plaintiffs' argument that Act No. 2004-455 revived Act No. 85-237).

35. *Id.*

36. *Riley*, 128 S. Ct. at 1979 (“While the Governor's appeal to the Alabama Supreme Court was pending, Mobile County's election officials obtained preclearance of procedures for a special election, scheduled to take place in January 2006.”).

37. *Riley*, 928 So. 2d at 1017. The Alabama Supreme Court held that the 2004 Act did not revive the 1985 Act because the 2004 Act did not expressly state, in its statutory language, that it was intended to have a retroactive effect. *Id.*

38. *Riley*, 128 S. Ct. at 1979; *see also* Brief for Abigail Thernstrom and Stephan Thernstrom as Amici Curiae Supporting Appellant at 7, *Riley*, 128 S. Ct. 1970 (No. 07-77) (noting that Juan Chastang was an African-American); Posting of Janai Nelson to Talking Justice, <http://communities.justicetalking.org/blogs/day28/default.aspx> (May 29, 2008, 7:30 EST) (identifying Juan Chastang as a Republican).

Act.³⁹ In this new venue, they argued that Section 5 required the State of Alabama to seek and secure federal approval of the two Alabama Supreme Court decisions that had rendered the 1985 Act a dead letter.⁴⁰ A three-judge federal district court panel agreed with the plaintiffs' argument, holding that the two Alabama Supreme Court decisions—mandating gubernatorial appointment as the method of filling vacancies on the Mobile County Commission—constituted changes from the practice of filling vacancies by special election that had received Section 5 approval in 1985.⁴¹ After the federal district court decision, the state's lawyers sought Section 5 preclearance from the United States Attorney General for the reversion from special elections to gubernatorial appointments, but the Attorney General refused preclearance, finding that the switch discriminated against African-Americans.⁴² After the Attorney General refused preclearance, the federal district court vacated Governor Riley's appointment of Juan Chastang.⁴³ A special election was then held in October 2007 to fill the vacancy. In that special election, Chastang lost in a landslide to Merceria Ludgood.⁴⁴ Ultimately, though, Governor Riley was victorious in an appeal of the three-judge panel decision to the United States Supreme Court.

B. *The Supreme Court's Opinion*

The opinion crafted by Justice Ruth Bader Ginsburg (for a seven-Justice majority) honed in on a question of Section 5 statutory interpretation that revolves around the meaning of the words "in force or

39. *Kennedy v. Riley*, 445 F. Supp. 2d 1333, 1334 (M.D. Ala. 2006).

40. *See id.* ("This three-judge court has been convened to consider the claim of plaintiffs Yvonne Kennedy, James Buskey, and William Clark that, under § 5 of the Voting Rights Act of 1965, the State of Alabama was required, but failed, to preclear two decisions of the Alabama Supreme Court: *Stokes v. Noonan* and *Riley v. Kennedy*." (citations omitted)).

41. *See id.* at 1336 ("We therefore hold that, because Act No. 85-237 is the baseline and because *Stokes v. Noonan* invalidated Act No. 85-237 and *Riley v. Kennedy* held that Act No. 85-237 was not rendered enforceable by Act No. 2004-455, the two decisions constituted changes that should have been precleared before they were implemented.").

42. *See* Letter from Wan J. Kim, Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice, to Troy King, Attorney Gen., and John J. Park Jr., Assistant Attorney Gen., State of Ala. (Jan. 8, 2007), available at http://www.usdoj.gov/crt/voting/sec_5/ltr/1_010807.htm ("The transfer of electoral power effected by *Stokes v. Noonan* and *Riley v. Kennedy* appears to diminish the opportunity of minority voters to elect a representative of their choice to the Mobile County Commission Under these circumstances, the State has failed to carry its burden of proof that the change is not retrogressive.").

43. *Kennedy v. Riley*, No. 2:05cv1100-MHT, 2007 WL 1284912, *1 (M.D. Ala. May 1, 2007).

44. *See* Certification of Results, Mobile County Board of Election Supervisors, Alabama (Oct. 16, 2007) (on file with author) (reporting the election results for Ludgood and Chastang).

effect.”⁴⁵ To put it mildly, Section 5 does not represent a model of statutory clarity—the provision’s first sentence contains a staggering 398 words!⁴⁶ The core language of the provision (at least for purposes of *Riley*) requires a state to obtain Section 5 preclearance whenever it “enact[s] or seek[s] to administer any . . . [practice] with respect to voting different from that in force or effect.”⁴⁷ In *Riley*, there was no question that Alabama was seeking to “administer” a practice that required gubernatorial appointment. Moreover, there was no question in *Riley* that the use of gubernatorial appointment was a practice related (“with respect”) to voting.⁴⁸ The question in *Riley* was whether the use of special elections to fill vacancies on the Mobile County Commission was ever “in force or effect,” as that term has been defined for purposes of Section 5.⁴⁹ Put simply, if the use of special elections was never “in force or effect” then the use of a system of gubernatorial appointment for filling vacancies on the Mobile County Commission was not a “different” practice that needed to receive Section 5 approval from the federal government. In other words, if the use of special elections had never been in existence for Section 5 purposes, the Alabama Supreme Court’s reinstatement of gubernatorial elections did not represent a voting change.⁵⁰

There are several possible ways for a court to determine whether a voting practice is “in force or effect.” One possible way would be to create a clear rule that a voting practice, even if it had been implemented at an election, cannot be considered to be “in force or effect” if the implementation of that voting practice amounted to a violation of state law. Such a rule would have some obvious benefits. First, it

45. 42 U.S.C.A. § 1973c(a) (West Supp. 2008). In her opinion for the majority, Justice Ginsburg framed the general dispute to be settled by the Court as “whether § 5 required Alabama to obtain preclearance before reinstating the practice of gubernatorial appointment in the wake of the decision by its highest court invalidating the special-election law.” *Riley v. Kennedy*, 128 S. Ct. 1970, 1981–82 (2008).

46. *See* 42 U.S.C.A. § 1973c(a).

47. *Id.*

48. *See* *Allen v. State Bd. of Elections*, 393 U.S. 544, 569–70 (1969) (holding that a switch from electing a county officer to appointing a county officer amounts to a voting change).

49. *Riley*, 128 S. Ct. at 1982.

50. In some respects, there is a bit of a fictional quality to the idea that special vacancy elections were never “in force or effect” when, in reality, a special election occurred. In some ways this fiction is reminiscent of a scene from the film *The Hunt for Red October*, where the United States government stages a false sinking of a runaway Russian submarine. In that scene, after detonating a torpedo before it hits the submarine, Admiral James Greer (played by James Earl Jones) flashes his Central Intelligence Agency Badge at a commander who had control over the torpedo and says: “Now, understand commander. That torpedo did not self-destruct. You heard it hit the hull. And I was never here.” *THE HUNT FOR RED OCTOBER* (Paramount Pictures 1990).

would be a relatively clear rule, although there would still undoubtedly be disputes over whether or not a particular practice complied with state law.⁵¹ Second, such a rule would avoid a situation where a state or local government might be put in the slightly awkward position of violating state law in order to comply with federal law.⁵² But, such a rule could lead to gamesmanship by officials in jurisdictions covered by Section 5 because they might knowingly violate state law for several years and then, once caught, retreat to discriminatory tactics.⁵³

Regardless of the costs and benefits of a rule mandating that no voting practice in violation of state law can ever be considered to be “in force or effect,” a pair of Supreme Court decisions reject this position. Most prominently, in *Perkins v. Matthews*⁵⁴ the Court had to determine which method of electing aldermen for the City of Canton, Mississippi, had been “in force or effect” as of the applicable date of coverage for the city—November 1, 1964.⁵⁵ In 1961, the city elected its aldermen using a single-member district system.⁵⁶ In 1962, the Mississippi legislature enacted a law requiring the city to conduct at-large elections, but the city completely ignored the 1962 state law and in 1965 conducted elections using single-member districts.⁵⁷ In 1969, however, the city sought to follow the 1962 state law and conduct at-

51. It is interesting to note that federal judges making Section 5 decisions might not be in the best position to resolve disputes over the application of state law.

52. A brief explanation of a scenario where this might happen is appropriate here. If a practice in violation of state law can serve as the baseline for whether a change has occurred then presumably that practice will also serve as the baseline for determining whether any new change discriminates against minority voters in violation of Section 5. If the new practice does, indeed, violate Section 5 then the jurisdiction could be forced to continue to implement a change that violates state law. To provide a more concrete example, suppose that a city has been violating state law by using single-member districts and that single-member districts are the practice “in force or effect.” The city then desires to switch to at-large elections—a system that would not violate state law. The city submits the change to at-large elections for Section 5 review and the federal government rejects the change as discriminatory. At the end of the day, this scenario leaves the city with no choice but to continue to implement the single-member district system that violates state law.

53. For instance, a city might attempt to minimize the influence of minority voters by illegally using single-member districts instead of the at-large elections authorized by state law. Later, though, when the minority population has become sizeable enough to control the outcome in one of those single-member districts, city officials might revert to at-large elections and claim that such a switch did not need Section 5 approval because the use of single-member districts violated state law.

54. 400 U.S. 379 (1971).

55. *Id.* at 394–95.

56. *Id.* at 394.

57. *Id.*

large elections.⁵⁸ The question, then, was what practice was “in force or effect” as of the date Section 5 froze into place the voting practices of the city—November 1, 1964. The Supreme Court, taking a functional view, held that the practice “in force or effect” as of November 1, 1964, was single-member districts even though state law technically required at-large elections.⁵⁹

More than a decade later, in *Lockhart v. United States*,⁶⁰ the Court faced a dilemma similar to the one it had faced in *Perkins*. In *Lockhart*, the city had employed a numbered post system to elect its city council for more than half a century.⁶¹ It appeared, however, that numbered posts had not been authorized by Texas state law.⁶² The Court, though, deemed it to be “irrelevant” whether or not Texas state law authorized the city to conduct elections using numbered posts.⁶³ Instead, the Court again took a functional view and held that numbered posts were the practice “in force or effect” as of the date Section 5 coverage began.⁶⁴ In sum, these decisions stand for the proposition that the failure of a voting practice to comply with state law does not amount to a *per se* reason to conclude the practice was never “in force or effect.”

Another possible route to deciding whether a voting practice has been “in force or effect” would be to create a rule that any practice that has received preclearance amounts to the practice having been “in force or effect.” Again, a positive here would be the creation of a relatively clear rule, although there might still be arguments about whether or not a particular practice has actually received the requisite Section 5 approval. Moreover, such a rule would be unlikely to lead to any change being adopted that would discriminate against minority voters in violation of Section 5—after all, if the existing practice has been precleared, that means the federal government has determined

58. *See id.* (“Canton now argues that it had no choice but to comply with the 1962 statute in the 1969 elections.”).

59. *See id.* at 395 (“Consequently, we conclude that the procedure *in fact* ‘in force or effect’ in Canton on November 1, 1964, was to elect aldermen by wards.”). In his dissent in *Perkins*, Justice John Marshall Harlan II stated that he would have created a rule where the procedure considered to be “in force or effect” would have been the procedure required by state law “[b]arring state attempts to resurrect long-ignored statutes.” *Id.* at 400 (Harlan, J., concurring in part and dissenting in part).

60. 460 U.S. 125 (1983).

61. *Id.* at 132 n.6.

62. *See id.* at 132 (noting that “Texas law is not entirely clear on this point”).

63. *See id.* (“The proper comparison is between the new system and the system actually in effect on November 1, 1972, regardless of what state law might have required.” (footnote omitted)).

64. *Id.* at 133.

the practice does not result in Section 5-type discrimination against minority voters. But, such a rule could lead to state and local governments using Section 5 as a cover for end-running state law. For example, a city might desire to adopt a single-member district system even though such a system violates state law. The city might then submit the single-member district plan to the federal government and receive Section 5 approval resulting in the freezing in place of the illegal (under state law) single-member district system.

Again, though, regardless of the benefits and drawbacks of a *per se* rule allowing for any Section 5 precleared practice to be considered “in force or effect,” Supreme Court precedent rejects this position. *Young v. Fordice*⁶⁵ involved a provisional voter registration plan used in the State of Mississippi. Because it appeared the Mississippi legislature was poised to change the state’s voter registration laws, state executive branch officials had sought and obtained Section 5 preclearance from the Attorney General for a new system of voter registration.⁶⁶ Under this new system, approximately 4,000 Mississippi residents achieved registered voter status.⁶⁷ However, the Mississippi legislature ultimately did not take action to amend the voter registration system, and, therefore, voters who had registered under the new system had to re-register.⁶⁸ The question became whether the precleared plan had ever been “in force or effect,” and the Supreme Court answered no because, in its view, the precleared voter registration plan amounted to a mere “temporary misapplication of state law”⁶⁹ that quickly had been abandoned “as soon as its unlawfulness became apparent.”⁷⁰ In addition to the short amount of time the plan that violated state law had been implemented, also important to the *Young* Court was that only a third of the state’s voter registration officials had used the plan, and that the state had held no elections during the time in which the new voter registration system had been utilized.⁷¹ In short, *Young* squarely rejects the notion that Section 5 preclearance of a voting practice amounts to a rubber stamp that automatically provides the practice with “in force or effect” status.

What the Supreme Court *has* endorsed is a hybrid, totality approach where no single fact controls the determination as to whether

65. 520 U.S. 273 (1997).

66. *Id.* at 279.

67. *Id.* at 278.

68. *Id.* at 279–80.

69. *Id.* at 282.

70. *Id.* at 283.

71. *Id.*

a voting practice has been “in force or effect.” Nevertheless, Court precedent (*Perkins*, *Lockhart*, *Young*) prior to *Riley* indicated that what mattered most in determining whether a practice was “in force or effect” was the extent of the practice’s implementation, including the length of time the practice had been in use. On this score, the factual scenario presented in *Riley* did not clearly fit any of the Court’s three key precedents exactly on all fours. The situation in *Riley*, with only a one-time use of the practice of filling Mobile County Commission vacancies by special election, differed substantially from the *Lockhart* scenario involving a half-century of use of a voting practice that was illegal under Texas state law. Similarly, the situation in *Riley*, with actual use of a voting practice at an election, differed from the *Young* scenario involving Mississippi officials abandoning their unlawful voter registration system before any election had been held. *Perkins*, however, arguably amounted to a very similar scenario to *Riley*. In *Perkins*, the Court found a voting practice had been “in force or effect” even though the practice was contrary to state law and only had been implemented at a single election.⁷² Similarly, in *Riley*, the Court considered a practice that was contrary to state law and only had been implemented at a single election. Indeed, Justice Ginsburg’s majority opinion in *Riley* recognized the difficulty of distinguishing *Perkins*.⁷³

But Justice Ginsburg’s opinion quite creatively distinguished all prior precedent, including *Perkins*, by expanding the factors to be considered in the Court’s functional analysis as to whether a voting practice should be considered “in force or effect” for purposes of Section 5. In addition to assessing the extent of the implementation of a practice (i.e., the number of elections at which the practice had been implemented) and the length of time the practice had been used, Justice Ginsburg focused on the existence of state court litigation surrounding the practice of using special vacancy elections to fill open seats on the Mobile County Commission.⁷⁴ More specifically, it was not just the presence of any state court litigation, but the litigation’s particular

72. *Perkins v. Matthews*, 400 U.S. 379, 394–95 (1971).

73. See *Riley v. Kennedy*, 128 S. Ct. 1970, 1984 (2008) (“If the only relevant factors were the length of time a practice was in use and the extent to which it was implemented, this would be a close case falling somewhere between the two poles established by our prior decisions. On one hand, as in *Young*, the 1985 Act was a ‘temporary misapplication’ of state law: It was on the books for just over three years and applied as a voting practice only once. In *Lockhart*, by contrast, the city had used the numbered-post system ‘for over 50 years without challenge.’ (*Perkins is a less clear case: The city failed to alter its practice in response to changed state law for roughly seven years, but only a single election was held during that period.*)” (emphasis added) (citations omitted)).

74. *Id.* at 1984–85.

nature that was of utmost importance. Here, Justice Ginsburg highlighted three elements of the Alabama state court dispute. First, the practice of using a special election to fill vacancies “was challenged in state court at first opportunity.”⁷⁵ Second, the only election at which the practice had been implemented was “held in the shadow of that legal challenge.”⁷⁶ Third, the practice of holding a special vacancy election was “ultimately invalidated” by Alabama’s highest judicial authority.⁷⁷ With these new factors to consider, Justice Ginsburg easily brushed aside prior precedent, including the seemingly indistinguishable *Perkins*, because none of the prior cases had involved the presence of state court litigation.

As a matter of judicial maneuvering, Justice Ginsburg’s *Riley* opinion added a new doctrinal element that conveniently allowed for the hurdling of prior precedent; but the theoretical underpinnings of the relevance of state court litigation seem to be sorely lacking. Justice Ginsburg’s opinion might best be explained by some sort of federalist deference to the decisions of the Alabama Supreme Court.⁷⁸ In *Riley*, Justice Ginsburg majestically described the Alabama Supreme Court as “the ultimate exposito[r] of state law” whose judicial opinions “merit[] respect in federal forums”⁷⁹ and she expressed concern that the Alabama Supreme Court’s role as the ultimate decision-maker could be usurped by federal statutory law merely because a “trial court misconstrued the State’s law and, due to that court’s error, an election took place.”⁸⁰ It would be terrible, apparently, to “bind Alabama to an unconstitutional practice because of an error by the state trial court,”⁸¹ so terrible in fact that Justice Ginsburg felt the need to men-

75. *Id.* at 1984.

76. *Id.*

77. *Id.*

78. While Justice Ginsburg’s opinion never explicitly used the word “federalism,” federalism played a prominent role in the state’s arguments to the Court. *See* Brief for Appellant at 14, *Riley*, 128 S. Ct. 1970 (No. 07-77) (“The federalism implications of the district court’s interpretation—which strips state courts of their autonomy to decide state-law questions by subjecting their decisions to the veto of federal executive-branch officials—are profound.”). The federalism argument also played a significant role in several of the amicus briefs filed in support of the state. *See, e.g.*, Brief Amici Curiae of Former State Court Justices Charles Fried and Thomas R. Phillips in Support of Appellant at 3, *Riley*, 128 S. Ct. 1970 (No. 07-77) (“[S]uch a rule [requiring preclearance of state supreme court decisions] would upset the federal-state balance . . . [and] would also significantly diminish the authority and dignity of state judiciaries, which are fully competent and duty-bound to uphold and apply federal law and are the final arbiters of state law matters.”).

79. *Riley*, 128 S. Ct. at 1985.

80. *Id.*

81. *Id.* at 1986.

tion this possibility at several separate places in her opinion.⁸² For Justice Ginsburg and the majority, respect for a fellow supreme court's ability to carry out its inherent judicial function mandated the result in *Riley*.

Yet, at a very basic level, Justice Ginsburg's sympathy for the Alabama Supreme Court's apparent victimization by a trial court does not hold water on the facts of *Riley*. Justice Ginsburg makes it seem as if the trial court rendered a decision clearly out-of-step with the Alabama Constitution and that the Alabama Supreme Court was some pathetic character in a John Grisham novel: powerless to stop a runaway trial court. But that is just not what happened. As Justice John Paul Stevens noted in dissent, it was not a slam-dunk case that the Alabama state legislature's 1985 Act allowing for vacancies to be filled by special election failed to comport with the Alabama Constitution.⁸³ Moreover, the Alabama Supreme Court had a *pre-election* opportunity to correct the trial court's mistake. After the trial court rejected the state constitutional challenge to the holding of a special vacancy election, the case was immediately appealed and an order was sought from the Alabama Supreme Court to stay the election pending a final resolution of the litigation.⁸⁴ The Alabama Supreme Court, however, failed to mobilize and denied the stay—allowing the special vacancy election to occur.⁸⁵

82. *See id.* at 1985 (“Ruling as Kennedy and the United States urge, moreover, would have the anomalous effect of binding Alabama to an unconstitutional practice because of a state trial court’s error.”); *id.* at 1986 (“We decline to adopt a rigid interpretation of ‘in force or effect’ that would deny state supreme courts the opportunity to correct similar [trial court] errors in the future.”).

83. *Id.* at 1991 (Stevens, J., dissenting) (“The majority attempts to portray the circuit court judge’s decision as far outside the bounds of Alabama law . . . I am certain, however, that the two Alabama Supreme Court Justices dissenting in *Stokes* would disagree.”).

84. *Id.* at 1978 (majority opinion).

85. *See id.* (“The requested stay was denied and the election went forward in June 1987.”). It is interesting to note that Justice Stevens did not criticize the Alabama Supreme Court for failing to grant the stay of the special election. My guess is that Justice Stevens did not employ this argument because he himself has a history of allowing elections to go forward even in the face of potentially meritorious constitutional claims. For example, in *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), the Court issued a per curiam opinion vacating an injunction issued against the State of Arizona’s voter identification law just weeks before an election was to be held at which the law would be administered. *Id.* at 2. Justice Stevens wrote a brief concurrence because he thought allowing the election to go forward would produce a better evidentiary record from which to judge the constitutionality of Arizona’s law. *Id.* at 6 (Stevens, J., concurring). Additionally, in *Spencer v. Pugh*, 543 U.S. 1301 (2004), two federal district courts had issued injunctions related to an alleged Republican plan to send watchers into predominantly African-American precincts to intimidate voters and cause delays through the use of indiscriminate challenges at the 2004 Presidential election in the State of Ohio. *Id.* at 1301–02. The United States Court of Appeals for the Sixth Circuit granted an emergency stay of the district court injunctions.

Even apart from the specific facts of *Riley*, there would appear to be no theoretical reason to treat an Alabama Supreme Court victimized by a trial court differently from a state legislature victimized by a local government. If *Riley* comes out the other way, the Alabama Supreme Court's ability to be the final expositor of state constitutional law gets trumped because a trial court made a wrong decision and the election went forward. That is seemingly no different from what happened to the state legislatures in either *Perkins* or *Lockhart*. In both those cases, a state legislature's ability to be the final expositor of state statutory law was usurped by local governments that failed to implement the will of state legislators.⁸⁶ In neither of those cases was the Court worried about failing to defer to state sovereignty. One might ask what makes the Alabama (or any other state's) Supreme Court so special? Certainly it is not the fact that the Alabama Supreme Court, in all its majesty as ultimate expositor of state law, historically has acted in a more racially sensitive manner than the Alabama legislature. Justice Stevens's dissent adequately demonstrates the Alabama Supreme Court's past role in engaging in voting-related racial discrimination.⁸⁷ What, then, is the difference? Justice Ginsburg provides no answer except to conclusorily state that she and the majority "think it plain" that the "burden" on the Alabama Supreme Court is "a burden of a different order."⁸⁸ It might have been helpful, though, if the plainness of the burden had been more plainly explicated.

Id. at 1302. An appeal of the stay was taken to Justice Stevens, who served as circuit Justice for the Sixth Circuit. *Id.* Justice Stevens declined to reinstate the injunctions just a few hours prior to the opening of the polls: (1) because of difficulty in determining the facts and the law in the short amount of time before the election was scheduled to begin, and (2) because of faith that election administrators and volunteers would properly carry out their duties. *Id.* at 1302–03.

86. See *supra* notes 54–64 and accompanying text.

87. *Riley*, 128 S. Ct. at 1991–93 (Stevens, J., dissenting); see also Brief of Amicus Curiae the NAACP Legal Defense & Educational Fund, Inc. in Support of Appellees at 15, *Riley*, 128 S. Ct. 1970 (No. 07-77) (“[T]he Alabama judiciary was a significant actor in the state machinery that disenfranchised African Americans.”). Much of the history related in Justice Stevens's dissenting opinion can be found in the amicus brief submitted by the NAACP; a brief that, in turn, relies quite a bit on the work of historian J. Mills Thornton III. See Brief of Amicus Curiae, *supra* at 15–26 (highlighting the Alabama judiciary's activity in suppressing African-Americans' ability to vote (citing J. MILLS THORNTON III, *DIVIDING LINES: MUNICIPAL POLITICS AND THE STRUGGLE FOR CIVIL RIGHTS IN MONTGOMERY, BIRMINGHAM, AND SELMA* (2002))). Somewhat surprisingly, Justice Stevens neglected to come clean about the United States Supreme Court's own past role in abetting Alabama's blatantly discriminatory voting practices. See generally *Giles v. Harris*, 189 U.S. 475 (1903) (rejecting a constitutional claim challenging Alabama's blatantly racially discriminatory voter registration scheme).

88. *Riley*, 128 S. Ct. at 1986 (majority opinion).

Even though Justice Ginsburg's doctrinal machinations in *Riley* may not have any justifiable theoretical underpinning, ultimately the lack of theory makes no difference to the litigation's ultimate outcome. In the final analysis, what seems like an obvious change in voting practice that occurred in Mobile County, Alabama—from a regime where special vacancy elections were the order of the day back to gubernatorial appointments—was held by seven members of the Supreme Court to not amount to a voting change for which it was necessary for Alabama to seek Section 5 approval. Theory aside, the more important question going forward is what *Riley* might mean for the future of Section 5, and that is what the remainder of this Article will explore.

C. *Riley as a Narrow Loss with a Possible (Small) Upside*

In the small picture, *Riley* represented no great tangible loss for minority voters in Mobile County. The Supreme Court issued the *Riley* opinion in late May 2008. The District 1 seat held by Merceria Ludgood—the winner of the special vacancy election—was to come up for regular election in November 2008.⁸⁹ Governor Riley did not move to reappoint Juan Chastang (or any other person) to the seat for the last five months of the term.⁹⁰ Moreover, the Alabama legislature passed a law to allow for special elections in the event of a future vacancy on the Mobile County Commission.⁹¹ In short, the outcome of the litigation had little immediate or long-term impact on African-American representation in Mobile County.

But while African-American voters in Mobile County felt few practical effects from the decision, the general legal principle laid down in *Riley* does not represent a positive for the racial and language minority groups protected by Section 5. Because Section 5 prevents the implementation of voting changes adopted for any discriminatory purpose

89. *Id.* at 1980 n.4 (stating that the term at issue would end in November 2008).

90. Following the ruling, Governor Riley issued a press release praising the Supreme Court's decision and noting that he would "confer with his legal staff to determine the impact this Supreme Court ruling has on the current Mobile County Commission." Press Release, Bob Riley, Governor, State of Ala., Governor Riley's Office Issues Statement on U.S. Supreme Court Ruling (May 27, 2008), available at http://governorpress.alabama.gov/pr/pr-2008-05-27-01-court_ruling.asp. On August 26, 2008, Merceria Ludgood resigned from her position on the Mobile County Commission; however, it does not appear that Governor Riley appointed anyone to the vacant seat, and Ludgood was re-elected without opposition in November 2008. See NBC15, *Merceria Ludgood Resigns*, http://www.nbc15online.com/news/local/story/Merceria-Ludgood-Resigns/Rsp06-KLyUittCyWAj_I5g.csp (last visited March 27, 2009).

91. See 2006 Ala. Laws 913 (prescribing a special election for filling vacancies on the Mobile County Commission).

or that retrogress minority voting strength,⁹² minority voters should never be worse off when a state or local government uses a previously precleared change. Put another way, Section 5 preclearance operates as a one-way ratchet that prevents backsliding and the implementation of changes adopted with any discriminatory purpose. If a state or local government's switch away from a previously precleared voting change has to be submitted for Section 5 review, minority voting strength cannot be retrogressed and minority voters cannot be saddled with a voting practice adopted with a discriminatory purpose.⁹³ However, if a switch away from a precleared change does *not* have to be submitted for Section 5 review, minority voting strength *does* have the potential to be retrogressed and minority voters *can* be saddled with a voting practice adopted with a discriminatory purpose. Indeed, by holding that Alabama did not need to submit the use of gubernatorial appointment for Section 5 review, the result in *Riley* itself led to the state's ability to implement a change that retrogressed African-American voting strength.⁹⁴ At the end of the day, minority voters in all of the Section 5 covered areas would have benefited from a different general rule than the one adopted in *Riley*.

92. 42 U.S.C.A. § 1973c(c) (West Supp. 2008); *Beer v. United States*, 425 U.S. 130, 141 (1976) (interpreting the concept of discriminatory "effect" under Section 5 to encompass retrogression of minority voting strength).

93. Two slight caveats are necessary here. For about six years, the purpose prong of Section 5 was interpreted only to prevent the implementation of voting changes adopted with a retrogressive purpose, rather than with *any* discriminatory purpose. See *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 528 U.S. 320, 341 (2000) (holding that Section 5 "does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose"), *superseded by statute*, 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. This makes it possible that in those six years, the federal government approved a few voting changes that were purposefully discriminatory and that in a few instances there is a possibility that the benchmark, precleared practice could actually have been adopted with a discriminatory purpose. Next, you can craft a hypothetical where the federal government has made an error with the prior preclearance decision by approving something that was retrogressive or adopted with a discriminatory purpose, or you could craft a hypothetical where the federal government makes an error with the future submission. Mistakes do occur, but mistakes are an anomaly and can happen with any preclearance decision. Moreover, the far more likely scenario is that the Attorney General and the D.C. District Court will be too expansive—at least from the perspective of the Supreme Court—in their view of what Section 5 requires from state and local governments. See *generally* *Miller v. Johnson*, 515 U.S. 900 (1995) (severely criticizing the Attorney General's refusal to grant preclearance to state redistricting plans).

94. Letter from Wan J. Kim, Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice, to Troy King, Attorney Gen., and John J. Park Jr., Assistant Attorney Gen., State of Ala. (Jan. 8, 2007), *available at* http://www.usdoj.gov/crt/voting/sec_5/ltr/1_010807.php (denying Section 5 approval to use of gubernatorial appointment).

Yet the newfound opportunity for retrogression could be quite minuscule because Justice Ginsburg's opinion for the Court manifests an obvious intent to minimize the potential for discrimination by cabining the decision to the unique facts of *Riley*. One can see her attempts to narrow the parameters of the decision through some of the ways she describes the events surrounding the litigation. For instance, she describes the existence of state court litigation as an "extraordinary circumstance."⁹⁵ Justice Ginsburg also clearly attempts to cabin the scope of the holding, referring at one point to the decision's "tightly bounded" nature.⁹⁶ In addition, the reasoning behind the holding—putting tremendous emphasis on the existence of pre-election litigation where a decision was ultimately rendered by a state's highest judicial authority—easily lends the opinion to a cramped application in future cases. Indeed, one need not carefully read between the lines to understand the narrow nature of the decision—Justice Ginsburg highlights this point in her concluding thoughts:

Although our reasoning and the particular facts of this case should make the narrow scope of our holding apparent, we conclude with some cautionary observations. First, the presence of a judgment by Alabama's highest court declaring the 1985 Act invalid under the State Constitution is critical to our decision Second, the 1985 Act was challenged the first time it was invoked and struck down shortly thereafter Finally, the consequence of the Alabama Supreme Court's decision in *Stokes* was to reinstate a practice—gubernatorial appointment—identical to the State's [Section] 5 baseline. Preclearance might well have been required had the court instead ordered the State to adopt a novel practice.⁹⁷

Before describing some specific hypothetical scenarios illustrating how narrowly Justice Ginsburg's opinion can be interpreted in situations where state court litigation occurs, it is important to first recognize that, in the big picture of Section 5, *Riley* should have limited application because the case does not represent the typical scenario where a switch in a state or local government's voting practice occurs. In the vast majority of instances, a state or local government adopts a voting practice, gets the practice precleared, and implements the practice without incident at the next election and at future elections. State court litigation over such voting practices rarely happens.

95. *Riley v. Kennedy*, 128 S. Ct. 1970, 1984 (2008).

96. *Id.* at 1987 n.13.

97. *Id.* at 1986–87.

No doubt it is true that election-related litigation may be on the increase in part thanks to a post-*Bush v. Gore*⁹⁸ willingness to move electoral contests from the corridors of polling places to the halls of courthouses.⁹⁹ But even with any increase in election-related litigation, the vast majority of the thousands of voting changes¹⁰⁰ that receive Section 5 approval will never be impacted by the type of state court litigation deemed essential to *Riley*'s outcome.¹⁰¹

Moreover, even in those rare instances where state court litigation ensues over a Section 5 precleared voting practice, the manner in which Justice Ginsburg crafted her opinion provides good reason to think *Riley* may have, at most, a very limited application. Take, for instance, the fact that the decision appears to be inapplicable when a state court adopts a novel voting practice rather than merely reinstating a prior voting practice. Here, assume a hypothetical situation where a state legislature draws a redistricting plan (the "new" plan) to replace a plan (the "old" plan) that had been precleared under Section 5 but, because of new decennial Census data becoming available, the old plan no longer complies with the equal protection mandate of "one person, one vote."¹⁰² Like the old redistricting plan, the new redistricting plan receives Section 5 preclearance, but then the new plan is challenged in state court prior to its implementation at an election. The state trial court rejects the pre-election challenge and an election ensues. After the election, though, the state supreme court reverses the lower court, upholds the state constitutional challenge,

98. 531 U.S. 98 (2000) (per curiam). In *Bush v. Gore*, the Supreme Court invalidated a state recount of votes for a presidential candidate based on the Equal Protection Clause. *Id.* at 103.

99. See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 955–59 (2005) (arguing that the increase in election litigation after *Bush v. Gore* may show that politicians are using election law as a political strategy).

100. See Bruce E. Cain & Karin MacDonald, *Voting Rights Act Enforcement: Navigating Between High and Low Expectations*, in THE FUTURE OF THE VOTING RIGHTS ACT 125, 128 (Epstein et al. eds., 2006) (providing a table showing the number of voting changes submitted by state and local governments to the Attorney General).

101. An amicus brief filed on behalf of several states covered by Section 5 argued that "[s]tate courts frequently must determine whether state laws affecting voting comport with other requirements of state law, including state constitutional law." Brief for the States of Florida, et al. as Amici Curiae in Support of Appellant at 13, *Riley*, 128 S. Ct. 1970 (No. 07-77). However, only a handful of cases—one of which dated back to the 1980s—were cited for this proposition. See *id.* at 13 n.3. Moreover, while state courts may make decisions regarding state voting laws, it is not clear how many of those judicial decisions involve a switch from a precleared practice to an unprecleared practice.

102. See *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (stating that political equality mandates the concept of "one person, one vote" (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963))).

and, to remedy the violation, crafts its own court-drawn redistricting plan. In that instance, the existence of pre-election state court litigation and an opinion by the state's highest court should not matter because Section 5 preclearance presumably needs to be secured whenever the voting practice ordered into place by a state supreme court represents a novel practice not identical to the state's Section 5 baseline.¹⁰³

Another distinguishable situation may arise when the state's highest judicial authority fails to get intimately involved in the outcome of the state court litigation. For example, switch the facts in *Riley* just slightly. Assume a pre-election challenge was brought against the use of a special vacancy election and the trial court refused to grant a preliminary injunction that would stop the election because the trial court did not think the plaintiffs were likely to prevail on the merits of their claim. After the election and further briefing and discovery, the trial court decides to grant a permanent injunction against the use of special elections to fill vacancies on the commission, thus reverting to the practice of gubernatorial appointment. The government defendant in the case decides not to appeal and the litigation goes no further than the state trial court level. Presumably, the lack of a "judgment" by the state's highest court—the presence of which was deemed "critical"¹⁰⁴ in *Riley*—would lead to the need for the state to preclear the switch from special election to gubernatorial appointment necessitated by the state *trial* court's decision.¹⁰⁵

And even if litigation involved a state's highest court and the decision did not amount to that court's implementation of a novel voting practice, delayed litigation would seemingly not serve to keep a practice—even if in violation of a state constitution—from being considered "in force or effect." Again, change the facts of *Riley* slightly and assume that Mobile County had held three special vacancy elections. Prior to the fourth special vacancy election, a plaintiff files a state court claim challenging the constitutionality of holding special vacancy elections. Ultimately, the Alabama Supreme Court upholds that challenge and returns the method for filling vacancies to gubernatorial appointment. Presumably, the switch from special election to gu-

103. See, e.g., *Branch v. Smith*, 538 U.S. 254, 261–62 (2003) (implying that a redistricting plan ordered by a state court constitutes a voting change subject to Section 5 preclearance).

104. *Riley*, 128 S. Ct. at 1986.

105. There are, undoubtedly, several other ways in which the pre-election and post-election litigation decisions could be different without the involvement of a state's highest court. For example, an intermediate appellate court might reverse the trial court or the trial court might rule favorably on a Rule 60-type motion.

bernatorial appointment would need to be submitted for Section 5 review because the practice had not been “invalidated only after enforcement without challenge in several previous elections.”¹⁰⁶ Rather, in the hypothetical posited, the change had been used at *several* elections. Here, on some level, the Court seems to be applying a theory of laches to the determination of whether a voting practice can be considered to be “in force or effect.” If a voting practice is not successfully challenged swiftly and the practice is implemented at an election, the practice will be deemed “in force or effect.”

Indeed, the laches aspect of *Riley* might be viewed as a plus for election law as a whole, even if it comes at the (perhaps slight) expense of minority voting rights. Professor Rick Hasen has argued that courts should, when possible, encourage pre-election litigation and to use a stronger doctrine of laches to reject post-election challenges.¹⁰⁷ Professor Hasen posits three primary rationales for courts to incentivize pre-election litigation: first, post-election remedies (such as re-running an election) are often impractical;¹⁰⁸ second, post-election remedies harm public confidence in the judiciary and in the democratic process itself;¹⁰⁹ third, post-election litigation encourages candidates and their allies to take a wait-and-see approach and to use post-election complaints “as an excuse to get a more favorable outcome”—in essence giving candidates two potential bites at the apple of electoral victory.¹¹⁰

Riley, because it rewards state court litigation of Section 5-approved voting changes as soon as practicable by eliminating the need to preclear a reversion to the *status quo ante*, might be viewed as in tandem with a theory that encourages pre-election challenges.¹¹¹ Most notably, it will serve to discourage chicanery on the part of state and local political actors who might try to game the system by allowing a one-time use of a voting practice but then challenging the same practice in state court at the next election because the practice is per-

106. *Riley*, 128 S. Ct. at 1986.

107. Hasen, *supra* note 99, at 991–99.

108. *See id.* at 991 (“[I]n some cases—particularly those involving presidential elections—pre-election adjudication remains the only way to give an effective remedy to an aggrieved plaintiff.”).

109. *Id.* at 993 (“Putting judges in the position of deciding election law questions when the winner and loser of its decision will be obvious can undermine the legitimacy of the courts [When] judges second-guess decisions made by legislators and votes cast by the people, the legitimacy of the election process itself can suffer.” (footnote omitted)).

110. *Id.* at 994.

111. For an early voting rights case that encourages litigants to file pre-election challenges in order to secure post-election relief, see *Hamer v. Campbell*, 358 F.2d 215, 221–22 (5th Cir. 1966).

ceived to not have a political advantage the second time around.¹¹² Of course, the United States Supreme Court has not exactly been consistent in encouraging pre-election litigation¹¹³ and it is deeply disturbing that such encouragement comes at the expense of minority voting rights. Nevertheless, it is possible to view *Riley* a bit more positively when placed in this broader perspective.¹¹⁴

In sum, *Riley* certainly cannot be considered to be much of a plus for minority voters who reside in regions of America covered by Section 5. But perhaps a couple of semi-silver linings can be extracted from the margins of the *Riley* cloud. First, the manner in which *Riley*

112. Within this context, *Riley* appears to encourage pre-election litigation by dispensing with the extra step of Section 5 preclearance if pre-election litigation is filed. If the challenger brings a timely lawsuit, Section 5 approval will be dispensed with. However, if the challenger delays the lawsuit until after the election, Section 5 preclearance would seem to be necessary.

113. See, e.g., *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1613–15 (2008) (rejecting facial challenge to Indiana’s voter identification law); *Purcell v. Gonzalez*, 549 U.S. 1, 2 (2006) (per curiam) (vacating pre-election injunction against enforcement of Arizona’s voter identification law). The idea that courts should encourage pre-election litigation may be the best theory to justify the Court’s decision in *Riley*. However, Justice Ginsburg never invokes this theory in her opinion and another recent decision seems to frown on pre-election challenges. See, e.g., *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1187 (2008) (rejecting challenge to state’s modified blanket primary until better evidence of actual impact in elections could be presented).

114. In addition, that a decision was rendered by the Court at all in *Riley* may be a positive sign when looking at the big picture of Section 5’s future staying power. Congress recently extended Section 5 through the year 2031 but doubts about the constitutionality of that extension linger. Compare Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 178–81 (2005) (expressing doubt about constitutionality of Section 5), with Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 3–4 (2007) (noting that Congress extended the preclearance regime in 2006 for another twenty-five years and arguing that Section 5 remains constitutional). Indeed, shortly after Congress extended Section 5, a constitutional challenge was filed and that challenge was rejected by a three-judge panel of the D.C. District Court. *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 223 (D.D.C. 2008). The constitutionality of Section 5, though, is not likely to turn on the opinion of three lower court judges but, rather, will turn on the views of a majority (or plurality) of nine Justices. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 129 S. Ct. 894, 984 (2009) (noting probable jurisdiction). One wonders then why the Supreme Court would bother dealing with a case such as *Riley* if it was not likely to uphold the constitutionality of Section 5 for the long haul. The stakes in the particular case were small. Indeed, the decision in *Riley* led to few changes on the ground in terms of representation for voters in Mobile. See *supra* notes 89–91 and accompanying text. What then was the larger motive behind taking the *Riley* case? There was no circuit court split, so there must be a larger message the Court wanted to send to make the case one of national importance. The larger message here must be the need for federal courts hearing Section 5 cases to be more deferential to decisions of state supreme courts involving the application of state constitutions. There would, however, be no reason to send such a message if it were unlikely that Section 5 would be around for many more years to come.

was decided seems to limit the decision to unique facts not likely to be found in the vast majority of situations involving a switch in electoral practices. Second, *Riley* may represent a positive for election law litigation more generally. To the extent the case represents a signal from the Supreme Court to future election law litigants that those litigants should not sit on their rights and should promptly challenge election practices they think violate state or federal constitutional provisions, then the Supreme Court may have made a positive shift. In short, *Riley* may not be all that bad. Then again, it might be.

III. THE DANGER OF *RILEY*

The danger of *Riley* is that the decision portends a weakening of the procedural protections of Section 5—thus leading to the possibility of state and local governments being able to implement more discriminatory voting changes. Interestingly, attacking the procedural aspect of Section 5 represents a possible new strategy for the conservative majority that has controlled the Supreme Court in recent years. Since the early 1990s, the Supreme Court has worked to curb Section 5's influence on the voting-related choices made by state and local governments. The Court, however, largely constrained Section 5's operation by limiting its *substantive* reach. In other words, the Court reduced Section 5's impact by limiting the number of voting changes to which the federal government may deny approval. In contrast, the Court mostly retained the strong procedural protections for minority voters. Put differently, the Court continued to be stringent in requiring voting changes to be submitted for Section 5 review (the procedural) even while relaxing the ability of the federal government to reject voting changes (the substantive). Congress, however, recently responded negatively to the Court's curbing of Section 5's substantive reach by statutorily overruling some of the Court's decisions. *Riley*, then, may reflect the first jab in the Court's counter-offensive—the limitation of Section 5's impact through the creation of additional procedural gaps.

A. *The Procedural and the Substantive Aspects of Section 5*

There are two aspects to Section 5, one of which can be categorized as procedural and one of which can be categorized as substantive.¹¹⁵ The procedural aspect of Section 5 deals with which types of

115. While the Supreme Court has never explicitly recognized the categories of procedural and substantive, it has hinted at this dichotomy. See *Young v. Fordice*, 520 U.S. 273, 285 (1997) ("It is change that invokes the preclearance *process*; evaluation of that change

voting changes *must be submitted to the federal government* for a determination as to whether or not the change discriminates against minority voters in purpose or effect. The question here is what sort of practices constitute the universe of state and local government activity that must be presented to a federal decisionmaker. In contrast, Section 5's substantive aspect deals with the merits of whether or not a particular voting change should receive federal approval. Here, the question is about the substantive meaning of discrimination under Section 5.¹¹⁶ One way to mark the dichotomy between procedural and substantive is by which federal court can hear different types of Section 5 litigation—a case involving the procedural aspect of Section 5 may be filed in any federal district court (assuming general jurisdictional principles are met) while a case involving the substantive aspect of Section 5 may only be filed in the United States District Court for the District of Columbia.

The procedural aspect of Section 5 operates most prominently in what litigators commonly refer to as Section 5 enforcement actions.¹¹⁷ If a change in voting practice or procedure adopted by a state or local government has not received approval from the federal government, the United States Attorney General or a private plaintiff may seek an injunction in federal district court to bar implementation of the

concerns the *merits* of whether the change should in fact be precleared.”); *see also* Perkins v. Matthews, 400 U.S. 379, 384–85 (1971) (distinguishing questions of “‘coverage’” from questions of “‘substantive discrimination’” (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 559 (1969))).

116. Of course, it must be recognized at the outset that trying to categorize something as procedural as opposed to substantive represents trouble in the theoretical abstract, but it does not represent trouble for purposes of my thesis here. Procedural choices always have substantive implications. In the context of Section 5, the determination about what must be submitted to federal authorities (the procedural aspect of Section 5) has a direct impact on the fundamental voting rights of minority citizens residing in the areas where Section 5 operates. In other words, the choice of whether the federal government gets to review a switch in voting practices can directly impact whether or not discriminatory changes are implemented by state and local governments. Put in the more concrete context of *Riley*, the Court's holding that the State of Alabama did not have to submit to the Section 5 preclearance process the switch from special elections to gubernatorial appointments meant that minority voting rights could (at least in theory) be substantively retrogressed. My focus here, though, is on a potential shift in the Supreme Court's jurisprudence from directly attacking the substantive determinations made by the federal government to directly attacking the procedural protections found in Section 5. Indeed, I would freely admit that any future direct attack by the Court on Section 5's procedural protections also represents an attack on Section 5's substantive protections.

117. Such lawsuits are also sometimes referred to as “coverage lawsuits.” *See* Brief for Appellees at 3, *Riley v. Kennedy*, 128 S. Ct. 1970 (2008) (No. 07-77) (citing *Allen*, 393 U.S. at 554–55, 560).

change.¹¹⁸ Section 5 enforcement actions are heard by three-judge panels,¹¹⁹ and can be filed in any federal district court.¹²⁰ However, the district court's purview is fundamentally limited in its scope. In a Section 5 enforcement action, the district court has no authority to determine whether the change at issue actually discriminates against minority voters.¹²¹ Instead, the district court only may ask "whether [Section] 5 covers a contested change, whether [Section] 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate."¹²²

Buried within the three questions the district court must ask when dealing with a Section 5 enforcement action lie several different strands of doctrine. First, some determination has to be made as to the types of changes covered by Section 5. What about when the location of a polling place is moved? What about when at-large elections replace single-member districts? What if a city annexes territory populated with potential voters? In each of these instances, Section 5 coverage applies¹²³ because, when determining whether Section 5 "covers

118. 42 U.S.C. § 1973j(d) (2000) (Attorney General); *Allen*, 393 U.S. at 555 (private party).

119. 28 U.S.C. § 2284 (2000); 42 U.S.C.A. § 1973c(a) (West Supp. 2008).

120. It may also be possible to file a Section 5 enforcement action in state court, although the Supreme Court has never definitively decided this issue. *See Hathorn v. Lovorn*, 457 U.S. 255, 267–68 (1982) (noting that the Court need not decide whether federal courts have exclusive jurisdiction over Section 5 enforcement actions because "at least when the issue arises collaterally, state courts may decide whether a proposed change in election procedure requires preclearance under § 5"); *see also* *City of Arcade v. Emmons*, 486 S.E.2d 359, 361 (Ga. 1997) ("[I]t is implicit in the U.S. Supreme Court's holding [in *Hathorn*] that state courts have the authority to examine § 5 claims and resolve those claims by ordering relief consistent with the VRA, at least where, as here, the § 5 issue did not call upon the state court to grant preclearance or review the Attorney General's actions in regard to the preclearance procedure.").

121. *See Lopez v. Monterey County (Lopez I)*, 519 U.S. 9, 23 (1996) ("On a complaint alleging failure to preclear election changes under § 5, [a district] court lacks authority to consider the discriminatory purpose or nature of the changes."); *see also* *Perkins v. Matthews*, 400 U.S. 379, 385 (1971) ("What is foreclosed to [a] district court is what Congress expressly reserved for consideration by the District Court for the District of Columbia or the Attorney General—the determination whether a covered change does or does not have the purpose or effect of denying or abridging the right to vote on account of race or color." (internal quotation marks omitted)).

122. *Lopez I*, 519 U.S. at 23; *see also* *City of Lockhart v. United States*, 460 U.S. 125, 129 n.3 (1983) ("In granting the injunction [to enjoin use of new election procedures pending preclearance], the District Court lacked jurisdiction to pass on the discriminatory purpose or effect of the changes. All it could do was determine (i) whether a change was covered by § 5, (ii) if the change was covered, whether § 5's approval requirements were satisfied, and (iii) if the requirements were not satisfied, what remedy was appropriate.").

123. *See* *Branch v. Smith*, 538 U.S. 254, 262 (2003) (redistricting plans); *City of Richmond v. United States*, 422 U.S. 358, 362 (1975) (city's annexation of territory); *Perkins v. Matthews*, 400 U.S. 379, 387 (1971) (changes in polling places).

a contested change,” the Court has laid down a rule broadly encompassing all aspects related to voting. Since the watershed decision in *Allen v. State Board of Elections*,¹²⁴ Section 5 has reached “any state enactment which alter[s] the election law of a covered State in even a minor way.”¹²⁵ In essence, what this has come to mean is that even the most picayune of voting changes must be presented to the federal government for preclearance. Why? Because past experience has shown that even very subtle changes to election laws can operate as tools of discrimination against minority voters.¹²⁶ For this reason, Section 5 covers any voting change having a “direct relation to voting and the election process,”¹²⁷ even including such aspects of democracy as changes in the method of casting ballots (i.e., from paper to electronic machine) and in the locations available for voter registration.¹²⁸

The second strand of doctrine related to Section 5 enforcement actions comes when trying to assess “whether Section 5’s approval requirements were satisfied.” Here, the question basically revolves around the amount of notice and information a state or local government must provide to the federal government about a voting change. What is integral to an understanding of this aspect of a Section 5 enforcement action is to comprehend that the United States Attorney General conducts the vast majority of preclearance activity¹²⁹ and that voting changes can be approved through silence on the part of the Attorney General. Put simply and more concretely, if a state or local government submits a voting change to the Attorney General and the Attorney General does not reject (in Section 5 jargon “object to”) the change within sixty days, the state or local government is free to implement the change.¹³⁰ For this reason, state and local governments

124. 393 U.S. 544 (1969).

125. *Id.* at 566.

126. *See id.* at 565 (explaining that the Voting Rights Act was intended to reach even subtle regulations that disenfranchise citizens based on their race).

127. *Presley v. Etowah County Comm’n*, 502 U.S. 491, 503 (1992).

128. *See Hearing on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 62–63 (1965) (statement of Nicholas deBelleville Katzenbach, Attorney Gen. of the United States) (stating that changes in method of voting and places of registration are subject to the Section 5 preclearance requirement).

129. Civil Rights Division, U.S. Dep’t of Justice, About Section 5 of the Voting Rights Act, http://www.usdoj.gov/crt/voting/sec_5/about.htm (last visited Feb. 13, 2009) (“Almost all voting changes are submitted to the Attorney General, and over the past decade the Attorney General has received submissions of between 14,000 and 22,000 voting changes per year.”).

130. 42 U.S.C. § 1973a(c) (2000) (“[A voting practice] may be enforced if the . . . practice . . . has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed

have an incentive to argue that *any minimal notice* of a change provided to the Attorney General amounts to a request for preclearance and that if the Attorney General does not respond to the minimal notice, the voting change has been precleared.

However, the Supreme Court has rejected a minimal notice approach, mandating that state and local governments clearly identify to the Attorney General any voting change for which preclearance is sought. In *McCain v. Lybrand*,¹³¹ the Court cogently described how a “fair interpretation of the Act requires that the State in some *unambiguous and recordable manner* submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act.”¹³² At its core, this aspect of Section 5 procedure prevents state or local governments from trying to sneak a discriminatory voting change past the Attorney General, who must review thousands of changes with limited resources.

The third strand of doctrine important to Section 5 enforcement actions deals with what a court should do when it deems a covered voting change has not received preclearance. The question in this instance focuses on what the appropriate remedy should be for failing to secure Section 5 review. Here, the Court has firmly stated that the failure to garner the requisite Section 5 approval “renders the change unenforceable”¹³³ and that, absent an “extreme circumstance,” a plaintiff who succeeds in a Section 5 enforcement action is entitled to injunctive relief.¹³⁴ In essence, when preclearance has not been

an objection within sixty days after such submission . . .”). Only rarely does preclearance of a voting change occur by silence, as the Attorney General’s guidelines for implementing Section 5 note that “[i]t is the practice and intention of the Attorney General to respond to each submission within the 60-day period.” 28 C.F.R. § 51.42 (2008). In addition, it is worthwhile to note one very important exception to the sixty-day rule. After receiving submission of a voting change, the Attorney General may request additional information from the jurisdiction making the submission. 28 C.F.R. § 51.37(a) (2008). This request for additional information essentially is a request for discovery that stops the sixty-day clock until the Attorney General receives a complete response to the request and the sixty-day period recommences. 28 C.F.R. § 51.37(c)–(d) (2008); *see also* *Georgia v. United States*, 411 U.S. 526, 539–41 (1973) (allowing the Attorney General to suspend sixty-day clock until a complete submission of the voting change has occurred).

131. 465 U.S. 236 (1984).

132. *Id.* at 249 (emphasis added) (citation and internal quotation marks omitted).

133. *Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982); *see also* *United States v. Bd. of Supervisors*, 429 U.S. 642, 645 (1977) (“No new voting practice or procedure may be enforced unless the State or political subdivision has succeeded in its declaratory judgment action or the Attorney General has declined to object . . .”).

134. *Clark v. Roemer*, 500 U.S. 646, 652–53, 654 (1991) (“If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes.” (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969))).

sought and secured, the federal courts issue a civil version of the Monopoly “Go Directly to Jail” card to the voting change—the voting change may not be utilized by the state or local government, “Do Not Pass Go, Do Not Collect \$200.”¹³⁵

In addition to the nitty-gritty doctrine surrounding Section 5 enforcement actions, one other aspect of procedural coverage bears mentioning—the type of jurisdiction that must submit voting changes for federal review. The question here is *who* must submit voting changes under Section 5. In *United States v. Board of Commissioners*,¹³⁶ the Supreme Court rejected the contention that preclearance did not need to be secured by political subunits, such as school districts, within Section 5 covered states and counties.¹³⁷ This means that entities such as cities, towns, school districts, and water districts must preclear their voting changes with the federal government¹³⁸—state and local political parties, too.¹³⁹ Moreover, even voting changes ordered into place by a federal court must be precleared to the extent that the changes ordered by the federal court reflect the policy choices of the jurisdiction covered by Section 5.¹⁴⁰

Once a state or local government has submitted a voting change to the Attorney General for administrative preclearance or, far less commonly, has filed a declaratory judgment action in the District of Columbia District Court, the substantive question of whether or not the change discriminates against minority voters kicks into operation. Here, two principal questions are answered: first, has the change been adopted with a discriminatory purpose; second, will implementation

135. In addition, if the unprecleared voting change has been used at an election, a potential for retrospective relief (i.e., invalidating the election and holding a new election) exists. See *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 182–83 (1985) (instructing the district court to consider retrospective relief); John P. MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 *CATH. U. L. REV.* 107, 124–27 (1979) (describing the potential for retrospective relief under Section 5).

136. 435 U.S. 110 (1978).

137. *Id.* at 135 (“In short, the legislative background of the enactment and re-enactments [of Section 5] compels the conclusion that, as the purposes of the Act and its terms suggest, [Section] 5 of the Act covers all political units within designated jurisdictions like Alabama.”).

138. See 28 C.F.R. § 51.6 (2008) (listing examples of political subunits subject to Section 5).

139. See 28 C.F.R. § 51.7 (2008) (providing that certain activities of political parties are subject to Section 5).

140. 28 C.F.R. § 51.18(a) (2008). Preclearance is not required when a federal court prepares and adopts its own voting change to remedy a constitutional violation. See *Connor v. Johnson*, 402 U.S. 690, 691 (1971) (holding that “[a] decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act” of 1965).

of the change have a discriminatory effect.¹⁴¹ The latter “effects” question has been held to encompass an inquiry into whether the voting change retrogresses minority voting strength.¹⁴² In other words, the question to be answered when assessing discriminatory effect is whether minority voters will be worse off after implementation of the change. The purpose question—although it has shifted back and forth a bit through the years (more on this shift later)—asks whether the change has been adopted for *any* discriminatory purpose.¹⁴³ More specifically, the purpose prong of Section 5 asks whether the change was adopted with the purpose of retrogressing minority voting strength or whether the change was adopted with an unconstitutional discriminatory purpose. If either of these motivations is present in the adoption of the voting change, the state or local government will not obtain Section 5 approval. In short, the substantive aspect of preclearance involves the decision on the merits made in Washington, D.C.

B. The Supreme Court’s Recent Section 5 Jurisprudence and Congress’s Response

Litigation involving Section 5 involves two overarching questions: (1) does the practice at issue amount to a change that needs to undergo the preclearance process; and (2) if the practice is a voting change that needs to undergo the process, does the voting change discriminate against minority voters. Breaking Section 5 down into these two categories can serve as a useful filter for examining the Supreme Court’s Section 5 jurisprudence since the early 1990s. The primary point to be made here is that during this time period, a conservative majority of the Supreme Court has usually retained strong procedural protections for Section 5 while weakening the operation of Section 5 through limitations on the provision’s substantive scope. While not an absolutely perfect line of decision-making, the lesson from the Supreme Court led by Chief Justice William H. Rehnquist was that trimming Section 5’s sails would come not through opening up gaps in the portion of Section 5 that required changes to undergo the preclearance process. Rather, the Rehnquist Court typi-

141. See 42 U.S.C.A. § 1973c(a) (West Supp. 2008) (prompting an inquiry into whether the submitted voting change has the “purpose and . . . effect of denying or abridging the right to vote on account of race or color”).

142. See *Beer v. United States*, 425 U.S. 130, 141 (1976) (“[T]he purpose of § 5 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.”).

143. 42 U.S.C.A. § 1973c(c) (West Supp. 2008).

cally trimmed the sails of Section 5 by opening up gaps in the portion of Section 5 where merits determinations about discrimination were ultimately made.

To begin, examine the Court's jurisprudence during this time period related to the procedural requirement that all changes directly impacting voting, no matter how minor, must be subjected to Section 5 review. In *Young v. Fordice*,¹⁴⁴ the Court examined changes made to Mississippi's method of registering voters in order to comply with the National Voter Registration Act ("NVRA").¹⁴⁵ The changes included, among other things, written registration materials that contained a new set of instructions; new registration reporting requirements for local election officials; new instructions about what sort of assistance state personnel could provide to potential registrants; and the designation of which state agencies should serve as NVRA registration sites.¹⁴⁶ Mississippi argued that these changes did not need to be submitted to the federal government, but the Court disagreed and reaffirmed the need for state and local governments to submit all voting changes—no matter how minor and even if related to an effort to comply with federal law—that reflect the policy choices of state or local officials.¹⁴⁷

A few months after the decision in *Young*, a similar issue arose in *Foreman v. Dallas County*.¹⁴⁸ In *Foreman*, the Court dealt with changes in the manner in which Dallas County, Texas, appointed poll workers.¹⁴⁹ A federal district court had held that Section 5 approval for the changes was not required because Dallas County officials were merely exercising discretion allowed by the Texas Election Code, which had already received preclearance.¹⁵⁰ The Supreme Court questioned whether the relevant provision of the Election Code had actually been precleared (an aspect of the case to be examined in the next paragraph), but also held that Section 5 reached "even 'an administrative effort to comply with a statute that had already received clearance' . . .

144. 520 U.S. 273 (1997).

145. *Id.* at 275. See generally 42 U.S.C. § 1973gg(a) (2000) (describing the NVRA's findings and purposes).

146. *Young*, 520 U.S. at 285.

147. *Id.* at 283–84.

148. 521 U.S. 979 (1997) (per curiam).

149. *Id.* at 980.

150. See *Foreman v. Dallas County*, 990 F. Supp. 505, 508 (N.D. Tex. 1998) ("We denied the application [for injunctive relief], holding . . . that § 32.002 [of the Texas Election Code] conferred discretionary authority on the Commissioners Court to appoint election judges, that this grant of authority was precleared, and that preclearance was not required for each exercise of this authority.").

because [Section] 5 ‘reaches informal as well as formal changes.’”¹⁵¹ In essence, the Supreme Court rejected an argument that the change was not subject to preclearance because it was informal and minor—once again holding in favor of a strong procedural rule that Section 5 covers all changes directly related to voting no matter how seemingly insignificant.¹⁵²

Foreman also involved another element of the procedural aspect of Section 5—the requirement that a Section 5 covered jurisdiction provide sufficient notice to the United States Attorney General about the voting change.¹⁵³ This aspect of the decision involved the State of Texas’s 1985 submission of a recodification and thirty-page summary of changes to its election laws that did not specifically highlight the changes related to poll worker selection at issue in the litigation.¹⁵⁴ Here, the Court held that such a bare-bones submission could not serve to adequately notify the United States Attorney General about the specific changes at issue.¹⁵⁵ Similarly, in *Young*, the Court rejected an argument proffered by Mississippi that changes in its voter registration system had been administratively approved by the Attorney General because the state had not unambiguously presented the nature of the changes for federal review.¹⁵⁶

The *Clark v. Roemer*¹⁵⁷ Court reached a similar conclusion about the need to provide unambiguous notice of a voting change to the Attorney General. Over the course of several years, the State of Loui-

151. *Foreman*, 521 U.S. at 980 (quoting *NAACP v. Hampton County Election Comm’n*, 470 U.S. 166, 178 (1985)).

152. For example, in *Morse v. Republican Party of Va.*, 517 U.S. 186, 190 (1996), the primary issue the Court had to decide was whether a voting change adopted by the state’s Republican Party needed to be submitted for Section 5 review. The change at issue was the imposition of a filing fee for persons who wanted to participate in the Party’s nominating convention for the United States Senate. *Id.* In that decision, however, the Court also invoked the principle that all changes directly impacting elections, no matter how insignificant, need to be precleared and held that a filing fee for voters at a political party’s nominating convention was a voting change subject to Section 5 review. *See id.* at 205 (“A filing fee for party delegates operates in precisely the same fashion as these covered practices.”).

153. *See Foreman*, 521 U.S. at 981 (considering whether the State of Texas’s submission provided a sufficient explanation of the voting change it sought).

154. *Id.*

155. *See id.* (“This submission was clearly insufficient under our precedents to put the Justice Department on notice that the State was seeking preclearance of the use of partisan affiliations in selecting election judges.”).

156. *See Young v. Fordice*, 520 U.S. 273, 288 (1997) (“[Mississippi’s] submission simply did not specify what would happen if the legislature did not pass the bill, and it thereby created ambiguity about whether the practices and procedures described in the submission would be implemented regardless of what the legislature did. The VRA permits the Attorney General to resolve such ambiguities against the submitting State.”).

157. 500 U.S. 646 (1991).

siana had slowly added additional (elected) judgeships, but had only sporadically sought and received preclearance of the creation of these additional elected positions. For example, the state might have started out with three judgeships, then created a fourth judgeship for which it *did not* obtain preclearance, and then created a fifth judgeship for which it *did* obtain preclearance.¹⁵⁸ A three-judge federal district court decided that preclearance by the Attorney General of later judgeships precleared by implication the earlier, unprecleared judgeships.¹⁵⁹ In other words, to take the example from above, preclearance of the fifth judgeship served to also preclear creation of the fourth judgeship. But the Supreme Court reversed, reiterating once again the strong procedural protection that requires a Section 5 covered jurisdiction to meet its obligation to “identify with specificity each change that it wishes the Attorney General to consider.”¹⁶⁰

Another element of *Clark* involved the procedural protection of what remedy should be ordered after a court determines that a properly covered change has not been precleared. The district court in *Clark* found that the Attorney General had correctly refused to approve some of the judgeships created by Louisiana, but the district court then declined to issue an order enjoining elections from being held for those unprecleared positions.¹⁶¹ The Supreme Court, however, found error in the district court’s refusal to enjoin these elections, easily swatting away a litany of rationales provided by the district court.¹⁶² A similar rebuke was issued to a three-judge panel in *Lopez v. Monterey County (Lopez I)*.¹⁶³ That case, involving judicial elections in California, featured a district court allowing elections to go forward under a system that had not been precleared.¹⁶⁴ Once again, the Supreme Court stood firm in its view that state and local governments

158. *See id.* at 650–51 (“[T]he First Judicial District Court in Caddo Parish has a number of judgeships, called Divisions . . . Louisiana submitted and obtained approval for Divisions E (created in 1966, precleared in 1986), G (created and precleared in 1976), H (created and precleared in 1978), and I (created and precleared in 1982). Division F was not submitted for approval when it was created in 1973; rather it was submitted and objected to in 1988.”).

159. *See id.* at 650 (“The three-judge District Court held that, despite his current objections, the Attorney General had precleared the earlier judgeships when he precleared the later, or related, voting changes.”).

160. *Id.* at 658–59.

161. *Id.* at 652.

162. *See id.* at 653–55 (describing the District Court’s reasons for not enjoining the election and rejecting each reason for lacking merit).

163. 519 U.S. 9, 22 (1996).

164. *See id.* at 19 (“[I]n essence, four years after the filing of the complaint in this case, the District Court ordered the County to hold elections under the very same scheme that appellants originally challenged under § 5 as unprecleared.”).

should be enjoined from implementing unprecleared voting changes.¹⁶⁵

Finally, there are two decisions involving the types of governing bodies making the voting changes that reflect the Supreme Court's tendency since the early 1990s to strongly protect the procedural realm of Section 5. The *Lopez* case reached the Court for a sequel after the district court on remand concluded that a state not covered by Section 5 did not have to preclear its laws even if those laws impacted a county covered by Section 5.¹⁶⁶ Put differently, according to the district court, the state voting law did not need preclearance because it had been adopted by a government *not* subject to Section 5, even though the state law would be implemented by a government that *was* subject to Section 5. The Supreme Court, however, declined to open up a procedural loophole that would have allowed a jurisdiction subject to Section 5 to implement a voting change so long as that change was mandated by a superior non-federal, non-covered jurisdiction.¹⁶⁷ Similarly, in *Morse v. Republican Party of Virginia*,¹⁶⁸ the Court did not allow voting changes made by a political party within a covered state to evade the Section 5 process.¹⁶⁹ The *Morse* Court had to decide whether Virginia's Republican Party needed preclearance of its decision to charge a registration fee to voters who wanted to participate in a state convention held to nominate the Party's candidate for the United States Senate.¹⁷⁰ Again, the Supreme Court retained a strong commitment to the Section 5 process by holding that even though this was a change adopted for a nominating convention rather

165. *See id.* at 20 ("If a voting change subject to § 5 has not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting implementation of the change. The District Court's order that the County conduct elections under the unprecleared, at-large judicial election plan conflicts with these principles" (citations omitted)).

166. *See Lopez v. Monterey County (Lopez II)*, 525 U.S. 266, 269 (1999) ("Here, the State of California . . . which is not subject to the Act's preclearance requirements, has passed legislation altering the scheme for electing judges in Monterey County, California . . . a 'covered' jurisdiction required to preclear its voting changes. In this appeal, we review the conclusion of a three-judge District Court that Monterey County need not seek approval of these [state] changes before giving them effect.").

167. *See id.* at 282 ("[W]e conclude that § 5's preclearance requirement applies to a covered county's nondiscretionary efforts to implement a voting change required by state law, notwithstanding the fact that the State is not itself a covered jurisdiction.").

168. 517 U.S. 186 (1996).

169. *See id.* at 203 (plurality opinion) (finding that Section 5 covers changes in electoral practices such as a political party's imposition of a filing fee for delegates to its convention).

170. *Id.* at 190.

than a primary election, Virginia's Republican Party still needed to seek preclearance for the use of the fee.¹⁷¹

In fact, there are only two exceptions to the Court's commitment to retaining the strong procedural protections found in Section 5. The first exception is a relatively minor per curiam opinion in *City of Monroe v. United States*.¹⁷² In *Monroe*, the Court addressed whether the State of Georgia had provided enough information about the consequences of a voting change to the Attorney General.¹⁷³ In other words, the question was whether the state had to give the Attorney General mere notice of the change or whether the state had to make the Attorney General aware of all the consequences of a voting change. The Court held that the state's only burden was to submit the voting change in an "unambiguous and recordable manner" and that it was then up to the Attorney General to adequately investigate what the consequences of such a change would be for minority voters.¹⁷⁴ Indeed, *Monroe* is such a minor case that it has only been cited by one other court in the past decade.¹⁷⁵

The more notable exception to the Court's commitment to retaining strong procedural protections is *Presley v. Etowah County Commission*.¹⁷⁶ In *Presley*, the Court considered whether a county's decision to switch the rules for distributing government largess

171. In particular, the Court opined:

The imposition by an established political party—that is to say, a party authorized by state law to determine the method of selecting its candidates for elective office and also authorized to have those candidates' names automatically appear atop the general election ballot—of a new prerequisite to voting for the party's nominees is subject to § 5's preclearance requirement.

Id. at 219. In *Lopez I*, the Court also reaffirmed the idea that the preclearance requirement applies to voting changes ordered into effect by a federal district court "where [the] court adopts a proposal 'reflecting the policy choices . . . of the people [in a covered jurisdiction].'" *Lopez v. Monterey County (Lopez I)*, 519 U.S. 9, 22 (1996) (quoting *McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981)).

172. 522 U.S. 34 (1997) (per curiam).

173. *Id.* at 36–37.

174. *Id.* at 39. In *Monroe*, the Court noted:

The Government does not dispute that Georgia submitted the state-law default rule to the Attorney General in an "unambiguous and recordable manner." The submission, furthermore, gave the Attorney General "an adequate opportunity to determine the purpose of the [default-rule] electoral changes and whether they will adversely affect minority voting." In consequence, by preclearing the 1968 code the Attorney General approved the state-law default rule [requiring at-large elections]. The controlling default rule having been precleared, *Monroe* may conduct [at-large] elections under its auspices.

Id. at 39 (first alteration in original).

175. *E.g.*, *MetraHealth Ins. Co. v. Drake*, 68 F. Supp. 2d 752, 758 (E.D. Tex. 1999) (citing to the Supreme Court's *Monroe* decision).

176. 502 U.S. 491 (1992).

amounted to a voting change requiring preclearance.¹⁷⁷ Before changing the rules, the Etowah County Commission allowed each commissioner to exercise control over the maintenance of roads in a particular geographic area and allowed each commissioner to exercise sole control over the funds spent to maintain those roads.¹⁷⁸ But after voting rights litigation resulted in additional seats being added to the Commission and the election of an African-American to one of the new seats, the existing commissioners retained control over the roads while placing the African-American commissioner in charge of the upkeep of the county courthouse and, additionally, decided to co-mingle all county funds rather than allow each individual commissioner to spend a share of the funds as he or she saw fit.¹⁷⁹ Private plaintiffs argued that changing the rules for allocating government funds was a voting change that needed to be precleared.¹⁸⁰ The Court, however, determined that altering the distribution of power among commissioners had “no direct relation to, or impact on, voting” and therefore did not constitute a “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting”¹⁸¹ requiring preclearance.¹⁸²

Presley represented a dent in the procedural armor of Section 5. The Court refused to allow Section 5 coverage to extend beyond state and local government changes that directly affected minority voters’ ability to participate in an election or aggregate their votes to elect a candidate of their choice. This resulted in a limit on the ability of minority voters to achieve what might be considered to be the primary benefit of voting—having one’s actual policy preferences turned into governmental action.¹⁸³ Even in *Presley*, however, the Court reiterated its commitment to the idea that Section 5 “is expansive within its

177. *See id.* at 497–98 (explaining that the county commission passed a resolution making changes to the county’s rules for spending funds in each district to repair and maintain roads).

178. *Id.* at 496.

179. *Id.* at 496–97.

180. Specifically, the Court noted:

Appellants argue that the [Etowah County] Common Fund Resolution is a covered change because after its enactment each commissioner has less individual power than before the resolution. A citizen casting a ballot for a commissioner today votes for an individual with less authority than before the resolution, and so, it is said, the value of the vote has been diminished.

Id. at 503–04.

181. 42 U.S.C.A. § 1973c(a) (West Supp. 2008).

182. *Presley*, 502 U.S. at 506.

183. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–21 (1993) (describing various conceptions of the right to vote).

sphere of operation”¹⁸⁴ (i.e., when it comes to laws that *directly* impact the electoral process), thereby retaining strong procedural protections for the category of practices considered to have a more clear nexus to the nuts and bolts of democracy. In short, *Presley* must and should be considered as a reduction in Section 5’s procedural coverage, but the case represents an outlier in terms of the overall picture since the early 1990s.

In contrast to the retention of Section 5’s strong procedural protections, the Court uniformly diminished the number of voting changes to which the federal government could deny approval on the merits. In *Reno v. Bossier Parish School Board (Bossier Parish I)*,¹⁸⁵ the Court considered whether a “clear”¹⁸⁶ violation of Section 2 of the Voting Rights Act—which bars the use of electoral practices that have discriminatory results¹⁸⁷—could serve as a basis for a denial of preclearance under Section 5.¹⁸⁸ In other words, the Court needed to decide whether a Section 2 review could be incorporated into a Section 5 analysis. Despite some legislative history indicating Congress’s intent to incorporate Section 2 within Section 5,¹⁸⁹ the Court held that a Section 2 violation could not be used as the *sole* basis for denying Section 5 approval.¹⁹⁰ Although this limitation of the substantive scope of Section 5 was arguably negligible—few rejections of voting changes by the federal government were based solely on the clear presence of a Section 2 violation¹⁹¹—the decision marked the first in

184. *Presley*, 502 U.S. at 501.

185. 520 U.S. 471 (1997).

186. 28 C.F.R. § 51.55(b)(2) (1996) (allowing the Attorney General to prevent the implementation of a voting change if the change would result in a “clear” violation of Section 2 of the Voting Rights Act). Following the decision in *Bossier Parish I*, the Attorney General revised the guidelines to eliminate the ability of the Attorney General to prevent implementation of a voting change because of the presence of a “clear” violation of Section 2. Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 63 Fed. Reg. 24108–09 (May 1, 1998).

187. 42 U.S.C. § 1973 (2000).

188. See *Bossier Parish I*, 520 U.S. at 474 (“Specifically, we decide . . . whether preclearance must be denied under § 5 whenever a covered jurisdiction’s new voting standard, practice, or procedure violates § 2.” (internal quotation marks omitted)).

189. See *id.* at 483–85 (discussing the legislative history).

190. See *id.* at 485 (“All we hold today is that preclearance under § 5 may not be denied on th[e] basis [of a Section 2 violation] alone.”).

191. See Peyton McCrary et al., *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275, 297 tbl.2 (2006) (showing that only eight determinations by the Attorney General rejected voting changes based solely on a Section 2 violation).

a series of cases that directly limited the ability of the federal government to deny preclearance.¹⁹²

Indeed, the sequel to *Bossier Parish I* led to a significant reduction in the substantive scope of Section 5. For many years, the federal government had denied preclearance to voting changes adopted with an unconstitutional discriminatory purpose.¹⁹³ In *Reno v. Bossier Parish School Board (Bossier Parish II)*,¹⁹⁴ however, the Supreme Court determined that Section 5 could only be used to prevent voting changes adopted by state and local governments that manifested a *purpose to retrogress* minority voting strength.¹⁹⁵ In other words, a purpose to discriminate would not preclude preclearance unless the purpose was to reduce minority voting strength. Unlike the Court's limitation of the substantive standard to bar the implementation of voting changes that clearly violated Section 2, the Court's limitation of the substantive standard to only bar changes adopted with a retrogressive purpose proved to have a profound impact. In the 1990s, the Attorney General had prevented the implementation of many voting changes *solely* because the changes had been adopted with a discriminatory purpose;

192. While *Bossier Parish I* represents the first direct limitation of the substantive reach of Section 5, the previous year in *Miller v. Johnson*, 515 U.S. 900 (1995), the Court had strongly hinted at its desire to limit the substantive reach of Section 5. *Miller* arose in the context of a constitutional racial gerrymandering claim against Georgia's post-1990 congressional redistricting plan. *Id.* at 909–11. Section 5 was indirectly implicated, however, because the challenged congressional district had been drawn in response to two denials of preclearance by the United States Attorney General. *Id.* at 905–08. Georgia defended against the claim of racial gerrymandering by arguing that the state had a compelling interest in complying with the Attorney General's Section 5 determinations. *Id.* at 920–22. The Justice Department justified its preclearance objections to Georgia's proposed congressional plans because Georgia had failed to provide a nondiscriminatory reason for failing to create additional majority-minority districts. *Id.* at 923–24. The Court, however, rejected the Attorney General's conception of Section 5 discriminatory purpose, finding that “[i]nstead of grounding its objections on evidence of a discriminatory purpose, it would appear the Government was driven by its policy of maximizing majority-black districts.” *Id.* at 924. Thus, in *Miller*, the Court was already demonstrating its inclination to curb the substantive aspect of Section 5 by making it more difficult for the federal government to deny preclearance using the purpose prong of Section 5. Indeed, two researchers have noted how *Miller* appeared to have an effect on the Attorney General's administration of Section 5, even though *Miller* was not directly a Section 5 case. See Guy-Uriel E. Charles & Luis Fuentes-Rowher, *Rethinking Section 5*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 100, at 38, 50 (“[I]t is clearly possible that the DOJ's failure to object to preclearance requests after 1995 may reflect a skittishness on the part of a department thoroughly chastised by the Court [in *Miller*].”).

193. See, e.g., *Busbee v. Smith*, 549 F. Supp. 494, 516 (D.D.C. 1982) (summarizing case law that states that Section 5 prohibits preclearance of voting plans adopted with a racially discriminatory purpose), *aff'd*, 459 U.S. 1166 (1983).

194. 528 U.S. 320 (2000).

195. See *id.* at 341 (“[W]e hold that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.”).

in the early 2000s, the Attorney General prevented the implementation of only a few changes solely because the changes were adopted with a discriminatory purpose.¹⁹⁶

Abrams v. Johnson,¹⁹⁷ decided in 1997, also demonstrates the Court's commitment to limiting the substantive reach of Section 5. Under Section 5, the substantive determination of whether minority voting strength has been retrogressed depends upon the baseline or benchmark practice.¹⁹⁸ Put differently, the determination of whether minority voters will be worse off after a voting change is implemented necessitates a comparison with the currently established practice (which in Section 5 jargon is known as the "benchmark").¹⁹⁹ *Abrams* followed a challenge to the State of Georgia's congressional districts as an unconstitutional racial gerrymander and the ordering into place of a remedial redistricting plan by a federal court.²⁰⁰ The plan deemed unconstitutional had been precleared by the Attorney General and had contained three majority African-American congressional districts, but the federal court's remedial plan only contained one district with an African-American majority.²⁰¹ The Section 5 question in the case was which plan should serve as the benchmark from which to assess whether a retrogression of African-American voting strength had occurred.

The Attorney General argued that the precleared plan cured of its constitutional defects should serve as the benchmark against which to assess retrogression.²⁰² Private plaintiffs wanted an unprecleared plan that contained two majority African-American districts to serve as

196. See McCrary et al., *supra* note 191, at 298, 313–14 (finding that forty-three percent of objections by the Attorney General during the 1990s were based solely upon a finding of discriminatory purpose as compared to only about five percent in the early 2000s).

197. 521 U.S. 74 (1997).

198. *Id.* at 96–97 (citing 28 C.F.R. § 51.54(b)(1) (1996)).

199. See *id.* (referring to "benchmarks" within the context of Section 5). Put into a simplified, more concrete hypothetical, if the existing or benchmark districting plan has one district in which minority voters have the ability to elect a candidate of choice and the new redistricting plan submitted for Section 5 approval has no district in which minority voters have the ability to elect a candidate of choice, retrogression (absent some extraordinary circumstances) has occurred. However, if the existing or benchmark districting plan has no district in which minority voters have the ability to elect a candidate of choice and the new redistricting plan submitted for Section 5 approval also has no such district, retrogression has not occurred.

200. *Id.* at 77–79.

201. *Id.* at 77–78.

202. *Id.* at 96 ("The Justice Department, for its part, contends the proper benchmark is the 1992 precleared plan, altered to cure its constitutional defects.").

the benchmark.²⁰³ The Supreme Court accepted neither argument, holding that the appropriate benchmark was the state's post-1980 re-districting plan.²⁰⁴ And, because the 1982 plan contained only one majority African-American district, no retrogression had occurred.²⁰⁵ Here, the Court's choice of the older benchmark limited the federal government's substantive ability to prevent the implementation of voting changes that retrogressed minority voting strength because, as a general matter, the further back in time one went, the less minority representation existed.²⁰⁶

So by the 2000 redistricting cycle, the Supreme Court had significantly trimmed the substantive scope of Section 5 by: (1) eliminating the ability of the federal government to deny approval to voting changes adopted with a discriminatory but nonretrogressive purpose; (2) eliminating the ability of the federal government to deny approval to voting changes that clearly violated Section 2; and (3) choosing a benchmark for assessing retrogression that was less favorable to minority voters. The Court, however, had one more substantive trim of Section 5 up its sleeve, this time taking on Section 5's effects prong.

In *Georgia v. Ashcroft*,²⁰⁷ the Supreme Court redefined what it meant to retrogress minority voting strength in the context of a state-wide redistricting. Simply put, prior to *Ashcroft*, the federal government would prevent implementation of any redistricting plan that arguably resulted in the loss of descriptive representation—a district where minority voters could elect a candidate of choice who shared their same racial or ethnic characteristics—and where it was mathe-

203. *Id.* (“Private appellants say the benchmark should be either the State’s initial [unprecleared] 1991 plan, containing two majority-black districts, or the State’s policy and goal of creating two majority-black districts.” (citation and internal quotation marks omitted)).

204. *Id.* at 97.

205. *See id.* (“Appellants have not shown that black voters in any particular district suffered a retrogression in their voting strength under the court plan measured against the 1982 plan.”). In addition, the Court summarily rejected another theory of retrogression:

We reject appellants’ assertion that, even using the 1982 plan as a benchmark, the court’s plan is retrogressive. They claim that under the 1982 plan 1 of the 10 districts (10%) was majority black, while under the District Court’s plan 1 of 11 districts (9%) is majority black, and therefore blacks do not have the same electoral opportunities under the District Court’s plan. Under that logic, each time a State with a majority-minority district was allowed to add one new district because of population growth, it would have to be majority-minority. This the Voting Rights Act does not require.

Id. at 97–98.

206. *See generally* DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL AND ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2000 (2002) (compiling statistical information about the number of black elected officials over the past thirty years).

207. 539 U.S. 461 (2003).

matically and geographically possible to preserve that descriptive representation.²⁰⁸ After *Ashcroft*, states had more flexibility to reduce descriptive representation as long as the reductions in descriptive representation were offset by gains in substantive representation (i.e., the ability of minority voters to elect candidates—most likely white Democrats—who might support legislation favored by minority voters).²⁰⁹ Flexibility, though, meant that fewer redistricting plans would be rejected under the retrogression standard embodied in the effects prong of Section 5.²¹⁰

So, to summarize, the two major hallmarks of the Court's Section 5 jurisprudence since the early 1990s were the retention of strong procedural protections with a concomitant reduction in the substantive protections provided to minority voters. For those keeping score up to this point, since the early 1990s, minority voters are eight and two against jurisdictions covered by Section 5 in litigation involving the procedural realm of Section 5.²¹¹ In contrast, during that same time period, minority voters are zero and four against jurisdictions covered

208. See Michael J. Pitts, *Georgia v. Ashcroft: It's the End of Section 5 As We Know It (And I Feel Fine)*, 32 PEPP. L. REV. 265, 275 (2005) (discussing the Attorney General's historic practices related to the assessment of retrogression).

209. See Richard H. Pildes, *Political Competition and the Modern VRA*, in THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 100, at 1, 6–7 (describing how the *Ashcroft* Court concluded “that Georgia had latitude to make at least marginal tradeoffs between the safety of black seats and the aim of marshaling political power effectively to control state political institutions”). As I have previously noted:

To the *Ashcroft* Court, it was acceptable for the State of Georgia to trade away some of African-American voters' descriptive representation if it could be demonstrated that the State provided something in return—the something in this instance being the substantive representation (the potential for positive legislative outcomes) African-American voters would achieve through the retention of a Democratic legislative majority in the Senate.

Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 940–41 (2008); see also Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 21 (2004) (describing how *Georgia v. Ashcroft* “fundamentally alter[ed] the preclearance process in disturbing ways”).

210. See Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 217 (2007) (describing the Court's decision in *Ashcroft* as “allow[ing] jurisdictions more flexibility in how minorities could be distributed in new redistricting plans”); *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 469, 478 (2003) (noting that *Ashcroft* would likely make it “far easier for states to obtain section 5 preclearance”); see also *Session v. Perry*, 298 F. Supp. 2d 451, 485 (E.D. Tex.) (three-judge panel) (explaining how “*Ashcroft* gave states greater latitude in complying with the Voting Rights Act”), *vacated*, *Henderson v. Perry*, 543 U.S. 941 (2004).

211. The victories were *Clark*, *Lopez I and II*, *Young*, *Monterey I and II*, *Morse*, and *Foreman*. The defeats were *Presley* and *Monroe*.

by Section 5 in litigation involving the substantive realm of Section 5.²¹²

In 2006, though, Congress provided a fairly sharp rebuke of the Court's narrowing of Section 5's substantive scope. The occasion for the rebuke was the need to revisit the continuing existence of Section 5 (and several other sunset provisions of the Voting Rights Act).²¹³ With Section 5 set to expire, Congress re-examined the need for Section 5 and concluded the provision remained a necessary tool in the statutory arsenal used to combat voting-related discrimination.²¹⁴ Importantly, Congress decided to overrule the Court's two most prominent decisions limiting the substantive reach of Section 5. *Bossier Parish II* was reversed, returning to a regime where the presence of *any* discriminatory purpose would serve as the basis for denying preclearance.²¹⁵ Likewise, *Ashcroft* was reversed, returning to a regime where the ability of minority voters to elect a candidate of choice could not be traded for gains in substantive representation.²¹⁶ In es-

212. The defeats were *Bossier I* and *II*, *Abrams*, and *Ashcroft*. Really, the zero and four record should be accompanied by an asterisk because *Miller v. Johnson* arguably represents a substantive loss as well.

213. See 42 U.S.C.A. § 1973b(a)(8) (West Supp. 2008) (setting forth Section 5's sunset date).

214. The recent legislation extending certain provisions of the Voting Rights Act notes: The record compiled by Congress demonstrates that, without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years.

Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 2(b)(9), 120 Stat. 578.

215. See *id.* § 5, 120 Stat. at 581 ("The term 'purpose' in subsections (a) and (b) of this section shall include any discriminatory purpose."). Moreover:

The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decision[] in *Reno v. Bossier Parish II*. . . which [has] misconstrued Congress'[s] original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act.

Id. § 2(b)(6), 120 Stat. at 578.

216. *Id.* § 5, 120 Stat. at 581 ("The purpose of subsection (b) of this section is to protect the ability of such [racial and language minority] citizens to elect their preferred candidates of choice."). Moreover:

The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decision[] in . . . *Georgia v. Ashcroft*, which [has] misconstrued Congress'[s] original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act.

Id. § 2(b)(6), 120 Stat. at 578; see also David T. Canon, *The Future of the Voting Rights Act*, 6 ELECTION L.J. 266, 267 (2007) (book review) ("Congress . . . restored the pre-*Georgia v. Ashcroft* retrogression standard.").

sence, the extension of Section 5 amounted to a congressional smackdown of the Court's interpretations of the substantive reach of Section 5.

C. *Riley as a Possible Omen for the Supreme Court's Future Strategy*

Returning to *Riley*, the decision is a landmark in several ways: It represents the first Section 5 decision from the Roberts Court, and it also represents the first Supreme Court opinion involving Section 5 following Congress's humbling of the Court's ill-fated attempts at interpreting a seminal civil rights statute. And what *Riley* suggests is that the conservative majority of the Supreme Court may take a new angle at curbing the efficacy of Section 5.²¹⁷ The new angle the Court may take will be to attack Section 5 from a procedural, rather than a substantive, posture. Instead of limiting the power of the federal government to reject voting changes as discriminating against minority voters, the Court may limit the capability of the federal government to even review those voting changes in the first place. *Riley*, after all, represents an attack on the Section 5 process itself (it was an appeal from a Section 5 enforcement action) rather than a more direct attack on the substantive reach of Section 5 that has been the Court's first-order weapon of choice since the early 1990s.

Intuitively, such a switch in judicial tactics—from curbing Section 5's substantive standard to curbing Section 5's procedural protections—makes eminent sense in light of the current Court's ideological bend. The general inclination of the conservative majority of the Court trends in two directions highly relevant to Section 5. The first general inclination is to curb the power of the federal government *vis-à-vis* state governments.²¹⁸ The second general inclination is to curb the use of race-based remedies by public actors.²¹⁹ Section 5, of course, runs in the complete opposite direction of both these general inclinations—it is a federal mandate that certain governments consider race when changing the rules of democracy.

217. I realize there is a bit of incongruity in viewing an opinion written by Justice Ginsburg as the harbinger of a strategy for the Court's conservative majority. In my view, Justice Ginsburg crafted the majority opinion with the goal of making it a very narrow in-road into Section 5 and would like the opinion to be interpreted in the manner discussed in Part II.C of this Article. However, it is quite possible Justice Ginsburg will not be able to stem the bleeding in future cases.

218. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (finding that Congress exceeded its power to enforce requirements upon states under the Fourteenth Amendment).

219. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (sustaining a racial gerrymandering challenge against a state redistricting plan).

Of course, these two general ideological inclinations could potentially lead the Court to just shut Section 5 down in its entirety by declaring it unconstitutional, but there may be reasons for the Court not to do that.²²⁰ Rejecting the constitutionality of Section 5 would require the Court to break with precedent—including precedent that might fairly be characterized as seminal.²²¹ Moreover, even conservative Justices may not wish to risk the political capital and jolt to the Court's prestige that might follow closely upon the heels of a decision to declare a key part of the Voting Rights Act unconstitutional.

So if a conservative Supreme Court does not wish to eliminate Section 5 in its entirety because it does not have the stomach (or the political capital) to do so,²²² but still wants to reduce the impact of Section 5, one tactic would be to slowly chip away at the substantive aspect of Section 5, as the Court has done since the mid 1990s. However, Congress's amendment of Section 5 overruling *Ashcroft* and *Bossier Parish II* has, at the very least, placed a bit of a roadblock in front of this strategy. Facing this roadblock, the new strategy for a conservative Court majority may be to slowly chip away at Section 5 through limiting the provision's procedural reach. In a way, what *Riley* may represent is the hydraulics of the constitutional conversation between the Court and Congress when it comes to the Voting Rights Act.²²³ When water gets blocked, it invariably tries to work its way around the blockage. The Supreme Court has perhaps been blocked from curbing Section 5's substantive reach, so the Court may now work its way around the blockage by limiting Section 5's procedural reach.²²⁴

220. As this Article progressed through the editing process, the Court noted probable jurisdiction in a case where the constitutionality of Section 5 is at issue. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 129 S. Ct. 894, 894 (2009).

221. For Supreme Court precedents that rejected constitutional challenges to Section 5, see *Lopez v. Monterey County (Lopez II)*, 525 U.S. 266, 282–84 (1999); *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *Georgia v. United States*, 411 U.S. 526, 540–41 (1973); and *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

222. Cf. Debra Cassens Weiss, *Supreme Court Gets First Negative Approval Rating*, A.B.A. J., July 28, 2008, http://abajournal.com/news/supreme_court_gets_first_negative_approval_rating (describing how the Supreme Court had earned its first negative approval rating in five years of polling).

223. Cf. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708–17 (1999) (describing, in the context of campaign finance, how regulatory reform efforts aimed at eliminating the influence of money in politics merely result in money being channeled into politics through a different avenue); Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 146–49 (2005) (discussing, in the context of political parties, how political actors will adapt to changed political circumstances by coming up with new methods to achieve old goals).

224. Of course, it is entirely possible that the conservative majority will attack Section 5 on both procedural and substantive fronts. Here again, though, *Riley* still can be considered a harbinger of a new strategy.

Indeed, such a strategy would seemingly fit within what political scientists have termed the “attitudinal model.” The theory advanced by political scientists is that Supreme Court Justices typically have ideological preferences and these preferences creep into Court decision-making because traditional legal arguments, such as precedent, statutes, and legislative history, are often indeterminate and leave judges with discretion to render policy judgments. In exercising this discretion, Justices decide cases according to ideological preference²²⁵—something legal realists have long-suspected.²²⁶ Legal commentators have followed suit in fleshing out the attitudinal model developed by political scientists. In one recent study, for instance, Professors Adam Cox and Thomas Miles found that “judicial ideology significantly influences judicial decisionmaking in Voting Rights Act cases [filed under Section 2].”²²⁷ Federal judges appointed by Democratic presidents, it seems, are significantly more likely to rule in favor of plaintiffs in Section 2 cases than are federal judges appointed by Republican presidents.²²⁸ For this reason, one could surmise that the conservative majority of the Supreme Court still has an ideological preference to reduce Section 5’s impact.

Looking by analogy to the literature on strategic judging, the switch from making substantive inroads into Section 5 to making procedural ones makes sense. Empirical research has found that judges advance their ideological preferences by strategic use of the bases for their opinions.²²⁹ For example, in the context of criminal sentencing, Democratic judges are more likely to use fact-based determinations to change the sentence of a defendant than law-based ones when the circuit court was ideologically opposed. In other words, Democratic district judges in Republican circuits would be more likely to use sentencing adjustments, which are factual determinations unlikely to be reversed on appeal. However, a Democratic district judge in a Democratic-controlled circuit would be more likely to use sentencing depar-

225. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 779 (2000) (“The attitudinal model posits that the Justices decide cases in accordance with their political beliefs.”).

226. See Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 257 (1997) (“The Critical Legal Studies (CLS) movement more recently assumed the mantle of extreme legal realism. To the ‘crits,’ the law was indeterminate; thus, traditional legal analytical methods could be employed to justify virtually any result in a given case.”).

227. Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3 (2008).

228. *Id.*

229. *Id.* at 17–18 (succinctly describing this literature).

tures, which are legal determinations more easily reversed by the court of appeals.²³⁰

Turning back to Section 5, it may be appropriate to consider the Supreme Court to be up against a Congress that is not ideologically aligned. The Court may think that Congress is less likely to reverse procedural choices made by the Court related to Section 5 and more likely to reject substantive choices related to Section 5. To make the analogy to the existing literature more explicit, the Court may think Congress will have a tougher time reversing its procedural choices (the corollary to fact-based determinations by district court judges) and an easier time reversing substantive decisions (the corollary to law-based determinations by district court judges). After all, in the most recent extension of Section 5, Congress reversed two of the substantive decisions made by the Court (*Ashcroft* and *Bossier Parish II*) but chose not to reverse the most prominent procedural inroad made by the Court (*Presley*).

If the strategy of the Court becomes one where it acts to limit Section 5 through a focus on the provision's procedural reach, the obvious question then becomes: In what other contexts might this play out in the future? The following discussion will focus on two possible ways in which the Court might limit the provision's procedural scope—one that involves the nature of the baseline for deciding when a Section 5 change has occurred and one dealing with the ability of a covered jurisdiction to escape Section 5 coverage. Importantly, though, these two examples do not represent the entire range of possible ways in which the Court might limit Section 5's procedural reach. Rather, they represent two examples that have particular salience in light of recent Section 5 action before the Court.

At the oral argument in *Riley*, the question arose as to whether a jurisdiction's decision to implement a voting procedure in force or effect on the date that Section 5 coverage began amounts to a voting change that requires preclearance *even if intervening changes had received Section 5 approval*. The idea is complicated and somewhat counterintuitive, so it helps to put the abstract concept into a more tangible hypothetical. Assume that on November 1, 1964 (the date on which Section 5 coverage began), vacancies on the Mobile County Commission were filled by gubernatorial appointment; then assume that the Attorney General granted Section 5 approval in 1986 to a change to fill vacancies on the county commission by special election

230. Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 725–27, 735–36 (2008).

and that this change was *not* challenged in state court; then assume that in 1990 the state wishes to revert to the practice in effect on November 1, 1964—filling the vacancies by gubernatorial appointment. On this set of facts, it is possible to argue that reversion to the practice in existence on November 1, 1964, does not need to be submitted to the federal government for Section 5 preclearance.

The rationale for such an interpretation of Section 5 reflects a plain-language vision outlined by Chief Justice John Roberts at the *Riley* oral argument. During oral argument, the Chief Justice gently needled Alabama's lawyer, Kevin Newsom, for failing to argue more forcefully that Alabama did not need to seek preclearance when it sought to reinstate a voting practice (gubernatorial appointment) in use on the date Alabama initially became subject to Section 5.²³¹ Later in the oral argument, the Chief Justice more extensively grilled opposing counsel, Professor Pamela Karlan: "Why did Alabama have to preclear anything? On November 1st, 1964, this was an appointed position. This is not a change from what was, quote, 'in force or effect' on November 1st, 1964."²³² When Professor Karlan replied that prior Supreme Court decisions, guidelines for administering Section 5 promulgated by the Attorney General, and legislative history dictated against interpreting Section 5 this way, Chief Justice Roberts tersely replied, "I just don't see how that squares with the statutory language."²³³

In truth, Chief Justice Roberts has a point about the statutory plain language, but Professor Karlan was most certainly correct that there are more chapters to the story. The literal language of Section 5 requires a state such as Alabama to seek preclearance only when it "shall enact or seek to administer any [voting practice] . . . *different from that in force or effect on November 1, 1964.*"²³⁴ In essence, the plain language indicates that the state does not need to obtain preclearance

231. Chief Justice Roberts stated the following during the oral argument:

Now, counsel, since you mentioned section 5, perhaps you ought to look at it. It says that you have to preclear standards, practices, whatever, different from that in force or effect on November 1st, 1964.

Now, the Respondents in their brief accused you of making the argument that since this isn't different from what was in effect in 1964 you don't have to preclear it. And you said, no, that's not what we're saying; we take no position on that.

Why in the world did you say that? . . . It says quite clearly the standard has to be different from that in force or effect on November 1st, '64.

Transcript of Oral Argument at 23, *Riley v. Kennedy*, 128 S. Ct. 1970 (2008) (No. 07-77).

232. *Id.* at 43.

233. *Id.* at 43–46.

234. 42 U.S.C.A. § 1973c(a) (West Supp. 2008) (emphasis added).

when returning to any practice in use on November 1, 1964. However, the Court has implied otherwise in its prior decisions. Moreover, the Attorney General has not interpreted the statute in this manner,²³⁵ and the Court grants considerable deference to the Attorney

235. Brief for the United States as Amicus Curiae Supporting Appellees in Part at 18, *Riley*, 128 S. Ct. 1970 (No. 07-77) (“[T]he Attorney General has consistently rejected an interpretation of Section 5 that would exclude from the preclearance requirement any change that merely reverts to a practice in place on November 1, 1964.”). In arguing that the Attorney General has “consistently” taken the position that reversion to the pre-coverage practice necessitates preclearance, the Attorney General relies on guidance that “a voting change is subject to preclearance ‘even though it . . . returns to a prior practice or procedure.’” *Id.* (quoting 28 C.F.R. § 51.12 (2007)). And in promulgating this guidance, “the Attorney General explained that the rule was 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.’” *Id.* (quoting Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 488 (Jan. 6, 1987) (codified at 51 C.F.R. pt. 51)); *see also* Letter from Grace Chung Becker, Acting Assistant Attorney Gen., Civil Rights Division, to Brian DeBano and Christopher Thomas (Dec. 26, 2007) (rejecting contention by the State of Michigan that a reversion to the voting procedure used on the date coverage began does not need to be reviewed under Section 5).

However, the issue may not be quite as clear-cut as presented in the amicus brief for the United States. The complete language of the guidelines is that “[a]ny *change affecting voting*, even though it . . . returns to a prior practice or procedure . . . must meet the section 5 preclearance requirement.” 28 C.F.R. § 51.12 (emphasis added). Elsewhere in the Guidance provided by the Attorney General, the phrase “change affecting voting” is defined as “[any voting practice] different from that in force or effect on the date used to determine coverage.” 28 C.F.R. § 51.2 (2007). Thus, the guidance could be read as follows: “Any voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on the date used to determine coverage [e.g., November 1, 1964],” *id.*, “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, must meet the Section 5 preclearance requirement.” 28 C.F.R. § 51.12. On this reading (and without reference to the supplementary statement in the Federal Register), the Guidance about reversion to a prior practice would seem to only apply when a Section 5 covered jurisdiction seeks to implement a voting practice not in effect on the initial date of coverage.

Moreover, it is not entirely clear that the Attorney General has “consistently” taken the approach that the practice in use on the initial coverage date is rendered meaningless by subsequent changes being precleared. In an amicus brief filed in *Richards v. Terrazas*, the Attorney General implied that the plain language interpretation of Section 5 should govern, writing specifically:

To determine whether there has been a change with respect to voting for purposes of Section 5, a court must compare the challenged practice with the one actually in effect at the time the jurisdiction became subject to the preclearance requirement. The State [of Texas] does not deny that S.B. 1 is different from the senatorial districting plan in effect in 1972, and thus Section 5 preclearance is required by the plain language of the statute.

Brief for United States as Amicus Curiae at 9, *Richards v. Terrazas*, 505 U.S. 1214 (1992) (No. 91-1270) (citations omitted).

General's constructions of Section 5.²³⁶ In addition, allowing a state to avoid preclearance by reverting to a practice in existence on the initial date of coverage after subsequent practices have received Section 5 approval would cut against the primary *raison d'être* for Section 5 in the first place—the avoidance of retrogression of minority voting rights.²³⁷

The Court itself has implied that voting changes precleared after the initial coverage date should serve to form a new baseline against which to assess whether a voting change has occurred. In *Young v. Fordice*, the Court noted that the initial coverage date was “not directly relevant, for differences once precleared normally need not be cleared again.”²³⁸ Instead, according to the Court, “[the differences] become part of the baseline standard for purposes of determining whether a State has enact[ed] or is seek[ing] to administer a practice or procedure that is different enough itself to require preclearance.”²³⁹ Likewise, in *Presley v. Etowah County Commission*, the Court noted that “[t]o determine whether there have been changes with respect to voting, we must compare the challenged practices with those in existence before they were adopted. *Absent relevant intervening changes*, the Act requires us to use practices in existence on November 1, 1964, as our standard of comparison.”²⁴⁰ In short, the Court's opinions imply that the practice in use on the date Section 5 coverage commenced becomes meaningless if subsequent changes are precleared.

One can contend, as Chief Justice Roberts did at the *Riley* oral argument, that these decisions amount to mere dicta in relation to the question of the relevant baseline for determining whether a change has occurred that needs to be subjected to the Section 5 process. Fair enough, but there is a tangential realm of Section 5 where the Court has clearly held that Section 5 approval obtained after the coverage

236. See *Lopez v. Monterey County (Lopez II)*, 525 U.S. 266, 281 (1999) (“[W]e traditionally afford substantial deference to the Attorney General's interpretation of § 5 in light of her central role . . . in formulating and implementing that section.” (citation and internal quotation marks omitted)); see also *United States v. Bd. of Comm'rs*, 435 U.S. 110, 131 (1978) (“In recognition of the Attorney General's key role in the formulation of the Act, this Court in the past has given great deference to his interpretations of it.”).

237. See *Beer v. United States*, 425 U.S. 130, 141 (1976) (“[T]he purpose of § 5 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.”).

238. *Young v. Fordice*, 520 U.S. 273, 281 (1997).

239. *Id.* (citation and internal quotation marks omitted) (second and third alterations in original).

240. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 495 (1992) (emphasis added).

date does formulate a new analytical baseline. When it comes to determining whether or not a voting change substantively violates Section 5, one must determine the baseline or “benchmark” practice against which to assess the retrogression of minority voting strength.²⁴¹ Here, the Attorney General has issued guidance as to which practices can serve as a benchmark for assessing retrogression. In essence, this guidance says that the benchmark for assessing retrogression is either the practice in effect on the initial date of coverage or any practice that has subsequently received Section 5 approval.²⁴² And the Court in *Abrams v. Johnson* followed the Attorney General’s guidance.²⁴³

Now, it is possible that Chief Justice Roberts (and other like-minded jurists) might try to divorce the concept of what serves as the benchmark for determining whether a voting change must be submitted to federal authorities (a subject on which there has not been an absolutely clear pronouncement from the Court) from the concept of what serves as the benchmark for determining whether a voting change actually discriminates against minority voters (a subject to which *Abrams* speaks clearly). In other words, if a state wants to return to a practice “in force or effect” on the initial date of coverage, the state can do so even if subsequent practices have been precleared. However, if the state wants to change to a practice that was not in force or effect on the initial date of coverage, then any subsequent precleared practice will serve as the benchmark for determining whether retrogression of minority voting strength has occurred.²⁴⁴ In a nutshell, the role that subsequently precleared practices will play

241. See *supra* notes 198–199 and accompanying text (describing the concept of the Section 5 “benchmark”).

242. See 28 C.F.R. § 51.54(b)(1) (2008) (“In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction’s applicable date for coverage . . . and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and . . . the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.”).

243. See *Abrams v. Johnson*, 521 U.S. 74, 96–98 (1997) (referring to the Attorney General’s regulations to determine the appropriate benchmark). Similarly, in *Georgia v. Ashcroft*, the Court used as a benchmark for assessing retrogression a redistricting plan that had been approved under Section 5 by the Attorney General in 1997. 539 U.S. 461, 468–69 (2003). In *Georgia*, however, the Court was careful to note that none of the parties in that case argued for a different benchmark. *Id.* at 469 (“All parties here concede that the 1997 plan is the benchmark plan for this litigation because it was in effect at the time of the 2001 redistricting effort.”).

244. This, of course, assumes that the Section 5 precleared voting change is “in force or effect” and is “otherwise legally enforceable” (i.e., does not violate the United States Constitution).

depends upon whether the court is dealing with a question of Section 5 process or Section 5 substance.

There are problems with this approach, however. For example, in past decisions the Court has appeared to interpret the benchmark for determining substantive retrogression to be one and the same as the benchmark for determining whether or not a voting change has occurred. *City of Lockhart v. United States*²⁴⁵ was one of three decisions relied upon in Justice Ginsburg's *Riley* opinion to determine the contours of what amounts to a change that is "in force or effect" for the purposes of determining whether or not a voting practice must be submitted for Section 5 review.²⁴⁶ However, the discussion from *Lockhart* cited by Justice Ginsburg did not arise in the context of determining whether the voting practice needed to be subjected to the Section 5 process. Rather, the discussion from *Lockhart* arose in the context of determining the benchmark for deciding the merits of the Section 5 claim—whether the changes discriminated against minority voters.²⁴⁷ The Supreme Court itself, then, has previously recognized that the benchmark for determining whether a change has occurred parallels the benchmark for determining discrimination against minority voters.

Even leaving prior precedent to one side, it is not clear that having one rule for assessing whether a change has occurred and another rule for assessing whether discrimination has occurred makes much sense in light of Section 5's primary purpose to prevent the backsliding of minority voting strength. For example, consider the following, admittedly extreme, hypothetical. On November 1, 1964, a city uses as a polling place in a predominantly African-American precinct the local KKK meeting house at 1 KKK Lane. Then assume that on November 1, 1970, the city moves the polling place for that precinct to an African-American church and obtains Section 5 approval for that move. On January 1, 2008, the city decides to return the polling place to the local KKK meeting house at 1 KKK Lane. Result: No Section 5 change because it is a return to the practice in force or effect on November 1, 1964, thus no preclearance is required. Now, alter the facts of the January 1, 2008 change just slightly and assume that the change

245. 460 U.S. 125 (1983).

246. See *Riley v. Kennedy*, 128 S. Ct. 1970, 1983 (2008) ("Similarly, in *City of Lockhart v. United States*, the question was what practice had been 'in force or effect' in Lockhart, Texas, on the relevant § 5 coverage date, November 1, 1972." (citation omitted)).

247. See *Lockhart*, 460 U.S. at 132–36 (discussing whether "the plan's changes that have not been precleared by the Attorney General have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group").

was a move to the White Supremacist Meeting House at 1 White Supremacy Drive. Result: A voting change that must be submitted and will be denied preclearance because the change is retrogressive in relation to the benchmark November 1, 1970, practice. There would not seem to be any good reason (apart from a plain-language view) to treat the two scenarios differently, yet under Chief Justice Roberts's approach each scenario would lead to a different result.

But at the end of the day, it is not important for purposes of the primary point being made here whether the view presented by Chief Justice Roberts at the *Riley* oral argument amounts to a proper interpretation of Section 5. Indeed, ultimately the *Riley* Court punted on this question.²⁴⁸ What is important here is the punt itself and what it indicates about the possible strategic approach the conservative majority will take in the future. Chief Justice Roberts has, in essence, invited litigation on this issue and has opened up the possibility of creating a procedural loophole that will allow state and local governments the freedom to return to any practice in force or effect on the initial coverage date. Imagine, then, for example, the possibility of numerous local governments returning to at-large elections or majority-vote requirements employed in the mid 1960s. Granted, many local governments may not take the bait. In many places, it may not be politically feasible to so nakedly retrogress minority voting strength and savvy local officials may recognize the many positive benefits minority representation can have on a community.²⁴⁹ Nevertheless, Chief Justice Roberts's seeming willingness to open up such a procedural loophole represents a marked danger for minority voters protected by Section 5.

A second possibility for the opening of a vast procedural loophole exists in the litigation involving the constitutionality of Section 5 currently pending before the Supreme Court. The Northwest Austin Mu-

248. The Court explained:

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, 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.

Riley, 128 S. Ct. at 1982 n.7 (citations omitted).

249. See RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 6–7 (2004) (describing recent research that shows the benefits of descriptive representation for African-Americans).

nicipal Utility District Number One—a subjurisdiction of the State of Texas—has brought a declaratory judgment action challenging Section 5’s constitutionality.²⁵⁰ Nearly lost among larger constitutional discussions about the power of Congress to enforce the Fourteenth and Fifteenth Amendments and doctrinal arguments related to congruence and proportionality²⁵¹ lurks a precursor question of statutory interpretation. The utility district’s first claim seeks what is known in Section 5 jargon as a “bailout.”²⁵²

A “bailout” presents a means for a jurisdiction covered by Section 5 to escape the preclearance requirement. Initially, a state or local government becomes subject to the Section 5 preclearance requirement when it meets the statutory formula for coverage.²⁵³ However, a jurisdiction initially subject to Section 5 may later escape from coverage through a process known as “bailout.” In a nutshell, to secure a

250. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 223 (D.D.C. 2008) (explaining that the municipal utility district challenged Section 5’s constitutionality, and rejecting the constitutional challenge), *prob. juris. noted*, 129 S. Ct. 894 (2009).

251. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 522–34 (2004) (applying congruence and proportionality to Title II of the Americans with Disabilities Act as it applies to the fundamental right of access to the courts).

252. See *Nw. Austin Mun. Util. Dist. No. One*, 573 F. Supp. 2d at 230 (“The District makes two claims . . . Claim I seeks a declaratory judgment pursuant to section 4(a) exempting the District from section 5’s preclearance requirement.”).

253. See 42 U.S.C.A. § 1973b(b) (2003 & West Supp. 2008). The coverage formula captures state and local governments that employed a “test or device” as a prerequisite for voting or registration and that had low voter participation rates as evidenced by reduced voter registration and turnout rates. *Id.* The Act defines the phrase “test or device” as: requiring that a person (1) “demonstrate the ability to read, write, understand, or interpret any matter”; (2) “demonstrate any educational achievement or . . . knowledge of any particular subject”; (3) “possess good moral character”; (4) prove qualifications to participate in an election by voucher of another person; and (5) the use of English-only elections where a significant number of voting age citizens in the jurisdiction are members of a language minority group. 42 U.S.C. § 1973b(c), (f)(3) (2000). These proxies were used as a means for identifying state and local governments that engaged in intentional discrimination related to voting. See Timothy G. O’Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 772–73 (1983) (explaining that Section 5’s coverage formula “rests on the rationale that the conjunction of low voter registration or turnout and the use of a literacy test . . . establishes a presumption that discrimination exists in the voting process”); see also *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 156–57 (1977) (plurality opinion) (describing the Section 5 coverage formula as capturing state and local governments “whenever it was administratively determined that certain conditions which experience had proved were indicative of racial discrimination in voting had existed in the area”). It is important to note that the bailout provision helps buttress the constitutionality of the Act to address possible overinclusiveness by the coverage formula. See *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966) (“Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years.”).

bailout, a jurisdiction must prove to a three-judge panel of the D.C. District Court that it has engaged in enough “good behavior” related to minority voting rights that it has earned the right to no longer be subject to Section 5.²⁵⁴

The thorny question of statutory interpretation related to bailout raised by the Northwest Austin Municipal Utility District concerns whether the utility district may seek a bailout or whether the ability to seek a bailout is limited, essentially, to states and counties. The history of the bailout provision is complex, but at least initially Congress made it nearly impossible for jurisdictions subject to Section 5 to escape coverage.²⁵⁵ One of the ways in which bailout was made difficult was that, at first, only two categories of jurisdictions could bail out: states and “political subdivision[s]” covered “as a separate unit.”²⁵⁶ Section 14(c)(2) of the Act defined the term “political subdivision” to mean, in most instances, the county unit of government.²⁵⁷ All together, this language resulted in the fact that a covered state could seek a bailout and a covered county could seek a bailout so long as the county did not lie in a covered state; however, a county in a covered state was *not* eligible to bail out. To make this more concrete: the State of Georgia could seek a bailout; Anson County, North Carolina

254. See 42 U.S.C.A. § 1973b(a)(1), (5) (2003 & West Supp. 2008). To obtain a bailout the jurisdiction must prove, among other things, that during the last ten years: (1) no discriminatory test or device has been used; (2) no court has adjudged the jurisdiction or any of its political subdivisions to have denied or abridged the right to vote; (3) no federal examiners or observers have been assigned to the jurisdiction; (4) the subjurisdiction and all political units within it have complied with Section 5; (5) no Section 5 objection by the Attorney General or unfavorable declaratory judgment has been issued by the D.C. District Court; and (6) the subjurisdiction and all its political units have eliminated voting procedures and methods of election that inhibit or dilute equal access to the electoral process, have engaged in constructive efforts to eliminate the intimidation and harassment of persons exercising the right to vote, and have engaged in constructive efforts to provide convenient opportunities for registration and participation by minority citizens. 42 U.S.C.A. § 1973b(a)(1)(A)–(F) (2003 & West Supp. 2008).

255. For a detailed discussion of the history of bailouts, see Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 383–412 (1985).

256. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438.

257. *Id.* § 14(c)(2), 79 Stat. at 445. The statutory language reflects the fact that Louisiana uses the term “parish” to describe its county level of government. In addition, the statute defines “political subdivision” to encompass any other subdivision (i.e., cities and towns) of a state that conducts voter registration when registration is not conducted at the county level. *Id.* In the vast majority of states, voter registration is conducted at the county level. See Project Vote Smart, Voter Registration Information, http://www.votesmart.org/voter_registration_resources.php (last visited Mar. 27, 2009) (providing state-by-state voter registration information and directing residents of the majority of states to submit voter registration applications to county election offices). Notable exceptions to this rule are typically found in northeastern states, such as Massachusetts and New Hampshire.

(a separately covered “political subdivision”), could seek a bailout because the State of North Carolina was not entirely covered; but Cobb County, Georgia, could not seek a bailout because the entire State of Georgia was covered.²⁵⁸

In 1982, however, Congress attempted to expand the possibility for bailout; but the question becomes how much of an expansion of bailout was enacted by Congress. One of the ways in which Congress attempted to expand the possibility for bailout was to open up the bailout process beyond states and political subdivisions (i.e., counties) covered “as a separate unit.” Congress did this by amending Section 4(a) of the Act to allow a bailout by “any political subdivision of [a covered] State . . . though such determinations were not made with respect to such subdivision as a separate unit.”²⁵⁹ The question then becomes exactly how much this language expands the number of entities eligible to seek a bailout. One view is that the language only opens up the opportunity to bail out to counties that lie in covered states. The other view, now espoused by the Northwest Austin Municipal Utility District, is that this amendment opens up the possibility of a bailout to “any political subdivision.”

The utility district’s primary argument for its ability to seek a bailout combines the Act’s plain language with a late 1970s Supreme Court decision. The utility district argues that it is a “political subdivision” under the plain meaning of the term as used in Section 4(a).²⁶⁰ Moreover, the utility district argues that the definition of “political subdivision” in Section 14(c)(2)—a definition that essentially limits the concept of the “political subdivision” to the county unit of government—does not apply because in *United States v. Board of Commissioners*²⁶¹ the Court wrote that the definition in Section 14(c)(2) “‘was intended to operate only for purposes of determining which political units in nondesignated States may be separately designated for coverage.’”²⁶² At bottom, what the utility district argues is that Section

258. See 28 C.F.R. § 51 app. (2008) (listing jurisdictions subject to Section 5).

259. 42 U.S.C.A. § 1973b(a)(1) (West Supp. 2008).

260. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 231 (D.D.C. 2008) (explaining that the utility district rests its eligibility to apply for a bailout upon the common meaning of “political subdivision” as a “division of a state that exists primarily to discharge some function of local government”), *prob. juris. noted*, 129 S. Ct. 849 (2009).

261. 435 U.S. 110 (1978).

262. *Nw. Austin Mun. Util. Dist. No. One*, 573 F. Supp. 2d at 232 (quoting *Bd. of Comm’rs*, 435 U.S. at 128–29). In *Board of Commissioners*, the Court reiterated its conclusion in a footnote saying “the only limitation § 14(c)(2) imposes on the Act pertains to the areas that may be *designated* for coverage.” *Bd. of Comm’rs*, 435 U.S. at 129 n.16 (emphasis added).

14(c)(2)'s limitation of the statutory term "political subdivision" to the county level of government only applies to which jurisdictions get *into* coverage and does not apply to which jurisdictions can get *out of* coverage.

The clearest counter to the utility district's argument comes from the legislative history surrounding Congress's decision in 1982 to expand the possibility of bailout, subsequent guidance issued by the executive branch, and the policy implications of expanding bailout to reach entities like municipal utility districts. The 1981 House Report noted that "[t]he standard for bail-out [wa]s broadened to permit political subdivisions, as defined in Section 14(c)(2), in covered states to seek to bail out although the state itself may remain covered."²⁶³ The 1982 Senate Report contains a similar statement.²⁶⁴ In addition, the Attorney General's procedures for the implementation of Section 5 note that "a political subdivision of a covered State may terminate the application of section 5"²⁶⁵ and limits the definition of the term "political subdivision" to the county level of government.²⁶⁶ Moreover, from a policy perspective, a bailout provision expanded to reach sub-jurisdictions such as municipal utility districts would be an executive administrative disaster without a massive expansion of executive

263. H.R. REP. NO. 97-227, at 2 (1981). The House Report also notes, "When referring to a political subdivision this amendment [to the bailout provision] refers only to counties and parishes except in those rare instances in which the county does not conduct [voter] registration; only in such rare instances . . . can a jurisdiction smaller than a county or parish file for bailout." *Id.* at 39.

264. S. REP. NO. 97-417, at 2 (1982) ("The standard for bailout is also broadened by permitting political subdivisions in covered states, as defined in Section 14(c)(2), to bail out although the state itself remains covered."). In addition, the Senate Report states:

When referring to a political subdivision this amendment refers only to counties and parishes except in those rare instances in which registration is not conducted under the supervision of a county or parish. In such instances, such as independent cities in Virginia, a jurisdiction other than a county or parish may file for bailout. A city with such registration may not bailout separately.

Id. at 69. The Senate Report indicates that the reason the ability to seek bailout was not extended to political subjurisdictions below the county level was to limit the burden of bailout suits on the Department of Justice and the civil rights litigation bar. *Id.* at 57 n.192; *see also id.* at 69 ("This limitation is a logistical one. If the smallest of political subdivisions could bail out, the Department of Justice and private groups would have to defend thousands of bailout suits.").

265. 28 C.F.R. § 51.5 (2008).

266. *Id.* § 51.2 ("Political subdivision is used, as defined in the Act, to refer to any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." (citation and internal quotation marks omitted)). Again, it bears repeating that technically it is also any other unit that conducts voter registration but that in only rare instances is voter registration conducted at a level of government other than the county level. *See supra* note 257.

branch resources. Currently, the Attorney General employs fewer than two dozen attorneys and analysts to review voting changes submitted under Section 5. In order to adequately review the potential thousands of bailouts that would be spawned by the utility district's interpretation of the statute, the Attorney General would have to hire many more employees to work almost exclusively on bailout matters.²⁶⁷

At the end of the day, though, the main point I want to emphasize about the statutory bailout argument presented in the litigation currently pending before the Supreme Court is that it represents another Trojan Horse-type opportunity to limit Section 5's procedural reach. The procedural aspect of Section 5 is most often about the question of whether an individual voting change needs to be precleared. In some sense, the ability (or inability) to seek bailout represents the *ultimate* procedural question—which states and local governments need to submit *any* voting changes for preclearance. Therefore, the threat arises that the Court may open up a huge procedural loophole by expanding the number of political subdivisions eligible to bail out.

267. In addition, it is possible to argue that, even if the utility district's plain language argument were accepted and political subdivisions such as cities, towns, school districts, and water districts were eligible for bailout, the Northwest Austin Municipal Utility District itself would not be eligible for bailout. The plain language of the phrase governing which jurisdictions are eligible for bailout allows "any political subdivision of [a covered] State (*as such subdivision existed on the date such determinations were made with respect to such State*)" to bail out. 42 U.S.C.A. § 1973b(a)(1) (West Supp. 2008) (emphasis added). The language used here seems to suggest that only a political subdivision that existed at the time coverage initially occurred is eligible to bail out. In many respects, such a rule makes sense because it would prevent a state from playing games with the bailout provision by, perhaps, splitting off a portion of a political subdivision and then seeking bailout for the split-off portion. It should be noted, however, that the legislative history surrounding this phrase appears to be sparse. I found no clear explanation of the reason for this phrase in either the House or Senate reports accompanying the amendments. In its section-by-section analysis of the bill, the Senate Report vaguely relates: "[F]or purposes of bailout, political subdivisions are defined as of the date they were covered under Section 4(b) of the Act." S. REP. NO. 97-417, at 69 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 248. The House Report contains the exact same language. *See* H.R. REP. NO. 97-227, at 39 (1981). That said, if this language means (as it seems to) that only political subdivisions that existed at the time of coverage can be eligible to seek a bailout, then the Northwest Austin Municipal Utility District itself cannot be eligible for bailout. The State of Texas became covered as of November 1, 1972. Voting Rights Act Amendments of 1975, 40 Fed. Reg. 43746 (Sept. 23, 1975). The utility district did not come into existence until the late 1980s. *See* *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 229–30 (D.D.C. 2008) (noting that the utility district was "[c]reated in the late 1980s to facilitate the development of a residential subdivision"), *prob. juris. noted*, 129 S. Ct. 894 (2009). In short, in the context of the utility district's litigation it may not be necessary to decide the question as to the scope of the term "political subdivision" when it comes to bailout because even on its own plain language terms the utility district might not be eligible.

While the interpretation of the bailout provision favored by the municipal utility district and the plain-language interpretation offered by Chief Justice Roberts at the *Riley* oral argument represent two possible ways in which the Court might cabin Section 5's procedural reach, these are not the only possible inroads. For example, another possible avenue for the Court would be to create additional gaps in the doctrine that requires courts to issue an injunction barring implementation of an unprecleared voting practice.²⁶⁸ Here, the Court has noted that an injunction always should issue unless an "extreme circumstance" counsels that the unprecleared change should be used. The Court has never found an extreme circumstance, but it is quite possible the Court could start to use the "extreme circumstance" exception more liberally. In addition, the Court could loosen up the doctrine that requires jurisdictions to give clear notice to the Attorney General of the changes for which preclearance is sought. Or, the Court might decide that certain voting changes are *de minimis* and need not be submitted for preclearance. In short, the possibility of procedural inroads is likely to be unlimited.

To sum up, *Riley* may not be just the least dangerous branch of Section 5 jurisprudence; instead, it could be the most dangerous. *Riley* may represent the harbinger of a new strategy to be implemented by the Court's conservative majority—a strategy that attacks Section 5's procedural prowess rather than the substantive ability of the federal government to deny preclearance.

One should not be fooled into thinking that the procedural scope of Section 5 is unimportant. Indeed, the procedural scope of Section 5 may be its most important feature. In the final analysis, the federal government denies preclearance to relatively few voting changes.²⁶⁹ Why? Because of Section 5's deterrent effect.²⁷⁰ State and local governments know they need to secure preclearance, so they tend to make sure they do not violate Section 5's substantive requirements. However, if a state or local government knew it would not have to go through the preclearance process, this deterrent effect would be lost. To put it plainly, the mere existence of the Section 5 process itself probably does more to help secure minority voting rights

268. See *supra* notes 133–135 and accompanying text.

269. See Richard L. Hasen, *Congressional Power to Renew Preclearance Provisions*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra* note 100, at 81, 93 (providing a table showing that in recent years the Attorney General has objected to less than one percent of the voting changes submitted).

270. See Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605, 613–17 (2005) (discussing the deterrent impact of Section 5).

than the actual denials of preclearance that emanate from the federal government. The Section 5 procedural process is extremely important to minority voting rights, and if *Riley* represents a harbinger of procedural inroads to come, it is a very dangerous case indeed.

IV. CONCLUSION: THE NECESSITY OF A CONGRESSIONAL RESPONSE

In this Article, I have laid out two possible avenues down which *Riley*—the Supreme Court’s first post-extension decision involving Section 5 of the Voting Rights Act—might lead. On one view, the case represents an outlier that poses no significant danger to the efficacy of Section 5 and, indeed, might even charitably be viewed as having some salutary impact. In the alternative, the case represents the possible beginnings of an ominous new trend in the Court’s Section 5 jurisprudence. Instead of trimming Section 5’s sails using the substantive standard for determining preclearance, a conservative majority of the Court may have found a new tactic by limiting its procedural reach. At this point, however, it is not possible to know in which direction *Riley* might lead. Indeed, events on the ground—most obviously, the potential for new members of the Court appointed by a new President—may shift the direction of the life of *Riley*.

Events on the ground may make a difference in terms of what *Riley* will mean, but political actors may be able to shape those events and political actors *should* try to shape those events. At this early point, reaction to *Riley* has been relatively muted in the press, in the academy, and in Congress. After a brief spurt of blog posts²⁷¹ and a few minor media reports, the conversation about *Riley* seems to have dissipated. However, to shape the legacy of *Riley*, a member of Congress who supports a “strong” Section 5 should introduce legislation that would overturn the Court’s decision. After introduction of this legislation, hearings should be conducted in both the Senate and the House.

The important point here is not that legislation reversing *Riley* must be enacted. Personally, I think enactment of such legislation would be a good idea because it would be more faithful to a strong commitment to maintain as much as possible minority voting strength in the jurisdictions subject to Section 5, and I think maintenance of the existing level of minority voting strength represents the best *raison*

271. See, e.g., Posting of Anita S. Krishnakumar to Concurring Opinions, <http://www.concurringopinions.com/archives/2008/05/> (May 30, 2008, 1:01 AM EST); Posting of Janai Nelson to Justice Talking, <http://communities.justicetalking.org/blogs/day28/archive/2008/05/29/chipping-away-at-the-vra-one-court-decision-at-a-time.aspx> (May 29, 2008, 7:30 AM EST).

d'être for Section 5 going forward.²⁷² Nevertheless, legislation reversing *Riley* may not be easy to pass for any number of reasons, including the fact that it may be hard for legislators to get their arms around the unusual set of circumstances in the case. Moreover, those who support overturning *Riley* might choose to emphasize other legislative priorities. At the end of the day, the important thing about introducing legislation and holding hearings is the signal Congress sends to the Court. Congress should not sit and wait, as it did with the Court's series of decisions that trimmed the substantive reach of Section 5, to see whether *Riley* represents the beginning of something more ominous. Rather, Congress should preempt the possibility of any judicial retrenchment of Section 5's procedural protections. The future of Section 5 lies just as much in the protection of the strong procedural process as it does in maintaining a strong substantive standard.

Some might counter that Congress should wait until the Court does more procedural damage to Section 5 than what has occurred in *Riley* before taking any action to stem the dismantling of the provision's procedural protections. However, procedural damage, once done, may take years to undo. In addition, reversing Supreme Court procedural decisions may not have much future legislative support—who knows what the composition of Congress will be in the future? There also may not be as much bipartisan support for the reversal of Court decisions limiting the provision's procedural reach. With respect to the reversal of the (substantive) *Bossier Parish II* and *Ashcroft* decisions, Republicans had a partisan political motive to support overruling these decisions, and that partisan political motive may not be as strong when it comes to more nuts and bolts procedural protections.²⁷³ Moreover, the reversal of the *Bossier Parish II* and *Ashcroft* decisions came about as part of a comprehensive review of much of the Act that presented more of an opportunity to make changes and cut legislative deals. Finally, even if the legislative will to reverse procedural Court decisions exists, mustering up that legislative will could take months and even years, and during what we might call this “legislative

272. See generally Pitts, *supra* note 209 (explaining how maintenance of minority voting strength serves as a “useful framework” for future interpretation of the Voting Rights Act).

273. Both the *Ashcroft* and *Bossier Parish II* decisions made it more difficult for the federal government to demand that state and local governments draw districts that provide descriptive representation for minority voters. Republicans tend to think that the drawing of districts that provide descriptive representation to minority voters tends to result in the election of more Republicans. See Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589, 1609–13 (2004) (describing the dynamic of majority-minority districts and the election of Republicans).

lag time,” Section 5 covered jurisdictions (and lower federal courts) could do lasting damage to minority voting rights.

Of course, it also must be recognized that there may be other dangers related to a strong congressional response to *Riley*. There is obviously a conservative majority of the Court that remains uncomfortable with the continued presence of Section 5. Since the 1990s, the Court’s trimming of the substantive reach of Section 5 may have served as the safety valve to alleviate some of these concerns. But Congress has now tried to turn off that safety valve by way of the 2006 extension and amendments. In response, the Court may be switching to a new safety valve to alleviate its concerns about Section 5’s continued presence by trimming the provision’s procedural reach. However, if Congress moved to shut off the procedural safety valve as well, this could lead to at least a couple of possibilities. First, it could lead a conservative majority of the Court to say “enough is enough” and declare Section 5 facially unconstitutional. This is possible, but would at first blush seemingly cut against the emerging Roberts Court jurisprudence of taking a limited, “as-applied” approach to constitutional litigation.²⁷⁴ Second, it could lead a conservative majority back to trying to trim the substantive reach of Section 5 through very constrained interpretations of what amounts to discriminatory purpose and effect under Section 5. For instance, it could lead the Court to hold that unconstitutional purpose is limited to cases where retrogressive impact has occurred. This holding would be subject to easy criticism,²⁷⁵ but in the world of Supreme Court jurisprudence there is a lot of play in the joints and such a holding would not be shocking if it emanated from the Roberts Court.

In short, it is possible a congressional reaction could backfire. But Section 5 will become more and more toothless if the Court continues to chip away at the procedural reach of Section 5. The procedural reach of Section 5 actually has the greatest substantive impact because state and local officials know they must garner preclearance and that leads them to adopt changes that do not discriminate against minority voters. Put differently, the Section 5 process itself amounts to a tremendous deterrent against the passage of discriminatory vot-

274. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (refusing to consider a First Amendment-like facial challenge to the validity of the Partial-Birth Abortion Ban Act of 2003).

275. In the past, the Supreme Court has found unconstitutional voting discrimination to be present even though no retrogression of minority voting strength had occurred. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 614–16 (1982) (finding the at-large system of elections in Burke County, Georgia, unconstitutional where lower courts found the state policy to be motivated by “invidious purposes”).

ing laws. Creating loopholes in the procedural reach of Section 5 will provide state and local politicians with new loopholes to exploit, and when politicians are provided loopholes they may exploit them to their advantage. *Riley* will not be a big deal if it stands alone and isolated; it will be a big deal if it is the first in a series of decisions limiting Section 5's procedural reach. Congress should take action to make sure the life of *Riley* is a lonely one.