

# SAVING SECTION 5: REFLECTIONS ON *GEORGIA V. ASHCROFT*, AND ITS IMPACT ON RENEWAL OF THE VOTING RIGHTS ACT

By  
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## Introduction

In 2003, the U.S. Supreme Court decided the case of *Georgia v. Ashcroft*, 539 U.S. 461 (hereinafter, “*Ashcroft*”), interpreting Section 5 of the Voting Rights Act as it related to the 2001 Georgia legislative and congressional redistrictings, and in so doing, changed the face of the Voting Rights Act. Prior to *Ashcroft*, redistrictings in jurisdictions subject to Section 5 were analyzed according to the standard enunciated in *Beer v. United States*, 425 U.S. 130 (1976), which held that Section 5 prohibits retrogression in the ability of minority voters with respect to their opportunity to effectively exercise the franchise. For almost three decades, until the *Ashcroft* decision, the effective exercise of the franchise was defined by the ability of minority voters to elect candidates of their own choice. Thus, by freezing in place gains that minority voters had made in electing their candidates of choice, Section 5 helped contribute to an environment where the number of black members of the House of Representatives rose from 6 in 1965 to 42 today.

However, the *Ashcroft* decision changed this standard substantially. The Court, by a 5-4 margin, redefined the “effective exercise” standard, suggesting a “totality of the circumstances” test was more appropriate.<sup>2</sup> Such a test, as derived by Justice O’Connor, suggested that a covered jurisdiction could comply with Section 5, even if it reduced the

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<sup>2</sup> *Ashcroft*, at \_\_\_\_\_. [not sure of the page in US Reports, but it’s at 123 S.Ct. at 2511]

ability of minority voters to elect candidates of their choice, if the jurisdiction otherwise increased the number of “influence districts,” or districts which might elect candidates “sympathetic to the interests of minority voters.”<sup>3</sup>

Not one of the parties to the action had suggested such a change in the standard, no briefs submitted to the Court had advocated such a standard, and this new standard had not been raised during oral argument. Nevertheless, in one of the most startling displays of judicial activism seen in voting rights jurisprudence, five members of the Court, led by Justice O’Connor, fundamentally altered thirty years of Section 5 jurisprudence, and the very meaning of the Voting Rights Act.

Understandably, this decision resulted in a lot of serious concern among advocates of the Voting Rights Act. It was (and is) unclear what this decision would mean for the advances minority voters had made throughout the last 40 years. Had minority voters really come so far that such a radical departure from established Voting Rights Act jurisprudence was warranted? Was it now possible, in covered jurisdictions, to replace minority voters’ candidates of choice (who were usually minorities themselves) with whites who were perceived by some standard to be somehow sympathetic to minority interests? How could one measure a candidate’s sympathy towards minorities? Could this “substantive representation” philosophy result in a blanching of legislative bodies in covered jurisdictions, and what would that mean for the minority constituencies they represent? Could unscrupulous jurisdictions draw district lines so as to intentionally reduce the ability of minority voters to effectively exercise the franchise, while using the mantra of “influence districts” as a pretext to win preclearance under Section 5? Could such a nebulous standard be administered by the Justice

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<sup>3</sup> *Ashcroft*, at \_\_\_\_ [123 S.Ct. at 2511-2513]

Department and the District Court, and if so, how? And perhaps most importantly, does Justice O'Connor's opinion render Section 5 toothless and meaningless in today's political climate?

Several commentators, including Professors Samuel Issacharoff and Richard Pildes, have focused on variations of the last two questions.<sup>4</sup> Prof. Issacharoff in particular has concluded that the *Ashcroft* standard is irredeemably complex, particularly when compared to the pre-*Ashcroft* standard, which he perceives to have been so simple and mechanical as to be routinely mathematically applied.<sup>5</sup> Additionally, Prof. Issacharoff openly questioned "whether section 5 has served its purpose and may now be impeding the type of political developments that would have been a distant aspiration when the Voting Rights Act was first passed."<sup>6</sup> Both Profs. Issacharoff and Pildes reached the conclusion that political developments with regard to racial minorities had so improved in this country, in large part due to the success of the Voting Rights Act, that Section 5 as applied could actually *harm* the rights of minority voters.<sup>7</sup>

This Essay will suggest that the concerns of commentators like Profs. Issacharoff and Pildes, while well-intentioned, and not without some merit, are nevertheless somewhat overstated. I will assert that the views of those commentators who perceive simplicity in the pre-*Ashcroft* standard, and who question the continued utility of Section

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<sup>4</sup> See Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its own Success?*, 104 Colum. L. Rev. 1710 (Oct., 2004), and Richard H. Pildes, *Political Competition and the Modern Era*, Russell Sage Conference, June, 2005.

<sup>5</sup> Issacharoff, at 1713 ("The [Beer standard's] required little more than the sort of sixth-grade arithmetic that has its own allure in the voting rights jurisprudence."); and at 1717 ("Justice O'Connor introduced a new test for section 5 that decisively abandoned the prior reliance on a straight-line mathematical comparison of minority voting strength before and after.")

<sup>6</sup> Issacharoff, at 1710.

<sup>7</sup> See Pildes, at 9 ("What a perversion of the VRA [the lower court's decision in *Ashcroft*, declining to preclear the Georgia State Senate plan] would have been in Georgia."), and Issacharoff, at 1714 ("The question for today is whether the successes of the VRA have compromised its mission") and at 1731 ("What seems less unclear, however, is the mischief that section 5 can play in stalling coalitional politics....").

5 (at least in the context of redistricting), are colored by misconceptions regarding the facts of the *Ashcroft* case, and some possible misinterpretations of the opinions in that case.

In Part I of this Essay, I will contend that the pre-*Ashcroft* standard, as first established in *Beer*, was not nearly as rigid, mechanical or simple as Prof. Issacharoff would suggest. Indeed, the pre-*Ashcroft* standard as applied predominantly by the Department of Justice (“DOJ”), and at times by the federal courts, was very complex, requiring the analysis of many diverse elements. In reality, neither the court nor the DOJ has relied upon the simplistic, mechanistic approach that Prof. Issacharoff and others perceive. Indeed, while remaining true to *Beer*’s requirement that there can be no retrogression in minority voters’ effective exercise of the franchise, as defined by their ability to elect candidates of their choice, the DOJ and the court in *Ashcroft* (and in other cases) reviewed massive amounts of evidence, including: expert testimony regarding voting patterns, racially polarized voting, and whether certain candidates (regardless of race) were the preferred candidates of minority voters; the demographic makeup of districts and the plans as a whole; the success of minority-preferred candidates in past elections; the approval or disapproval of minority legislators (as evidenced by not only their votes, but also their public statements expressed in the Legislature and otherwise); and the expressed opinions of minority leaders, candidates, and voters regarding the plans.

In Part II, I will discuss the facts as applied to the law at the time of the *Ashcroft* case, correcting many of the misconceptions that have permeated this discussion. In particular, I will discuss the actual electoral power of minority voters, as testified to by

expert witnesses, using both demographic measurements as well as other indications of voting clout. While many commentators, including Profs. Issacharoff and Pildes, have apparently relied *solely* upon the black voting age percentage in districts as a shorthand for the political power of black voters, I will demonstrate that the great variety of evidence introduced in the case helps to paint the full picture of minority voting rights in Georgia, albeit one not nearly as rosy as some have thought. Furthermore, I will attempt to lay bare the mistaken belief that black legislators were unanimous in their support of the Georgia State Senate plan, pointing out evidence that there was substantial dissent about the effect of the plan.

Finally, in Part III, I will discuss Justice O'Connor's opinion, and how it could be possible to answer some of the questions asked by many commentators. I agree that the *Beer* standard, as applied pre-*Ashcroft*, is a far more effective standard for measuring true retrogression under Section 5, and I would strongly advocate that Congress should reauthorize Section 5, and consider (and apparently *is* considering) restoring the *Beer* standard when it does so. However, even if an *Ashcroft*-fix is not in our future, I would propose that a Voting Rights Act with Section 5 in its present state is constitutional and administrable (though inarguably more difficult to administer), and is immeasurably preferable to a Voting Rights Act without any preclearance provisions at all.

Nevertheless, contrary to the belief shared by Profs. Issacharoff and Pildes, the facts of *Ashcroft* amply demonstrate the continued need for Section 5 in some form. Indeed, by highlighting the comprehensive nature of Section 5 review pre-*Ashcroft*, one hopes that Congress can be convinced to revise and reauthorize Section 5 in a form which will

continue to protect minority voters from retrogression in their ability to elect candidates of their choice.

## I.

There appears to be a great deal of misunderstanding about the retrogression standard as it existed pre-*Ashcroft*. In particular, it appears that many analysts perceive the standard to have been a simplistic, mechanical mathematical calculation, tallying up majority-minority districts in the benchmark, and comparing that number to the total of majority-minority districts in the proposed plan. Prof. Issacharoff in particular refers dozens of times to the simplicity of the analysis pre-*Ashcroft*, calling it “sixth-grade arithmetic”,<sup>8</sup> “rigid”,<sup>9</sup> “a simple quantitative definition of minority concentrations in specified districts”,<sup>10</sup> and referring to the “ease of administration of a relatively mechanical test”.<sup>11</sup> However, the suggestion that the pre-*Ashcroft* analysis was so crude and narrow-minded could not be further off the mark.

Prior to the *Ashcroft* case, the applicable standard in determining whether a redistricting plan violated Section 5 was first enunciated in the *Beer* case. In that case, the Supreme Court held that:

“When it adopted a 7-year extension of the Voting Rights Act in 1975, Congress explicitly stated that “the standard [under Section 5] can only be fully satisfied by determining on the basis of the facts found by the Attorney General [or the District Court] to be true whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting . . . .” H. R. Rep. No. 94-196, p. 60 (emphasis added). In other words the purpose of [Section 5] has always been to insure that no voting-procedure changes would be made that would lead to

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<sup>8</sup> Issacharoff, at 1713.

<sup>9</sup> *Id.*, at 1718.

<sup>10</sup> *Id.*, at 1722.

<sup>11</sup> *Id.*, at 1719. Issacharoff also states that “the Court introduced *for the first time* to section 5 the fine grained calculus of political influence versus descriptive representation.” *Id.*, at 1720.

retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>12</sup>

The Court expressly focused on the ability of minority voters to elect their candidates of choice, and in doing so, concentrated primarily on the black total population (“BPOP”) and black voter registration (“BREG”)<sup>13</sup> in the districts in determining the ability to elect.<sup>14</sup>

Over time, until the *Ashcroft* decision, there were few published cases discussing the *Beer* standard. Most of the redistrictings submitted for preclearance under Section 5 went through the DOJ.<sup>15</sup> However, the DOJ did develop guidance for analyzing redistricting plans pursuant to the *Beer* retrogression test.<sup>16</sup> In its Guidance, the DOJ stated that:

“Division staff ... analyzes the proposed plan to determine whether it will reduce minority voting strength when compared to the benchmark plan, considering all of the relevant, available information. Although comparison of the census population of districts in the benchmark and proposed plans is the important starting point of any retrogression analysis, our review and analysis will be greatly facilitated by inclusion of additional demographic and election data in the submission. [Citation omitted]. For example, census population data may not reflect significant differences in group voting behavior. Therefore, election history and voting patterns within the jurisdiction, voter registration and turnout information, and other similar information are very important to an assessment of the actual effect

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<sup>12</sup> *Beer*, at 141.

<sup>13</sup> Note that the Court did *not* look at black voting age population (“BVAP”), which many litigants, commentators and courts have used as a shorthand for black voting power in the past. *See Ashcroft*, at [123 S.Ct. at 2506 – *can’t find the cite in US Reports*] (Discussing the number of majority-minority districts in the benchmark and proposed plans as measured solely by BVAP).

<sup>14</sup> *Id.*, at 136 (“[The plan at issue] produced Negro population majorities in two districts and a Negro voter majority (52.6%) in one district.”); *see also Id.*, at 141-142 (“Under the [benchmark plan] none of the five councilmanic districts had a clear Negro majority of registered voters, and no Negro has been elected to the New Orleans City Council while that apportionment system has been in effect. Under [the proposed plan], by contrast, Negroes will constitute a majority of the population in two of the five districts and a clear majority of the registered voters in one of them. Thus, there is every reason to predict, upon the District Court’s hypothesis of bloc voting, that at least one and perhaps two Negroes may well be elected to the council under [the proposed plan].”)

<sup>15</sup> *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, 273-274 (2005).

<sup>16</sup> Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42, U.S.C. 1973c, 66 Fed. Reg. 5412, 5413 (Jan. 18, 2001) [hereinafter “Guidance”].

of a redistricting plan. This information is used to compare minority voting strength in the benchmark plan as a whole with minority voting strength in the proposed plan as a whole.”<sup>17</sup>

Thus, contrary to the impression that many promote, a large number of factors informed the Section 5 retrogression analysis pre-*Ashcroft*.<sup>18</sup> The DOJ most certainly did not simply focus on a mathematical calculation of the number of majority-minority districts – had that been the case, the DOJ would hardly have needed the full sixty days permitted under Section 5 to review even the most complex redistrictings. Any redistricting could have been fully analyzed in ten minutes.

The misunderstanding of the *Beer* standard has led to some common misconceptions. First, *Ashcroft* did not “introduc[e] ... broad-range review”<sup>19</sup> under Section 5 – broad-range review of multiple factors in determining whether there has been a reduction in the effective exercise of minority electoral power has been around since *Beer*.<sup>20</sup> As described below, such a broad and comprehensive review was at the heart of the DOJ’s case and the lower court majority opinion in *Ashcroft*.

Second, the pre-*Ashcroft* standard did not “hamper the very type of coalitional politics that traditional defenders of minority voting rights so adamantly fought to

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<sup>17</sup> *Id.* (“The Section 5 Procedures identify a number of factors that are considered in deciding whether or not a redistricting plan has a retrogressive purpose or effect. These factors include whether minority voting strength is reduced by the proposed redistricting; whether minority concentrations are fragmented among different districts; whether minorities are overconcentrated in one or more districts; whether available alternative plans satisfying the jurisdiction’s legitimate governmental interests were considered; whether the proposed plan departs from objective redistricting criteria set by the submitting jurisdiction, ignores other relevant factors such as compactness and contiguity, or displays a configuration that inexplicably disregards available natural or artificial boundaries; and, whether the plan is inconsistent with the jurisdiction’s stated redistricting standards.”)

<sup>18</sup> See also Pitts, at 273-276.

<sup>19</sup> Issacharoff, at 1719.

<sup>20</sup> See also *Id.*, at 1722 (Prof. Issacharoff, in favorably comparing the analysis done in *Page v. Bartels*, 144 F. Supp. 2d 346 (D. N.J. 2001), notes that “the New Jersey court”, in apparent contrast to his perception of the lower court in *Ashcroft*, “assessed the electoral prospects of minority-preferred candidates under an intensely local examination of political conditions.” As demonstrated below, the *Ashcroft* defendants and the lower court did exactly that in the *Ashcroft* case as well.

protect....”<sup>21</sup> To the contrary, coalitional districts (i.e., districts in which minority voters did not make up a majority of all voters) where minority-preferred candidates were being elected were *absolutely* considered pursuant to the *Beer* standard and the Guidance. In other words, where there was a number of white voters (no matter how small) that had demonstrated their willingness to prefer the same candidates as minority voters, sufficient such that the minority voters’ candidate of choice was being elected, such a district was considered an “ability to elect” district pursuant *Beer*, and the elimination of such a district would have raised serious problems under Section 5. Indeed, as discussed in detail below, the *Ashcroft* case included several such districts, and the court’s and the DOJ’s analysis of such districts in *Ashcroft* confirms that not only was Section 5 not “stalling coalition politics”,<sup>22</sup> as Prof. Issacharoff suggests, but actually was instrumental in the development of such productive coalitions.

As discussed earlier, the lower court in *Ashcroft* applied the comprehensive *Beer* standard, analyzing a variety of factors to determine relative minority voting strength between the benchmark and proposed Georgia State Senate plans. In particular, it noted how the United States had “presented the court with a greater amount of and more detailed evidence [than the state], including voter registration data, precinct-level information, data and maps demonstrating exactly how district lines would be redrawn by the proposed plans, and testimony of numerous social leaders and local elected officials from the contested districts,” as well as expert testimony regarding the presence of

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<sup>21</sup> *Id.*, at 1728.

<sup>22</sup> *Id.*, at 1731.

racially polarized voting.<sup>23</sup> As an illustration of the pre-*Ashcroft* standard, let us review the evidence presented to and considered by the lower court.

#### A. Census Data

First, the lower court reviewed evidence regarding several types of census demographic data. The court determined that there were thirteen Senate districts with greater than 50 percent BPOP in both the benchmark and proposed plans.<sup>24</sup> The court also noted twelve Senate districts with more than 50 percent BVAP in the benchmark plan, compared to an apparent thirteen districts with more than 50 percent BVAP in the proposed plan.<sup>25</sup> In the benchmark plan, twelve of those districts had a BVAP of greater than 54 percent, while only seven districts in the proposed plan were greater than 54 percent BVAP, while six districts were barely greater than 50 percent BVAP, with none

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<sup>23</sup> *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 36-37 (D.D.C. 2002) [hereinafter, “*Georgia*”]

<sup>24</sup> *Georgia*, at 55-56.

<sup>25</sup> *Id.* Note that there was an ongoing minor dispute between Georgia and the DOJ about how to properly calculate BVAP in the proposed plan. For the first time, the 2000 Census included permitted respondents to list multiple races on their forms, thus resulting in individuals who had listed themselves as black in combination with one or more other races. The number of multiple-race respondents ended up being statistically irrelevant to the analysis of overall minority voting strength. Thus, to reduce the possibility of double-counting individuals for the purposes of analyzing redistrictings (i.e., counting someone who had listed themselves as both black and American Indian twice, as both), the DOJ Guidance, published before Georgia redistricted, clearly stated that, for purposes of analysis under Section 5, the DOJ would count only those individuals as a member of a particular minority group who had responded that they were solely of that group, or of that group in combination with white. Guidance, at 5414. In spite of the Guidance, Georgia calculated BVAP differently, totaling all those who indicated they were black in combination with any number of other races. Thus, Georgia calculated that there were thirteen BVAP majority districts in the proposed plan, with five of those districts being below 51 percent, while the DOJ calculated that there were only eleven BVAP majority districts in the proposed plan, with districts 2 and 34 falling below 50 percent BVAP using the method dictated by the Guidance. While the DOJ thought that both measures should be considered by the court, to facilitate the maximum understanding of the demographics and minority voting strength, Georgia sought to exclude the DOJ’s BVAP measures. Plaintiff’s Motion to Exclude Evidence, January 18, 2002. The DOJ successfully opposed that motion, and the court considered both measures of BVAP, deferring at times to the Georgia measurement, as that was the measure most favorable to the state (though Georgia held the burden of proof). United States’ Opposition To Plaintiff’s Motion In Limine, January 24, 2002; *Georgia*, at 79 (“The United States urges this court to refrain from choosing one measurement, and rather to evaluate the entire picture, taking into account the different measurements of eligible African American voting population. The court agrees that such an approach is both prudent and in keeping with controlling precedent.”).

of those six reaching a BVAP higher than 51.5 percent.<sup>26</sup> In the three Senate districts challenged by the DOJ – districts 2, 12, and 26, in the Savannah, Albany, and Macon areas, respectively – evidence was presented indicated that the BVAP went from 60.6, 55.4, and 62.5 percent, respectively, in the benchmark plan, to 50.3, 50.7, and 50.8 percent, respectively, in the proposed plan.<sup>27</sup> The court further found that the overall BPOP in Georgia, according to the 2000 Census, was just under 29 percent, and the overall BVAP was just under 27 percent, both an increase from the 1990 Census.<sup>28</sup>

### *B. Voter Registration Data*

The lower court determined that black voter registration in Georgia was over 25 percent of the statewide registered voters at the time of the 2000 general elections, up from approximately 22 percent in 1992.<sup>29</sup> Furthermore, the court admitted undisputed evidence that there were thirteen districts with BREG greater than 50 percent in the benchmark plan (actually, all were greater than 52.5 percent BREG), and only *eight* districts in the proposed plan with a BREG of greater than 50 percent – a reduction of five majority-black registration districts.<sup>30</sup> In districts in 2, 12, and 26, the BREG went from 62.4, 52.5, and 62.8 percent, respectively, to 48.4, 47.5, and 48.3 percent in the proposed plan.<sup>31</sup>

### *C. Election History*

The evidence was undisputed that, in Georgia's history, no black candidate of choice had been elected to an open Senate seat in Georgia that had less than 53 percent

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*, at 38-39.

<sup>29</sup> *Id.*, at 39.

<sup>30</sup> *Id.*, at 55-56.

<sup>31</sup> *Id.*

BVAP, and only one black candidate of choice had ever won election to the Senate, an incumbent, in a district with less than 50 percent BVAP.<sup>32</sup>

In all of the districts challenged by the DOJ, the court heard detailed testimony and evidence indicating presence of racially polarized voting, the prospects of black candidates of choice, and the electoral and racial climate in each of these districts.

In District 2, the court found that the black incumbent, who was the candidate of choice of black voters, had barely won the special election to her seat in 1999 (by a margin of fewer than 77 votes), over a white candidate.<sup>33</sup> Furthermore, the court heard testimony from eleven witnesses, and the DOJ's expert witness, indicating that voting in District 2 was severely racially polarized.<sup>34</sup>

In District 12, black voters had never been able to elect their preferred candidates, even though they made up a majority of the registered voters.<sup>35</sup> Indeed, even when a qualified black candidate (who had served for many terms in the Georgia State House) ran for the open seat in 1998, evidence demonstrated that this candidate lost the Democratic primary barely (by less than 3 percent of the vote) to a candidate (who had never run for office) preferred by white voters, in an election typified by extreme racial polarization.<sup>36</sup> Several witnesses testified without dispute to the existence of extremely racially polarized voting in District 12, and that it would be impossible to elect their candidate of choice in proposed District 12.<sup>37</sup>

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<sup>32</sup> Georgia's Exhibit 25, Appendix 1.

<sup>33</sup> *Georgia*, at 57-58.

<sup>34</sup> *Id.*, at 58-59.

<sup>35</sup> *Id.*, at 59-60. However, they had come very close, as indicated below. The changes to this district made it such that the gains black voters had made in coming close to electing their candidate of choice were reduced to the point where no black-preferred candidate could be elected.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*, at 60-61.

In District 26, testimony of several witnesses confirmed that, while the black incumbent in that district was fairly safe, there was substantial racial polarization in voting, and there were serious doubts as to whether another black candidate of choice could be elected in the proposed district.<sup>38</sup>

*D. Support of Minority Legislators*

While the lower court expressly refused to consider the votes of black legislators as being probative of retrogressive effect,<sup>39</sup> the Supreme Court obviously gave the support of minority legislators great weight, while ignoring much undisputed evidence indicating that such support was ambivalent, at best. It is true that all but two black legislators voted for the proposed plan.<sup>40</sup> However, just before the vote on the plans, several members of the Georgia Legislative Black Caucus (all of whom ended up voting for the plan) wrote a letter complaining that black legislators had been shut out of the process, and many others expressed serious reservations about the plan, including that the process “has resulted, among other things, in a legislative plan passing that has diluted majority-minority districts in both the House and the Senate.”<sup>41</sup> Indeed, at least two black senators (both of whom voted for the plan) spoke from the well of the Senate to express concerns about the plan, with one going so far as to talk about the reductions in black voting strength in several Senate districts, including those challenged by the DOJ.<sup>42</sup> Finally, virtually every black legislator testified to the strong-arming tactics (both threats and promises) used by proponents of the plans to ensure their votes.<sup>43</sup>

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<sup>38</sup> *Id.*, at 61-62.

<sup>39</sup> *Id.*, at 89.

<sup>40</sup> *Id.*

<sup>41</sup> United States’ Proposed Findings of Fact, Nos. 59-80.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

This is obviously a truncated summary of the evidence produced in the *Ashcroft* case. Indeed, the lower court opinion has 35 pages of findings of fact alone, clearly indicating something more than a simple “straight-line mathematical comparison.”<sup>44</sup> In addition, the parties submitted hundreds of pages of proposed findings of fact, evidence, and testimony. Had the standard been as simple as had been presumed, one can imagine that the only evidence required would have been the number of majority-minority districts in each plan. Nevertheless, the lower court engaged in the kind of comprehensive analysis of relative minority voting strength that *Beer* and the Guidance demanded.

## II.

The *Ashcroft* case has been analyzed and re-analyzed, but nevertheless many misconceptions about the legal standard and the facts surround this case have developed and multiplied. To fully understand the implications of this case, these myths must be dispelled.

### *A. Did Georgia Maintain the Number of Majority-Minority Districts?*

Prof. Issacharoff and the Supreme Court state that Georgia managed to maintain the same number of majority-minority districts in the proposed Senate plan as in the benchmark.<sup>45</sup> However, this statement is based solely on BVAP, and ignores other demographic measurements of minority voting strength. If one looks to BREG, *the same*

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<sup>44</sup> *Georgia*, at 36-71.

<sup>45</sup> Issacharoff, at 1716; *Ashcroft*, at \_\_\_\_.

*measure of black voting strength applied by the Beer court*, the number of majority-minority districts fell from thirteen to eight – a net reduction of five.<sup>46</sup>

Additionally, it is a misnomer to use the term “majority-minority” as a shorthand to indicate a district where, in the words of *Beer*, minority voters could “elect their choices to office”.<sup>47</sup> No longer can minority voting strength be so cavalierly determined, if it ever could be, as the facts in *Ashcroft* reveal.

It is often forgotten, but there were actually *three* different plans at issue in *Ashcroft* – the Georgia Senate plan (to which the DOJ objected), as well as the Georgia Congressional and State House plans (to which the DOJ did not object). The lower court spent fourteen pages analyzing the Congressional and State House plans.<sup>48</sup> Several of the districts in these plans to which neither the DOJ nor the lower court objected are instructive here. For instance, the benchmark Congressional plan contained only one district – District 5, represented by John Lewis – where the BVAP or BREG was greater than 50 percent.<sup>49</sup> Nevertheless, black voters demonstrated the ability to elect their candidates of choice (who were also black) in two other districts, in addition to Congressman Lewis’ district – District 2 in southwestern Georgia, where Sanford Bishop was getting elected in a benchmark district with 37.4 percent BVAP and 35.7 percent BREG, and District 4, in the Atlanta metropolitan area, which Cynthia McKinney represented with a 46.2 percent BVAP and a 49.1 percent BREG.<sup>50</sup> Neither of these

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<sup>46</sup> *Georgia*, at 55-56.

<sup>47</sup> *Beer*, at 141.

<sup>48</sup> *Georgia*, at 42-55.

<sup>49</sup> *Id.*, at 42-43. The actual percentages in Congressman Lewis’ benchmark district were 58.9 percent BVAP and 60.3 percent BREG.

<sup>50</sup> *Id.*

districts was majority-minority, and yet there was no question that each of these black members of Congress were candidates of choice of black voters.

Despite the fact that there was only one majority-minority district in the benchmark Congressional plan, it cannot be disputed that the benchmark contained three districts which satisfied the *Beer* standard for minority voting power – the ability to elect minority candidates of choice. Had the proposed plan eliminated any of these three districts – even one which was not technically “majority-minority” – *Beer* would have required that preclearance be denied. However, the state did an excellent job of complying with the *Beer* standard when it came to the Congressional plan. The proposed plan increased the BVAP and BREG in both districts 2 and 4,<sup>51</sup> and though District 5’s BVAP and BREG were reduced to 52.0 percent and 53.4 percent, respectively, there was no evidence that said reduction would affect the ability to elect black candidates of choice, in this, John Lewis’ district.<sup>52</sup>

Thus, the term “majority-minority” has two fundamental flaws. First, there is no specification regarding which measurement of majority population is more relevant – BREG as used in *Beer*, or BVAP, as used by most commentators and many courts. Often, these two measurements can conflict – Georgia’s proposed Senate plan had thirteen BVAP-majority districts, but only eight BREG-majority districts. Second, the term “majority-minority” seems to be used as a shorthand to describe a district in which minority voters are electing their candidates of choice, when in actuality, the

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<sup>51</sup> *Id.*, at 44. Proposed District 2 contained 41.5 percent BVAP and 40.0 percent BREG, while proposed District 4 was drawn to contain 50.0 percent BVAP and 51.2 percent BREG.

<sup>52</sup> *Id.* Virtually all of the black population removed from District 5 went into District 4 to increase its BVAP and BREG. There was no evidence presented indicating that Congressman Lewis was put in the slightest danger by this small reduction in the black population in his district, and all the evidence indicated that he enjoyed remarkable white crossover in his elections, to the degree that he rarely had any serious challenger for the seat.

demographics of the district are but one factor – or, as the Guidance states, a “starting point” – in the complete analysis of minority voters effective exercise of the franchise.

Thus, I would suggest discarding the term “majority-minority” district altogether (except where explicitly referring only to the demographics of a district, not minority voting strength), in favor of the term “ability-to-elect” districts.<sup>53</sup> In reviewing the number of “ability-to-elect” districts in the Georgia Senate plan, the lower court expressly held that Georgia had not met its burden of proving that it maintained the number of “ability-to-elect” districts,<sup>54</sup> and the Supreme Court did not hold that the lower court’s ruling on this discreet issue was erroneous.<sup>55</sup>

*B. Was Georgia Trying to “Unpack” its Black-Majority Districts?*

The Supreme Court routinely refers to Georgia’s “strategy of ‘unpacking’ minority voters in some districts to create more influence and coalitional districts.”<sup>56</sup> Prof. Issacharoff also perceives an attempt by Georgia to unpack, claiming that “the new Senate plan sought to leverage black political strength, [as it] diminished the locked-in protections of the overwhelmingly black-concentrated districts.”<sup>57</sup> However, I would submit that to interpret the benchmark Senate plan as “packed” is to grossly misinterpret the undisputed evidence.

There were five Senate districts contested by any party – districts 2, 12, and 26 (to which the DOJ objected), and districts 15 and 22 (to which the intervenors objected). Of

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<sup>53</sup> This term is not new, and others have used it as well.

<sup>54</sup> *Georgia*, at 93-94.

<sup>55</sup> *Ashcroft*, at \_\_\_\_\_. Indeed, the Court acknowledged the diminution in “ability-to-elect” districts (districts 2, 12, and 26 in particular), but held that any retrogression in those districts may have been offset by increases in influence in other districts.

<sup>56</sup> *Id.*, at \_\_\_\_\_.

<sup>57</sup> Issacharoff, at 1717. *See also Id.*, at 1716 (“Part of the [Georgia] Democrats’ strategy was not only to keep the same number of majority-minority districts, but to leverage black voting strength by diminishing the concentration of black voters in minority-dominated districts.”).

these districts, not one had a benchmark BVAP above 63.5 percent, with District 12 having a BVAP just below 55 percent.<sup>58</sup> Whether such districts could qualify as “packed” is doubtful. However, even if the state could argue that it viewed these districts as seriously packed, it did not merely move what it viewed as the extra black population out of the district, in order to enhance black voting power statewide, as is the usual definition of “unpacking.” Instead, it shaved the black populations in these districts so dangerously low that it put the continued ability of black voters to elect the candidates of their choice in serious jeopardy. In the proposed plan, not one of these five districts possessed a BVAP higher than 51.5 percent, and only one (District 15) had a bare majority BREG.<sup>59</sup> Regardless of how badly packed a district is (and to call a 63 percent BVAP district “packed” is highly questionable), it strains credulity to suggest that reducing such a district to less than 50 percent BREG constitutes “unpacking” that district. Indeed, if a jurisdiction were to take even a 90 percent minority registration district, and reduce it to 49 percent minority registration, such a reduction would be the very definition of retrogression under *Beer* (assuming racially polarized voting existed as it did in all five of these districts).

*C. Did the Beer Standard Prevent the Building of Coalitional Districts?*

The facts of the *Ashcroft* case make clear that, despite popular belief, not only did the pre-*Ashcroft* standard not impede the development of coalition districts, it actually aided in advancing coalitional politics. As discussed above, there were three plans at issue in *Ashcroft* – the Congressional and State House plans, as well as the State Senate

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<sup>58</sup> *Georgia*, at 55-56.

<sup>59</sup> *Id.* The BVAP percentages in districts 2, 12, 15, 22, and 26 were reduced to 50.3, 50.7, 50.9, 51.5, and 50.8, respectively, while the BREG percentages in those districts were reduced to 48.4, 47.5, 50.3, 49.4, and 48.3, respectively.

plan, which was the only plan to which the DOJ objected. The benchmark Congressional plan contained at least two coalition districts – Sanford Bishop’s District 2 and Cynthia McKinney’s District 4 – in which black voters made up significantly less than 50 percent of the BVAP and BREG. However, in both those districts, white voters demonstrated a consistent willingness to vote for the black voters’ candidates of choice (at least in Congressional elections).<sup>60</sup> Thus, while black voters could not control the election of their preferred candidate on their own, without white support, white crossover was substantial and consistent enough to create the very definition of a coalitional district.<sup>61</sup>

Similar coalitional considerations were made in the Senate plan. In District 22, for instance, the BVAP fell from 63.5 percent to 51.5 percent, and the BREG fell from 64.1 percent to 49.4 percent.<sup>62</sup> Thus, although there was massive reduction in BREG to below 50 percent, there was substantial evidence of significant, if not overwhelming, white crossover in Senate elections in this district.<sup>63</sup> Therefore, despite the fact that blacks no longer made up a majority of the voters in this district, and therefore could not control the outcome of the election on their own, the DOJ did not challenge this district, and neither the lower court nor the Supreme Court found retrogression here, because the evidence suggested that a coalition of black and some white voters could consistently elect the black-preferred candidate.<sup>64</sup>

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<sup>60</sup> The evidence suggested that in more localized elections in Congressional District 2 (such as State Senate and House elections), where voters actually knew the candidates, racially polarized voting among whites was much more prevalent. Senate District 12 was within Congressional District 2. *Georgia*, at 60, 84-88.

<sup>61</sup> A similar situation was found in benchmark State House District 89, centered in Athens, where a black representative and candidate of choice was consistently being elected in a district with less than 40 percent BVAP and BREG, thanks to consistent white crossover.

<sup>62</sup> *Id.*, at 56.

<sup>63</sup> *Id.*, at 63-64.

<sup>64</sup> Ironically, this conclusion ended up being premature. After the black incumbent in Senate District 22, Charles Walker, who also served as Senate Majority Leader, was accused of corruption prior to the 2002 elections, he lost to a white Republican by a very slim margin (0.8 percent of the total vote).

Notwithstanding the Supreme Court’s suggestion that the *Beer* standard did not account for coalitional districts, or Prof. Issacharoff’s suggestion that “it would be an irony of historic proportions if the VRA were to emerge as a brake on black political aspirations in the heart of the Deep South,”<sup>65</sup> the reality was far different. Where evidence demonstrated that non-minority voters in a district were routinely joining with minority voters to elect their candidates of choice, that district was considered an ability-to-elect district, from which retrogression was impermissible under Section 5. Suggestions otherwise to the contrary, the *Beer* standard adequately accounted for coalition districts.

*D. Did Black Legislators Support the Plan?*

The Supreme Court correctly notes that all but two of the black legislators in Georgia voted for the redistricting plans submitted for preclearance.<sup>66</sup> Prof. Issacharoff goes so far as to state that “[t]here was no mistaking that this was not a plan imposed on black elected officials....”<sup>67</sup> However, the mere fact that most black lawmakers ended up voting for the plans only tells part of the story. The Supreme Court, and the lower court dissent, placed much weight purely on the votes of these legislators, and the general testimony of the three black legislators (only two of whom voted on the plan) in favor of the plan. The Court looked particularly favorably on the testimony of Congressman Lewis, who, in written testimony submitted to the court, stated that the Senate plan would

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[http://www.sos.state.ga.us/elections/election\\_results/2002\\_1105/senate.htm](http://www.sos.state.ga.us/elections/election_results/2002_1105/senate.htm). He regained his seat in the 2004 elections by a comfortable margin.

[http://www.sos.state.ga.us/elections/election\\_results/2004\\_1102/senate.htm](http://www.sos.state.ga.us/elections/election_results/2004_1102/senate.htm).

<sup>65</sup> Issacharoff, at 1717.

<sup>66</sup> *Ashcroft*, at [123 S.Ct. at 2506-2507].

<sup>67</sup> Issacharoff, at 1716.

“give real meaning to voting for African Americans” because “you have a greater chance of putting in office people that are going to be responsive.”<sup>68</sup>

Despite this testimony, the record reflects that the state did not ask Congressman Lewis to submit any testimony directly related to any of the three Senate districts challenged by the DOJ, a fact not lost on the lower court. Indeed, with the exception of Senate District 26, not one of the black legislators testifying on behalf of the state rendered any testimony relating to a challenged district.<sup>69</sup> In a finding left untouched by the Supreme Court,<sup>70</sup> Judge Edwards stated in his concurrence that:

“First, nowhere do any of [the black politicians testifying for the state] purport to compare the proposed Senate plan with the existing apportionment scheme. Accordingly while some of what they have to say bear upon (albeit only in the most general terms) the opportunities available to minority candidates under the new plan, their testimony simply does not address *retrogression*.... Nor do these legislators address the polarization problem that is at the heart of the Court’s decision to deny preclearance.”<sup>71</sup>

Furthermore, Judge Edwards notes that “neither Congressman Lewis nor Senator Walker had any direct knowledge of the demographics and voting patterns in the contested districts.”<sup>72</sup> Congressman Lewis, who was not a member of the Georgia Legislature, did not and could not vote on the plans.

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<sup>68</sup> *Ashcroft*, at [123 S.Ct. at 2516]

<sup>69</sup> The other black legislators testifying on behalf of the plan were Senator Charles Walker, representing District 22 and the Senate Majority leader, and Senator Robert Brown, representing District 26, and the vice-Chair of the Redistricting Committee that drew the plan. Senator Brown testified with somewhat more specificity about his district.

<sup>70</sup> The Court overturned only one specific factual finding of lower court, holding that the lower court’s “statement that Georgia did not ‘presen[t] evidence regarding potential gains in minority voting strength in Senate Districts other than Districts 2, 12, and 26’ is therefore clearly erroneous.” *Id.*, at \_\_\_\_ [123 S.Ct. at 2514]. Indeed, with not one Justice reversing the factual findings of the lower court, the Court expressly stated that along with “the dissent, we accept the District Court’s findings that the reductions in black voting age population in proposed Districts 2, 12, and 26 to just over 50% make it marginally less likely that minority voters can elect a candidate of their choice in those districts....” *Id.*, at \_\_\_\_ [123 S.Ct. at 2414-2415]

<sup>71</sup> *Georgia*, at 100.

<sup>72</sup> *Id.*, at 101. Judge Edwards goes on to state here that “their testimony about the general BVAP levels at which African American preferred candidates have a fair opportunity to compete, in addition to being

In fact, in the three Senate districts with which the DOJ took issue, there was only one black witness to testify with any competence about minority voting strength in those specific districts,<sup>73</sup> while the DOJ offered testimony from dozens of black politicians and activists in each of those districts which specifically detailed their problems with reduction in minority voting strength in the plan. Judge Edwards made the lower court's undisturbed findings clear when he stated:

“The Voting Rights Act does not protect minority incumbents; it protects minority voters. It is thus a dangerous business to conflate a politician's assessment of her own continued electoral prospects with the genuine protection of African American voting strength.

.... The three politicians on whom the dissent relies represent but a small slice of the testimony presented regarding the attitudes of Georgia's African American political leadership to the proposed Senate plan. Indeed, it is simply inaccurate to suggest that those leaders have spoken with a single voice. The United States offered the testimony of a number of prominent African Americans, from each of the three Senate Districts that it has challenged, in which those witnesses expressed considerable concern about the effect of the proposed changes on minority voting strength. The Senate plan, for whatever support it has received, cannot fairly be said to represent the unanimous preferences or desires of African American leaders in the State of Georgia.”<sup>74</sup>

It is true that all but two of the black legislators voted for the plan. However, the votes as cast do not accurately represent the very serious doubts that black legislators had about retrogression, vote dilution, and discrimination in the Senate plan. In particular, less than a week before voting on the plan, six members of the Georgia Legislative Black

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tangential to the question of retrogression, has little bearing as to what levels might be required in Districts 2, 12, and 26.”

<sup>73</sup> As indicated above, that witness was Senator Brown, who testified regarding his own District 26. Regarding his testimony, one must note that the lower court held that “the testimony of Senator Brown ... leaves little doubt that he was speaking primarily as a loyal Democrat, interested in advancing the political fortunes of his own party.... What is ... telling ... is Senator Brown's ready recognition that his motives were primarily partisan.... Brown acknowledged that ‘I was not looking at race as a predominant concern....’ Indeed, Senator Brown's enthusiasm for the plan seems to reflect a general agreement among Georgia Democrats that the present reapportionment will preserve their partisan interests more effectively than any alternative. While such considerations are not impermissible under the Voting Rights Act, they are certainly not sufficient to satisfy the demands of § 5.” *Id.*, at 101 (Edwards, J., concurring).

<sup>74</sup> *Id.*, at 101-102.

Caucus [“GLBC”] wrote to the Chairman of the Caucus, stating that they were “concerned that the GLBC has not been involved in the redistricting process almost at all. This has resulted, among other things, in a legislative plan passing that has diluted majority-minority districts in both the House and the Senate.”<sup>75</sup> The lower court noted that “the United States has presented extensive evidence of African American Senators’ misgivings about the Senate plan.”<sup>76</sup>

Nevertheless, the Supreme Court, without reaching any factual conclusions, held that “it is also significant, though not dispositive, whether the representatives elected from the very districts created and protected by the Voting Rights Act support the new redistricting plan” to determine both retrogressive purpose and effect.<sup>77</sup> The lower court had considered these facts, though, and while determining that the court should not consider the “support of African American legislators as evidence of the actual *effect* of the Senate redistricting plan,”<sup>78</sup> the court also recognized that a “vote for legislation is almost always a compromise of some sort, motivated by a complex intersection of self-interest and external pressures.”<sup>79</sup>

Of the three districts which were challenged by the DOJ, only one – Senate District 26 – had the support of the black senator who represented “the very district created and protected by the Voting Rights Act.”<sup>80</sup> In addition, there was ample evidence of such political horse-trading for the votes of other black legislators. The court heard

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<sup>75</sup> *Id.*, at 45-46.

<sup>76</sup> *Id.*, at 89.

<sup>77</sup> *Ashcroft*, at \_\_\_\_ [123 S.Ct. at 2513]

<sup>78</sup> *Georgia*, at 89.

<sup>79</sup> *Id.*

<sup>80</sup> District 2’s black senator openly opposed the plan and voted against it, despite tremendous pressure from other Democrats, and District 12 was represented by a white senator who was not the candidate of choice of black voters, who voted for the plan. In addition, more than a dozen black politicians and leaders from these two districts testified in opposition to the plan, while the state put on no witnesses who resided in these two districts.

undisputed testimony from black legislators that they always had a handler present when viewing the plan,<sup>81</sup> that their input on the plan and their own districts was ignored,<sup>82</sup> that the plan was withheld from their scrutiny until mere minutes before the vote,<sup>83</sup> that they were heavily pressured to vote for the plan by other Democrats,<sup>84</sup> and that they were promised that they could later have any changes to their districts they wanted if they voted for the plan.<sup>85</sup>

Some even spoke openly in the well of the Senate of their concern about the vast reductions in black populations in their districts.<sup>86</sup> Senator Vincent Fort, the black senator who authored the letter to the GLBC complaining about the dilution in the plan, made the following statement of concern from the well just days before the vote:

“I’ve looked at the data district by district regarding race and black voting district. I know that ten out of thirteen of these majority black districts have lost black VAP. Eight out of thirteen have lost more than 10 percent of black VAP. And then even more importantly, there are four districts that are below 50 percent black voter registration. I don’t know whether that’s dilution or retrogression; that’s going to be for others to decide who have more experience and learning on this issue. But the question is a valid question ... [T]here is something going on here in the thirteen districts throughout the state. There have been some other things said. 45 percent has been thrown around and 49 percent has been thrown around as the benchmark to give an African American a reasonable chance to be elected ... I’ve not seen that data, I have not seen any calculations, any formulas; and to accept a benchmark, whether it’s 49 or 44 or 40 or 40-something, does not make sense unless you have a chance to look at the data, and I have not had that chance; so I don’t know what influence districts are. Did we get influence districts by decreasing black registration or black VAP in other districts? I mean, what is the road to influence districts? I think that’s a question that needs to be asked.”<sup>87</sup>

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<sup>81</sup> United States’ Post-Trial Brief, pp. 11-12.

<sup>82</sup> *Id.*, at 12-13.

<sup>83</sup> *Id.*, at 14-15.

<sup>84</sup> *Id.*, at 9.

<sup>85</sup> *Id.*, at 21.

<sup>86</sup> *Id.*, at 16-17.

<sup>87</sup> *Id.*, at 17-18. Senator Fort also testified that it was “certainly” possible that the African-American candidate of choice could lose in Proposed Senate Districts 2, 15, 22, and 26. *Id.*, at 19.

Senator Fort nevertheless voted for the plan, after being promised support for his anti-predatory lending bill.<sup>88</sup>

Since the *Ashcroft* decision, several black legislators have come forward to clarify their position on State Senate plan, the *Ashcroft* case, and Section 5 overall. At recent Congressional hearings on renewal of the Section of the Voting Rights Act, Rep. Tyrone Brooks, a key black legislator who had voted for the plan, confirmed the difficulties black lawmakers had with the plan, stating that:

“The arguments that the state recently made in the Supreme Court in *Georgia v. Ashcroft* are also very disturbing. They demonstrate a continuing disdain for the Voting Rights Act and a willingness to disregard the interests of minority voters. The state argued that Section 5 as applied by the federal court was unconstitutional. It said the retrogression standard of Section 5 should be abolished, that majority black districts were no longer needed, and that minorities should never be allowed to participate in the preclearance process.

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Georgia argued strenuously that its 2002 senate plan could not be deemed to dilute minority voting strength because black legislators supported the plan. But the support of the plan by black legislators should not be confused with their support of the state's arguments in the Supreme Court that majority black districts could be abolished, or that the retrogression standard should be abandoned, or that minority "influence" could be a substitute for the ability to elect.

Most of the members of the Legislative Black Caucus voted for the senate plan as a way of maintaining Democratic control of the legislature and holding onto committee chairs, and because any reductions made in their own districts did not compromise their reelection or the ability of minority voters to elect candidates of their choice. The overriding goals of the Democrats were to protect incumbents and increase the number of Democratic seats by not wasting the black votes in existing majority black districts. And while black caucus members agreed to the population reductions, they would never have agreed to the abolition of majority black districts. Black caucus member Bob Holmes, who has served in the Georgia house almost as long as I have, has said that "No one would have gone for that. There would not have been a black vote for that.

Notably, the black civil rights leadership of the state, including NAACP, Southern Christian Leadership Conference, RAINBOW/PUSH, Concerned Black Clergy, Georgia Association of Black Elected Officials, Georgia Coalition of Black Women, and Georgia Coalition for the Peoples' Agenda, filed an amicus brief in the Supreme Court urging it to affirm the decision of the lower court rejecting the state's senate redistricting plan. They asked the Court to reject the

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<sup>88</sup> *Id.*, at 20.

state's arguments for repeal of the retrogression standard, the abolition of majority-minority districts, and excluding minorities from the preclearance process.

Most tellingly, black members of the legislature who had voted for the state's plan gave their full support to the filing of the amicus brief and said that it was the correct position for the civil rights community to take. I made a statement at the time that:

We fully supported the filing of the amicus brief by the civil rights groups. We voted for the state's plan for political reasons, but we were appalled by the arguments the state made in its brief in *Georgia v. Ashcroft*. There is no question that abolishing the majority black districts would turn the clock back. The preservation of the majority black districts is critical to minority office holding and minority political participation. As its president, I can speak for the Georgia Association of Black Officials and say that we strongly disagreed with the state's arguments in the Supreme Court. "<sup>89</sup>

Interestingly, both Congressman Lewis and Senator Brown have also since come out in favor of reducing the impact of the *Ashcroft* decision, with Congressman Lewis finding himself in the ironic position of seeking to overturn a decision in which his testimony was used so unexpectedly to produce a result unfavorable to black voters.<sup>90</sup>

Accordingly, the lower court was quite right about the nature of political compromise, and the suggestion of nearly-unanimous black support for the plan was put in serious doubt by the weight of the evidence indicating black legislators' ambivalence, and even antipathy, towards the redistricting. The state presented virtually no evidence indicating that the black lawmakers' viewed the plan as non-retrogressive prior to voting, and in fact, the evidence suggested that they voted for the plan in spite of serious questions regarding retrogression.

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<sup>89</sup> *Hearings to Examine the Impact and Effectiveness of the Voting Rights Act, Before the Subcomm. on the Constitution of the House Judiciary Comm.*, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Nov. 9, 2005) (statement of Tyrone L. Brooks of the Georgia House of Representatives, Georgia Association of Black Elected Officials).

<sup>90</sup> Jonathan Tilove, *Voting Rights Act, at 40, Faces Reauthorization Amid Topsy-Turvy Politics*, Newhouse News Service, Aug. 4, 2005 (<http://www.newhousenews.com/archive/tilove080405.html>).

Prof. Issacharoff asks an interesting question related to this issue – “whether the protection of black voting interests was best left to the intervention of legal remedies or to the prospect of political trading and hauling, primarily through coalition politics within the Democratic Party.”<sup>91</sup> When one reviews the facts of the *Ashcroft* case, the answer to this question should be clear, at least as it relates to the state of Georgia (and likely other Section 5 covered jurisdictions) – political trading and hauling, at best, protects only the interests of minority politicians and incumbents. To truly protect the rights of minority voters themselves, legal remedies, and Section 5 in particular, must be available. Thus, to read *Ashcroft* to suggest that ‘black voters in Georgia have moved from a world of discrete status meriting protections external to the political system to a situation more closely approximating the normal give and take of politics,’<sup>92</sup> is to gravely misread the undisputed status of black voters in Georgia.

### III.

The fact remains, as Profs. Issacharoff and Pildes intimate, that Justice O’Connor’s *Ashcroft* opinion leaves many questions left unanswered. First, was the Court’s focus on influence districts and substantive representation a necessary and natural result of Section 5’s success? To my mind, the answer is unequivocally no. As outlined earlier, Section 5 was not a “victim of its own success,” as Prof. Issacharoff suggests, but rather had *facilitated* the kind of descriptive *and* substantive representation that had enfranchised so many minority voters. Section 5 had encouraged and protected the kind of coalition building that black candidates (who were also candidates of choice of black

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<sup>91</sup> Issacharoff, at 1724.

<sup>92</sup> *Id.*, at 1730.

voters and many white voters) were consistently being elected in Georgia in several legislative districts with BVAPs and BREGs less than 50 percent.<sup>93</sup> Rather than adapting Section 5 to changing conditions, as some suggest, the Court’s alteration of the *Beer* standard that had worked so well in producing such ability-to-elect districts was to put in jeopardy the very gains for which minority voters had fought so hard. Rather than “impos[ing] ... more racially homogenous constituencies,”<sup>94</sup> as Prof. Pildes declares, the *Beer* standard had forced and protected the development of racially diverse coalitions, where white crossover voting permitted. Indeed, I do not believe a single commentator has produced real evidence of a single coalitional district which the pre-*Ashcroft* standard allegedly put at risk – to the contrary, all the evidence from the *Ashcroft* case and others clearly outlines how Section 5 facilitated such coalitional districts. To put to rest this myth, virtually every black politician whose testimony was used to support the *Ashcroft* decision has since distanced themselves from the decision, and begun the fight to amend a renewed Section 5 to restore the pre-*Ashcroft* standard.

What has brought about such a prominent reversal, and recognition of the harms of the *Ashcroft* decision? I believe it is because those familiar with and indebted to the protections of Section 5 realized the natural result of Justice O’Connor’s decision. Prof. Issacharoff is quite correct to question how one is to measure “influence” districts, as promoted by Justice O’Connor. If one reads her opinion closely, it would appear she is ready to ascribe “influence” to any district where minority voters make up between 25

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<sup>93</sup> While there were several coalition districts, this was the exception rather than the rule in Georgia. In most locations and in most elections, white crossover voting was so minimal as to be statistically insignificant, rendering the possibility of black candidates being elected by a coalition of black and white voters virtually nonexistent. The existence of such racially-polarized voting, even in the year 2000, only highlights the continued need for Section 5.

<sup>94</sup> Pildes, at 92.

and 50 percent of the voting population.<sup>95</sup> To anyone familiar with politics in Georgia, or other Section 5 covered jurisdictions, such a thought must be incredible, and frightening. In fact, in the 2002 elections in Georgia, under a plan virtually identical to the proposed plan, there were 16 districts between 25 and 50 percent BVAP, and almost half of them were represented by white Republicans, who were unanimously determined *not* to be the candidates of choice of black voters.<sup>96</sup> Every one of the sixteen districts was represented by whites. To further document that such a doctrine of “influence” as measured by BVAP is not well-grounded in political reality, one need look no further than the highly-publicized vote to remove the Confederate battle emblem from the Georgia state flag. While the GLBC was unanimous in its support for the changing of the flag, twelve of the nineteen white senators elected from districts with more than 25 percent BVAP voted in 2003 *against* the changing of the flag.<sup>97</sup>

How then to measure such “influence”? Can it be measured? The best answer for this question comes from the DOJ, in its response to the lower court’s Order to Show Cause on remand from the Supreme Court’s decision. In that response, the DOJ suggested that two factors would be key in establishing the presence or absence of influence in a particular district. First, expert testimony regarding past election results in districts purported to be influence districts by the state. Second, testimony from experts and lay witnesses regarding the willingness of legislators from alleged influence districts to take the interests of the minority community into account.<sup>98</sup> Based on voting patterns,

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<sup>95</sup> *Ashcroft*, at \_\_\_\_ [123 S.Ct. at 2506]

<sup>96</sup> United States’ Response to Order to Show Cause, Attachment C, Sept. 19, 2003. Seven of the 16 seats were held by white Republicans, with the other nine held by white Democrats. It is unclear whether *any* of the white Democrats was the candidate of choice of black voters, though there were races where black candidates ran unsuccessfully against these white Democrats in the Democratic primary.

<sup>97</sup> *Id.*, at 18.

<sup>98</sup> *Id.*, at 15-16.

including racially polarized voting, and analysis of legislators' actions, some degree of influence might be determined.

An essential element to the determination of influence is the burden of proof. In *Ashcroft*, the entire Court expressly upheld the long-standing principle that the burden of proof in a Section 5 proceeding falls entirely on the covered jurisdiction seeking preclearance.<sup>99</sup> As the DOJ argued, this means that when a jurisdiction claims that a reduction in ability-to-elect districts is offset by an increase in influence districts, it is the burden of the jurisdiction to prove the increase in influence, and that such an increase is sufficient to offset the losses in ability-to-elect. If such a standard is applied properly, any difficulty in administration of this standard falls entirely on the covered jurisdictions, for if they cannot prove a sufficient increase in influence to offset losses in ability-to-elect, the *Ashcroft* standard demands that preclearance be denied. Unless such a burden is applied strictly, as the Court demands, jurisdictions could effectively blanch entire plans, while creating some greater number of supposed influence districts that elected white representatives who could demonstrate no tangible sympathies or responsiveness to minority voters.

Thus, applying the standard as the Court dictates, it may be possible to administer the *Ashcroft* standard, while strictly imposing the burden of proof on the covered states.<sup>100</sup>

However, while the decision purports to grant the states greater flexibility, in actuality the burden on those states becomes greater, as it is no doubt much more difficult to

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<sup>99</sup> *Ashcroft*, at \_\_\_\_ [123 S.Ct. at 2507]

<sup>100</sup> For two excellent discussions of the administrability of Section 5 under the *Ashcroft* standard, both written by alumni of the DOJ's Voting Section familiar with the administration of Section 5, see the Pitts article, and Meghann E. Donahue, "*The Reports Of My Death Are Greatly Exaggerated*": *Administering Section 5 Of The Voting Rights Act After Georgia V. Ashcroft*, 104 Colum. L. Rev. 1651 (2004).

demonstrate the existence of “influence.” Indeed, given this conundrum, the covered jurisdictions should join voting rights advocates, including those who testified for the state in *Ashcroft*, in promoting a return to the more-predictable, more-defined pre-*Ashcroft* ability-to-elect standard.

Regardless, even with the *Ashcroft* standard, minority voters are better off with Section 5 than without it. Section 5 provides an *additional*, not an alternative, recourse and remedy for minority voters. Other causes of action, including constitutional claims and claims under Section 2 of the Voting Rights Act, are available after Section 5 review, but without Section 5, those claims would be the *only* means of addressing potential discrimination. Even with a flawed standard, or a standard that is harder to implement, such an additional line of defense could be critical for minority voters, because *only* with Section 5 is the burden of proof not on those voters to prove discrimination, but on the jurisdiction to prove the absence of retrogression. As anyone who has ever litigated both Section 5 and Section 2 cases knows, such a distinction can be vital to obtaining necessary relief for minority voters.

### Conclusion

As one looks more critically at the Court’s decision, and at the facts as determined by the lower court and upheld by the Supreme Court, one begins to get a clearer picture of the reality of racial politics in this age. While advances have been made, without doubt, those advances have been compelled and nurtured by the Voting Rights Act, and Section 5 in particular. Section 5 has never required the packing of minority voters, and indeed, the Voting Rights Act prevents such packing as a dilution of minority voting

strength. Rather, it required – until the *Ashcroft* decision – that where minority voters had worked so hard to successfully elect candidates of their choice, that work could not be destroyed by a swipe of the governor’s pen.

Perhaps most importantly, however, one must recognize the comprehensive nature of the pre-*Ashcroft* standard, and its flexibility regarding the consideration of all types of ability-to-elect districts, including coalitional districts. Understanding this standard, and its ability to promote positive developments in racial politics, including coalitional districts, will be an important factor in documenting the need to restore the standard during the reauthorization process. Furthermore, a complete grasp of the facts of *Ashcroft* and the application of the *Beer* standard to those facts will be a cornerstone in developing a record sufficient to justify restoring the standard.

And finally, it is essential to understand that Georgia, in an express attempt to maintain Democratic power in a state where such power was waning, sought to fortify white Democrats with black voters, at the expense of the black elected officials those black voters preferred.<sup>101</sup> Though Prof. Issacharoff contends that “[n]o longer are blacks political outsiders in the covered jurisdictions,”<sup>102</sup> and that “the Southern political process is highly attuned to black political claims,”<sup>103</sup> the *Ashcroft* case is actually proof that black voters continue to be traded, manipulated, and let down by the white power structure in covered jurisdictions. However, in the greatest irony, even this betrayal of black voters was not enough to keep the Democrats in power in the State Senate. After the 2002 elections, running in a plan virtually identical to the proposed plan at issue in

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<sup>101</sup> As Prof. Issacharoff correctly notes, there was no mistaking “the evident partisan objectives of the plan....” Issacharoff, at 1716.

<sup>102</sup> *Id.*, at 1714

<sup>103</sup> *Id.*

*Ashcroft*, the Republicans held a 30-26 advantage in the Senate, and presently hold 34 seats.<sup>104</sup> Perhaps this is the greatest lesson of *Ashcroft* – that the betrayal of the Democrats’ core constituencies cannot result in long-term electoral gains.

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<sup>104</sup> Four white senators who had run as Democrats in so-called “influence” districts switched parties to Republican in the weeks following the 2002 general election, thereby permanently putting the Republicans into the majority. All three senators, who ran in Districts 2, 12, and 26 won re-election in 2002, including the two black incumbents, and continue to serve in the Senate at the present time.