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Preclearance, Discrimination, and the Department of Justice: The Case of South Carolina

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Fuentes-Rohwer and Charles: Preclearance, Discrimination, and the Department of Justice: The
PRECLEARANCE, DISCRIMINATION, AND THE
DEPARTMENT OF JUSTICE: THE CASE OF SOUTH CAROLINA

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I. INTRODUCTION

By all accounts, the Voting Rights Act of 1965¹ was an extreme measure, a “strong medicine”² designed to “eliminate, in an automatic way, massive discrimination.”³ Arriving on the heels of Bloody Sunday and the tragedy at Selma,

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1. Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1973 to 1973bb-1 (2000)).

2. *Voting Rights Act: Hearings on H.R. 6400 Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 89th Cong. 110 (1965) [hereinafter *1965 House Hearings*] (statement of Rep. Chelf).

3. *Id.* at 402 (statement of Rep. Celler).

and authored by high-ranking officials in the Johnson administration, its breadth and scope were seen as necessary tools in the national fight against racial discrimination in voting. As President Johnson remarked during his national address before a joint session of Congress on March 15, 1965, this was a fight “for the dignity of man and the destiny of democracy.”⁴

The proposed legislation was hailed as a national response to a national problem, but under the relevant provisions of the Act, one could be forgiven for thinking otherwise. Under Section 4(b)—its trigger provision—the Act affected only those jurisdictions (1) that had implemented a literacy test *and* (2) in which the voter registration rate on November 1, 1964 *or* voter turnout rates for the 1964 Presidential election did not reach fifty percent.⁵ Under this formula, the Act initially covered Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and twenty-six counties in North Carolina.⁶ This was not a coincidence. In the words of the Attorney General, the Act would “get rid of the problem in those areas which have been discriminating and discriminating and discriminating and have been doing it for a long period of time.”⁷ Chairman Celler similarly remarked during the House hearings that “the purpose of this Bill . . . is primarily to get at those States where there exists massive discrimination and to provide automatic—I use the word ‘automatic’ advisedly—automatic relief.”⁸

The Act was not universally admired, particularly by those who bore the force of its provisions. During the 1969 Senate hearings regarding the extension of the Act, for example, Senator Ervin complained that the “North Carolina Legislature should [not] be required to come to Washington to the Attorney General’s office, and bow and scrape and make obeisance before him and say, ‘Please allow this act of our legislature to go into effect.’”⁹ Previously, during the 1969 House hearings, A. F. Summer, Mississippi’s Attorney General, similarly argued, “It is section 5 of this act that we cannot live with, nor do we believe the other five States affected can live with it.”¹⁰ To his mind, this section of the Act was akin to a “sentence,” which forced covered jurisdictions to “go down to [their] lowest common denominator

4. President Lyndon B. Johnson, Special Message to Congress: The American Promise, PUB. PAPERS 281 (Mar. 15, 1965).

5. Voting Rights Act of 1965 § 4(b); 42 U.S.C. 1973b(b) (2000).

6. The formula would also pick up the state of Alaska and three other counties: Apache County in Arizona, Aroostook County in Maine, and Elmore County in Idaho. *See Voting Rights Act: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 33 (1965) [hereinafter *1965 Senate Hearings*] (testimony of Att’y Gen. Katzenbach).

7. *Id.* at 33.

8. *1965 House Hearings*, *supra* note 1, at 685.

9. *Amendments to the Voting Rights Act of 1965: Hearings on S. 818, S. 2456, S. 2507, and Title IV of S. 2029 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 91st Cong. 201 (1970) [hereinafter *1970 Senate Hearings*] (statement of Sen. Sam J. Ervin, Jr.).

10. *Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538, and Similar Proposals Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. 130 (1969) [hereinafter *1969 House Hearings*] (statement of A.F. Summer, Attorney Gen. of Miss.).

before you can rejoin the other States. This is not right, no matter the cause, it is not right.”¹¹

From this perspective, the preclearance requirement, whereby the covered jurisdictions must submit all election-related changes to the Attorney General for approval, or seek a declaratory judgment from District Court for the District of Columbia that such changes will not discriminate against prospective voters on the basis of race, “is not right, no matter the cause”¹²—no matter Selma, the Civil Rights Movement, the turbulent sixties, or anything else. Senator Ervin and Attorney General Summer were not alone in their views of the Act but did not have many friends where it mattered. In the inevitable challenge to the Act’s constitutionality, they could only rely on Justice Black—a fellow Southerner—who complained in his dissent in *South Carolina v. Katzenbach*¹³ that the Act “creates the impression” that the covered jurisdictions “are little more than conquered province[s].”¹⁴ The Court admitted in *South Carolina* that the coverage and preclearance provisions “may have been an uncommon exercise of congressional power,”¹⁵ yet the Court did not suffer much difficulty in upholding the Act.¹⁶ This was in the midst of the Civil Rights Movement, after all, when the Court went out of its way to allow Congress the power to carry out its legislative agenda.¹⁷

Conceding that its approach to the problem of racial discrimination in voting was radical in nature, Congress initially enacted the coverage provision as a five-year measure.¹⁸ Thus, absent an extension of the Act in 1970, the coverage of the Act would sunset under an implicit acknowledgment that the need for such strong medicine had ceased to exist. Yet in 1970, Congress extended this provision for an extra five years,¹⁹ and in 1975 it extended it again, for seven years.²⁰ In 1982, Congress considered extending the preclearance provision permanently, but

11. *Id.* at 129.

12. *Id.*

13. 383 U.S. 301 (1966).

14. *Id.* at 360 (Black, J., concurring and dissenting).

15. *Id.* at 334 (majority opinion).

16. *Id.* at 337; *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966).

17. According to John Lindsay, a congressional representative from New York, “the country is in a mood to do what is right and I think the Congress is in a mood to do what is right.” 1965 *House Hearings*, *supra* note 1, at 372. See Archibald Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966) (“A newer theme is the strong declaration of congressional power under Section 5 of the [F]ourteenth [A]mendment. If the Congress follows the lead that the Court has provided, the last Term’s opinions interpreting Section 5 will prove as important in bespeaking national legislative authority to promote human rights as the Labor Board decisions of 1937 were in providing national authority to regulate the economy.” (Footnote omitted)); see also LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 265 (2000) (“The Court was extending an offer to Congress to become a full partner in the Court’s great tasks, just as Congress had become with the Civil Rights Act of 1964 and the Voting Rights Act of 1965.”).

18. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4, 79 Stat. 437, 438–39.

19. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 314, 315.

20. Act of Aug. 6, 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400, 400.

compromised to 25 years.²¹ This brings us to the year 2007, when Congress will again have to decide whether to extend the life of the preclearance provision.

The debate over the Act's extension promises to encompass familiar themes, such as the scope of congressional powers under the Reconstruction Amendments, the breadth of the federalism revolution of recent vintage, and the continued need to enact race-conscious legislation to combat instances of perceived racial discrimination. This Article sets these important issues aside and begins with a prior inquiry. It examines the Department of Justice's (DOJ) practices in carrying out its duties under its Section 5 authority. Before debating the merits of the preclearance requirement and its role in American political life during the last forty-two years, we must first understand the DOJ's actual preclearance practices. We begin this project by focusing on the state of South Carolina.

Our findings are mixed. From the time of enactment until 1995, the DOJ interposed a steady number of objections to proposed changes from South Carolina. Yet after 1995, the number of objections decreased sharply. This drastic change raises myriad implications. For one, it appears to support the argument from the Act's critics that the preclearance requirement has outlived its usefulness. The sharp decline also supports the view that the Supreme Court has gutted the Act to the point the DOJ no longer has a useful role to play under Section 5.

Despite these implications, we are not ready to advocate for the sunset of the preclearance provision. This is because we found that even though the absolute number of objections declined, the number of objections based on retrogression grounds, that is, on the state's inability to convince the DOJ that the proposed change did not make voters of color worse off than they were before, remained steady. Moreover, the decline in objections might be explainable on at least two alternative grounds.

We offer our findings in four Parts. Part I contextualizes the argument by providing a snapshot of the state of voting rights in South Carolina pre-1965. This Part demonstrates the magnitude of the problem and the concomitant need for a strong voting rights bill. Part II examines post-1965 South Carolina and the state of voting rights once the Act took effect. Parts III and IV present the results of our examination of the objection letters from the DOJ to governmental institutions in South Carolina. In conclusion, we look to present day South Carolina and offer our view on the reauthorization question looming in the horizon.

II. VOTING RIGHTS AND RACIAL DISCRIMINATION IN SOUTH CAROLINA: A BRIEF HISTORY

In his opinion for the Court in *South Carolina v. Katzenbach*—the first direct challenge to the constitutionality of the Voting Rights Act—Chief Justice Warren opined, “[I]n most of the States covered by the Act, including South Carolina, various tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been

21. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(a), 96 Stat. 131, 131.

administered in a discriminatory fashion for many years.”²² In specific reference to South Carolina, Chief Justice Warren quoted some choice passages by United States Senator Ben Tillman,²³ the unquestioned leader of the post-Reconstruction movement to disenfranchise black citizens.²⁴ During the 1895 South Carolina constitutional convention, for example, Tillman defined the goals of the new state literacy test as follows: “[T]he only thing we can do as patriots and as statesmen is to take from [the ‘ignorant blacks’] every ballot that we can under the laws of our national government.”²⁵ On the floor of the United States Senate, Tillman offered similar sentiments: “[W]e took the government away. We stuffed ballot boxes. We shot them. We are not ashamed of it.”²⁶

Senator Tillman was neither alone in his views nor an accident of late nineteenth century racial politics in South Carolina. In 1940, a local Democratic party official explained his position on the question of race and politics to a journalist: “If a coon wants to vote in the primary, we make him recite the Constitution backward, as well as forward, make him close his eyes and dot his t’s and cross his i’s. We have to comply with the law, you see.”²⁷ And soon after the United States Supreme Court invalidated the white primary in 1944,²⁸ Governor Johnston convened a special legislative session, where he told the legislators that “[a]fter these statutes are repealed . . . we will have done everything within our power to guarantee white supremacy in our primaries.”²⁹

These sentiments help contextualize a much larger and troubling story of overt black disenfranchisement in South Carolina. The devices were many and included the usual suspects, such as poll taxes, literacy tests, and understanding clauses, as well as lengthy residency requirements, short registration times and hours, and the outright denial of the franchise for committing particular crimes.³⁰ When these measures failed to keep blacks from casting ballots, election officials stood as the last line of defense, ready to take any needed measure to keep black voters from casting valid ballots. As precinct manager Wade H. Ratcliffe explained when he was charged in 1964 with telling a black voter to put his ballot in the wrong box, “I knew this was wrong but we have always done these things.”³¹

22. *South Carolina v. Katzenbach*, 383 U.S. 301, 333–34 (1966).

23. *Id.* at 310 n.9.

24. See RICHARD MAXWELL BROWN, *STRAIN OF VIOLENCE: HISTORICAL STUDIES OF AMERICAN VIOLENCE AND VIGILANTISM* 86 (1975).

25. *South Carolina v. Katzenbach*, 383 U.S. at 310 n.9 (alteration in original) (quoting JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 464 (1895)).

26. 33 CONG. REC. 2245 (1900).

27. Orville Vernon Burton, “*The Black Squint of the Law*”: *Racism in South Carolina*, in *THE MEANING OF SOUTH CAROLINA HISTORY: ESSAYS IN HONOR OF GEORGE C. ROGERS, JR.* 161, 171 (David R. Chesnutt & Clyde N. Wilson eds., 1991).

28. *Smith v. Allwright*, 321 U.S. 649, 666 (1944).

29. V. O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 627 (1949).

30. See Orville Vernon Burton et al., *South Carolina*, in *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990*, at 191, 231 tbl.7.9 (Chandler Davidson & Bernard Grofman eds., 1994).

31. *Camden Chronicle*, Feb. 19, 1965, at 1.

This evidence, standing alone, offers a serious indictment on the purported legitimacy of South Carolina's pre-1965 political system. In looking at the registration and turnout numbers, it becomes immediately clear that the system worked as intended. For example, as seen below in Table 1, only 15 percent of the black voting-age population was registered to vote in 1958.³² This number stood in sharp contrast to the registration rate for the white voting-age population, which was approximately 31 percent.³³ By 1962, 22.9 percent of the black voting-age population was registered to vote, and two years later, this figure had increased to 37.3 percent of voting-age blacks³⁴ (compared to 75.7 percent for voting-age whites).³⁵ In total, registered blacks accounted for only 17 percent of all registered voters in South Carolina in 1964.³⁶ These figures led the authors of an important account on the Voting Rights Act's impact in South Carolina to conclude that "[o]n the eve of passage of the Voting Rights Act, South Carolina remained thoroughly in the grip of white supremacy."³⁷

TABLE 1.
ESTIMATED PERCENTAGE OF REGISTERED VOTING-AGE
POPULATION IN SOUTH CAROLINA³⁸

	1956	1958	1962	1965
White	†	31	83	75.7
Black	27	15	22.9	37.3

† No figures were available for this date for white registrants.

32. See *infra* Table 1.

33. DONALD L. FOWLER, PRESIDENTIAL VOTING IN SOUTH CAROLINA 1948-1964, at 44 (1966).

34. See *infra* Table 1.

35. U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 13 tbl. (1968).

36. Orville Vernon Burton et al., *supra* note 30, at 199.

37. *Id.*

38. See DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 11 tbl.1-2, 19 tbl.1-3 (1978), for the black registration figures. Garrow provided a caveat concerning the fluctuations in the totals—particularly in reference to South Carolina's figures from 1956 to 1958—which he stated “are the result not of drastic changes in actual registration levels but of overly optimistic estimations made in one year and more sober estimates made several years later.” *Id.* at 11 tbl.1-2. In this vein, we must note the statistics found in U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1963, at 35 (1963), reflect a much lower figure—8.3 percent for black registrants of voting age in 1956 and 7.4 percent in 1962. For the white registration figures, see U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 252-53 tbl.11 (1968), and U.S. COMM'N ON CIVIL RIGHTS, REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 1963, at 35 (1963).

During the House debates in the spring of 1965, state officials disputed time and again the charge that South Carolina discriminated on racial grounds. On the second day of the hearings, for example, United States Representative Robert Ashmore queried Attorney General Katzenbach on this point: "You don't have one single case on the record in recent years to show that they have discriminated against any man because of race or color. You don't know of any, do you, Mr. Attorney General?"³⁹ The Attorney General acknowledged that the DOJ had not brought any suits in federal court against South Carolina or its officials, and the DOJ had also addressed some of its concerns to local officials, who in turn had taken "remedial steps," but this was not to say, he made clear, that "we have never had any evidence at all of racial discrimination."⁴⁰

In subsequent days, Daniel McLeod, South Carolina's Attorney General, was far more direct in his assessment that the state was not guilty of racial discrimination in voting. For example, to the charge that disparities in registration rates along racial lines were due to discrimination against prospective black registrants, he responded, "I account for it in one word: indifference, voting indifference."⁴¹ He continued, "Now, you cannot, to my way of thinking, draw an assumption from the disparity between the Negro registration ratio as opposed to the white registration ratio, in the face of lack of interest in voting not only among the negro population but among the white population."⁴²

Moments later, Representative McCulloch asked McLeod whether he believed "that there might be discrimination by threats or intimidation, or by subtle pressures that are very effective in this regard in other States and in other human activities []." ⁴³ Being "perfectly candid," McLeod explained that he "kn[e]w of none. I can state in all sincerity that if they do occur, they may occur, I think they occur to a minimal extent. I have had no complaints."⁴⁴

In the end, these and similar assertions by officials from other jurisdictions did not persuade the 89th Congress. The Voting Rights Act of 1965 passed both houses of Congress by wide margins: the House passed the bill by a vote of 328 to 74; in the Senate, it passed by a margin of 79 to 18.⁴⁵

III. A WELCOMED CHANGE: THE IMMEDIATE EFFECT OF THE VOTING RIGHTS ACT

As expected, the Voting Rights Act had a remarkable effect. The issue of minority disenfranchisement was framed as a problem of voting registration, as demonstrated by the prominence of registration figures, which served as both evidentiary tools and as part of the statute's coverage formula. During the House hearings, Attorney General Katzenbach remarked, "Our concern today is to enlarge

39. 1965 House Hearings, *supra* note 2, at 114.

40. *Id.*

41. *Id.* at 603.

42. *Id.*

43. *Id.* at 605.

44. *Id.*

45. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

representative government. It is to solicit the consent of all the governed. It is to increase the number of citizens who can vote.”⁴⁶ In an oft-quoted passage, Burke Marshall similarly contended that “[t]he problem that the bill was aimed at was the problem of registration, Congressman. If there is a problem of another sort, I would like to see it corrected, but that is not what we were trying to deal with in the bill.”⁴⁷

And in this regard, the bill performed admirably. As seen in Table 2, the estimated percentage of the voting-age black population registered in South Carolina rose to 51.4 percent in 1966 and held steady through the end of the decade.⁴⁸ By 1974, the number had risen to 60.8 percent, which compared favorably to the white registration rate of 61.3 percent.⁴⁹

TABLE 2.
ESTIMATED PERCENTAGE OF VOTING-AGE POPULATION IN SOUTH CAROLINA⁵⁰

	1966	1967	1970–1971	1974
White	81.7	81.7	51.2	61.3
Black	51.4	51.2	48	60.8

Without question, the Act brought dramatic and rapid improvement to the registration numbers in South Carolina.

Tellingly, the Act also brought important changes in the composition of state and local boards. As seen in Table 3, the sum total of blacks elected to the state legislature in 1964 was zero.⁵¹ The number remained unchanged in 1966, yet by 1991, seventeen black representatives had reached the state house and six had reached the state senate. These numbers rose steadily through the 1990s so that by 2001, South Carolina had one black representative in Congress, seven black state senators, and twenty-four black state representatives.⁵² Similarly impressive gains can be seen when looking at county, municipal, and school board posts.⁵³

46. 1965 House Hearings, *supra* note 2, at 17. He repeats this sentiment a few moments later. See *id.* at 19.

47. *Id.* at 74.

48. See *infra* Table 2.

49. U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 375–76 tbl.1-C (1975).

50. GARROW, *supra* note 38, at 200 tbl.6-2; U.S. COMM’N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 252–53 tbl.11 (1968); U.S. COMM’N ON CIVIL RIGHTS, *supra* note 49.

51. Orville Vernon Burton et al., *supra* note 30, at 232 tbl.7.10.

52. See DAVID A. BOSITIS, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 2001, at 14 (2003).

53. *Id.*

TABLE 3.
RACIAL MEMBERSHIP IN THE SOUTH CAROLINA LEGISLATURE⁵⁴

		1964	1974	1983	1991	2001	2005
State Senate	White	46	46	45	40	39	38
	Black	0	0	1	6	7	8
State House	White	124	120	109	107	100	99
	Black	0	4	15	17	24	25

These numbers compare favorably with the racial composition of the state, even if a significant gap remains. As Table 4 shows, the percentage of blacks in South Carolina over the last forty years has hovered around the 30 percent mark.

TABLE 4.
POPULATION BY RACE IN SOUTH CAROLINA⁵⁵

	1960	1970	1980	1990	2000
White Population	65.1%	69.3%	68.8%	69%	67.2%
Black Population	34.8%	30.5%	30.4%	29.8%	29.5%

To be sure, blacks in the state are not represented in the state legislature to the level their numbers might indicate. But this conclusion betrays a far more important story; to wit, these numbers portend an important trend in South Carolina politics. One can reasonably attribute most of this success to the Voting Rights Act. The next Part offers data to show how the DOJ used Section 5 to improve black political participation in South Carolina.

54. Charles S. Bullock, III & Ronald Keith Gaddie, An Assessment of Voting Rights Progress in South Carolina 35 tbl.5 (Oct. 1, 2005), *available at* <http://www.aei.org/research/nri/subjectAreas/pageID.1140,projectID.22/default.asp> (click “VRA South Carolina Executive Summary and Study”).

55. U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, various editions.

IV. MEASURING IMPACT: A VIEW OF THE VOTING RIGHTS ACT FROM THE OBJECTION LETTERS, 1965-2005

Section 5 of the Voting Rights Act requires those jurisdictions included within its coverage formula to preclear with the United States Attorney General any change in a “standard, practice, or procedure with respect to voting.”⁵⁶ The Attorney General has the discretion to deny preclearance if the proposed change has the “purpose . . . [or] effect of denying or abridging the right to vote on account of race or color.”⁵⁷ Alternatively, a covered jurisdiction may seek a declaratory judgment in the United States District Court for the District of Columbia that their proposed changes do not have that prohibited intent or effect.⁵⁸

These words leave much to the imagination and have proven difficult to put into practice. For example, what exactly is a standard, practice, or procedure with respect to voting? And when does a change have the purpose or effect of denying or abridging the right to vote on account of race or color? These are by no means rhetorical questions.⁵⁹ From the perspective of the Supreme Court, these questions have posed difficult interpretive challenges, which the Court has resolved in accordance with its particular view of its own role. Soon after the statute’s enactment, the Court interpreted these words broadly; in so doing, it played a direct role in expanding the Voting Rights Act in American political life. As the Court’s composition changed, so did the Court’s broad and expansive readings.⁶⁰

From the time the Court faced a direct challenge to the constitutionality of the Act in *South Carolina v. Katzenbach*, it became amply clear that the words of the statute would find a receptive audience with a Court majority. In *South Carolina*, and while acknowledging that the Act established “stringent new remedies,” and some of its provisions were “inventive” and “uncommon,” the Court concluded that

56. 42 U.S.C. § 1973c (2000).

57. *Id.*

58. *Id.*

59. See, e.g., *Bossier Parish II*, 528 U.S. 320, 341 (2000) (“[W]e hold that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but nonretrogressive purpose.”); *Beer v. United States*, 425 U.S. 130, 141 (1976) (“[A] legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the ‘effect’ of diluting or abridging the right to vote on account of race within the meaning of § 5.”); *Georgia v. United States*, 411 U.S. 526, 531, 535 (1973) (holding Georgia’s 1972 reapportionment plan, which included “the extensive reorganization of voting districts and the creation of multimember districts in place of single-member districts,” fell within the scope of Section 5); *Perkins v. Matthews*, 400 U.S. 379, 387 (1971) (“[W]e think it clear that the location of polling places constitutes a ‘standard, practice, or procedure with respect to voting.’”); *Gaston County v. United States*, 395 U.S. 285, 293 (1969) (“We conclude that in an action brought under § 4(a) of the Voting Rights Act of 1965, it is appropriate for a court to consider whether a literacy or educational requirement has the ‘effect of denying . . . the right to vote on account of race or color’ because the State or subdivision which seeks to impose the requirement has maintained separate and inferior schools for its Negro residents who are now of voting age.”); *Allen v. State Bd. of Elections*, 393 U.S. 544, 550 (1969) (considering whether new laws and regulations passed in Mississippi and Virginia fell within the prohibition of Section 5).

60. See Luis Fuentes-Rohwer, *Taking Statutory Language to its Constitutional Limits: The Case of the Voting Rights Act 15–39* (2006) (unpublished manuscript, on file with authors).

the means used by Congress were a legitimate, permissible response to the problem at hand.⁶¹ And in *Katzenbach v. Morgan*,⁶² the Court similarly concluded that the abrogation of a requirement of English literacy for persons who had completed a sixth-grade education in Puerto Rico would pass constitutional muster.⁶³ The Court reached this conclusion in the face of *Lassiter v. Northampton County Board of Elections*,⁶⁴ decided a scant seven years earlier, where the Court had upheld the constitutionality of literacy tests.⁶⁵

Three years later, in *Allen v. State Board of Elections*⁶⁶ and *Gaston County v. United States*,⁶⁷ the Court continued its expansive readings of the statute, this time in furtherance of its understanding of the substantive provisions of the Act. Subsequent cases followed this script,⁶⁸ and may be said to culminate with *United States v. Board of Commissioners of Sheffield, Alabama*,⁶⁹ where the Court concluded, in the face of contravening legislative history, that a political subdivision that did not conduct voter registration was covered under Section 4 of the Act.

In due time, however, the Court ceased to read the provisions of the Act in such forgiving fashion.⁷⁰ It can be said that the first case to do so was *Beer v. United States*.⁷¹ In *Beer*, the Court interpreted the effects prong of Section 5 of the statute to encompass only retrogressive effects, that is, changes that would leave blacks in a worse position than before the change.⁷² Two further cases, decided within the last ten years, further narrowed the scope of the statute and the role of the DOJ under Section 5. In the first installment of *Reno v. Bossier Parish School Board*,⁷³ the Court held that the DOJ cannot object to a proposed change on the ground that the change violates Section 2, the vote dilution provision.⁷⁴ And three years later, the Court concluded that the DOJ must preclear a discriminatory though non-retrogressive proposed change.⁷⁵

Given the case law, we would expect the objection letters to show objections based both on retrogression and discrimination grounds, up to the year 2000. After 2000, and if the lawyers at the DOJ are reading the case law, we would expect to only see objections on retrogression grounds. Curiously, however, the evidence on this point is both scattered and anecdotal in nature. In other words, few accounts

61. *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 327, 334–37 (1966).

62. 384 U.S. 641 (1966).

63. *Id.* at 643–47.

64. 360 U.S. 45 (1959).

65. *Id.* at 51–53.

66. 393 U.S. 544 (1969).

67. 395 U.S. 285 (1969).

68. *See Georgia v. United States*, 411 U.S. 526 (1973); *Perkins v. Matthews*, 400 U.S. 379 (1971).

69. 435 U.S. 110 (1978).

70. *Id.* at 135.

71. 425 U.S. 130 (1976).

72. *Id.* at 141.

73. (*Bossier Parish I*) 520 U.S. 471 (1997).

74. *Id.* at 478–81.

75. *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 528 U.S. 320, 341 (2000).

have attempted to look at the letters to tell a story about the relationship between the DOJ and the Court. This is puzzling, as the DOJ has played the leading role in carrying out the Act's mandates through its Section 5 power.

This Part seeks to fill this important void in the literature by examining the objection letters issued by the DOJ to political entities in South Carolina seeking to preclear changes covered under the statute. In particular, we wish to understand what the DOJ considered a Section 5 violation and how well it was able to detect when such violations arose. This information is important because it provides greater clarity to the debate of whether Congress should reauthorized the preclearance provision. To debate whether Congress should reauthorize Section 5 or allow it to sunset, it is important to get a clearer picture of what will be lost if this important statute expires.

An understanding of the legal constraints on the DOJ is helpful in understanding how Section 5 is administered and the scope of its coverage. Yet one must also examine the DOJ's actual practices. Thus, this Part pursues two related goals. First, it presents an overview of the form and substance of the objection letters from the DOJ to South Carolina officials. Second, it offers a synopsis of the mechanics of preclearance in South Carolina as seen from the objection letters. More particularly, we examine the number of objections offered by the DOJ, the types of submissions to which it objected most often, and the factors it considered. This Part also discusses a very important finding: the DOJ objected most often to proposed changes by county and city entities.

A. The Letters: Form, Substance, and Cover

From our survey of objection letters from the DOJ to South Carolina, we discern three important themes. First, the DOJ is remarkably respectful toward state and local officials. In South Carolina, for example, the DOJ issued its first objection letter on March 6, 1972, it was addressed to Daniel McLeod, South Carolina's Attorney General.⁷⁶ The letter referenced the state's submission of its senate redistricting plan, for which the DOJ denied preclearance.⁷⁷ After explaining his reasoning and offering a spate of lower court cases supporting the plan's denial, Assistant Attorney General Norman stated:

We have reached this conclusion reluctantly because we fully understand the complexities facing any state in designing a reapportionment plan to satisfy the needs of the state and its citizens, and, simultaneously, to comply with the mandates of the Federal Constitution and laws. We are persuaded, however, that the Voting Rights Act compels this result.⁷⁸

76. Letter from David L. Norman, Assistant Attorney Gen., Civil Rights Div., to Daniel E. McLeod, S.C. Attorney Gen. (Mar. 6, 1972).

77. *Id.* at 3.

78. *Id.*

This posture is remarkable for many reasons. The DOJ need not explain itself to state and local officials, and surely may take the view that whatever covered jurisdictions have coming to them is a direct result of the jurisdiction's own past practices. Yet, the DOJ showed respect that might border on deferential. To be sure, one can argue that the question of impact looms in the background, and the covered jurisdictions may simply choose to make things harder for the DOJ, either by refusing to submit changes for preclearance or evading the statute in other ways. The DOJ seemed to recognize this possibility and responded by treating the jurisdiction with a modicum of respect that, one might argue, is undeserved in light of the reasons the jurisdiction fell under the Act's coverage in the first place.

A second feature of the letters, which is a direct reflection of the statutory scheme, is their burden-shifting component. In an early letter, Assistant Attorney General Norman explained, "[W]e are unable to conclude as we must under Section 5, that [the change] . . . does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."⁷⁹ The letters continually repeat this refrain in basically the same form. A jurisdiction submits a proposed change with information about its enactment, and the DOJ then determines within sixty days whether the change violates the statute. If the DOJ needs more information, it asks for more, and the sixty-day window begins to close only after the DOJ has an opportunity to determine whether the change does not have the purpose, and will not have the effect, of denying or abridging the right to vote on racial grounds.

Many letters demonstrate the importance of the statute's burden-shifting component. Consider, for example, the August 23, 1982 letter from Assistant Attorney General Bradford Reynolds to the Assistant Attorney General of South Carolina.⁸⁰ The letter addressed, *inter alia*, abolishing the Hampton County Board of Education.⁸¹ According to Reynolds:

Our analysis shows that the county board has been particularly responsive to the interests and needs of the black community in Hampton County and consistently has appointed bi-racial representation on the local boards of trustees for both School District 1 and School District 2. We remain unsatisfied on the information submitted by the State that elimination of the county board—in a county with a 52-percent black population and a system which allows the use of a plurality and single-shot method of election—does not deprive black voters of an opportunity to

79. Letter from David L. Norman, Assistant Attorney Gen., Civil Rights Div., to Hardwick Stuart, Jr., S.C. Assistant Attorney Gen. (Nov. 13, 1972).

80. Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., to Havird Jones, Jr., S.C. Assistant Attorney Gen. (Aug. 23, 1982).

81. *Id.* at 1.

elect representatives of their choice who can help assure that interests of blacks will be protected on a county-wide basis.⁸²

Essentially, the county board of education was good for the black community, and the state had not shown that eliminating it would not harm black interests. Without any such showing, the statute demands the DOJ deny preclearance.⁸³

Consider also Assistant Attorney General John Dunne's letter to attorney James Gonzales, who was acting on behalf of the City of North Charleston.⁸⁴ The letter addressed the city's submission of its districting plan for preclearance.⁸⁵ Dunne noted that the city had used an at-large election method for the offices of mayor and city council and that voting in the city was racially polarized.⁸⁶ While blacks constituted a third of the city's population, under these conditions, only one black candidate had won a council seat.⁸⁷ A local referendum election forced the city to adopt a districting method for electing its council members, and it was this new plan the city submitted to the DOJ for approval.⁸⁸

Under the new plan, blacks constituted a majority in two of the ten districts, and Dunne therefore conceded the plan satisfied *Beer's*⁸⁹ retrogression prong.⁹⁰ Yet the plan must also satisfy the statute's purpose prong, and here the city's position was not as strong. Dunne explained:

Our analysis indicates that districting options were readily available to the city which would allow for one or more additional black majority districts and thus would more fairly reflect black voting strength. Two aspects of the city's plan are implicated in this regard. First, the plan appears to minimize black electoral opportunity by fragmenting black neighborhoods, located in the southern area of the city, into white majority districts where blacks will not have an opportunity to elect council members of their choice. Second, the city chose to combine the military base populations exclusively with white majority areas, although the base populations also adjoin the city's black neighborhoods and could as easily be combined with those neighborhoods to result in districts in which black voters are in the majority since, as we

82. *Id.* at 1–2.

83. *See* 42 U.S.C. § 1973c (2000).

84. Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., to James E. Gonzales, Esquire, Gonzales & Gonzales (May 3, 1990).

85. *Id.* at 1.

86. *Id.*

87. *Id.*

88. *Id.*

89. *See Beer v. United States*, 425 U.S. 130, 141 (1976).

90. Letter from John Dunne to James E. Gonzales, *supra* note 84, at 1–2.

understand it, this military population is largely inactive in the local electoral process.⁹¹

Dunne conceded that valid, nonracial reasons may justify the city's choices "unnecessarily limiting black voters to a realistic opportunity to elect representatives of their choice in only two districts," but "[o]ur review has not indicated any."⁹² One such reason may be protecting incumbents, yet "it appears that the devices employed here to accomplish that goal were inextricably linked to minimizing black voting strength."⁹³ And while recognizing the time pressures on the city to adopt a new plan, Dunne noted "the city sought to meet the deadline by adopting a plan through a closed process which did not permit fair and open debate about the available districting alternatives, and foreclosed serious consideration of the views of minority residents."⁹⁴

On these facts, Dunne explained, "I cannot conclude, as I must under the Voting Rights Act, that the city has carried its burden in this instance." That is, the city did not carry its burden of showing the proposed plan was not enacted with discriminatory racial purpose. This result is remarkable, especially because this burden-shifting device places the onus on the state to prove a negative, while vesting great discretion in the United States Attorney General to preclear or object to plans under review. Of note, this discretion was one of the great worries offered by the plan's critics during the early congressional hearings.⁹⁵ United States Attorney General Mitchell himself leveled this criticism during the 1969 hearings, contending "the processes provided under which the Attorney General must make a decision are not adequate. They result in arbitrary decisions without sufficient information."⁹⁶ Our review of the letters, however, makes clear the Attorney General has not abused this seemingly boundless grant of authority.

Finally, the letters also reveal the DOJ is parsing through the doctrine to enforce the statute as the Supreme Court interprets it. The DOJ is thus behaving as a court—interpreting opinions and applying them to the facts at hand. In light of

91. *Id.* at 2.

92. *Id.*

93. *Id.*

94. *Id.*

95. *See, e.g., 1970 Senate Hearings, supra* note 9, at 257 (statement of Sen. Sam J. Ervin, Jr., Chairman, Subcomm. on Constitutional Rights of the Comm. on the Judiciary) (complaining that Section 5 "subordinates the decisions of the elected representatives of the people in the States to the unreviewable whims of an executive official of the Federal Government").

96. *Id.* at 204 (statement of John Newton Mitchell, Att'y Gen. of the United States). Mitchell explained, "[W]ith respect to the filing of the legislation in the DOJ, that having lived with it I did not think it was the proper place for a determination of whether statutes are or are not going to be used in a discriminatory fashion." *Id.* at 232. He also complained the best he could do under Section 5 was to "try and guess as to the effect of the legislation." *Id.* at 233. Senator Hruska

thought [Section 5] was wrong because it put into the hands of an appointed political office of another branch of the Government the right to veto, in effect, the legislative act of a State legislature. It was wrong because it is difficult to judge a law, a draft of a law, in a vacuum.

Id. at 239 (statement of Sen. Hruska).

the preclearance power's volatile nature and the many issues such an inquiry raises, the letters offer an expected subtext; when enforcing the statute as interpreted by the Court, the DOJ often string cites cases that support its conclusion or demand the result it reached. In effect, the DOJ is saying, "It is not us, it's them. If you disagree with our position, do not complain to us, complain to the Court."

B. A Look at the Data

1. Frequency of Objections

The Voting Rights Act came into law in August 1965, yet judging the preclearance requirement's effectiveness from that date would be unfair because the preclearance provision lay dormant for many years. This was a common refrain during the 1969 hearings from those supporting the Act's extension. As Representative McCulloch explained, "Section 5 was intended to prevent the use of most of these devices. But apparently the States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement."⁹⁷ South Carolina offers a perfect example of this complaint. The DOJ offered its first objection under the preclearance provision on March 6, 1972.⁹⁸ As Table 5 shows, this was the first of forty-eight objections the DOJ offered during the 1970s.

TABLE 5.
NUMBER OF OBJECTIONS BY DECADE: SOUTH CAROLINA

Decade	Number of Objections (Letters) [†]	Number of Submissions
1970-1979	48 (52)	30
1980-1989	36 (46)	2,665
1990-1999	32 (34)	10,194
2000-2004	9 (9)	
TOTAL	125 (141)	

[†] The numbers in parentheses represent the total number of objection letters, including objection letters to resubmissions and requests for new information.

97. 1969 House Hearings, *supra* note 10, at 4 (statement of Rep. McCulloch); *see also id.* at 61 (statement of Howard A. Glickstein, General Counsel and Acting Staff Director, U.S. Commission on Civil Rights) (labeling the DOJ's role during the first four years of the Act as "deficient").

98. Letter from David L. Norman to Daniel E. McLeod, *supra* note 76.

Table 5 illustrates the conventional story of the letters and the role of the DOJ in interposing objections to proposed changes. In the early years of the Act, when the problems to which the Act is directed were at their highest, one would expect the DOJ to interpose the highest number of objections, and the data bears out this assertion. The objections then began a steady decline through the decades, only to sharply decline in the last five years.

These findings are in line with our general expectations of the Act. Like any other medicine, the Act was intended as a temporary measure with the view that it would ultimately alter the social and political norms across the region. Once the Act altered these norms, the number of objections would diminish, and the Act's special provisions would ultimately sunset. Hence, one conclusion may be that the medicine has taken effect and that the Act is therefore no longer needed. As subcommittee chairman Don Edwards remarked during the 1975 House hearings, "The act that was the result of this frustration was a radical bill. It was bent on results without delay. It was also designed to be temporary. After a few years of harsh measures, the practices of a lifetime would be reversed and special Federal protection would no longer be necessary."⁹⁹

2. *Types of Objected Submissions*

Examining the types of submissions eliciting objection letters from the DOJ presents a similar picture. As Table 6 indicates, we classified the objectionable submissions into four major types: objections to voting systems, including objections to at-large election systems, numbered posts, and residency requirements; objections to form of government; objections to procedures; and objections to redistricting; and objections to the drawing of boundaries.

99. *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3427, and H.R. 3501 Before Subcomm. on Civil and Const. Rights, 94th Cong. 887 (1975)* (statement of Rep. Edwards).

TABLE 6.
TYPES OF OBJECTIONABLE SUBMISSIONS BY DECADE: SOUTH CAROLINA

Type of Objectionable Submission	Decade				
	1970–79	1980–89	1990–99	2000–05	TOTAL
Voting Systems	50	15	3	2	70
Form of Government	15	13	12	4	44
Procedures	13	22	7	0	42
Redistricting	4	7	17	4	32
Boundaries	2	5	4	2	13
TOTAL	84	62	43	12	201

There are two findings worth underscoring. First, most objections were for submissions seeking changes in electoral structures, such as voting systems and redistricting. Second, there is a partial repetition of the downward trend discussed in Section A. With regard to voting systems, the DOJ began by offering fifty objections for the first full decade of the Act's existence, fifteen objections for the following decade, three objections during the 1990s, and only two objections between 2000 and 2005. However, the reasons for these findings might not be as before. Instead, perhaps jurisdictions learned to live with the preclearance requirement, or simply ceased making changes to which they knew the DOJ would object. Alternatively, as detailed by the steady objections to redistricting plans, the DOJ might have shifted its gaze to other sources of concern.

3. *Factors Considered*

A third important finding relates to the factors considered by the DOJ when interposing a preclearance objection. As Table 7 indicates, our review of the data as a whole makes clear that the DOJ considers multiple factors before deciding whether a standard or practice has the effect or purpose of abridging the right to vote on the basis of race.¹⁰⁰

100. This was particularly true in the 1970s and 1980s.

TABLE 7.
TOP TEN REASONS STATED BY DOJ FOR
DENYING PRECLEARANCE: SOUTH CAROLINA, 1970–2005

Reason for Objection	Number of Objections
Racial Bloc Voting	65
Minority Population	64
At-Large Districts	41
Majority Vote Requirement	36
Limits Opportunity to Election Candidate of Choice	34
Rejected Available Alternatives	33
Absence of Non-Racial Explanations	29
Opposition by Communities of Color	29
Past Failure to Elect Candidates of Color	28
Use of Staggered Terms	22

Some of these factors, such as retrogression and racial discrimination/vote dilution, should be expected. In particular, the DOJ paid close attention to the potential impact of electoral structures on voters of color.

In this vein, consider the following letter, from Assistant Attorney General Drew Days to the county attorney in Bamberg County, South Carolina, in reference to a change in the method of choosing members of the county school board. After refraining from objecting to a change in the date of the referendum and the changing of these posts from appointive to elective, the Assistant Attorney General stated:

With respect to the at-large feature of the electoral system we have carefully considered the information you provided as well as election returns for at-large elections in which black persons have competed. We are concerned under Section 5 with whether this at-large feature dilutes the voting strength of any group of persons on the basis of race or color.

We note that the submitted plan calls for the election of seven School Board members, one from each of the seven councilmanic districts. Blacks comprise 42 percent of the registered voters, at

least half of the voting age population, and have the potential to elect three candidates of their choice under the present councilmanic districting system. The injection of an at-large feature, against the background of racial bloc voting that appears to exist in the county, significantly reduces the opportunity of minority voters to select the candidates of their choice.¹⁰¹

This letter displays a nuance and tenor regularly seen in objection letters: an at-large election, coupled with the racial background of the submitting jurisdiction, leads to a concern that the proposed change does not meet the preclearance standard.

This is a common refrain throughout the letters. The DOJ paid close attention to electoral structures and their potential impact on voters of color. In particular, the DOJ strongly discouraged state and local officials from adopting particular electoral structures due to their negative impact on communities of color.

Pointing out that structural objections played a leading role in the preclearance process only tells part of the story. We make two further points. First, it is clear that structural objections did not play the only role. Our review of the data supports this assertion; the DOJ used an eclectic, gestalt approach when reviewing proposed changes and considered the combined impact of electoral structures on communities of color. In this regard, consider the DOJ's first objection letter, dated March 6, 1972, in which the DOJ objected to a submission for preclearance from South Carolina.¹⁰² The letter referenced a proposed change to South Carolina's redistricting plans for its state senate districts.¹⁰³ Assistant Attorney General David Norman stated:

We have given careful consideration to the submitted districting plans (Plan A and Plan B) and the supporting information, as well as to information received from other sources. Insofar as time limitations have allowed, we have studied both plans in detail. As a result, however, we are unable to conclude, as we must under the Voting Rights Act, that either proposed Plan A or Plan B will not have the effect of abridging the right of black citizens of South Carolina to vote on account of race or color.

A careful analysis and review of the demographic facts involved and recent court decisions identify several significant areas of concern. Twelve of the 23 proposed districts under Plan A and 14 of the 20 districts in Plan B are multi-member. We note that in these districts candidates must run for numbered posts. It

101. Letter from Drew S. Days, III, Assistant Attorney Gen., Civil Rights Div., to D. A. Early, County Attorney, Bamberg County, S.C. (Aug. 31, 1977).

102. Letter from David L. Norman to Daniel E. McLeod, *supra* note 76.

103. *Id.* at 1.

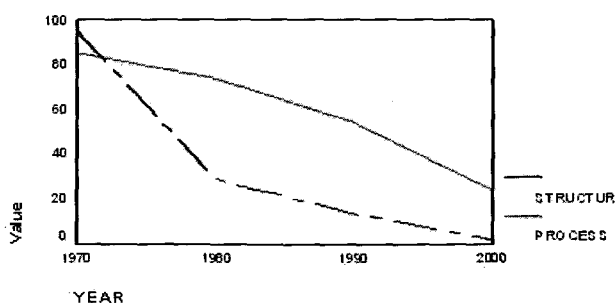
is our understanding also that South Carolina law requires a majority of votes to win primary elections. A substantial number of multi-member districts in each plan have significant concentrations of black population.

Our analysis of recent federal court decisions dealing with issues of this nature, and to which we feel obligated to give great weight, leaves us unable to conclude, with respect to these plans, that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina.¹⁰⁴

The mix of multi-member districts, numbered posts, and a majority vote requirement led the Assistant Attorney General to conclude the DOJ could not preclear the changes.¹⁰⁵ This is a common approach throughout the letters. In his letter of August 17, 1973, to the mayor of Darlington, Assistant Attorney General J. Stanley Pottinger was far more explicit: "Based on all the available facts and circumstances, the Attorney General is unable to conclude as we must under the Voting Rights Act that the changes involving the implementation of residency requirements and a majority requirement will not have a discriminatory racial effect on voting."¹⁰⁶

Second, this is a story of clear decline. As noted in Figure 1, objections to structural changes dropped sharply from the first to the second decade of the DOJ's enforcement of the Act.

FIGURE 1.
 STRUCTURAL AND PROCESS-BASED PRECLEARANCE DENIALS:
 SOUTH CAROLINA, 1970-2005



104. *Id.* at 1-2.

105. *Id.* at 2-3.

106. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., to Frank A. Wells, Mayor of Darlington, S.C. (Aug. 17, 1973).

Figure 1 tracks the frequency of objections interposed on structural grounds between 1970 and 2000. These objections include at-large systems, majority vote requirements, staggered terms, and residency requirements. From a high of thirty-four in the 1970s, these objections came down to single digits in the 2000s. This data can be interpreted in a number of ways. One way may be to suggest the Department succeeded in weeding discrimination from the political process. This view is in accordance with the Act's original goal as a temporary measure. Just as likely, however, is that the data suggests that covered jurisdictions simply stopped submitting changes that included these structural devices. In this vein, this decline may be attributed to the fact that the DOJ was successful in eliminating structural devices as elements of discrimination because they are easier for the DOJ to police and monitor than process-based issues.

4. *Local Governments as Culprits*

The final finding may be the most important. Commentators often focus on state legislatures as the primary violators of Section 5. On this view, they argue Section 5 may no longer be needed in a politically competitive South, where parties must fight for votes irrespective of race or color.¹⁰⁷ Our study of South Carolina introduces a wrinkle in this argument. Table 8 identifies each level of government responsible for implementing a proposed change and the number of objections against that level.

107. See generally Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1731 (2004) (examining "the changed political environment that has eroded the preconditions for the success of section 5 of the Voting Rights Act . . . [and concluding] that section 5 has served its purposes and may now be impeding the type of political developments that could have been only a distant aspiration when the VRA was passed in 1965").

TABLE 8.
OBJECTIONS BY LEVEL OF GOVERNMENT: SOUTH CAROLINA, 1975–2005

Level of Government	Decade				TOTAL
	1970s	1980s	1990s	2000s	
State	19	15	7	4	45
County	13	11	8	1	33
City	19	18	17	4	58
School District	1	2	2	50	5
TOTAL	52	46	34	9	141

As Table 8 shows, the DOJ interposed the most objections against proposed changes submitted at the county and city level. The table underscores the importance of paying attention to how voters of color interact with local government officials. Knowing how many elected officials of color are in the legislature may not suffice. One must also pay attention to the composition of school boards, city offices, and county offices, all of which are loci of significant political power in the South.

V. A CLOSER LOOK: THE LETTERS, THE DOJ, AND THE COURT

Part IV offered our analysis of the preclearance requirement’s impact as the DOJ enforced it. Concededly, that analysis was general in scope and broad in perspective. This Part shifts the analysis to the objection letters. We believe this inquiry is important and fruitful for two reasons. First, while mindful of the preclearance requirement’s politically volatile nature, we examine how the DOJ executed its duties under the statute. This is an important story, especially because the preclearance power was dormant for the first five years of the Act. The DOJ issued the first objection letter in South Carolina on March 6, 1972.¹⁰⁸ Second, we explore how the DOJ enforced the preclearance requirement as the Supreme Court interpreted it through the years. Put another way, scholars often assume the Court crafts the doctrine and the DOJ slavishly enforces it. We find that assumption is both incomplete and somewhat inaccurate. While it is true that case law guides the DOJ—and the DOJ follows case law to a great extent—it is also true that case law is far from the only factor the DOJ considers in deciding whether to deny

108. See Letter from David L. Norman to Daniel E. McLeod, *supra* note 76.

preclearance. In light of the DOJ's broad discretion, however, this finding should not be at all surprising.

A. *The Court and the DOJ: A Purported Colloquy*

Section 5 offers an incomparable canvas for mapping the Supreme Court's doctrine and the doctrine's application as enforced by the DOJ. This last Section examines that interaction, which we understand as a colloquy between the Court and the DOJ. We make two particular observations. First, the DOJ looks carefully to the doctrine and applies it to the facts at hand. Second, the DOJ does not feel bound by doctrinal proscriptions, and other factors play a role as well.

1. *On Justice, the Court, and the Doctrine*

The story of Section 5's enforcement as seen through the objection letters plays out in a predictable pattern. In the early years, the DOJ looked across the case law and pieced together cases to determine whether a proposed change violated Section 5 standards. The Supreme Court had yet to speak about the standard's parameters, so the DOJ looked mostly to lower court cases from across the circuits, as well as Supreme Court vote dilution cases.

Whitcomb v. Chavis,¹⁰⁹ *White v. Regester*,¹¹⁰ and *Zimmer v. McKeithen*¹¹¹ figured prominently among these cases. The DOJ was thus looking to equal protection case law for guidance—and for good measure. After all, Congress intended to shift the inquiry into voting changes in covered jurisdictions away from the time consuming litigation process to the sixty-day DOJ inquiry. Thus, the DOJ was justified in looking to equal protection doctrine, the very source a court would look to in reviewing the proposed plan. And so, as the DOJ stated after objecting to the establishment of a residency requirement, “In considering the system for conducting future elections in your city, you may wish to obtain legal advice on the possible constitutional infirmities involved in at-large elections under comparable situations.”¹¹² The letter cited *Regester* and the Fifth Circuit cases of *Zimmer v. McKeithen* and *Turner v. McKeithen*¹¹³ for support.¹¹⁴

In 1973, the Supreme Court decided *Georgia v. United States*, which upheld DOJ regulations placing the burden of proof on the submitting jurisdictions.¹¹⁵ *Georgia v. United States* soon became boilerplate, and the most consistently cited

109. 403 U.S. 124 (1971).

110. 412 U.S. 755 (1973).

111. 467 F.2d 1381 (5th Cir. 1972).

112. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., to Tuck McConnell, City Manager, Walterboro, S.C. (May 24, 1974).

113. 490 F.2d 191 (5th Cir. 1973).

114. Letter from J. Stanley Pottinger to Tuck McConnell, *supra* note 112, at 2.

115. *Georgia v. United States*, 411 U.S. 526, 541 (1973).

case in the letters. The D.C. Circuit's 1974 opinion in *Beer v. United States*¹¹⁶ soon became prominent in the DOJ's objection letters as well.

In 1976, the Supreme Court decided the *Beer* appeal and established a standard of retrogression for the effects prong of the Section 5 inquiry.¹¹⁷ After that, one would expect *Beer* to dominate the discussion across the objection letters, but it does not. *Beer* was first cited in an objection letter dated March 22, 1977, and in a companion cite with *Regester*.¹¹⁸ The next citation to *Beer* appeared five letters later, on February 6, 1978.¹¹⁹ The case was cited once again on September 27, 1979 but did not play an important role in the DOJ's determination.¹²⁰ On January 12, 1983, *Beer* finally appeared as the important case it should be, apparently controlling the outcome of the DOJ's determination.¹²¹ After this letter, *Beer* quickly joined the list of oft-cited cases, joining *Georgia v. United States* and *City of Richmond v. United States*.¹²² Incidentally, by this time, *Whitcomb* and *Regester* had disappeared entirely from the letters.

To be clear, our point is not that the DOJ misapplies the law or chooses cases in accordance to its political predilections and in the pursuit of its preferred political outcomes—far from it. The DOJ's attempts to faithfully follow the Court's precedent should impress anyone reading these letters. Rather, our point is how much discretion exists within the doctrine for the DOJ to play an important role in enforcing it. Even when the doctrine appears very clear, as with *Beer*, reality never quite catches up to this perception. Thus, understanding the many criticisms of the DOJ's role in this area is easy. The DOJ's discretion can appear to be close to boundless.

Consider in this regard a final letter, from Assistant Attorney General R. Alexander Acosta to H. Bruce Buckheister, Mayor of the Town of North.¹²³ The letter addressed two proposed annexations to the town.¹²⁴ In objecting to these annexations, the letter explained:

The test for determining whether or not a jurisdiction made racially selective annexations is whether the annexation policies and standards applied to white areas are different than those applied to minority areas. If the standards are not the same or

116. 374 F. Supp. 363 (D.D.C. 1974).

117. *Beer v. United States*, 425 U.S. 130, 141 (1976).

118. Letter from Drew S. Days, III, Assistant Attorney Gen., Civil Rights Div., to J. D. Cato, Mayor of Pageland, S.C. (Mar. 22, 1977).

119. Letter from Drew S. Days, III, Assistant Attorney General, Civil Rights Div., to Treva G. Ashworth, S.C. Assistant Attorney Gen. (Feb. 6, 1978).

120. Letter from Drew S. Days, III, Assistant Attorney Gen., Civil Rights Div., to Howard P. King, County Counsel, Sumter, S.C. (Sept. 27, 1979).

121. Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., to J. Lewis Cromer, Richland County Attorney (Jan. 12, 1983).

122. 22 U.S. 358 (1975).

123. Letter from R. Alexander Acosta, Assistant Attorney Gen., Civil Rights Div., to H. Bruce Buckheister, Mayor of North, S.C. (Sept. 16, 2003).

124. *Id.*

have been applied inconsistently, there is a strong likelihood that the decision not to annex the minority area had a discriminatory purpose.¹²⁵

The letter cited *City of Pleasant Grove v. United States*, *Perkins v. Matthews*, and, as a “see also” cite, *Bossier Parish II* for support.¹²⁶

This citation to *Bossier Parish II* is noteworthy, as the case appeared to foreclose all inquiries into discriminatory purpose, and instead focused the preclearance process on retrogression and whether the proposed change had a negative impact on people of color.¹²⁷ Yet the DOJ reached back to a 1987 case and a 1971 case and explicitly engaged in a purpose inquiry. One can view this as a misreading of the case law, or perhaps one can instead see this letter as part of the great deal of discretion accorded to the DOJ even under seemingly settled doctrine.

2. *On the Limits of Doctrine: Looking Around*

One clear finding from our review of the letters is how broadly the DOJ understood its role under Section 5. We do not think we can overstate this point: the DOJ often acted as an advocate for communities of color, and other times as a mediator between these communities and state and local governments. This finding turns democratic theory on its head. Here is the cold, distant federal government interceding on behalf of citizens of color and speaking for them to state and local officials—yet the evidence is unmistakable. Consider an objection letter from Assistant Attorney General Stanley Pottinger to an attorney for the town of McClellanville, South Carolina, in connection with the town’s desire to annex two surrounding areas.¹²⁸ The objection letter noted the existence of “an area of concentrated black population immediately contiguous to the town” that was not included in the preclearance submission.¹²⁹ The Assistant Attorney General stated:

The information available to us is . . . conflicting with regard to the desire for annexation among the residents of the area of black population adjacent to McClellanville. Information which we have received from town officials would indicate that the majority of the adjacent black residents prefer to remain outside the town’s boundaries. But our direct discussions with those residents, and with private citizens who claim familiarity with the desires of those residents, indicate a strong desire for annexation. Moreover, residents of this adjacent black area, who appear to be

125. *Id.*

126. Letter from R. Alexander Acosta to H. Bruce Buckheister, *supra* note 123.

127. See *Bossier Parish II*, 528 U.S. at 341.

128. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., to Philip A. Middleton, Attorney, Town of McClellanville, S.C. (May 6, 1974).

129. *Id.* at 1.

representative of the majority of the residents involved, have informed us that town officials have made clear to them that any formal request for annexation of the area would be rejected, primarily because the addition of the residents of the area would serve to dramatically alter the racial composition of the town's present predominantly white population.¹³⁰

Pottinger explained his office was aware the mayor of McClellanville would be meeting with black leaders "to more clearly determine the desires of the area's residents for annexation, and to inform them that the necessary steps under state law should be taken by those residents if a desire for annexation is evidenced."¹³¹ In this vein, he further noted that the DOJ was open to reconsider its objection after this meeting took place but only if the town provided the minutes of the meeting, "the actions of the residents taken in pursuit of annexation, and the actions and determination of the town officials in response to the efforts of the black residents."¹³² In other words, the DOJ was telling the town to listen to the black residents and meet their concerns, and only then might the DOJ preclear the change.

The role of communities of color in the preclearance process can be characterized in two ways. First, the DOJ often relied on local leaders and "representative" groups to gain a clearer sense of local political realities. Consider the following objection letter, offered in response to a proposed change of a county superintendent's office from election to appointment.¹³³ According to Assistant Attorney General Pottinger:

Comments received from black residents of Clarendon County indicate a perception that the abolition of the elective office in conjunction with a potential black majority electorate shows a discriminatory purpose or effect. Moreover, representations have been made to this office that some black citizens of Clarendon County do not agree that this elective office should be abolished and that black candidates would offer for this position had it not been abolished. We have carefully reviewed the justification submitted to satisfy the state's burden of proof that the submitted change does not have the purpose or effect of denying or abridging voting rights on the basis of race. Under all circumstances of this case we are not so persuaded and must therefore interpose an objection¹³⁴

130. *Id.* at 2.

131. *Id.* at 3-4.

132. *Id.* at 4.

133. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., to Hardwick Stuart, Jr., S.C. Assistant Attorney Gen. (Nov. 13, 1973).

134. *Id.* at 1-2.

This letter is remarkable in its admissions. Note that comments from black residents indicate not a fact—but only a perception—that the change, coupled with a potential black electorate, showed the requisite discriminatory purpose or effect. Additionally, local black residents informed the DOJ that black candidates would in fact run for this office if still an elective post. Clearly the DOJ would not have this information on its own, and the state and local officials would be unlikely to furnish it. More importantly, the DOJ took the word of these black representatives unquestioningly.

Second, the objection letters as a whole leave us with a very strong impression that when black leaders object to a proposed change, the DOJ listens. Consider a follow-up objection letter from Assistant Attorney General Pottinger to the South Carolina Attorney General. In the first letter, the DOJ provisionally objected to a proposed plan including staggered terms and residency requirements but did not object to an at-large electoral feature.¹³⁵ Seventeen days later, the DOJ issued the following objection letter:

On September 17, 1974, a delegation of black citizens of Bamberg County visited with representatives of this Division and presented petitions signed by more than 600 persons in opposition to the utilization of the at-large system of election in Bamberg County. Basically, the delegation raised issues as to the validity of our previous presumptions that the at-large voting system, in the context of plurality win and the ability to single-shot vote, provides blacks a realistic opportunity to elect candidates of their choice in Bamberg County. In this connection, they cite the 1972 municipal elections in Denmark where it is claimed that in face of such a “single-shot” effort by blacks, white candidates withdrew to an extent that the field of candidates was reduced to a point which made any single-shot effort of blacks (a minority of registered voters) ineffective. In addition, we have been advised that voter registration efforts among blacks in the county have been frustrated and that those elected to office have not sought to protect black interest nor to satisfy black needs.

These claims raise serious questions as to which, I am sure you will understand, we are unable to resolve within the 60 days allowed the Attorney General to render his final determination under Section 5 Therefore, . . . I must interpose an objection to the at-large feature of the new system of government in addition to those objections previously registered in my letter of September 3, 1974.¹³⁶

135. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., to Daniel R. McLeod, S.C. Attorney Gen. (Sept. 3, 1974).

136. Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., to Daniel R. McLeod, S.C. Attorney Gen. (Sept. 20, 1974).

This letter is noteworthy for many reasons, not least of which is the degree to which the DOJ chose to object based on the advice of black delegates from the affected community. As before, the representatives offered a version of the facts of which the DOJ was unaware, and the DOJ responded to these new developments by registering an objection.

We found this conduct by the DOJ to be quite prevalent. From our review of the data, and as Figure 2 shows, the DOJ often issued objection letters while explicitly stating the opinion of communities of color as a basis for denying preclearance.

FIGURE 2.
OPPOSITION BY COMMUNITIES OF COLOR AND DOJ OBJECTIONS:
SOUTH CAROLINA, 1972–2004



For example, of forty-three objections interposed by the DOJ throughout the 1970s, six explicitly denied preclearance because communities of color opposed the proposed changes. The 1990s show a similar trend: eight of thirty-one denials explicitly stated the opposition of communities of color. As Figure 2 shows, the DOJ has relied on communities of color from South Carolina throughout the four decades of Section 5 administration.

B. Furthering Political Participation

Our reading of the objection letters leads us to a second conclusion. When analyzing the proposed changes under the Section 5 prism, the letters portray a DOJ

concerned with racial discrimination, to be sure, but also with protecting broad political participation by citizens of color. Put another way, the DOJ emphasized removing barriers to full political participation by voters of color. For example, consider the following letter in response to a proposed change that would require county employees to resign their employment if they wished to run for public office. According to the letter:

With regard to the resignation requirement, we note from 1980 Census data that blacks constitute approximately 39 percent of the population of Richland County. According to information provided by the personnel department of Richland County, blacks constitute approximately 31 percent of the employees of Richland County. In addition, the 1980 Census data and data from the county concerning salaries of county employees lend support to the concerns expressed by some that the resignation requirement will operate as an economic disincentive which will impact more heavily on the black potential candidates than on the white potential candidates. This burden will in turn significantly affect black voters in Richland County because it limits the pool of potential candidates likely to be the choice of the black constituency.

An additional concern raised by information received from black and white county residents is that the 1986 change requiring resignation was designed to inhibit potential black candidates. A change cannot be precleared if it is tainted with an invidious racial purpose.

. . . Under the circumstances involved here, I am unable to conclude, as I must under the Voting Rights Act, that these provisions are free of the proscribed purpose and effect.¹³⁷

As before, this letter indicates the DOJ's cognizance of the many nuances affecting the statutory calculus. But more importantly, the letter offers a broad understanding of the DOJ's role in pursuing the statute's goals.

Consider a second letter, this time in reference to a submission for a change in the qualifications for probate judges. The Assistant Attorney General noted:

At the outset we note that currently the sole qualification for a person to be a candidate for the position of probate judge in South Carolina is that a person be a registered voter. Presently, 26 percent of the registered voters in the state are black, according to our information. The state now proposes to change those qualifications so that a person must be 21 years of age and either

137. Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., to C. Dennis Aughtry, County Attorney, Richland County, S.C. (Sept. 23, 1988) (citations omitted).

possess a degree from a four-year college or at least four years' experience working in a probate judge's office. According to the 1980 census, there are 232,629 persons who have completed four or more years of college, and of this number only 28,771 (12%) are black. Thus, the four-year college degree requirement would reduce the percentage of black citizens who meet the qualification to run for the office of probate judge by 14 percent. Requiring that persons who wish to run for the office of probate judge demonstrate that they have completed four years of college, therefore, would appear to have a disparate impact on black citizens of the state.

....

While we recognize the state's interest in establishing reasonable qualifications for those who are to hold office, especially those of the nature here, it cannot do so in a manner which weighs disparately upon its black constituents, absent a convincing reason. . . . We are not yet persuaded that the state's legitimate interest cannot be met through other means which do not produce the "undesirable racial effect[]" of the qualifications proposed.¹³⁸

These letters epitomize the broad and forgiving role the DOJ adopted in administering Section 5. To be sure, many objections were concerned with the standard anti-discrimination account and whether the proposed change had either the intent or effect of disadvantaging voters of color. Yet more importantly, a noticeable number of objections paint the DOJ as concerned that the proposed changes were not sufficiently furthering consequential political autonomy by voters of color.

The DOJ was able to interpret the statute in this way—and pursue such vague and amorphous concerns—due to the nature of Section 5's burden-shifting device.¹³⁹ Under the statute, the burden rests with the submitting jurisdictions to prove their proposed changes do not have a discriminatory purpose or effect.¹⁴⁰ A cursory examination of the letters underscores the importance of this feature, as the DOJ often explains that under the facts as then present, it is "unable" to preclear the proposed plan. This importance is also evident by the many times the DOJ relied on *Georgia v. United States*, in which the Supreme Court upheld DOJ regulations that placed the burden of proof on the submitting authority.¹⁴¹ This is the single most cited case in letters between 1970 and 1990. Hence, if the DOJ thought a given proposal did not further the political interests of voters of color, it did not

138. Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., to C. Havird Jones, Jr., Assistant S.C. Attorney Gen. (Oct. 15, 1990) (brackets in original).

139. See 42 U.S.C. § 1973c (2000).

140. *Id.*

141. *Georgia v. United States*, 411 U.S. 526, 541 (1973).

need to prove so. Rather, the DOJ only needed to object to the plan and force the submitting jurisdiction to prove otherwise.

VI. CONCLUSION

This Article began with a modest goal: to show the DOJ's accomplishments in enforcing Section 5 of the Voting Rights Act and how it had fulfilled these important responsibilities. Our examination led us to conclude the DOJ was far more aggressive in the early life of the Act, while its enthusiasm for enforcement has diminished steadily through the decades. This finding may be interpreted a number of ways. One suggestion is the Act has done as intended, so the need for Section 5 power no longer exists. We are not enamored by this characterization, especially because the Court has interpreted the statute narrowly in recent years. That narrow interpretation, particularly evident in the Bossier Parish cases, probably had a direct influence in the steep decline in objection letters.

Based on this data, where should we go from here? More specifically, what should Congress do when it revisits the reauthorization question in the next year? One possibility is for Congress to confront squarely the Court's role in this important field. In past hearings, Congress has generally paid cursory attention to judicial opinions interpreting the Act, often adopting them *sub silentio*. In light of the sharp decline in objections, it stands to reason that Congress must make a clear choice if it chooses to extend the life of the Act. If our interpretation of the data is correct, after all, an extension of the statute that refuses to wrestle with the important issues raised by the Bossier Parish cases might hardly matter.

Another answer is that Congress must explore whether the Act has in fact served its purpose and whether reauthorization is necessary. Again, we offer this suggestion in light of our findings, particularly the sharp decline in objection letters. Looking ahead to the inevitable constitutional questions that reauthorization of the Act will raise, this need for new evidence will play a leading role in determining the constitutionality of the Act. This need for evidence is an argument for new findings as a necessary step in extending the life of the Act. However, if the need for the Act has not yet dissipated, Congress should not find that hurdle difficult to overcome.

Finally, we find the role played by the DOJ both important and necessary and would love to see it codified in the statute. We concede that such a result is unlikely but one that would help ensure that no Attorney General will single-handedly set back the statute's important goals. Of course, Congress may also choose to disagree with these goals as understood by the DOJ, but our hope is that Congress will both agree with these goals and the DOJ's interpretations. If so, the logical step is simply to codify these interpretations into the statute.