

Remarks of Brenda Wright
on behalf of the National Voting Rights Institute
and Demos: A Network of Ideas and Action
Congressional Black Caucus Foundation
“Strengthening Diversity in Democracy: A Conference
on the Voting Rights Act”
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In 1974, Congresswoman Barbara Jordan spoke about the meaning of our Constitution and she referred to its preamble; many here will remember what she said:

"We, the people." It is a very eloquent beginning. But when that document was completed on the seventeenth of September in 1787, I was not included in that "We, the people." I felt somehow for many years that George Washington and Alexander Hamilton just left me out by mistake. But through the process of amendment, interpretation, and court decision, I have finally been included in "We, the people."¹

As we address the need to reauthorize crucial provisions of the Voting Rights Act, I was reminded of Congresswoman Jordan's comments for a couple of reasons. First, it's clear that the protections of Section 5 and Section 203 of the Voting Rights Act have been indispensable in the struggle to assure that "We, the People" includes everyone that it should include. And second, notice that Congresswoman Jordan mentioned "court decisions" as a means of moving us forward to realize the Constitution's vision of "We, the People." That has been true many times in our history; but one thing we know today is that sometimes court decisions can have the effect of moving us backward instead of forward. The process of reauthorizing the Voting Rights Act gives Congress the opportunity, exercising its authority under Constitution, to address such decisions and make sure we have a Voting Rights Act that can fulfill its purposes.

I'm here today to discuss in particular a Supreme Court decision six years ago in *Reno v. Bossier Parish School Board*² which fundamentally weakened Section 5's protections against purposeful racial discrimination in

¹ Hon. Barbara Jordan, Statement on the Articles of Impeachment, delivered July 25, 1975, before the House Judiciary Committee.

² *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000).

voting. In that decision, a narrow majority on the Supreme Court interpreted Section 5 to require the Justice Department to approve certain racially discriminatory voting changes under Section 5, even if the Department determines that the discrimination was *intentional*. This decision, I submit, was contrary to Congress' intent in enacting Section 5 and contrary to well-settled precedent, and Congress should correct it as part of reauthorization.

By its very terms, Section 5 bars any voting change that is racially discriminatory either in its purpose or its effect. Prior to the *Bossier Parish* decision, it was clear that the “purpose” and “effect” tests of Section 5 were independent; so that failure to satisfy either one meant that the voting change should not be precleared.³ A series of Supreme Court decisions in the 1970s and 80s made it clear that any voting change that was the product of intentional racial discrimination was barred under Section 5, whether or not the change was “retrogressive” – that is, whether or not it made things worse for minority voters than the previous system. As the Court explained in a 1975 decision, *City of Richmond v. United States*,⁴

An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution or under the statute.⁵

For many years, the Justice Department relied on this understanding of the purpose test of Section 5 to deny preclearance to any voting changes that reflected intentional racial discrimination by a covered jurisdiction.

The *Bossier Parish* decision six years ago changed all this by ruling that the intent prong of Section 5 does not outlaw all intentional racial discrimination, but instead covers only so-called “retrogressive intent”⁶ -- that is, an intent to make things worse for minority citizens as compared to the *status quo*. Under that interpretation, a jurisdiction that never had minority representation on its elected body could continue to adopt new redistricting plans intentionally designed to freeze out minority voting strength, and Section 5 would provide no protection.

³ See, e.g., *City of Rome v. United States*, 446 U.S. 156, 172 (1980) (“By describing the elements of discriminatory purpose and effect in the conjunctive, Congress plainly intended that a voting practice not be precleared unless *both* discriminatory purpose and effect are absent.”) (emphasis in original); *City of Pleasant Grove v. United States*, 479 U.S. 462, 469 (1987) (same).

⁴ 422 U.S. 358 (1975).

⁵ *Id.* at 378.

⁶ *Reno v. Bossier Parish School Board*, 528 U.S. at 326.

The facts in the *Bossier Parish* case itself provide a good illustration of that. Bossier Parish is located in northwest Louisiana. In 1990, African Americans constituted approximately 20 percent of the population in the parish, yet no African American had ever been elected to the 12-member school board. The school board refused to include any majority black districts in the new redistricting plan it enacted after the 1990 Census, even though the school board later admitted in court that it was “obvious that a reasonably compact black-majority district could be drawn within Bossier City.”⁷ There was even testimony that two school board members acknowledged that the school board’s plan reflected opposition to “black representation” or to a “black-majority district.”⁸

As Justice Souter put it in his dissent in the *Bossier Parish* case, “The record illustrates exactly the sort of relentless bad faith on the part of majority-white voters in covered jurisdictions that led to the enactment of § 5.”⁹

The Supreme Court nevertheless ruled that the Justice Department was powerless to block the school board’s plan under Section 5, because the plan did not have the “retrogressive purpose” of making things worse than they already were for minority voters.¹⁰

That decision greatly weakens the anti-discrimination protections of the Voting Rights Act. If this interpretation had been applied during the first 35 years of Section 5’s history, Congressman John Lewis of Georgia probably would not have won election to the U.S. Congress in 1986. In the early 1980s, Georgia enacted a racially discriminatory congressional redistricting plan that fragmented the black population in the Atlanta area. The Georgia legislator who headed the redistricting committee, openly declared his opposition to drawing so-called “Negro districts” – except that he did not use the word Negro.¹¹ He used a racial epithet.

⁷ *Id.* at 350 (Souter, J., dissenting).

⁸ *Bossier Parish School Board v. Reno*, 907 F. Supp. 434, 438 n.4 (D.D.C. 1995), *aff’d in part, vacated & remanded in part sub nom. Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997).

⁹ *Id.* at 342 (Souter, J., dissenting).

¹⁰ 528 U.S. at 328-341.

¹¹ *Busbee v. Smith*, 549 F. Supp. 494, 498 (D.D.C. 1982), *aff’d mem.*, 459 U.S. 1166 (1983). The district court decision reported that Representative Wilson routinely used that racial epithet in referring to blacks. 549 F. Supp. at 500. The court made the somewhat remarkable finding of fact: “Joe Mack Wilson is a racist.” *Id.*

Because of the clear evidence of racism behind the plan, the Justice Department objected under Section 5, even though the plan was not retrogressive (because the previous plan also had no majority-black district). Because of DOJ's objection, Georgia then redrew its districts, and the result was that Congressman John Lewis was able to win election from a majority-black congressional district in 1986. But under the *Bossier Parish* decision, the Department of Justice would have been obliged to approve Georgia's original, blatantly discriminatory plan.

The *Bossier Parish* decision does not merely conflict with the antidiscrimination principles long followed by our laws. It also has had a serious detrimental impact on Section 5 enforcement.

According to a forthcoming study by Peyton McCrary, Christopher Seaman, and Richard Vallely, in the 1980s and 1990s, before the *Bossier Parish* decision, over two hundred Section 5 objections were based solely on racially discriminatory intent. Such objections accounted for 25% of the Department's Section 5 objections in the 1980s (83 total objections), and 43% of total objections in the 1990s (151). By contrast, between January 2000 and June 2004, only two objections were based solely on intent.¹²

All of this underscores the importance of restoring the original intent of Section 5 when Congress reauthorizes it. When a jurisdiction deliberately acts to lock minorities out of electoral power, that jurisdiction should not be entitled to preclearance simply because minorities always have been discriminated against in the jurisdiction.¹³ Intentional racial discrimination should not be tolerated under Section 5. Such a result is fundamentally inconsistent with our nation's values.

¹² Peyton McCrary, Christopher Seaman, & Richard Vallely, *The End of Preclearance As We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, Table 2 (forthcoming in Univ. Mich. Journal of Race & Law) (manuscript draft available on request).

¹³ As Justice Souter said in dissent in *Bossier*, "the preclearance requirement was not enacted to authorize covered jurisdictions to pour old poison into new bottles." 528 U.S. at 366.